

THE CIVIL COURT MANUAL
(IMPERIAL ACTS)

THE
CIVIL COURT MANUAL
(IMPERIAL ACTS)

[*BROUGHT UP TO AUGUST, 1937*]

SIXTH EDITION
[REVISED AND ENLARGED]

VOLUME I
—
A—I

MADRAS
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PREFACE

The uniformly welcome reception that has been accorded to the five previous editions of this book and the constant demand for it have rendered it necessary for the publishers to bring out a new edition of the same. The numerous, and, in some cases, important amendments made by the recent Adaptation of Indian Laws Order in Council passed under the new Government of India Act have been carried out in their proper places.

All Acts of any importance published up to August 1937 have been incorporated in this edition. The case-law has also been brought up to the end of August 1937. Special care has been bestowed in the preparation of this new edition to re-examine the citation of authorities and make them clear and exhaustive.

The several Provincial Amendments of the Court-Fees Act and the Stamp Act will be given *in extenso* at the end of the second volume.

Mylapore, Madras, }
20—9—'37.

PUBLISHERS.

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APPENDIX.

PUBLIC DEPARTMENT.

(Reforms).

NOTIFICATIONS.

Fort St. George, the 7th April, 1936.

No. 3.—The following notifications of the Government of India are republished:—

LEGISLATIVE DEPARTMENT.

New Delhi, the 1st April, 1936.

No. 143/36-P.—Whereas by the Government of India (Constitution of Orissa) Order, 1936, His Majesty has been pleased to direct that the provisions of S. 71 of the Government of India Act, (Except sub-S. (4) thereof) hereinafter called “the said section”, shall apply to the whole of Orissa;

And whereas the Local Government of Orissa has proposed to the Governor-General in Council drafts of the following Regulations, together with the reasons for proposing the same;

And whereas the Governor-General in Council has taken the said drafts and reasons into consideration and has approved the drafts and the same have received the assent of the Governor-General on the first day of April, 1936,

In pursuance of the direction contained in sub-S. (2) of the said section, the said Regulations are published in the Gazette of India.

REGULATION No. I OF 1936.

A Regulation to declare the law in force in the Province of Orissa.

Whereas it is expedient to declare the law in force in the Province of Orissa; It is hereby enacted as follows:—

Short title, extant and commencement. 1. (1) This Regulation may be called
THE ORISSA LAWS REGULATION, 1936.

(2) It extends to the whole of the Province of Orissa except the districts of Angul and the Khondmals and the tracts of country specified in S. 2 of the Ganjam and Vizagapatam Act, 1839.

(3) It shall come into force on the 1st day of April, 1936.

2. In this Regulation the expression ‘areas transferred to Orissa’ means areas transferred to the Province of

Definition. Orissa by the Government of India (Constitution of Orissa) Order, 1936.

Cesser of the Madras District Police Act, 1859, and extension of the Police Act, 1861.

Cesser of the Madras District Police Act, 1859, and extension of the Police Act, 1861.

3. (1) The Madras District Police Act, 1859, shall cease to have effect and the Police Act, 1861, shall take effect in the areas transferred to Orissa from the Presidency of

Madras.

(2) All appointments, rules and orders made, powers and duties conferred or imposed and all other things done under the Madras District Police Act, 1859, shall be deemed, so far as may be, to have been respectively made, conferred, imposed or done under the Police Act, 1861.

Cesser of the Madras Civil Courts Act, 1873, and the Central Provinces Courts Act, 1917, and extension of the Bengal, Agra and Assam Civil Courts Act, 1887.

4. (1) The Madras Civil Courts Act, 1873, and the Central Provinces Courts Act, 1917, shall cease to extend and the Bengal, Agra and Assam Civil Courts Act, 1887, shall extend to the areas transferred to Orissa from the Presidency of Madras and the Central Provinces.

(2) All Courts constituted, appointments, rules and orders made, jurisdiction and powers conferred and other things done under the Madras Civil Courts Act, 1873, or the Central Provinces Courts Act, 1917, shall, so far as may be, be deemed to have been respectively constituted, made, conferred or done under the Bengal, Agra and Assam Civil Courts Act, 1887.

Cesser of the Central Provinces Local Self-Government Act, 1920, and extension of the Central Provinces Local Self-Government Act, 1883.

5. (1) The Central Provinces Local Self-Government Act, 1920, shall cease to extend and the Central Provinces Local Self-Government Act, 1883, is hereby extended to the areas transferred to Orissa from the Central Provinces.

(2) All notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under the Central Provinces Local Self-Government Act, 1883, are hereby extended so far as they are applicable, to the areas transferred to Orissa from the Central Provinces.

(3) (a) The areas transferred to Orissa from the Central Provinces shall, for the purposes of the Central Provinces Local Self-Government Act, 1883, be deemed to be part of the district of Sambalpur and to be under the control and administration of the Sambalpur District Council.

(b) The Governor may nominate not more than three persons to be members of the Sambalpur District Council to represent the aforesaid areas, and the persons so nominated shall, notwithstanding anything contained in the Central Provinces Local Self-Government Act, 1883, or the rules made thereunder, be deemed to be members of the Sambalpur District Council, and shall hold office as such members until representatives of the said areas are elected, in accordance with the Central Provinces Local Self-Government Act, 1883, and the rules made thereunder.

Repeal of S. 3 of the Madras Deputy Collectors Act, 1914.

6. S. 3 of the Madras Deputy Collectors Act, 1914, is hereby repealed.

7. Subject to the provisions of paragraphs 16 and 17 of the Government of India (Constitution of Orissa) Order,

Construction of certain enactments in force in the Province of Orissa.

1936, all enactments other than enactments repealed by this Regulation made by any authority in British India and all notifications, orders, schemes, rules, forms and by-laws issued, made or prescribed under such enactments, which were, immediately before the 1st day of April, 1936, in force in any of the areas comprised in the Province of Orissa, shall, in their application to such areas, be construed as if references therein by whatever form of words to the authorities, territory or Gazettes mentioned in column 1 of the First Schedule were references to the authorities, territory or Gazettes respectively mentioned or referred to opposite thereto in column 2 of the said Schedule.

8. Nothing in any law in force in the Province of Orissa which

Certain provisions of law to be inapplicable to notifications, orders, etc.

requires that the draft of any notification, order, scheme, rule, form or by-law shall before being made by the Local Government be laid on the Table of, or be approved by, a Legislative Council, or which requires that any objections or suggestions made in any manner whatsoever by such Legislative Council with respect to any such draft shall be considered by the Local Government or which confers on any Legislative Council the power to make any modifications in any such draft, shall apply to any notification, order, scheme, rule, form or by-law made or issued by the Government of Orissa.

Repeal of certain enactments.

9. The enactments specified in the Second Schedule are hereby repealed.

10. The enactments specified in the Third Schedule are hereby

Amendments of certain enactments.

amended to the extent and in the manner mentioned in the fourth column thereof.

Extension of the application of certain enactments.

11. The enactments specified in the Fourth Schedule are hereby extended to the areas specified in the fourth column thereof.

12. All notifications, orders, schemes, rules, forms and by-laws issued,

Extension of application notifications, orders, etc.

made or prescribed under any of the enactments mentioned in column 3 of the Fourth Schedule, are hereby extended, so far as the said notifications, orders, schemes, rules, forms and by-laws are applicable, to the areas respectively mentioned against such enactment in column 4 of the said Schedule.

13. Without prejudice to any provisions made in this behalf by or

Disposal of pending revenue proceedings.

under the Government of India (Constitution of Orissa) Order, 1936, revenue proceedings pending immediately before the 1st day of April, 1936, (including cases where an appeal lies or will lie from a decision made or to be made) in or in respect of any of the areas transferred to Orissa shall, unless the Governor-General in Council otherwise directs in any case, be continued and disposed of as if the said Order had not been made.

14. Save as otherwise provided by this Regulation, the repeal by this Regulation of any enactment shall not affect any Act or Regulation in which such enactment has been applied, incorporated or referred to, and this Regulation shall not affect the validity or invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing; nor shall this Regulation affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed.

Nor shall the repeal by this Regulation of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure, or other matter or thing not now existing or in force.

FIRST SCHEDULE.

(See S. 7).

Construction of enactments.

1. (a) The Local Government or the Local Government of Madras or the Local Government of Bihar and Orissa or except in connection with any revenue matter the Local Government of the Central Provinces.

(b) The Governor or the Governor of Madras or the Governor of Bihar and Orissa or the Governor of the Central Provinces, except in the Patna University Act, 1917, and the Andhra University Act, 1925.

2. All officers and official bodies not mentioned in the foregoing clauses (except the Treasurer of Charitable Endowments) whose authority extended (whether exclusively or not) immediately before the commencement of the Government of India (Constitution of Orissa) Order, 1936, over the territories or any part of the territories mentioned in the First Schedule to that Order as well as over other territories.

3. (a) The Presidency of Madras.

(b) The Province of Bihar and Orissa.

(c) The Central Provinces.

1. The Governor of Orissa.

2. The same officers or official bodies, or such other officers or official bodies as the Governor of Orissa may by notification in the Local Official Gazette under paragraph 17 of the Government of India (Constitution of Orissa) Order, 1936, direct.

3. (a) The areas separated from the Presidency of Madras and forming part of the Province of Orissa.

(b) The areas separated from the Province of Bihar and Orissa and forming part of the Province of Orissa.

(c) The areas separated from the Central Provinces and forming part of the Province of Orissa.

4. The Local Official Gazette or the Local Official Gazette of the Government of Madras, or the Local Official Gazette of the Government of Bihar and Orissa, or the Local Official Gazette of the Government of the Central Provinces, or the District Gazette published in the districts of Ganjam and Vizagapatam.

4. The Local Official Gazette of the Government of Orissa.

SECOND SCHEDULE.

(See S. 9)

Enactments repealed.

| Year. (1) | Number. (2) | Subject or short title. (3) |
|---|----------------|---|
| PART I.—BENGAL REGULATIONS. | | |
| 1812 | XVIII | The Bengal Leases and Land Revenue Regulation, 1812. |
| PART II.—MADRAS REGULATION. | | |
| 1802 | XIX | The Indian Civil Service (Madras) Loans Prohibition Regulation, 1802. |
| 1819 | II | The Madras State Prisoners Regulation, 1819. |
| 1831 | V | The Madras Stamp Penalties Regulation, 1831. |
| PART III.—ACT OF THE GOVERNOR-GENERAL IN COUNCIL. | | |
| 1912 | II | The Co-operative Societies Act, 1912. |
| PART IV.—BENGAL ACTS. | | |
| 1864 | VII | The Salt Act, 1864. |
| 1873 | I | The Bengal Salt Act, 1873. |
| 1880 | VI | The Bengal Drainage Act, 1880. |
| 1895 | III | The Land Records Maintenance Act, 1895. |
| PART V.—BIHAR AND ORISSA ACTS. | | |
| 1916 | II | The Bihar and Orissa Medical Act, 1916. |
| 1922 | V | The Bihar and Orissa Private Irrigation Works Act, 1922. |
| 1922 | VI | The Bihar and Orissa, Minor Irrigation Works Act, 1922. |
| PART VI.—MADRAS ACTS. | | |
| 1888 | I | The Local Authorities Loans Act, 1888. |
| 1914 | IV | The Madras Medical Registration Act, 1914. |
| 1920 | IV | The Madras Children Act, 1920. |
| 1923 | V | The Madras State Aid to Industries Act, 1923. |
| 1926 | V | The Madras Hostel Schools Act, 1925. |
| 1929 | XI | The Madras Services Commission Act, 1929. |
| 1931 | V | The Madras Government Roads Traffic Control Act, 1931. |
| 1934 | X | The Madras Co-operative Land Mortgage Banks Act, 1934. |
| PART VII.—CENTRAL PROVINCES ACTS. | | |
| 1915 | II | The Central Provinces Excise Act, 1915. |
| 1916 | I | The Central Provinces Medical Registration Act, 1916. |
| 1916 | II | The Central Provinces Land Alienation Act, 1916. |
| 1920 | III | The Central Provinces Primary Education Act, 1920. |
| 1922 | I | The Local Authorities Loans (Central Provinces Amendment) Act, 1922. |
| 1922 | II | The Central Provinces Municipalities Act, 1922. |
| 1922 | III | The High School Education Act, 1922. |
| 1923 | V | The Nagpur University Act, 1923. |

| Year. (1) | Number. (2) | Subject or short title. (3) |
|---|----------------|---|
| PART VII.—CENTRAL PROVINCES ACTS. (<i>Contd.</i>) | | |
| 1928 | IX | The Central Provinces Borstal Act, 1928. |
| 1928 | X | The Central Provinces Children Act, 1928. |
| 1929 | I | The Opium (Central Provinces Amendment) Act, 1929. |
| 1930 | VII | The Co-operative Societies (Central Provinces Amendment) Act, 1930. |
| 1932 | 1 | The Central Provinces Motor Vehicles Taxation Act, 1932. |
| 1933 | IX | The Central Provinces Local Fund Audit Act, 1933. |
| 1933 | XII | The Central Provinces State Aid to Industries Act, 1933. |

THIRD SCHEDULE.

(See S. 10).

Enactments amended.

| Year. (1) | Number. (2) | Subject or short title. (3) | Amendments. (4) |
|--------------------------------|----------------|---|---|
| PART I.—BIHAR AND ORISSA ACTS. | | | |
| 1925 | II | The Bihar and Orissa Local Fund Audit Act, 1925. | In sub-S. (1) of S. 10 after the words "recoverable from him" the following shall be inserted, namely:— "as an arrear of land revenue under S. 94 of the Central Provinces Land Revenue Act, 1881, or" |
| 1930 | II | The Bihar and Orissa Motor Vehicles Taxation Act, 1930. | After S. 13 the following shall be inserted, namely:— "13-A. Notwithstanding anything contained in this Act a tax paid in respect of any motor vehicle under the Madras Motor Vehicles Taxation Act, 1931, in respect of which a licence has been granted under sub-cl. (1) of cl. (a) of sub-S. (3) of S. 5 of the Madras Motor Vehicles Taxation Act, 1931 by a licensing officer appointed for the whole or any part of the areas transferred to Orissa from the Presidency of Madras shall be valid throughout the whole of Orissa and shall be deemed, so far as may be, to have been paid under this Act". |
| PART II.—MADRAS ACTS. | | | |
| 1926 | III | The Madras Nurses and Midwives Act, 1926. | 1. In cl. (a) of S. 2, for the word "Madras" the word "Orissa" shall be substituted. 2. For S. 3, the following shall be substituted, namely:— |

| Year. (1) | Number. (2) | Subject or short title. (3) | Amendments. (4) |
|---|----------------|---|--|
| PART II.—MADRAS ACTS. (<i>Contd.</i>) | | | |
| | | | 3. "(1) A Council shall be established and called the Orissa Nurses and Mid-wives Council, and such council shall be a body corporate and have perpetual succession and a common seal, and shall by the said name sue and be sued. |
| | | | (2) The said Council shall consist of five members to be nominated by the Local Government. |
| | | | (3) The term of office of a member shall continue for so long as the Local Government may in the case of each member direct. |
| | | | (4) The name of every member nominated under this section shall be published by the Local Government in the Orissa Gazette. |
| | | | (5) No act of the Council or of its officers shall be deemed to be invalid by reason only that the number of members of the Council was, at the time of the performance of such act, less than five". |
| | | | 3. S. 4 shall be omitted. |
| | | | 4. For sub-S. (2) of S. 8, the following shall be substituted, namely:— "(2) Such appeal shall be heard by a Tribunal of three persons appointed by the Governor". |
| | | | 5. In sub-S. (2) of S. 11, —(i) cl. (a) shall be omitted, and (ii) for cl. (c) the following shall be substituted, namely:— "(c) regulating the procedure of the Tribunal appointed under sub-S. (2) of S. 8". |
| | | | 6. In S. 15 the words a "Presidency Magistrate or" shall be omitted. |
| 1931 | III | The Madras Motor Vehicles Taxation Act, 1931. | After S. 7 the following section shall be inserted, namely:— "8. Notwithstanding anything contained in this Act, a tax paid in respect of any motor vehicle for which a receipt has been granted under S. 11 of the Bihar and Orissa Motor Vehicles Taxation Act, 1930, by a taxing officer appointed under that Act for the whole or any |

| Year. (1) | Number. (2) | Subject or short title. (3) | Amendments. (4) |
|---|----------------|--------------------------------|--|
| PART II.—MADRAS ACTS. (<i>Conclud.</i>) | | | part of the areas transferred to Orissa from the Province of Bihar and Orissa or transferred to Orissa from the Central Provinces shall be valid throughout the whole of Orissa and shall be deemed, so far as may be, to have been paid under this Act? |

FOURTH SCHEDULE.

(See S. 11.)

Enactments the application of which is extended.

| Year. (1) | Number. (2) | Subject or short title. (3) | Areas to which extended. (4) |
|---------------------------------|----------------|--|--|
| PART I.—BENGAL REGULATIONS. | | | |
| 1793 | XXXVIII | The Indian Civil Service (Bengal) Loans Prohibition Regulation, 1793. | The areas transferred to Orissa from the Presidency of Madras and the Central Provinces. |
| 1818 | III | The Bengal State Prisoners Regulation, 1818. | The areas transferred to Orissa from the Presidency of Madras. |
| 1823 | VII | The Indian Civil Service (Bengal) Loans Prohibitions Regulation, 1823. | The areas transferred to Orissa from the Presidency of Madras and the Central Provinces. |
| PART II.—BIHAR AND ORISSA ACTS. | | | |
| 1915 | II | The Bihar and Orissa Excise Act, 1915. | The areas transferred to Orissa from the Central Provinces. |
| 1922 | VII | The Bihar and Orissa Municipal Act, 1922. | The areas transferred to Orissa from the Central Provinces. |
| 1923 | VI | The Bihar and Orissa State Aid to Industries Act, 1923. | The areas transferred to Orissa from the Presidency of Madras and the Central Provinces. |
| 1924 | III | The Bihar and Orissa Aerial Ropeways Act, 1924. | The areas transferred to Orissa from the Presidency of Madras and the Central Provinces. |
| 1925 | II | The Bihar and Orissa Local Fund Audit Act, 1925. | The areas transferred to Orissa from the Central Provinces. |
| 1926 | III | The Bihar and Orissa Highways Act, 1926. | The areas transferred to Orissa from the Presidency of Madras and the Central Provinces. |
| 1930 | II | The Bihar and Orissa Motor Vehicles Taxation Act, 1930. | The areas transferred to Orissa from the Central Provinces. |
| 1933 | I | The Bihar and Orissa Public Safety Act, 1933. | The areas transferred to Orissa from the Presidency of Madras and the Central Provinces. |
| 1935 | VI | The Bihar and Orissa Co-operative Societies Act, 1935. | The areas transferred to Orissa from the Central Provinces. |

REGULATION NO. III OF 1936.

A Regulation to provide for the consolidation of certain appellate and Revisional powers in the Province of Orissa.

Whereas it is expedient to provide for the consolidation of certain appellate and Revisional powers in the Province of Orissa; It is hereby enacted as follows:—

1. (1) This Regulation may be called
 Short title, application THE ORISSA CONSOLIDATION OF APPEALS REGU-
 and commencement LATION, 1936.

(2) It applies to the Province of Orissa.

(3) It shall come into force on the 1st day of April, 1936.

2. Where appellate or Revisional powers which were, immediately before
 Consolidation of appeals the coming into force of the Government of
 when separate appellate powers India (Constitution of Orissa) Order, 1936,
 are vested in Revenue Commis- vested in separate Courts or authorities have, by
 sioner. reason of any direction issued under the provi-

sions of said Order, or by reason of any Regulation issued under S. 71 of the Government of India Act, become vested in the Revenue Commissioner for Orissa,

(a) the appellate or revisional powers which are so vested in the said Revenue Commissioner shall be deemed to be consolidated, and

(b) the period of limitation for an appeal or application for revision to the Revenue Commissioner shall be the longest period within which an appeal or application for revision could have been made to any of the Courts or authorities whose powers are so consolidated, if such powers had not been consolidated.

HOME DEPARTMENT

JUDICIAL

New Delhi, 1st April, 1936.

No. F 210/36 Judicial.—In exercise of the powers conferred by paragraph 20 of the Government of India (Constitution of Orissa) Order, 1936, the Governor-General in Council is pleased to direct as follows:—

1. Every proceeding pending on the appointed day before any Court, other than a High Court, in, or in respect of, any area transferred by the said Order to Orissa shall be continued, as if the said Order had not been made.

2. Any appeal or application for revision in respect of any proceeding so pending or of any decision made before the appointed day in any such Court in or in respect of any such area shall lie in the Court which has appellate or revisional jurisdiction as the case may be over the Court which would have jurisdiction to try such proceeding if the proceeding were instituted after the appointed day:

Provided that, where the proceeding relates to any property situate partly within and partly without any area transferred by the said Order to Orissa, any appeal or application for revision shall lie as if the said Order had not been made.

THE GOVERNMENT OF INDIA (FEDERAL COURT) ORDER, 1937
AT THE COURT AT BUCKINGHAM PALACE.

The 29th day of July, 1937

PRESENT:

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by sub-section (1) of section two hundred of the Government of India Act, 1935 (hereafter in this Order referred to as "the Act") provision is made for the establishment of a Federal Court consisting of a Chief Justice of India and such number of other Judges as His Majesty may deem necessary, so, however, that (except in the circumstances mentioned in the said sub-section) the number of those other Judges shall not exceed six:

AND WHEREAS by section two hundred and one of the Act the Judges of the Federal Court are to be entitled to such salaries and allowances, including allowances for expenses in respect of equipment and travelling upon appointment, and to such rights in respect of leave and pensions, as may from time to time be fixed by His Majesty in Council:

AND WHEREAS by virtue of the powers vested in him by sub-section (3) of section three hundred and twenty of the Act His Majesty in Council has made provision as to the dates on which certain sections of Chapter 1 of Part IX of the Act (being the chapter which contains the provisions of the Act with respect to the Federal Court) shall come into force, but no such provision has yet been made with respect to section two hundred and fifteen of the Act:

AND WHEREAS a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an Address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:

NOW, THEREFORE, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased by and with the advice of his Privy Council to order, and it is hereby ordered as follows:—

Introductory.

1. (1) This Order may be cited as "THE GOVERNMENT OF INDIA (FEDERAL COURT) ORDER, 1937."

(2) Paragraph three of this Order shall take effect forthwith, but, save as aforesaid, the provisions of this Order shall come into operation on the first day of October, nineteen hundred and thirty-seven.

2. (1) In this Order, except where it is otherwise expressly provided or the context otherwise requires—

"Chief Justice" means the Chief Justice of India, but does not include an acting Chief Justice;

“acting Chief Justice” means a Judge appointed under section two hundred and two of the Act to perform the duties of the Chief Justice of India;

“Judge” means a Judge of the Federal Court and includes the Chief Justice, an acting Chief Justice and an acting Judge;

“Puisne Judge” includes an acting Chief Justice and an acting puisne Judge;

“High Court” means a court which is a High Court for the purposes of the Act;

“Chartered High Court” means a High Court other than a Chief Court or a Judicial Commissioner’s Court;

“actual service” includes—

(a) time spent by a Judge on duty as Judge, or in the performance of such other functions as he may at the request of the Governor-General undertake to discharge;

(b) vacations; and

(c) joining time on transfer from a High Court to the Federal Court;

“service for pension” includes—

(a) actual service;

(b) joining time taken on return from leave out of India;

“service as a Judge in India” means such service rendered either in the Federal Court only or in that Court and in one or more of the High Courts, and “Judge in India” and “service for pension as a Judge in India” shall be construed accordingly;

“term-time” means any part of the year not included in a vacation;

“vacation” means a vacation fixed by or under Rules of Court made with the approval of the Governor-General in his discretion under section two hundred and fourteen of the Act.

(2) The interpretation Act, 1889, applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

3. The provisions of section two hundred and fifteen of the Act (which relates to ancillary powers of the Federal Court) shall come into force on the making of this Order.

Expenses for Equipment and Voyage.

4. There shall be paid to a Judge who was permanently resident in Europe at the date of his appointment an allowance of five hundred pounds for expenses in respect of equipment and travelling on appointment.

Salaries.

5. There shall be paid to a Judge in respect of time spent on actual service salary at that one of the following rates which is appropriate to him, that is to say—

Chief Justice, or acting Chief Justice ... Rs. 7,000 per month;

Any other Judge, or an acting Judge ... Rs. 5,500 per month:

Provided that, if a Judge at the time of his appointment is in receipt of a pension (other than a disability or wound pension) in respect of any previous service under the Crown in India, his salary in respect of service in the Federal Court shall be reduced by the amount of that pension.

Leave and Vacation.

6. Leave may be granted to a Judge during term-time in the following circumstances:—

(a) on medical certificate, for a period not exceeding six months, or for two or more periods not exceeding in the aggregate six months during the whole period of his service as Judge;

(b) for a period not exceeding six months, and not more than once during the whole period of his service as a Judge, otherwise than on medical certificate.

7. There shall be payable to a Judge in lieu of salary—

(a) in respect of any period of leave, an allowance at the rate of one thousand one hundred and ten rupees a month if resident in Asia during his leave, and at the rate of one hundred and eleven pounds a month if resident outside Asia,

(b) in respect of joining time on his return from leave out of India, an allowance at the rate of one thousand one hundred and ten rupees a month.

8. Extraordinary leave not exceeding six months in duration may be granted during term-time not more than once during the period of a Judge's service as such in excess of any leave permissible under paragraph six of this Order, but no salary or allowances shall be payable in respect of the period of such leave.

9. (1) If a Judge overstays his leave or any vacation, he shall receive no salary in respect of the period of his absence in excess of the leave granted to him or beyond the end of the vacation, as the case may be:

Provided that, if such absence is due to circumstances beyond his control, the period thereof may be treated as leave entitling him to such allowances as are mentioned in paragraph seven of this Order, but no account shall be taken of that period for the purposes of paragraph six of this Order.

(2) Nothing in this Order shall be construed as requiring a Judge to rejoin on the expiration of a period of leave when that period expires immediately before the commencement of a vacation, nor as authorising any acting Chief Justice or acting Judge to continue to hold his acting appointment during a vacation.

10. The power to grant, refuse, revoke or curtail leave shall be vested in the Governor-General exercising his individual judgment, after consultation with the Chief Justice.

Passages.

11. (1) A Judge who is a member of the Indian Civil Service shall have such rights in respect of passages for himself and his wife and children, if any, as under the rules of that Service he would have had if he had not been appointed a Judge, his services as a Judge in India being treated as service for the purpose of determining those rights.

(2) Any other Judge whose domicile at the date of his first appointment as a Judge in India was elsewhere than in Asia shall have such rights in respect of passages for himself and his wife and children, if any, as under the rules for the time being applicable to persons who became members of the Indian Civil Service on that date, he would have had if he had become a member thereof on that date and if his service as a Judge in India were treated as service therein for the purpose of determining those rights:

Provided that—

- (i) if he has received an allowance for equipment and voyage on appointment as a Judge in India, he shall not be entitled to a passage (whether for himself, or his wife or children) until the completion of five years, nor to a second passage until the completion of ten years, total service as a Judge in India; and
- (ii) if he dies while serving as a Judge, his wife and children shall not be entitled to any concession in respect of passages in addition to the gratuity for which provision is made in this Order.

Pensions.

12. (1) Subject to the provisions of this Order, a pension shall be payable in accordance with the provisions thereof to a Judge of the Federal Court on his retirement if, but only if,—

- (a) he has completed not less than seven years' service for pension as a Judge in India; or
- (b) he has completed not less than three years' service for pension as a Judge of the Federal Court and has attained the age of sixty-five years; or
- (c) he has completed not less than three years' service for pension as a Judge of the Federal Court and his retirement is medically certified to be necessitated by ill-health; or
- (d) he is a member of the Indian Civil Service who under the rules of that Service is entitled to retire with a pension.

(2) The Secretary of State may for special reasons direct that any period not exceeding three months shall be added to a Judge's service for pension, and any such period so added shall count for pension purposes—

- (a) in the case of a Judge who has served in the Federal Court as Chief Justice only, as service as Chief Justice; and

(b) in the case of any other Judge of the Federal Court, as service as a puisne Judge.

13. Subject to the subsequent provisions of this Order, the pension payable thereunder to a Judge who on his retirement is entitled to a pension shall be calculated--

(a) in the case of a Chief Justice, other than a Chief Justice who is so entitled only by virtue of being a member of the Indian Civil Service, and in the case of a puisne Judge who is not a member of the Indian Civil Service, in accordance with the rules in Part I of the First Schedule to this Order;

(b) in the case of a Chief Justice who is so entitled only by virtue of being a member of the Indian Civil Service and in the case of a puisne Judge who is a member of the Indian Civil Service, in accordance with the rules in Part II of the said Schedule.

14. The pension payable to a Judge to whom paragraph twenty-seven (provision as to existing Judges) of the Government of India (High Court Judges) Order, 1937, applied before the date of his appointment to the Federal Court shall in no case be less than the pension which would have been payable to him under the rules to which he was subject immediately before that date if his service, if any, as Chief Justice of the Federal Court had been service as Chief Justice of the Calcutta High Court and his service, if any, as a puisne Judge of the Federal Court had been service as Chief Justice of one or more of the Chartered High Courts, other than those at Calcutta or Nagpur.

15. (1) The provisions of this paragraph shall apply in relation to a Judge who is a member of a civil service of the Crown in India.

(2) If any such Judge is entitled to a pension under the foregoing provisions of this Order he shall elect to receive either that pension or such pension as is referred to in the next succeeding sub-paragraph.

(3) If any such Judge is not entitled to a pension under the foregoing provisions of this Order or, being entitled to such a pension, elects not to receive that pension, the pension payable to him shall be--

(a) the pension for which he would have been eligible under the rules of his civil service if he had not been appointed a Judge in India, his service as a Judge in India being treated as service for the purpose of calculating that pension; and

(b) if he is not a member of the Indian Civil Service, a special additional pension of five hundred rupees per annum in respect of each completed year of service for pension as a Judge in India, but not in any case exceeding two thousand five hundred rupees per annum

16. If at the time of his appointment to the Federal Court a Judge is in receipt of a pension in respect of previous service as a Judge of a High Court the pension payable to him under this Order shall be an additional pension for service in the Federal Court equal to the difference between his original pension and the pension to which he would have been entitled under this Order if his service in the Federal Court had been rendered in continuation of the previous service for which his original pension was granted.

17. There shall be paid to the legal personal representatives of any Judge who dies while in possession of his office and who was at the time of his first appointment as a Judge in India permanently resident in Europe--

- (a) if the death occurred more than six months after the date of his assumption of office as a Judge in India a sum equal to six months' salary in addition to any salary due to the Judge at the date of his death; or
- (b) if the death occurred within six months after his assumption of office as a Judge in India or during his voyage to India for the purpose of first assuming office as such, such sum as with any amount received by or due to the Judge on account of salary will make up the amount of one year's salary.

18. The rules for the time being in force with respect to the grant of extraordinary pensions and gratuities and privileges in regard to special disability leave and passages to, or in respect of, members of the Indian Civil Service who may suffer injury or die as a result of violence shall apply in relation to a Judge, whether a member of a civil service or not, subject, however, to the modification that references in those rules to tables of injury gratuities and pensions and of family gratuities and pensions, shall be construed as references to the tables in the Second Schedule to this Order.

19. Pensions expressed in sterling only shall, if paid in India, be converted at such rate of exchange as the Secretary of State may from time to time prescribe:

Provided that nothing in this paragraph shall affect any specific privilege in respect of the conversion of sterling pensions which was conferred by any Rules previously in force on persons who on the 1st February, 1921, were members of a civil service of the Crown in India.

20. The Civil Pensions (Commutation) Rules applicable to persons appointed by the Secretary of State shall with any necessary modifications apply to Judges of the Federal Court.

21. Save as may be otherwise expressly provided in the relevant rules relating to the grant of extraordinary pensions and gratuities, the authority competent to grant pension to a Judge under the provisions of this Order shall be the Governor-General, exercising his individual judgment.

Travelling Allowances.

22. A Judge shall receive such reasonable allowances to reimburse him for expenses incurred in travelling on duty in India and shall be afforded such reasonable facilities in connection with travelling as the Governor-General may from time to time prescribe exercising his individual judgment.

Subsidiary.

23. Subject to the provisions of this Order and of any other Order in Council made under the Act, the conditions of service of a Judge shall be determined by the rules for the time being applicable to an officer of non-Asiatic domicile or, as the case may be, of Asiatic domicile, appointed by the Secretary of State to a civil service of the Crown in India and holding the rank of Secretary to the Government of India;

Provided that nothing in this paragraph shall have effect so as to give to a Judge who is a member of a civil service of the Crown in India less favourable terms in respect of any of his conditions of service than those to which he would be entitled as a member of his civil service if he had not been appointed a Judge, his service as a Judge in India being treated as service for the purpose of determining those terms.

Repeal and Saving.

24. Subject as hereinafter provided, paragraphs two and four to ten of the Government of India (Federal Court) Order, 1936, shall cease to have effect:

Provided that in relation to the first Chief Justice of India this Order shall have effect as if for the provisions of paragraphs twelve to seventeen thereof there were substituted the provisions of paragraphs five and six of the said Order of 1936.

FIRST SCHEDULE.

(Paragraph 13.)

PENSIONS OF JUDGES.

PART I.

1. The Judges to whom the provisions of this Part of this Schedule apply are a Chief Justice, not being a Chief Justice who is entitled to a pension only by virtue of being a member of the Indian Civil Service, and a puisne Judge who is not a member of the Indian Civil Service.

2. The pension payable to a Chief Justice who has completed seven years' service for pension as a Judge in India shall be an amount equal to the sum of the following amounts, that is to say—

- (i) an amount equal to the pension which would have been payable to him in accordance with the scale and rules in Part I of the Third Schedule to the Government of India (High Court Judges) Order, 1937; if his service as Chief Justice of the Federal Court had been rendered as Chief Justice of the Calcutta High Court, and his service, if any, as a puisne Judge of the Federal Court had been rendered as Chief Justice in any one or more of the Chartered High Courts other than those at Calcutta and Nagpur,
- (ii) an additional amount of £15 for each completed year of service as Chief Justice of the Federal Court until he has become entitled to a pension of £1,800, and thereafter an additional amount of £90 for each completed year of such service:

Provided that the aggregate amount of his pension shall in no case exceed £2,000 per annum.

3. The pension payable to a puisne Judge to whom this Part of this Schedule applies and who has completed seven years' service for pension as a Judge in India shall be an amount equal to the pension which would have been payable to him in accordance with the scale and rules in Part I of the Third Schedule to the Government of India (High Court Judges) Order, 1937, if his service as Judge of the Federal Court had been rendered as Chief Justice in any one or more of the Chartered High Courts other than those at Calcutta and Nagpur.

4. The pension payable to a Judge (whether a Chief Justice or a puisne Judge) to whom this Part of this Schedule applies, and who has completed three years' service for pension in the Federal Court, but less than seven years' service for pension as a Judge in India shall be—

- (i) for each completed year of service as Chief Justice of the Federal Court. £140

B.—Children

| | Annual Child's Pension. | |
|----------------------------|-------------------------|----|
| | Rs. | £. |
| If Child is motherless | ... 550 | 41 |
| If Child is not motherless | ... 320 | 24 |

No. 59.—The following notification of the Government of India is republished:—

**THE GOVERNMENT OF INDIA
(HIGH COURT JUDGES) (AMENDMENT) ORDER, 1937.
AT THE COURT AT BUCKINGHAM PALACE.**

The 29th day of July 1937

PRESENT :

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS in the exercise of the powers conferred on him by sections two hundred and twenty and two hundred and twenty-one of the Government of India Act, 1935, His Majesty in Council was pleased to make the Government of India (High Court Judges) Order, 1937 (hereafter in this Order referred to as "the principal Order"):

AND WHEREAS by sub-section (2) of section three hundred and nine of the said Act His Majesty in Council is empowered to revoke or vary any Order previously made by him in Council under the said Act:

AND WHEREAS the Judges of the Courts of the Judicial Commissioners of Sind and the North-West Frontier Province, other than the Judicial Commissioners themselves, are in the principal Order referred to as Assistant Judicial Commissioners but are no longer to be so styled, and it is accordingly expedient to amend the references to them in the principal Order:

AND WHEREAS a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the said Act and an address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:

NOW, THEREFORE, His Majesty, in the exercise of the said powers, and of all other powers enabling him in that behalf, is pleased by and with the advice of his Privy Council to order, and it is hereby ordered, as follows:—

1. This Order may be cited as the Government of India (High Court Judges) (Amendment) Order, 1937.
2. The Interpretation Act, 1889, applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.
3. The principal Order shall be amended in the manner specified in the Schedule to this Order.

THE SCHEDULE.

In sub-paragraph (1) of paragraph two of the principal Order, for the definition of "Judge" the following definition shall be substituted:—

"'Judge' includes a Chief Justice, an acting Chief Justice, an acting Judge and an additional Judge;"

In the First Schedule to the principal Order, for the words from "In each case" to the end of the first paragraph there shall be substituted the words "In each case the number is exclusive of the Chief Justice, but includes any additional Judges,"

In the table in the said Schedule, for the entry relating to Sind there shall be substituted the following entry:—

"The Court of the Judicial Commissioner of Sind . . 5,"

In the Second Schedule to the principal Order, for the words "Assistant Judicial Commissioner of Sind" there shall be substituted the words "Judge of the Court of the Judicial Commissioner of Sind", and for the words from "'Judge' includes" to the end of the Schedule there shall be substituted the words "and 'Judge' includes an acting or an additional Judge".

LEGAL DEPARTMENT.

NOTIFICATION.

Fort St. George, September 16, 1937

(G. O. Ms. No. 161, Legal).

No.—4 The following Order in Council is republished:—

**THE GOVERNMENT OF INDIA (ADAPTATION
OF INDIAN LAWS) SUPPLEMENTARY ORDER, 1937.
AT THE COURT AT BUCKINGHAM PALACE.**

The 29th day of July 1937

PRESENT :

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS by section two hundred and ninety-three of the Government of India Act, 1935 (hereafter in the recitals to this Order referred to as "the Act") His Majesty is empowered by Order in Council to provide that as from such date as may be specified in the Order any law in force in British India or in any part of British India shall, until repealed or amended by a competent legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the Act;

AND WHEREAS in exercise of the said powers an Order in Council called the Government of India (Adaptation of Indian Laws) Order, 1937 (hereafter in this Order referred to as "the Principal order") has been made:

AND WHEREAS by sub-section (2) of section three hundred and nine of the Act His Majesty in Council is empowered to vary any Order in Council previously made under the Act:

AND WHEREAS a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:

NOW, THEREFORE, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered, as follows:—

1. This Order may be cited as the Government of India (Adaptation of Indian Laws) Supplementary Order, 1937.

2. The Schedules to the Principal Order shall be modified as directed in the Schedule to this Order, and shall have effect, and be deemed always to have had effect, as so modified.

THE SCHEDULE.

Modifications of Schedule I to the Principal Order.

Omit the directions relating to the Madras Inland Customs Act, 1844 (VI of 1844), and the Bombay Land Customs Act, 1857 (XXIX of 1857).

For the direction relating to section 6 of the Cattle Trespass Act, 1871 (I of 1871), substitute—

“For section 6 substitute:

“6 The Provincial Government shall appoint a pound-keeper for every pound.

Pound-keepers may hold Any pound-keeper may hold simultaneously any other offices. other office under the Crown

Pound-keepers to be public Every pound-keeper shall be deemed to be a public servant within the meaning of the Indian Penal Code.”

After the direction relating to section 27 of the Oath Laws Act, 1876 (XVIII of 1876), insert—

“Section 31.—For ‘at discretion by such Magistrate, or by some officer authorised by him in that behalf substitute ‘by the Provincial Government.’

Section 32.—For ‘Magistrate of the district’ substitute ‘Provincial Government.’

Section 33.—For ‘Magistrate of the district’ substitute ‘Provincial Government’ and for ‘the road-police of his district’ substitute ‘road-police.’

After the direction relating to section 5 of the Harkney Carriage Act, 1879 (XIV of 1879), insert—

“Section 6.—Omit ‘or section 4.’”

For the direction relating to section 36 of the Bengal, Agra and Assam Civil Courts Act, 1887 (XII of 1887), substitute.—

“Section 36.—For ‘sections 4 to 8 (both inclusive), or sections 10 to 12 (both inclusive), or sections 27 to 35 (both inclusive)’ substitute ‘sections 4, 5, 6, 8, 10 or 11’”

Before the direction relating to the omission of section 23 of the Indian Arbitration Act, 1899 (IX of 1899), insert—

“Section 2.—Omit ‘Subject to the provisions of section 23’”

In the direction relating to section 1 of the Indian Tea Cess Act, 1903 (IX of 1903), after “Aden” insert “and Burma”.

After the direction relating to section 6 of the Indian Registration Act, 1908 (XVI of 1908), insert—

“Section 8 (as in force in the Provinces of Bombay and Sind)—Omit the proviso to subsection (1).”

After the direction relating to section 17 of the Indian Registration Act, 1908 (XVI of 1908), insert—

“Section 70-B.—Omit the proviso.”

For the direction relating to section 77 of the Presidency-towns Insolvency Act, 1909 (III of 1909), substitute:—

“Section 77.—For sub-section (1) substitute:

‘(1) (a) The Chief Justice of the High Court at Madras may from time to time appoint substantively or temporarily such person as he thinks fit to the office of official assignee of insolvents’ estates and such person or persons as he thinks fit to the office of the deputy official assignee for the said Court and may, with the concurrence of a majority of the other Judges of the Court, remove the person for the time being holding any of the said offices for any cause appearing to the Court sufficient.

(b) The Provincial Government of Bengal shall, after consultation with, and with the concurrence of, the Chief Justice of the High Court at Calcutta, appoint substantively or

temporarily a person to the office of official assignee of insolvents' estates for the said Court and may, after the like consultation and with the like concurrence, appoint substantively or temporarily a person or persons to the office of the deputy official assignee for the said Court.

- (c) For the High Court at Bombay, the Provincial Government of Bombay, and for the Court of the Judicial Commissioner of Sind, the Provincial Government of Sind, may from time to time appoint substantively or temporarily such person as the Provincial Government thinks fit to the office of official assignee of insolvents' estates and such person or persons as the Provincial Government thinks fit to the office of the deputy official assignee.'

In sub-section (3) (as in force outside Bengal) omit 'and in the Chief Court of Lower Burma under that Act as applied by the Lower Burma Courts Act, 1900', and 'and in the Chief Court of Lower Burma', and after the said direction insert—

"For section 81-A substitute.

Salary, allowances and pension of official assignee and deputy official assignee. '81-A.—The salary, allowances and pension of the official assignee or any deputy official assignee shall be paid by the Provincial Government.'

Section 81-B.—Omit sub-section (2).

Section 112.—In sub-section (2) omit clause (a), and in clause (a) the words 'of the remuneration of the official assignee, of the costs, charges and expenses of his establishment, and'; and at the end of the subsection insert—

'and, in the case of the High Court at Madras, may also provide for and regulate the remuneration of the Official assignee and the payment of the costs, charges and expenses of his establishment.'

For the directions relating to sections 37 and 38 of the Indian Electricity Act, 1910 (IX of 1910), including the new section 38-A inserted after section 38, substitute:—

"Section 36-A.—For 'Local Governments' substitute 'Provincial Governments'; and after 'Central Provinces' insert 'and Berar'.

'Chief Commissioner' shall stand unmodified.

Section 38.—In sub-section (3) 'Gazette of India' shall stand unmodified.'

After the direction relating to section 14 of the Indian Motor Vehicles Act, 1914 (VIII of 1914), insert—

"Section 15.—For 'such as is referred to in' substitute 'governed by rules made under' and for 'any rule made under the said clause' and substitute 'the said rules'."

In the direction relating to Part I of Schedule I to the Imperial Bank of India Act, 1920 (XLVII of 1920), for "in clause (a) (vi) omit the proviso" substitute "for the proviso to clause (a) substitute the following.—

'Provided that any advances or loans which, under the law for the time being in force, any of the following Governments or authorities, that is to say, the Secretary of State, any Government in British India, the Federal Railway Authority, the Government of Burma or the Burma Railway Board, may lawfully accept from the Bank may, if the Central Board think fit, be made without any specific security.'

For the directions relating to sections 28, 29 and 31 of the Indian Boilers Act, 1923 (V of 1923), substitute:—

"Section 27-A.—For 'Local Governments' substitute 'Provincial Governments'; and after 'Central Provinces' insert 'and Berar'.

'Chief Commissioner' shall stand unmodified

Section 28.—'Gazette of India' shall stand unmodified

Section 29.—In clause (a) omit 'for regulating the salary, allowances and conditions of service'; and omit the proviso

Section 31.—Sub-section (2) shall stand unmodified"

After the direction relating to sections 9, 10 and 11 of the Indian Cotton Cess Act, 1923 (XIV of 1923), insert—

“After section 12 insert—

‘12-A.—As soon as may be after the first day of April 1937, the Committee shall pay to the Government of Burma, for the promotion of agricultural and technological research in the interests of the cotton industry in Burma, the sum of rupees forty-two thousand and sixty-six.’”

In the direction relating to section 39 of the Indian Forest Act, 1927 (XVI of 1927), for so much of the new sub-section (4) as precedes the proviso substitute:

“(4) Notwithstanding anything in this section, the Provincial Government may, until provision to the contrary is made by the Central Legislature, continue to levy any duty which it was lawfully levying before the commencement of Part III of the Government of India Act, 1935, under this section as then in force.”

Omit the direction relating to sub-section (5) of section 4 of the Indian Lac Cess Act, 1930 (XXIV of 1930).

After the direction relating to the Geneva Convention Implementing Act, 1936 (XIV of 1936), insert—

“*The Indian Finance Act, 1937.*

(Governor-General's Act.)

Section 2—Omit ‘other than Burma or Aden.’”

In the direction relating to section 3 of the Indian Penal Code (XLV of 1860), after “Governor-General” insert “of India”.

At the end of the direction relating to section 124 of the Indian Penal Code (XLV of 1860), insert “but save as aforesaid, the section shall stand unmodified”.

In the direction relating to section 271 of the Indian Penal Code (XLV of 1860), for “Governor” substitute “Government”.

After the direction relating to section 44 of the Code of Civil Procedure, 1908 (V of 1908), insert—

“Section 44-A.—In Explanation 2, omit ‘or in India.’”

At the end of the direction relating to section 60 of the Code of Civil Procedure, 1908 (V of 1908), insert—

“In clause (i) of the said proviso for ‘Governor-General in Council’ substitute ‘appropriate Government’, and after Explanation 2 to sub-section (1) insert—

‘Explanation 3.—In clause (i) “appropriate Government” means—

(i) as respects any public officer in the service of the Central Government, or any servant of a Federal Railway or of a cantonment authority or of the port authority of a major port, the Central Government;

(ii) as respects any public officer employed in connection with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative; and

(iii) as respects any other public officer or a servant of any other railway or local authority, the Provincial Government’”

Modifications of Schedule III to the Principal Order.

For the directions relating to sections 1 and 1-A of the Sindh Courts Act, 1866 (Bombay XII of 1866), substitute—

‘Section 1.—In the second sentence omit “three or more” and omit “and the others Additional Judicial Commissioners”.

Omit the third sentence.

Section 1-A.—For “Judicial Commissioner and Additional Judicial Commissioners” substitute “Judges of the Court of the Judicial Commissioner”; omit from “shall be appointed” to “removed. They”; and for “Judicial Commissioner and Additional Judicial Commissioner” substitute “Judge”.

In the directions relating to the Bombay Salt Act, 1890 (Bombay II of 1890), after “except in the phrases” insert “Government officer”.

Omit the direction relating to the Indian Registration (Bombay Amendment) Act, 1929 (Bombay V of 1929).

Modifications of Schedule IV to the Principal Order.

After the direction relating to section 8 of the Bengal Excise Act, 1909 (Bengal V of 1909), insert—

“Sections 9 and 10.—For ‘imposed under section 27’ substitute ‘payable under Chapter V’.”

After the directions relating to sections 463 and 464 of the Calcutta Municipal Act, 1923 (Bengal III of 1923), insert—

“Section 482.—At the end insert—

‘(3) The powers conferred by this section on the Provincial Government shall, in relation to any by-law made under clause (69) of section 478, be powers of the Central Government.’”

At the end of the Schedule insert—

“*The Bengal Non-Agricultural Lands Assessment Act, 1936.*
(Bengal XIX of 1936.)

Throughout the Act for ‘the Government’ substitute ‘the Crown’.

For section 18 substitute:

‘18 No suit shall be instituted against the Crown under section 17 unless the Crown is interested as landlord or tenant.’”

Modifications of Schedule V to the Principal Order.

At the end insert—

“*The United Provinces Cotton Pest Control Act, 1936.*

(U. P. XI of 1936.)

Section 13.—For ‘the Legislative Council’ substitute ‘both chambers of the Provincial Legislature’.

The United Provinces Muslim Wakfs Act, 1936.

(U.P. XIII of 1936.)

Section 2.—In sub-section (2) for ‘Government’ substitute ‘the Provincial Government’.

Section 3.—In clause (8) for ‘Government’ substitute ‘the Provincial Government’.

Section 16.—For ‘Government gazetted officer’ substitute ‘~~gazetted officer~~ of the Provincial Government’.

Section 17.—For ‘Government Officer’ substitute ‘officer of the Provincial Government’.

Section 54.—For ‘to the Government’ or ‘to Government’ substitute ‘to the Crown’.

Omit section 67.

Section 68.—For ‘Government’ substitute ‘Provincial Government’.”

Modifications of Schedule VII to the Principal Order.

At the end insert—

“*The Hasaribagh Mines Board Act, 1936.*

(Bihar III of 1936.)

Section 4.—After ‘Railway Board’ insert ‘or after the establishment of the Federal Railway Authority by that Authority’ and for ‘Government official’ substitute ‘person in the service of the Crown’.

Section 13.—In clause (c) of sub-section (1) after ‘realised’ insert ‘by the Board’ and omit ‘fines, penalties’.

Section 15.—For ‘the Government’ substitute ‘the Provincial Government’.

Section 17.—For ‘by Government’ substitute ‘by any Government’.”

Modifications of Schedule VIII to the Principal Order.

After the direction relating to section 25 of the Central Provinces Municipalities Act, 1922 (O. P. II of 1922), insert—

“Section 29.—At the end insert—

Provided that, where one of the local bodies is a cantonment authority, the decision of the Provincial Government shall be subject to the concurrence of the Central Government."

After the directions relating to section 3 of the Central Provinces Local Fund Audit Act, 1933 (C.P. IX of 1933), insert—

"Section 7.—For 'Government' substitute 'Provincial Government'."

After the directions relating to the Central Provinces Agricultural Pests and Diseases Act, 1936 (C P XXXV of 1936), insert—

"The Nagpur Improvement Trust Act, 1936

(C. P. XXXV of 1936.)

Throughout the Act for 'Government servant' and 'servant of the Government' substitute 'servant of the Crown'

Section 13.—For 'any general or special orders of the Government for regulating the transfer of Government servants to foreign service' substitute 'the conditions of his service under the Crown relating to transfer to foreign service.'

Sections 43 and 45.—For 'property of, and managed by, Government' substitute 'property of the Crown and managed by the Central Government or the Provincial Government'.

Section 57.—In sub-section (4) omit 'which was at the commencement of this Act the property of Government or has since been acquired by Government and was'.

Section 69.—For 'by Government' substitute 'by the Crown' and for 'or managed by Government' substitute 'the Crown or is managed by the Central Government or the Provincial Government'.

Section 77.—Omit sub-section (4).

Omit sections 78 and 79 and sub-section (3) of section 80.

Section 85.—For 'by Government' substitute 'by the Provincial Government'.

Section 89.—In Clause (k) of sub-section (1) for 'leave or leave allowances under the rules or orders made by the Local Government in this behalf' substitute 'such leave or leave allowances as may be prescribed by the conditions of his service under the Crown relating to transfer to foreign service'.

Section 108.—Omit 'fines and'.

Section 110.—For 'prescribed in any general or special orders of the Local Government' substitute 'required by the conditions of his service under the Crown to be paid by him or on his behalf'.

Section 121.—In sub-section (2) omit 'which was at the commencement of this Act the property of Government or has since been acquired by Government, and was'."

"The Central Provinces Co-operative Land Mortgage Banks Act, 1937.

(C P. I of 1937)

Section 7.—In sub-section (2) for 'Council' substitute 'Assembly'.

Sections 17 and 18.—For 'Government' substitute 'the Provincial Government'.

Section 25.—For 'Registrar' substitute 'Provincial Government'.

Section 31.—For 'Government' substitute 'Provincial Government'.

The Central Provinces Famine Relief Fund Act, 1937

(C P.I. of 1937.)

Throughout the Act, except in sub-section (3) of section 1, after 'Central Provinces' insert 'and Bihar'.

"The Central Provinces Recognised Examinations Act, 1937.

(C. P. X of 1937.)

Section 2.—For 'the Government' substitute 'any Government'."

In the directions relating to the First Schedule to Notification No. 3510—1. B. of 3rd November, 1913, for "Reformatory Schools Act, 1899" substitute 'Reformatory Schools Act, 1897'."

Modifications of Schedule XI to the Principal Order.

In the directions relating to the North-West Frontier Province Courts Regulation, 1931 (Central Regulation I of 1931), for the directions preceding that relating to section 7 of the Regulation substitute—

“Throughout the Regulation, except in section 6, for “Additional Judicial Commissioner” and “Additional Judicial Commissioners” substitute ‘other Judge’ and ‘other Judges’ respectively.

Omit section 4.

Section 6.—For “any Additional Judicial Commissioner” substitute “any other Judge of the Court”.

In the direction relating to section 45 of the Khondmals Laws Regulation, 1936 (Central Regulation IV of 1936), after “any village” insert “or the panchayat, if any,”

In the direction relating to section 46 of the Angul Laws Regulations, 1936 (Central Regulation V of 1936), after “any village” insert “or the panchayat, if any,”

At the end insert—

“The Orissa Ports Regulation, 1937.

(Central Regulation XI of 1937)

Throughout the Regulation for ‘Local Government’ substitute ‘Government’.

Section 2.—At the end of the section insert—“(d) “The Government” means, in relation to a port which is a major port within the meaning of the Indian Ports Act, 1908, the Central Government and, in relation to any other port, the Provincial Government’.”

"The Court shall allow the defect to be remedied then and there or within a time to be fixed by it, and, if the decree-holder fails to remedy the defect within such time, the Court may reject the application".

[Patna] O. XXI, r. 22. For sub-r. (1) of r. 22 *substitute* the following sub-rule. —

"Where an application for execution is made in writing under r. 11 (2) the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed, why the decree should not be executed against him."

[Patna] O. XXI, r. 26. In sub-r. (3) of r. 26 *substitute* the words "shall, unless sufficient cause is shown to the contrary", for the word "may".

[Patna] O. XXI, r. 31. In sub-r. (2) and (3) of r. 31 for the words "six months" *substitute* "three months", and *add* the following as sub-r. (4). —

"(4) The Court may, for sufficient cause, extend the period of three months mentioned in sub-r. (2) and (3) to such period, not exceeding six months in the whole, as it may think fit".

[Patna] O. XXI, r. 32. In sub-r. (3) of r. 32 for the words "for one year" *substitute* the words "for three months or for such further periods not exceeding one year in the whole, as may on sufficient cause shown, be fixed by the Court".

[Patna.] O. XXI, r. 39. In sub-r. (5) of r. 39 *delete* the words "in the civil prison" in the first place where they occur.

[Patna.] O. XXI, r. 45. *Add* to sub-r. (1) of r. 45 after *deleting* the full-stop at the end of the sub-rule:—

"and the applicant shall pay into Court such sums as he may from time to time be required by the Court to pay in order to defray the cost of such arrangements"

[Patna.] O. XXI, r. 50. In sub-r. (2) of r. 50 *add* the words "or to the Court to which it is sent for execution" after the words "passed the decree" and before the words "for leave".

[Patna] O. XXI, r. 53. *Substitute* the following for r. 53 (1) (b):—

"53 (1) (b) If the decree sought to be attached was passed by another Court, then by the issue to which such other Court (or to the Court to which that decree may have been transferred for execution) of a notice by the Court before which the application has been made requesting such other Court (or the Court to which the decree may have been transferred for execution as the case may be) to stay the execution of the decree sought to be attached unless and until—

(i) the Court which has issued the notice shall cancel the same, or

(ii) the holder of the decree sought to be executed, or his judgment debtor, with the consent of the said decree-holder expressed in writing or the permission of the attaching Court, applies to such other Court (or to the Court to which the decree may have been transferred for execution) to execute the attached decree"

[Patna] O. XXI, r. 57. *Delete* the last sentence from r. 57 and *add* the following sub-paragraph to the rule —

"Upon every order dismissing an execution case in which there is an attachment, the attachment shall cease unless the Court otherwise directs".

[Patna] O. XXI, r. 58. *Substitute* the following for r. 58.—

"58 (1) When any claim is preferred to any property the subject-matter of execution proceedings, or any objection is made to the attachment thereof, on the ground that the applicant has an interest therein which is not bound under the decree, or that such property is not liable to

attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit:

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering that sale may in its discretion make an order postponing the delivery of the property after the sale pending the investigation of the claim or objection. And in no case shall the sale become absolute until the claim or objection has been decided."

[Patna.] O. XXI, r. 59. *Substitute the following for r. 59* —

"59. The claimant or objector must adduce evidence to show that at the date of the decree or of the attachment, as the case may be, he had some interest in, or was possessed of the property in question."

[Patna.] O. XXI, r. 60. *Substitute the following for r. 60* :—

"60. Where upon the said investigation the Court is satisfied that for the reasons stated in the claim or objection such property was not, at the date of the decree, or when attached, as the case may be, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account as his own property, but on account of, or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order realising the property, wholly or to such extent as it thinks fit, from the execution proceedings, or from attachment."

Where the property has been sold, such order shall have the effect of setting aside the sale, and if it has been purchased by a third party in good faith, the Court may make such order for his compensation by the decree-holder or objector, to an extent not exceeding 12½ per cent. of the purchase price, as it thinks fit."

[Patna.] O. XXI, r. 61. *Substitute the following for r. 61* :—

"61. Where the Court is satisfied that the property was, at the time of the decree, or of the attachment, as the case may be, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him the Court shall disallow the claim."

[Patna.] O. XXI, *Add the following heading and rules below r. 61* :—

GARNISHEE ORDERS

63-A. Where a debt (other than a debt secured by a mortgage or a debt recoverable only in a Revenue Court or a debt the amount of which exceeds the pecuniary jurisdiction of the Court) has been attached under r. 16 and the debtor prohibited under cl. (2) of sub-r. (1) of r. 16 (herein after called the garnishee) does not pay the amount of the debt into Court in accordance with r. 16, sub-r. (3), the Court on the application of the decree holder may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment-debtor. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment-debtor.

63-B. (1) If the garnishee does not pay into Court the amount of the debt due into Court the amount of the debt due from him to the judgment-debtor, and if he does not appear in answer to the notice issued under r. 63-A, or does not dispute his liability to pay such debt to the judgment debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him.

(2) If the garnishee appears in answer to the notice issued under r. 63-A and disputes his liability to pay the debt attached, the Court,

instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

63-C. Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has a lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt, and prove the same if necessary.

63-D. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as shall seem just and reasonable.

63-E. Payment made by or levied by execution upon the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment-debtor and any other person ordered to appear under these rules, for the amount paid or levied, although such order or the judgment may be set aside or reversed.

63-F. The costs of any application for the attachment of a debt or under the foregoing rules and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree-holder shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree.

63-G. Out of the amount recovered under the garnishee order the Court shall deduct a sum equal to the Court fee payable under the Indian Court-Fees Act on a plaint in a suit for recovery of the money and credit the same to the Government.

63-H (1) Where the liability of any garnishee has been tried and determined under these rules the order shall have the same force and be subject to the same conditions as to appeals or otherwise as if it were a decree.

(2) Orders not covered by cl. (1) shall be appealable as orders made in execution.

[Patna.] O. XXI, r. 64. In r. 64 for the words "attached by it" *substitute* the words "in respect of which it has made an order of attachment"

Insert the words "which is" between the words "and" and "liable"

[Patna.] O. XXI, r. 66.

Omit the words "shall be drawn up after notice to the decree-holder and the judgment-debtor and "from sub-rule (2) of rule 66, and *add* the following proviso after sub-clause (e) of sub-rule (2) —

"Provided that no estimate of the value of the property, other than those, if any, made by the decree-holder and the judgment-debtor respectively together with a statement that the Court does not vouch for the accuracy of either shall be inserted in the sale-proclamation."

[Patna.] O. XXI, r. 67.

Add the following words at the end of sub-rule (1) of rule 67 after deleting the full-stop at the end of the sub-rule. —

"and may, if the Court so directs, on the application of the decree-holder, be proclaimed and published simultaneously with the order of attachment."

[Patna.] O. XXI, r. 69. In rule 69 (2) for the word "seven" read "fourteen" and *add* the following proviso. —

"Provided that the Court may dispense with the consent of any judgment-debtor who has not appeared in the proceedings."

[Patna.] O. XXI, r. 72. (1) *Substitute* the following for sub-rule (1):—

"(1) No holder of a decree in execution of which property is sold shall be precluded from bidding for or purchasing the property unless an express order to that effect is made by the Court."

(ii) In sub-rule (2) for the words "with such permission" *substitute* the words "the property."

(iii) *Substitute* the following for sub-rule (3) :—

"(3) Where notwithstanding an order made under sub-rule (1) a decree-holder purchases the property by himself or through another person the Court shall, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale, and the cost of such application and order and any deficiency of price which may happen on the re-sale and all expenses attending it shall be in the discretion of the Court"

[Patna] O XXI, r. 75. *Substitute* the following for r 75 —

"Where the property to be sold is a growing crop which can be sold to greater advantage in an unripe or unripe state, it may be sold unripe, and the purchaser shall be entitled to enter on the land to do all that is necessary for the purpose of tending and reaping it. In all other cases the day of sale shall be so fixed as to admit of the crop ripening and being reaped, before the sale."

[Patna] O XXI, r. 85. For the portion of rule 85 of Order XXI beginning with the words "The full amount" and ending with the words "Sale of the property" *substitute* the following —

"The purchaser shall pay into the Court the full amount of the purchase money and shall also tender the stamp necessary for the certificate referred to in rule 94 before the Court closes on the fifteenth day from the sale of the property."

Rule 86 *Insert* the words "or tender of stamp" between the words "payment" and "within" in rule 86 of Order XXI.

(Bihar Gazette, Part III, dated 20th October 1937)

[Patna] O XXI, r. 89. In sub-rule (i) of rule 89 for the words "any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale" *Substitute* the words "the judgment-debtor or any person deriving title through the judgment-debtor, or any person holding an interest in the property at the date of the application under this rule"

[Patna] O XXI, r. 90. *Substitute* the following for the proviso to r 90 (1).—

(i) Provided that no application to set aside a sale shall be admitted unless—

(a) it discloses a ground which could not have been put forward by the applicant before the sale was concluded, and

(b) the applicant deposits with the application such amount not exceeding 12½ per cent of the sum realised by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded dispenses with the deposit.

(ii) Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

and *add* the following as sub r. (2):—

"(2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in proviso (a) (b), if any".

[Patna] O XXI, r. 92. In sub r. (1) of r 92 after the words "the Court shall" *insert* the words "subject to the provisions of r. 58 (2)".

[Patna.] O XXI, r. 97. *Add* the following sub-rule to r. 97:—

"(3) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to the applications under this rule".

[Patna.] O. XXI, r. 99. In r. 99 for the brackets and words "other than the judgment-debtor)" *substitute* the brackets and words "other than the persons mentioned in rr. 95 and 98)".

[Patna.] O. XXXIV, r. 2. In r. 2 (2) *insert* the words "of its own motion or" after the words "the Court may".

[Patna.] O. XXXIX, r. 1. *Substitute* the word "the" for the word "a" in line of clause (a) of rule 1 and *add* the following proviso after rule 1.—

"Provided that no such temporary injunction shall be granted if it would contravene the provisions of Section 56 of the Specific Relief Act (I of 1877).

Provided further that an injunction to restrain a sale, or confirmation of a sale, or to restrain delivery of possession, shall not be granted except in a case where the applicant cannot lawfully prefer, and could not lawfully have preferred, a claim to the property, or objection to the sale, or to the attachment proceeding *it*, before the Court executing the decree."

[Patna.] O. XLIII, r. 1. *Add* the following to rule 1 as clause (ii) after clause (i).—

"(ii) an order in garnishee proceedings other than an order referred to in rule 63-H (1) of Order XXI."

THE CIVIL COURT MANUAL (IMPERIAL ACTS)

THE GOVERNMENT OF INDIA (ADAPTATION OF ACTS OF PARLIAMENT) ORDER, 1937.

AT THE COURT AT BUCKINGHAM PALACE.

The 18th day of March, 1937.

PRESENT:

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

Whereas by subsection (5) of section three hundred and eleven of the Government of India Act, 1935 (hereafter in the recitals to this Order referred to as "the Act") it is provided that any Act of Parliament containing references to India or any part thereof, to countries other than or situate outside India or other than or situate outside British India, to His Majesty's dominions, to a British possession, to the Secretary of State in Council, to the Governor-General in Council, to a Governor in Council or to Legislatures, courts or authorities in, or to matters relating to the government or administration of, India or British India, shall have effect subject to such adaptations and modifications as His Majesty in Council may direct, being adaptations and modifications which appear to His Majesty in Council to be necessary or expedient in consequence of the provisions of the Act or of the Government of Burma Act, 1935:

And whereas by subsection (2) of section one hundred and seventy-eight of the Act it is provided that all enactments relating to any such loans, guarantees and other financial obligations of the Secretary of State in Council as are referred to in subsection (1) of that section shall in relation to those loans, guarantees and obligations continue to have effect with certain substitutions and with such other modifications and such adaptations as His Majesty in Council may deem necessary:

And whereas under section three hundred and twenty of the Act His Majesty by Order in Council has appointed the first day of April, nineteen hundred and thirty-seven, as the date on which the provisions of the Act, other than the provisions of Part II thereof, are, subject to any exceptions mentioned in the Order, to come into force:

And whereas a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:

Now, therefore, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased, by and with the advice of His Privy Council, to order, and it is hereby ordered, as follows:—

1. This Order may be cited as THE GOVERNMENT OF INDIA (ADAPTATION OF ACTS OF PARLIAMENT) ORDER, 1937, and shall come into operation on the first day of April, nineteen hundred and thirty-seven.

2. The Acts of Parliament referred to in the Schedule to this Order shall have effect subject to the adaptations and modifications specified in the said Schedule.

3. In any Act of Parliament passed before the commencement of this Order and not referred to in the Schedule thereto references to the revenues of India shall be construed, in relation to the period after the establishment of the Federation of India, as references to the revenues of the Federation and, in relation to the period between the commencement of Part III of the Government of India Act, 1935, and the establishment of the Federation, as references to the revenues of the Governor-General in Council.

4. The provisions of this Order which adapt or modify any Act by transferring functions to another authority shall not render invalid any order, byelaw, rule or regulation duly made, or anything duly done, before the commencement of this Order and any such order, byelaw, rule, regulation or thing may be revoked, varied or undone in like manner, to the like extent and in the like circumstances as orders, byelaws, rules, regulations or things made or done by the authority to which the functions are transferred.

5. Nothing in the Aden Colony Order, 1936, shall be construed as requiring that references in Acts of Parliament to India or British India shall continue to be construed as including references to Aden.

M. P. A. Hankey.

THE SCHEDULE.

PART I

The Interpretation Act, 1889.

(52 & 53 Vict. c. 63)

In section eighteen, the definitions of "British India" and "India" shall be omitted, and in the definition of "Governor" the words "and India" shall be omitted and after the words "any other British possession" there shall be inserted the words "outside British India."

After section eighteen there shall be inserted the following section:—

Special definitions relating to India. "18-A.—(1) In this Act and in every other Act, whether passed before or after the commencement of this Act,—

(i) the expression "British possession", when used in relation to British territories in India, shall, unless the contrary intention appears, mean British India as a whole, and references, in whatever words, to territories of the Crown abroad shall as respects India be construed accordingly,

(ii) the expression "Governor" shall, when used in relation to British India as a whole or to India as a whole, mean the Governor-General;

(iii) the expression "Governor-General" shall, when used in relation to British India or to India,—

(a) in relation to the period between the commencement of Part III of the Government of India Act, 1935, and the establishment of the Federation of India, mean the Governor-General in Council,

(b) in relation to any period after the commencement of the said Part III, be construed as including a reference to the Governor of a Province in India acting within the scope of any authority given to him under Part VI of the said Act,

(iv) the expression "Indian legislature" and, when used in relation to British India or to India, the expression "legislature" shall mean the authority, other than the Imperial Parliament, competent to make laws for British India, or for the relevant part of British India

(2) This section applies for the interpretation of the Government of India (Adaptation of Acts of Parliament) Order, 1937, but it does not apply for the interpretation of the Government of India Act, 1935, or the Government of Burma Act, 1935, nor, save as aforesaid, for the interpretation of any Order in Council made under either of those Acts, notwithstanding that that Order may provide generally that this Act shall apply for the interpretation thereof as it applies for the interpretation of an Act of Parliament.

PART II.

*General enactments.**The Criminal Law (India) Act, 1828.*

(9 Geo. 4. c. 74).

In sections one, seven and eight, references (in whatever words) to the British territories under the government of the East India Company shall be construed as references to British India, British Burma, Aden and the Straits Settlements.

The Slave Trade Act, 1843

(6 & 7 Vict. c. 98.)

At the end of section four there shall be inserted the following subsection —

"(2) In the case of British India, any such writ as aforesaid may be addressed to the chief justice, or other chief judge, of any court which is a High Court for the purposes of the Government of India Act, 1935."

The Chinese Passengers Act, 1855

(18 & 19 Vict. c. 104.)

In section one, the words "not being under the government of the East India Company", and in sections eight and ten the words "or in the territories of the East India Company", shall be omitted.

The Evidence by Commission Act, 1859.

(22 Vict. c. 20.)

At the end of section five there shall be inserted the following sub-section —

"(2) For the purposes of this Act the expression 'Supreme Court' means, as respects India, a court which is a High Court for the purposes of the Government of India Act, 1935, and, as respects Burma, the High Court at Rangoon."

The Indian Securities Act, 1860

(23 & 24 Vict. c. 5.)

In section one for the words "by the Secretary of State in Council" there shall be substituted the words "by the Governor-General".

The Admiralty Jurisdiction (India) Act, 1860

(23 & 24 Vict. c. 88.)

For section one there shall be substituted the following section —

Application of principal Act to British India and British Burma.

"1 The Admiralty Offences (Colonial) Act, 1849, shall apply to British India and British Burma as it applies to colonies."

The Colonial Laws Validity Act, 1865.

(28 & 29 Vict. c. 63.)

In section one, for the words "and such territories as may for the time being be vested in Her Majesty under or by virtue of any Act of Parliament for the government of India" there shall be substituted the words "British India and British Burma".

The Documentary Evidence Act, 1868

(31 & 32 Vict. c. 37.)

In section five, in the definition of "British colony and possession" the words from "and such" to "India" shall be omitted, and at the end of the section there shall be inserted the following subsection —

"(2) For the purposes of this Act, British India as a whole and also each Governor's Province and Chief Commissioner's Province thereof shall be regarded as separate British possessions."

The Colonial Prisoners Removal Act, 1869

(32 & 33 Vict. c. 10.)

In section two, for the words "such territories as may for the time being be vested in Her Majesty by virtue of any Act of Parliament for the government of India" there shall be substituted the words "British India or British Burma".

The Extradition Act, 1870.

(33 & 34 Vict. c. 52.)

In section twenty-three, after the words "of India" there shall be inserted the words "or, as the case may be, of the Governor of Burma"; the words "in Council" shall be omitted and after the words "British India" there shall be inserted the words "or with Burma".

In section twenty-six, in the definition of "governor" the words "and includes the governor of any part of India" shall be omitted.

The Foreign Enlistment Act, 1870.

(33 & 34 Vict. c. 90.)

In section thirty, in the definition of "The Governor" the words "or the governor of any presidency" shall be omitted, and for the words "and where a British possession consists," there shall be substituted the words "and as respects a British possession which consists."

The Slave Trade Act, 1873.

(36 & 37 Vict. c. 88.)

In section two, at the end of the definition of "governor" there shall be inserted the following words:—

"Provided that as respects British India it means the Governor-General"

The Courts (Colonial) Jurisdiction Act, 1874

(37 & 38 Vict. c. 27.)

In section two, for the words from "or the Channel Islands" to "India and" there shall be substituted the words "the Channel Islands, British India or British Burma, but shall include", and at the end of that section there shall be inserted the following section:—

Application of Act to 2A. This Act applies in relation to each Governor's Province, British India and British Prince and Chief Commissioner's Province of British India and Burma. to British Burma as it applies in relation to a colony."

The Slave Trade Act, 1876.

(39 & 40 Vict. c. 46.)

In section two, for the words "If the Governor-General of India in Council shall at a meeting for making laws and regulations amend" there shall be substituted the words "If the Legislature of India shall amend"; and for the words "the Secretary of State for India" there shall be substituted the words "the Secretary of State".

In section three, for the words "section 330 of Act 10 of 1872 passed by the Governor-General of India in Council and" there shall be substituted the words "Chapter XL of the Indian Act V of 1898"; for the words "the Governor-General of India in Council or any Indian Government" there shall be substituted the words "His Majesty's Representative for the exercise of the functions of the Crown in its relations with Indian States or of the Governor-General", and for the words "Her Majesty's Indian dominions" there shall be substituted the words "British India, British Burma or Aden".

After section three there shall be inserted the following sections:—

Application of Act to 3-A (1) The provisions of this Act shall apply to Burma subject to the modifications specified in this section.

(2) In section one, for the words "of any Prince or State in India in alliance with Her Majesty" there shall be substituted the words "a native of any part of Burma not forming part of British Burma"; and for the words "British India" there shall be substituted the words "British Burma".

(3) In section two, for the words "Legislature of India" there shall be substituted the words "the Burma Legislature".

(4) In section three, for the words "every High Court in India" there shall be substituted the words "the High Court at Rangoon"; for the words "And every High Court" there shall be substituted the words "And the High Court"; for the words from "agent of" to the words "alliance with Her Majesty" there shall be substituted the words "agent of the Governor in the said parts", and for the words "jurisdiction in India" there shall be substituted the words "jurisdiction in Burma".

(5) For any reference to the Indian Penal Code and for the reference to Chapter XL of the Code of Criminal Procedure there shall be substituted a reference to the Code or Chapter in question as adapted or modified under the Government of Burma Act, 1935, and in force as part of the law of Burma immediately after the commencement of that Act.

Provided that, if the Code of Criminal Procedure is repealed and re-enacted in Burma, either with or without modifications, the reference to the said Chapter XL shall be construed as a reference to the corresponding provisions of the re-enacted Code as for the time being in force in Burma.

Application of Act to 3-B. (1) The provisions of this Act shall apply to Aden subject to the modifications specified in this section.

(2) In section one, the words "or of any Prince or State in India in alliance with Her Majesty" shall be omitted and for the words "British India" there shall be substituted the word "Aden".

(3) In section two, for the words "the Legislature of India" there shall be substituted the words "any authority competent to make laws for Aden", after the word "unless", where it first occurs, there shall be inserted the words "(in the case of a law not made by Order in Council)", and for the words "amending Act" there shall be substituted the words "amending law".

(4) In section three, for the words "every High Court in India", there shall be substituted the words "the Supreme Court of Aden", for the words "And every High Court" there shall be substituted the words "And the Supreme Court"; for the words from "agent of" to the words "alliance with Her Majesty" there shall be substituted the words "agent of the Governor in the said parts", and for the words "jurisdiction in India" there shall be substituted the words "jurisdiction in or for Aden".

(5) Any reference to the Indian Penal Code shall be construed as a reference to that Code as in force in Aden immediately after the commencement of the Aden Colony Order,

1936, and the reference to Chapter XL of the Code of Criminal Procedure shall be construed as a reference to that Chapter as for the time being in force in Aden, or, if the said Code is repealed and re-enacted in Aden, either with or without modifications, as a reference to the corresponding provisions of the re enacted Code as for the time being in force in Aden

Section five shall be omitted.

The Colonial Fortifications Act, 1877

(40 & 41 Vict. c. 23.)

In section three, for the words "India as defined for the purposes of the Acts for the time being in force relating to the Government of India" there shall be substituted the words "British India or British Burma".

The Colonial Stock Act, 1877.

(40 & 41 Vict. c. 59.)

In section twenty-six, for the words "India as defined for the purposes of the Acts for the time being in force relating to the Government of India" there shall be substituted the words "British India or British Burma".

The Territorial Waters Jurisdiction Act, 1878.

(41 & 42 Vict. c. 73.)

In section seven, in the definition of "Governor" the words "or the Governor of any presidency" shall be omitted, and for the words "and where a British possession" there shall be substituted the words "and as respects a British possession which".

The Fugitive Offenders Act, 1881.

(44 & 45 Vict. c. 69.)

In section thirty-nine in the definition of "governor" the words "and includes the governor and lieutenant-governor of any part of India" shall be omitted

The Colonial Prisoners Removal Act, 1884.

(47 & 48 Vict. c. 31.)

After section fourteen there shall be inserted the following sections:—

Application of Act to "14A (1) This Act in its application to British India shall have effect subject to the modifications specified in this section.

(2) In relation to persons removed or to be removed, or returned or to be returned, from or to British India to or from any part of His Majesty's dominions outside British India shall be deemed to be one British possession and, in relation to that possession, any reference to the Government, to the Governor or to the Governor in Council and any reference to the Legislature shall be construed as a reference to the Governor-General or, as the case may be, to the Indian or Federal Legislature

(3) In relation to persons removed or to be removed, or returned or to be returned, from or to one Province in British India to or from another Province in British India, each Province shall be deemed to be a separate British possession, any reference to the Government or to the Governor in Council and any reference to the Legislature shall, in relation to a Governor's Province, be construed as a reference to the Governor or, as the case may be, to the Provincial Legislature, and any reference to the Government, the Governor or the Governor in Council and any reference to the Legislature shall, in relation to a Chief Commissioner's Province, be construed as a reference to the Governor-General or, as the case may be, to the Indian or Federal Legislature

14B. In the application of this Act to British Burma references to the Governor in Council shall be construed as references to the Governor."

In section eighteen—

(a) after the words "unless the context otherwise requires" there shall be inserted the words "and subject, as respects India, to the provisions of section fourteen A of this Act";

(b) in the definition of "British possession", the words "and any part of India under a Governor or Lieutenant-Governor shall be deemed to be one British possession" shall be omitted;

(c) the definition of "India" shall be omitted;

(d) in the definition of "legislature", the words "and in every part of India means the Governor-General in Council" shall be omitted, and

(e) in the definition of "Governor", the words "and includes the Governor-General of India and also the Governor and Lieutenant-Governor of any part of India" shall be omitted.

The Evidence by Commission Act, 1885.

(48 & 49 Vict. c. 74.)

In sections two and three, after the word "India" there shall be inserted the word "Burma".

The Colonial Courts of Admiralty Act, 1890.

(53 & 54 Vict. c. 27.)

At the end of section four there shall be inserted the following paragraph —

"This section shall not apply to Indian laws or Burma laws"

In proviso (a) to subsection (2) of section nine, for the words "or in any British possession" there shall be substituted the words "or in Burma or in any other British possession".

The Foreign Jurisdiction Act, 1890.

(53 & 54 Vict. c. 37.)

At the end of section fifteen there shall be inserted the words "and natives of any part of Burma which is not part of British Burma"

The Superannuation Act, 1892.

(55 & 56 Vict. c. 40.)

In subsection (3) of section one, after the words "revenue of India" there shall be inserted the words "or of Burma" and the words "in Council of India" shall be omitted.

In paragraph (c) of section four, after the words "of India" there shall be inserted the words "or of Burma", and at the end of the section there shall be inserted the following subsection —

"(2) In this Act references to the revenue of India include references to the revenues of the Federation (and, before the establishment of the Federation, the revenues of the Governor-General in Council) and to the revenues of any Province in India".

The Regimental Debts Act, 1893.

(56 & 57 Vict. c. 5)

In section sixteen, after the word "India" there shall be inserted the words "or Burma".

In section twenty-five, for the words "as if it were a colony" there shall be substituted the words "and to Burma as if they were colonies"; and at the end of the section there shall be added the words "or to any native of Burma within the meaning of Burma military law"

In section twenty-six, after the word "India" where it first occurs there shall be inserted the words "or Burma", after the words "of the commander-in-chief in India" there shall be inserted the words "or of the general officer commanding the forces in Burma", the words "or of any provincial Commander-in-Chief in India" shall be omitted and for the words "The Secretary to the Government of India in the Military Department" there shall be substituted the words "The Governor-General of India or, as the case may be, the Governor of Burma".

In section twenty-seven, for the words "the Indian military and orphan funds, or either of them" there shall be substituted the words "any officially recognised pension or provident fund".

Section twenty-eight shall be omitted.

In section twenty-nine, in the definition of "representation" after the word "India" in both places where it occurs there shall be inserted the word "Burma", and in the definition of "official administrator" the words "presidency or" shall be omitted, and after the word "province" there shall be inserted the words "and in Burma the Administrator-General of Burma."

The Trustee Act, 1893.

(56 & 57 Vict. c. 53.)

Until the Parliament of Northern Ireland makes other provision in that behalf, this Act shall, in its application to Northern Ireland, have effect as if —

(a) at the end of paragraph (d) of section one there were inserted the words "or in any sterling loans raised by the Secretary of State on behalf of the Governor-General of India in Council under the provisions of Part XIII of the Government of India Act, 1935", and

(b) at the end of the said section there were inserted the words "(2) The dissolution of the Council of India shall not remove from the operation of this section any securities which were within the operation thereof immediately before the dissolution of that Council".

The Merchant Shipping Act, 1894.

(57 & 58 Vict. c. 60)

In section ninety-nine, for the words "Indian Marine Service", in both places where they occur, there shall be substituted the words "Indian Navy"

In section one hundred and twenty-five, in subsection (1), after the words "of India" there shall be inserted the words "or Burma", and after the words "British India" there shall be inserted the words "or British Burma", in subsection (2), for the word, from "as the Governor-General" to the end of the subsection there shall be substituted the words "as the Governor-General of India or the Governor of Burma, according as the agreement is made in India or Burma, may direct"; in subsection (3) the words "in Council of India", wherever they occur, shall be omitted, and in subsection (4) after the word "India", wherever it occurs, there shall be inserted the words "or Burma".

In section one hundred and eighty-five, the words "in Council of India" wherever they occur, shall be omitted, in sub section (1), after the words "natives of India" there shall be inserted the words "or Burma"; in subsection (2), after the words "The part of India" there shall be inserted the words "or of Burma", in subsection (3), the words "out of the revenues of India" shall be omitted, and at the end of the subsection there shall be inserted the words "but, so far as not recovered from the owner or master shall be a liability to be met out of the revenues of India or, as the case may be, of Burma", and in subsection (4) after the word "India" there shall be inserted the words "or Burma".

In section two hundred and seventy, after the words "British India" there shall be inserted the words "British Burma".

In subsection (2) of section three hundred and sixty-eight, for the words "Governor-General of India in Council" there shall be substituted the words "legislature of India".

After section three hundred and sixty eight there shall be inserted the following section :—

"368-A. (1) The provisions of the past preceding section shall apply in relation to British Burma as they apply in relation to British India with the substitution of references to British Burma for references to British India or India and of a reference to Burma law for the reference to Indian law.

Power for Legislature of Burma to apply Part III.

(2) Any Act of the Indian Legislature which, as adapted or modified under the Government of Burma Act, 1935, is in force immediately after the commencement of that Act as part of the law of Burma shall, for the purposes of this section, be deemed to be an Act of the Legislature of Burma".

The Appellate Jurisdiction Act, 1908.

(8 Edw. 7, c. 51)

In subsection (1) of section two, for the words "any High Court in British India" there shall be substituted the words "the Federal Court in India, a High Court in British India or the High Court at Rangoon", and for subsection (3) of that section there shall be substituted the following subsection :—

"(3) In this section the expression 'High Court in British India' means a court which is a High Court for the purposes of the Government of India Act, 1935, and, as respects any period before the commencement of Part III of that Act, a court which was, or was recognised by Order in Council as being, a High Court in British India for the purposes of this section".

In the Schedule, after the words "British India" there shall be inserted the words "British Burma".

The Pensions (Governors of Dominions, etc) Act, 1911

(1 & 2 Geo 5 c 24)

In subsection (1) of section twelve, after the words "of British India" there shall be inserted the words "and of British Burma".

The British Nationality and Status of Aliens Act, 1914

(4 & 5 Geo 5 c 17)

In subsection (1) of section eight, after the words "British India" there shall be inserted the words "British Burma".

The Prize Courts Act, 1915

(5 & 6 Geo 5 c 57)

In section four, for the words "as respects any prize court in India except on the application of the Governor-General of India in Council" there shall be substituted the words "as respects any prize court in India, except on the application of the Governor of the Province in which the court has its principal seat or, as respects any prize court in Burma, except on the application of the Governor of Burma".

The Official Secrets Act, 1920.

(10 & 11 Geo. 5. c. 75.)

In proviso (a) to subsection (1) of section eleven, for the words "and India", there shall be substituted the words "India and Burma".

The Trusts (Scotland) Act, 1921.

(11 & 12 Geo. 5. c 58.)

At the end of section ten there shall be inserted the following subsection :—

"(2) In this section the expression "the Indian Government" means the Secretary of State in Council of India, but the dissolution of the Council of India shall not remove from the operation of this section any stock, debentures, bonds or mortgages which were within the operation thereof immediately before the dissolution of that Council."

The Treaties of Washington Act, 1922.

(12 & 13 Geo. 5 c. 21.)

In subsection (1) of section five, after the word "India" there shall be inserted the word "Burma".

The Finance Act, 1923

(13 & 14 Geo. 5 c. 14.)

In section nineteen, in subsection (2), after the words "British India" there shall be inserted the words "or British Burma", and in subsection (4) for the words "British India or for" there shall be substituted the words "India, Burma or".

The Trustee Act, 1925.

(15 & 16 Geo. 5 c. 19.)

At the end of section one, there shall be inserted the following subsection:—

"(3) The dissolution of the Council of India shall not remove from the operation of this section any debenture stock or other stock which was within the operation thereof immediately before the dissolution of that Council."

The Merchant Shipping (International Labour Conventions) Act, 1925.

(15 & 16 Geo. 5 c. 42.)

At the end of section five there shall be inserted the following subsection:—

"(2) Notwithstanding the separation of India and Burma this Act shall continue to have effect as if Burma were still part of India."

Indian and Colonial Divorce Jurisdiction Act, 1926.

(16 & 17 Geo. 5 c. 40.)

In subsection (1) of section one, for the words "a High Court in India to which Part IX of the Government of India Act applies" there shall be substituted the words "a High Court in British India constituted by His Majesty by Letters Patent"; and for the words "where a court in India" there shall be substituted the words "where a court in British India".

In subsection (4) of section one, the words "in Council of India" shall be omitted.

In subsection (5) of section one, for the words "and India" there shall be substituted the words "India and Burma".

At the end of section one, there shall be inserted the following sections:—

Divorce Jurisdiction of "1-A—The provisions of section one of this Act shall High Court in Burma where apply in relation to Burma as they apply in the relation to parties are domiciled in India, subject to the following modifications, that is to England or Scotland. say—

(a) in subsection (1) of the said section, for the words "a High Court in British India constituted by His Majesty by Letters Patent" there shall be substituted the words "the High Court at Rangoon", and for the words "where a court in British India" there shall be substituted the words "where the court",

(b) in the provisos to the said subsection, for the words "any such court", wherever those words occur, there shall be substituted the words "the court"; and for the words "no such court shall" there shall be substituted the words "the court shall not",

(c) in subsection (3) of the said section, for the words "the High Court in India by which the decree or order is made" there shall be substituted the words "the High Court at Rangoon" and for the words "by the High Court in India" there shall be substituted the words "by the High Court at Rangoon",

(d) in subsection (4) of the said section, for the words "a High Court in India" there shall be substituted the words "the High Court at Rangoon" and in paragraph (2) for the words "each High Court" there shall be substituted the words "the High Court",

(e) in subsection (5) of the said section for the words "a High Court in India" there shall be substituted the words "the High Court at Rangoon",

(f) save as aforesaid, for the word "India" wherever it occurs in the said section (except in the phrase "India and Burma") there shall be substituted the word "Burma"

1-B—(1) Any proceedings commenced under this Act before the separation of Burma from India may be continued determined and appealed against in all respects as if Burma had continued to be part of India.

(2) The rules made under subsection (4) of section one of this Act which immediately before the separation of Burma from India were applicable to the High Court at Rangoon shall, until superseded by fresh rules, continue to apply to that court, and nominations made and approved under those rules shall continue to have effect."

In section two, for the words "the foregoing provisions of this Act" there shall be substituted the words "the provisions of section one of this Act"

In section three, after the words "in India" there shall be inserted the words "(including Burma and Aden)".

Indian Church Act, 1927.

(17 & 18 Geo. 5. c. 40.)

In section one, in the definition of "chaplain" for the words from "is appointed" to "a like chaplaincy" there shall be substituted the words—

"(i) is a chaplain to whom the provisions of section two hundred and sixty-nine of the Government of India Act, 1935, or the provisions of section one hundred and twenty-two of the Government of Burma Act, 1935, apply, or

(ii) is in the permanent service of the Crown and has been or is accepted by the Secretary of State in Council of India, or by the Secretary of State, as holding for the purposes of this Act a chaplaincy in India, Burma or Aden"

At the end of the said section there shall be inserted the following words and sub-section—

"Any reference in this Act to the revenues of the Federation of India shall, as respects the period before the establishment of the Federation, be construed as a reference to the revenues of the Governor-General in Council.

Any reference in this Act to, or to any provisions of, an Indian Act shall be construed as a reference to that Act as for the time being in force in India, and, as respects any period after the separation of Burma and Aden from India, as including references to that Act or those provisions as for the time being in force in Burma and as for the time being in force in Aden, and, if any such Act or provisions have, whether in India, Burma or Aden, been repealed and re-enacted either with or without modifications, any reference thereto in this Act shall be construed as a reference to the re-enacted Act or provisions as in force in the country in question

(2) Nothing in the Government of India Act, 1935 shall be construed as affecting the unity of the Indian Church as defined in this section or as excluding Burma or Aden from the operation of this Act."

In section three after the words "church or burial ground" in the first two places where those words occur there shall be inserted the words "in India, Burma or Aden."

In section four, in subsection (1), the words "in Council", in both places where those words occur, shall be omitted, and after the words "whether consecrated or not" there shall be inserted the words "which are situate in India"

After the said sub-section (1) there shall be inserted the following subsection—

"(1-A) If such a certificate as aforesaid is sent to the Governor-General of India he shall also forward a certified copy thereof to the Governor of Burma who shall cause it to be published in the official Gazette of Burma and thereupon shall be at liberty to resume complete control of all or any Maintained Churches or burial grounds, whether consecrated or not, which are situate in Burma, and the Indian Church and the officials and members thereof respectively shall cease to have any rights therein"

In subsection (2), at the end of paragraph (i), there shall be inserted the words "or, as the case may be of the Government of Burma"

In subsection (3), for the words "the Governor-General of India in Council" there shall be substituted the words "Governor-General of India or, as the case may be, the Governor of Burma"; and at the end of the subsection there shall be inserted the following subsection—

"(3-A) The provisions of subsections (1-A), (2) and (3) of this section shall apply in relation to Aden as they apply in relation to Burma, with the substitution of the word 'Aden' for the word 'Burma' wherever that word occurs."

In section five, for the words from "The Governor-General" to "Council of India" there shall be substituted the words "The Governor-General of India as respects India, the Governor of Burma as respects Burma, and the Governor of Aden as respects Aden, in each case with the sanction of the Secretary of State"

In paragraph (ii) of the said section for the word "the revenues of India" there shall be substituted the words "the revenues of the Federation of India, the revenues of Burma or the revenues of Aden, as the case may be".

In paragraph (x) of the said section for the words "the Governor-General of India in Council" there shall be substituted the words "Governor-General of India, the Governor of Burma, or the Governor of Aden".

At the end of the said section there shall be inserted the following sub-section—

"(2) Any rules made under this section which immediately before the separation of Burma and Aden from India were applicable to Burma or Aden shall, until superseded by other rules, continue to apply with any necessary modifications to Burma or Aden as the case may be"

In section eight, at the end of subsection (2), there shall be inserted the following sub-section—

"(2-A) Notwithstanding anything in section one of this Act, section ninety-two of the Code of Civil Procedure as for the time being in force in India shall, for the purposes of this section, be deemed to be in force in Aden as part of the law of Aden, whether it is there in force for other purposes or not, and any appeal under this section from the decision of a court in Aden shall lie to, and be entertained by, the High Court at Bombay".

Subsection (3) of the said section shall be omitted

In section nine, in paragraph (i) for the words "the Secretary of State in Council of India" in both places in which they occur there shall be substituted the words "any competent authority", in paragraphs (iii) and (iv) after "continuance" there shall be inserted the words "by the competent authority", and in paragraph (iv) after the words "minister in India" there shall be inserted the words "Burma or Aden".

Throughout the section for the words "the revenues of India" there shall be substituted the words "public revenues of India, Burma or Aden".

The Easter Act, 1928.

(18 & 19 Geo. 5. c. 35.)

In part I of the Schedule, after the words "British India" there shall be inserted the words "British Burma"

The Appellate Jurisdiction Act, 1929

(19 & 20 Geo. 5. c. 8)

For subsection (2) of section one there shall be substituted the following subsection:—

"(2) A person shall be qualified under this section if he is a Privy Councillor, and

(a) is or has been a judge of the Federal Court in India, a High Court in British India or the High Court at Rangoon; or

(b) is a barrister, advocate or pleader of not less than fourteen years standing who practises, or has practised, in British India or British Burma

In this subsection the expression 'High Court in British India' means a court which is a High Court for the purposes of the Government of India Act, 1935, and, as respects any period before the commencement of Part III of that Act, a court which was a High Court within the meaning of clause (24) of section three of an Act of the Indian Legislature known as the General Clauses Act, 1897."

In subsection (5), for the words "the revenues of India" there shall be substituted the words "the revenues of the Federation of India, the revenues of the Governor-General of India in Council or the revenues of Burma, as the case may be."

The Companies Act, 1929.

(19 & 20 Geo 5 c. 23.)

In paragraph (h) of subsection (1) of section fifty-four, for the words, "as amended by" there shall be substituted the words "as amended or adapted by or under".

The Import Duties Act, 1932,

(22 & 23 Geo 5. c. 8)

At the end of subsection (1) of section four there shall be inserted the following words:—

"This section shall apply also to Burma as respects goods imported after the thirty-first day of March, nineteen hundred and thirty-eight."

In subsection (1) of section twenty-one, in the definition of "the British Empire" after the word "India" there shall be inserted the words "and Burma".

The Isle of Man (Customs) Act, 1932.

(22 & 23 Geo. 5 c. 16.)

At the end of subsection (1) of section two there shall be inserted the following words:—

"This section shall apply also to Burma as respects goods imported after the thirty-first day of March, nineteen hundred and thirty-eight."

In paragraph (b) of section eleven, after the word "India" there shall be inserted the words "and Burma."

The Finance Act, 1933.

(23 & 24 Geo. 5. c. 19.)

At the end of paragraph (a) of section (1) of section fifteen there shall be inserted the words "(as adapted by any order in Council made under the Government of India Act, 1935)".

In paragraph 2 (d) of Schedule V after the word "India" there shall be inserted the word "Burma"

The Isle of Man (Customs) Act, 1933.

(22 & 24 Geo 5 c. 40.)

At the end of paragraph (a) of section eleven and at the end of paragraph (b) of subsection (2) of section twenty-one there shall be inserted the words "(as adapted by any Order in Council made under the Government of India Act, 1935)".

In paragraph 2 (b) of schedule IV, after the word "India" there shall be inserted the word "Burma".

The Whaling Industry (Regulation) Act, 1934.

(24 & 25 Geo. 5. c. 49.)

In subsection (1) of section fifteen, the words "or by the Indian Legislature" and the words "or, as the case may be, in British India" shall be omitted, and in subsection (1) of section seventeen, after the word "India" there shall be inserted the words "or Burma".

The Unemployment Insurance Act, 1935.

(25 & 26 Geo 5 c 8.)

In paragraph (d) of subsection (10) of section ninety-six, after the words "Indian forces" there shall be inserted the words "Burma forces"

The National Health Insurance Act, 1936.

(26 Geo. 5 & 1 Edw. 8. c. 32.)

In subsection (1) of section one hundred and twenty-nine, after the words "Indian Forces" there shall be inserted the words "of His Majesty's Burma Forces"

PART III.

The Army and Air Force Acts.(a) *Adaptations of the Army Act and also of the Air Force Act.*

In section thirteen,—in paragraph (a) of subsection (1) after the word "India" there shall be inserted the word "Burma".

In section fifty-four,—in subsection (8), after the word "India" there shall be inserted the words "or Burma", and at the end of the subsection there shall be added the words "or, as the case may be, by the Governor of Burma"; and in subsection (9) after the words "the Governor-General" there shall be inserted the words "or, if he has been tried in Burma, by the Governor of Burma"

In section fifty-nine, after the word "India", in both places where it occurs, there shall be inserted the word "Burma"

In section sixty, after the word "India", in both places where it occurs, there shall be inserted the words "or Burma".

In section sixty-four,—in subsection (4) after the word "India", in the first three places where it occurs, there shall be inserted the word "Burma", and after the words "Governor-General of India" there shall be inserted the words "the Governor of a Province in India, the Governor of Burma".

In section sixty-eight,—in paragraphs (f), (g) and (h) of subsection (2) after the word "India", wherever it occurs, there shall be inserted the word "Burma"

In section ninety-four, after the word "India" where it first occurs, there shall be inserted the word "Burma", and after the words "in the Dominion, and" there shall be inserted the words "In Burma, any person duly authorised in that behalf by the Governor of Burma, and"

In section one hundred and twenty-two,—in subsection (5) after the words "the Governor-General of India" there shall be inserted the words "the Governor of Burma"

In section one hundred and twenty-seven, the words "to the provisions of the Indian Evidence Act, 1872 or" shall be omitted, and after the word "legislature" there shall be inserted the words "or authority"

In section one hundred and thirty,—in subsection (5) for the words "presidency in which the person is confined" there shall be substituted the words "Province in which the person is confined and, in the case of a person confined in Burma, the Governor of Burma", and after the words "the United Kingdom, India", in both places where those words occur, there shall be inserted the word "Burma".

In section one hundred and thirty-two, after the words "in India for the Governor-General" in both places where those words occur, there shall be inserted the words "and in Burma for the Governor", for "the words the Secretary of State or Governor-General" there shall be substituted the words "the Secretary of State, Governor-General or Governor" and for the words "The Secretary of State and Governor-General shall by rule" there shall be substituted the words "The Secretary of State, the Governor-General and the Governor of Burma shall by rules"

In section one hundred and thirty-four, after the word "India" in both places where that word occurs, there shall be inserted the words "or Burma".

In section one hundred and thirty-five, after the words "with the Governor-General of India" there shall be inserted the words "the Governor of any Province in India, the Governor of Burma"; for the words "or in such colony," there shall be substituted the words "Burma or that colony"; and after the words "from the Governor-General of India" there shall be inserted the words "the Governor of the Province, the Governor of Burma".

In section one hundred and thirty-six, for the words "passed by the Governor-General of India in Council" there shall be substituted the words "for the time being in force in India or Burma, being in the case of India a law of the Indian legislature."

In section one hundred and thirty-seven,—in paragraph (4) after the words "the Governor-General" there shall be inserted the words "or, in the case of officers serving in Burma, the Governor", after the words "an officer serving in India" there shall be inserted the words "or Burma", and for the words "in Council" there shall be substituted the words "or, as the case may be, for Burma".

In section one hundred and forty-three,—in subsection (1) for the words "the legislature or other authority in India or any colony, there shall be substituted the words "any legislature or other authority in India, Burma or a colony".

In section one hundred and fifty-four,—in paragraph (5) after the word "India" there shall be inserted the words "or Burma", and in paragraph (7) after the word "India" there shall be inserted the word "Burma".

In section one hundred and fifty-six,—in subsection (8) after the words "the Governor-General of India" there shall be inserted the words "or the Governor of Burma", for the words "by any law or Ordinance to reduce" there shall be substituted the words, "to provide for reducing"; and after the words "such Governor-General" there shall be inserted the word "Governor".

In section one hundred and sixty-two,—in subsection (3) for the words "supreme court in India" there shall be substituted the words "High Court in India or Burma".

In section one hundred and sixty-three,—in paragraph (d) of subsection (1) after the words "Governor-General of India" there shall be inserted the words "and, if in Burma, by some office under the Governor of Burma", and in subsection (2), after the word "India" there shall be inserted the words "or Burma".

In section one hundred and sixty-eight, after the word "India" there shall be inserted the word "Burma".

In section one hundred and sixty-nine, after the words "the Governor-General of India" there shall be inserted the words "and the Governor of Burma", the words "by law" shall be omitted, and after the words "appear to the Governor-General" there shall be inserted the word "Governor".

In section one hundred and seventy,—in subsection (3) for the words "supreme court in India" there shall be substituted the words "High Court in India or Burma" and after the words "such Indian" there shall be inserted the word "Burma".

In section one hundred and seventy-five,—in paragraph (4) for the words "and of India" there shall be substituted the words "India and Burma",

In paragraph (7) after the words "Governor-General of India" there shall be inserted the words "or of the Governor of Burma"; and

In paragraph (12) after the word "India" in both places where it occurs, there shall be inserted the word "Burma".

In section one hundred and seventy-six,—in paragraph (3) for the words "and of India" there shall be substituted the words "India and Burma", and

In paragraph (11) after the word "India" in both places where it occurs, there shall be inserted the word "Burma".

In section one hundred and seventy-seven, for the words "in India or in a colony" there shall be substituted the words "in India, Burma or a colony", and after the words "of India" wherever those words occur, there shall be inserted the word "Burma".

In section one hundred and eighty,—in subsection (1) after the word "India" wherever it occurs, there shall be inserted the words "or Burma", and in subsection (3) after the word "India" there shall be inserted the words "or Burma".

In section one hundred and eighty-one,—in subsection (1) after the word "India" there shall be inserted the word "Burma".

In section one hundred and ninety,—for paragraph (21) the following paragraphs shall be substituted —

"(21) The expression 'British India' means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces, and the expression 'India' means British India together with all territories of any Indian Ruler under the suzerainty of His Majesty, all territories under the suzerainty of any such an Indian Ruler, the tribal areas and any other territories which His Majesty in Council may from time to time after ascertaining the views of the Federal Government and the Federal Legislature, declare to be part of India

(21-A) The expression 'Burma' includes (subject to the exercise by His Majesty of any powers vested in him with respect to the alteration of the boundaries thereof) all territories which were immediately before the first day of April, nineteen hundred and thirty-seven, comprised in India, being territories lying to the east of Bengal, the State of Manipur, Assam and any tribal areas connected with Assam, and the expression 'British Burma' means so much of Burma as belongs to His Majesty.

(21-B) The expressions 'tribal areas' and 'Ruler' have for the purposes of the foregoing definitions, the same meanings as they have in the Government of India Act, 1935",

in paragraph (23-A) after the words "of British India" there shall be inserted the words "of British India";

in paragraph (24) for the words "or India" there shall be substituted the words "India or Burma";

in paragraph (30) the words from the beginning to "chief court and" shall be omitted;

in paragraph (33) after the word "India" there shall be inserted the words "or Burma", and

in paragraph (35) after the word "India" there shall be inserted the word "Burma".

(b) *Adaptations of the Army Act.*

In section one hundred and seventy-five,—in paragraph (7) after the words "native of India" there shall be inserted the words "or Burma" and after the words "to Indian military law" there shall be inserted the words "or, as the case may be, to Burma military law, but in either case"; and in paragraph (11) after the word "India" there shall be inserted the word "Burma".

In section one hundred and seventy-six,—in paragraph (8-A) after the word "India" there shall be inserted the word "Burma", in paragraph (10) after the words "Indian military law" in the first place where those words occur there shall be inserted the words "or consisting partly of His Majesty's Burma forces subject to Burma military law"; after the words "natives of India" there shall be inserted the words "or, as the case may be, natives of Burma", and at the end of the paragraph there shall be added the words "or, as the case may be, to Burma military law".

In section one hundred and eighty, for subsection (2) the following subsection shall be substituted:—

"(2) In the application of this Act to His Majesty's Indian forces and His Majesty's Burma forces (hereafter in this section referred to as the Indian forces and the Burma forces respectively) the following modifications shall be made:—

(a) nothing in this Act shall prejudice or affect the Indian military law respecting officers or soldiers belonging to or followers in the Indian forces, being natives of India, or the Burma military law respecting officers or soldiers belonging to or followers in the Burma forces, being natives of Burma, and on the trial of all offences committed by any such officer, soldier or follower reference shall be had to the Indian military law or, as the case may be, the Burma military law for such officers, soldiers or followers, and to the established usages of the service, but courts martial for such trials may be convened in pursuance of this Act,

(b) Indian military law or, as the case may be, Burma military law shall extend to such officers, soldiers and followers as aforesaid wherever they are serving,

(c) the Governor-General of India may suspend the proceedings of any court martial held in India on an officer or soldier belonging to the Indian forces or to the Burma forces, and the Governor of Burma may suspend the proceedings of any court martial held in Burma on any such officer or soldier,

(d) an officer belonging to the Indian forces who thinks himself wronged by his commanding officer and on due application made to him does not receive the redress to which he considers himself entitled may complain to the Governor-General of India, who shall cause his complaint to be enquired into and if so desired by the officer shall make a report through the Secretary of State to His Majesty in order to receive the directions of His Majesty thereon,

(e) a court martial or, where the case is dealt with summarily under the provisions of this Act, the authority having power so to deal with the case may sentence an officer belonging to the Indian forces to forfeit all or any part of his service for the purposes of promotion and, in addition, if the court or authority thinks fit, to be severely reprimanded or reprimanded,

(f) the Governor-General of India in the case of the Indian forces, and the Governor of Burma in the case of the Burma forces, may reduce any warrant officer to a lower grade of warrant rank, or may remand any such warrant officer to regimental duty in the regimental rank held by him immediately before his appointment to be a warrant officer,

(g) the provisions of this Act relating to warrant officers shall apply to hospital apprentices in India or Burma although not appointed by warrant,

(h) Part II of this Act shall not apply to the Indian forces or the Burma forces, but persons may be enlisted and attested in India or Burma for medical service or for other special service in the Indian forces or the Burma forces for such periods, by such persons and in such manner as may be from time to time authorised by the Governor-General or the Governor of Burma."

In section one hundred and ninety,—in paragraph (8) for the words "and His Majesty's Indian forces" there shall be substituted the words "His Majesty's Indian forces and His Majesty's Burma forces"

For paragraph (22) there shall be substituted the following paragraph:—

"(22) The expressions 'native of India' and 'native of Burma' mean respectively a person triable and punishable under Indian military law or Burma military law."

(C) *Adaptations of the Air Force Act.*

In section one hundred and seventy-five,—in paragraph (11-A) after the words “in India” there shall be inserted the words “or Burma”; after the words “outside India” there shall be inserted the words “or, as the case may be, outside Burma”, and after the words “of India” there shall be inserted the words “or, as the case may be, by the Air Council and the Governor of Burma”.

In section one hundred and seventy-six,—in paragraph (8-B) after the words “in India” there shall be inserted the words “or Burma”; after the words “outside India” there shall be inserted the words “or, as the case may be, outside Burma”, and after the words “of India” there shall be inserted the words “or, as the case may be, by the Air Council and the Governor of Burma”.

In section one hundred and eighty-four B, after the words “in India” there shall be inserted the words “or Burma”, and after the words “of India” there shall be inserted the words “or, as the case may be, by the Air Council and the Governor of Burma”.

PART IV.

ENACTMENTS RELATING TO INDIAN RAILWAYS.

The Indian Guaranteed Railways Act, 1879.

(42 & 43 Vict. c. 41.)

In section one, after the words “the Secretary of State for India in Council” (where those words first occur) there shall be inserted the words “the Federal Railway Authority or any Government in British India”, after those words in the second place where they occur, there shall be inserted the words “or any Government in British India”, the words “and belonging to the Secretary of State for India in Council, or” and the words “belonging or” in both places where they occur) shall be omitted, and at the end of the section there shall be added the following paragraphs—

“The term ‘the General Controlling Authority’ means, in relation to a Federal Railway, the Federal Railway Authority, in relation to a minor railway, the Provincial Government and in relation to an Indian State Railway, the Governor-General acting in his discretion”.

The terms ‘Federal Railway’, ‘Indian State Railway’, ‘minor railway’ and ‘Federal Railway Authority’ have the meanings respectively assigned to them in the Government of India Act, 1935, except that, as respects the period before the establishment of the Federal Railway Authority, the term “Federal Railway Authority” means the Governor-General.

In section two, for the words “the Secretary of State for India in Council”, where they first occur, there shall be substituted the words “the Federal Railway Authority or any Government in British India”, for the words “with the sanction of the Secretary of State for India in Council” there shall be substituted the words “with the sanction of the General Controlling Authorities of all the railways concerned”.

In section three, for the words “the Secretary of State for India in Council” the word “the Secretary of State”, and “the Secretary of State in Council” wherever they occur there shall be substituted the words “the Governor-General”.

In section four, for the words “with the sanction of the Secretary of State for India in Council” there shall be substituted the words “with the sanction of the General Controlling Authority”; for the words “with the Secretary of State for India in Council” there shall be substituted the words “with the Federal Railway Authority or any Government in British India”, and for the words “by laws and regulations made by the Governor-General in Council” there shall be substituted the words “by or under the law in force in British India”.

Section five shall be omitted.

The East India Unclaimed Stock Act, 1885.

(48 & 49 Vict. c. 25)

At the end of section twenty-two there shall be added the following paragraph.

“The powers conferred by this section on the Secretary of State (including the power to make regulations) shall, after the coming into force of section one hundred and ninety-nine of the Government of India Act, 1935, instead of being exercised by the Secretary of State, be exercised in accordance with the provisions of that section.”

In section twenty-three for the words “the Secretary of State” there shall be substituted the words “the Governor-General”.

The Indian Railways Act, 1894

(57 & 58 Vict. c. 12.)

In section two, after the words “the expression ‘the Secretary of State’ means” there shall be inserted the words “as respects the period before the commencement of Part III of the Government of India Act, 1935”.

Private Railway Acts.

Any power conferred by any Private Act on a Railway Company to make and carry out contracts with the Secretary of State in Council shall be deemed to include a power to make and carry out contracts with the Federal Railway Authority (as defined in the Indian Guaranteed Railways Act, 1879) or any Government in British India for the like purposes; references in any Private Act relating to railways in India to the Secretary of State in Council in relation to contracts or anything to be done in relation to contracts shall, where the context and the circumstances so admit or require, be construed as including references to that Authority or any such Government, any provision in any such Act requiring the previous sanction of the Secretary of State in Council to the payment of any portion of the remuneration of a director of a railway company as part of the working expenses of the company shall be construed as requiring the previous sanction of the Governor-General thereto; and any provision in any such Act vesting any property in the Secretary of State in Council shall be construed as having vested that property in His Majesty for the purposes of the Government of India.

General and Private Railway Acts.

So much of any enactment relating to railways in India, whether contained in a Public General Act or a Private Act, as directs the Secretary of State in Council to hold unclaimed moneys subject to the claims of persons entitled thereto or authorises him to apply such moneys as part of the revenues of India, or to apply them as part of the revenues of India or otherwise as he thinks fit, shall be construed as requiring the Secretary of State to treat such moneys (subject to any claims which may be established thereto in accordance with the relevant enactments) as part of the revenues of the Governor-General in Council or, after the establishment of the Federation of India, as part of the revenues of the Federation.

THE GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) ORDER, 1937.

N.B.—The Acts and Regulations contained in these volumes are to be taken as subject to the amendments made by the Government of India (Adaptation of Indian Laws) Order, 1937

Fort St. George, April 20, 1937

The following notification of the Government of India is republished:—
The Government of India (Adaptation of Indian Laws) Order, 1937.

AT THE COURT AT BUCKINGHAM PALACE.

The 18th day of March 1937

PRESENT:

THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

Whereas by section two hundred and ninety-three of the Government of India Act, 1935 (hereafter in the recitals to this Order referred to as "the Act"), His Majesty is empowered by Order in Council to provide that as from such date as may be specified in the order any law in force in British India or in any part of British India shall, until repealed or amended by a competent legislature or other competent authority, have effect subject to such adaptations and modifications as appear to His Majesty to be necessary or expedient for bringing the provisions of that law into accord with the provisions of the Act:

And whereas a draft of this Order has been laid before Parliament in accordance with the provisions of sub-section (1) of section three hundred and nine of the Act and an Address has been presented to His Majesty by both Houses of Parliament praying that an Order may be made in the terms of this Order:

Now, therefore, His Majesty, in the exercise of the said powers and of all other powers enabling him in that behalf, is pleased by and with the advice of His Privy Council to order, and it is hereby ordered as follows:—

1 This Order may be cited as THE GOVERNMENT OF INDIA (ADAPTATION OF INDIAN LAWS) ORDER, 1937, and shall come into operation on the first day of April, nineteen hundred and thirty-seven.

2. (1) In this Order the expression "Indian law" means a law as defined in section two hundred and ninety three of the Act.

(2) The Interpretation Act, 1889, applies for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

3. The Indian Laws mentioned in the Schedules to this Order shall, until repealed or amended by a competent Legislature or other competent authority, have effect subject to the adaptations and modifications directed by those Schedules to be made therein or, if it is so directed, shall cease to have effect.

4. (1) Whenever an expression mentioned in the first column of the table hereunder printed occurs (otherwise than in a title or preamble or in a citation or description of an enactment) in a Central or Provincial Act or Regulation, whether an Act or Regulation mentioned in the Schedules to this Order or not then, unless that expression is by this Order expressly directed to be otherwise adapted or modified, or to stand unmodified, or to be omitted, there shall be substituted therefor the expression set opposite to it in column two of the said table.

Table of General Adaptations.

| (1) | (2) |
|---|------------------------|
| Governor-General of India in Council: Governor-General of India: Governor-General in Council: Governor-General. Government of India. | Central Government. |
| Governor in Council: Governor (except in the expression "Governor's Province"): Lieutenant Governor in Council: Lieutenant Governor: Chief Commissioner (except in the expression "Chief Commissioner's Province"): Local Government: Local Administration. | Provincial Government. |
| Gazette of India: Local official Gazette: local gazette: any other expression denoting a gazette in which official notices of a government are published, not being the gazette of a district or other sub-division of a Province. | Official Gazette. |

Any reference to the Governor (*or* Lieutenant Governor) of a named Province in Council shall be treated for the purposes of this paragraph as if it were a reference to the Governor (*or* Lieutenant Governor) in Council of that Province.

(2) A direction in the Schedules to this Order that a specified Indian law or section or portion of an Indian law shall stand unmodified shall be construed merely as a direction that it is not to be modified or adapted in accordance with the foregoing provisions of this paragraph.

5. (1) Where this Order requires that in any specified Indian law, or in any section or other portion of an Indian law, certain words shall be substituted for certain other words or that certain words shall be omitted, that substitution or omission, as the case may be, shall, except where it is otherwise expressly provided, be made wherever the words referred to occur in that law, or, as the case may be, in that section or portion.

(2) Where this Order requires that in any Indian law a plural noun shall be substituted for a singular noun or vice versa, or a masculine noun for a neuter noun or vice versa, there shall be made also in any verb or pronoun in the sentence in question such consequential amendment as the rules of grammar may require.

6. (1) The following provisions shall have effect where any Indian law which under this Order is to be adapted or modified has before the commencement of this Order been amended, either generally or in relation to any particular area, by the insertion or omission of words, or the substitution of words for other words:—

(a) Effect shall first be given in the amending law to any adaptation or modification required by paragraphs three and five of this Order to be made therein;

(b) the original law shall then be amended, either generally or, as the case may be, in its application to the particular area, so as to give effect to the directions contained in the amending law or, where any adaptation or modification has fallen to be made under sub-paragraph (a), in that law as so adapted or modified; and

(c) all adaptations or modifications required by this Order to be made in the original law shall then be made in that law as so amended, except so far as in the case of any particular area they may be inapplicable.

(2) In this paragraph references to the amendment of a law by the insertion or omission of words or the substitution of words do not include references to an amendment which is effected merely by directing that certain words shall be construed in a particular manner.

7. Subject to the foregoing provisions of this Order, any reference by whatever form of words in any Indian law in force immediately before the commencement of this Order to an authority competent at the date of the passing of that law to exercise any powers or authorities, or discharge any functions, in any part of British India shall, where a corresponding new authority has been constituted by or under any Part of the Government of India Act, 1935, for the time being in force, have effect until duly repealed or amended as if it were a reference to that new authority.

8. In any Indian law in force immediately before the commencement of this Order any reference by name or description to any territory shall, unless the contrary intention appears or unless it has been, or is by this Order, otherwise expressly provided, be construed as a reference to the territory which bore that name or answered to that description at the date when the enactment containing that name or description came into operation:

Provided that in the application of any enactment to Madras, Bombay, Bihar, or the Central Provinces, references in that enactment to Madras, Bombay, Bihar or the Central Provinces, as the case may be, shall be construed as exclusive of so much of those Provinces respectively as was separated therefrom on the constitution of the Provinces of Orissa and Sind.

9 The provisions of this Order which adapt or modify Indian laws so as to alter the manner in which, the authority by which, or the law under or in accordance with which, any powers are exercisable, shall not render invalid any notification, order, commitment, attachment, byelaw, rule or regulation duly made or issued, or anything duly done, before the commencement of this Order; and any such notification, order, commitment, attachment, byelaw, rule, regulation or thing may be revoked, varied or undone in the like manner, to the like extent and in the like circumstances as if it had been made, issued or done after the commencement of this Order by the competent authority and under and in accordance with the provisions then applicable to such a case.

10. Save as provided by this Order, all powers which under any law in force in British India, or in any part of British India, were immediately before the commencement of Part III of the Government of India Act, 1935, vested in, or exercisable by, any person or authority shall continue to be so vested or exercisable until other provision is made by some legislature or authority empowered to regulate the matter in question.

11. Nothing in this Order shall affect the previous operation of, or anything duly done or suffered under, any Indian law, or any right, privilege, obligation or liability already acquired, accrued or incurred under any such law, or any penalty, forfeiture or punishment incurred in respect of any offence already committed against any such law.

12. For the avoidance of doubt it is hereby declared that--

(a) nothing in this Order transferring or assigning any functions to the Central Government shall be construed as excluding those functions from the operation of section one hundred and twenty-three or section one hundred and twenty-four of the Government of India Act, 1935,

(b) the transfer by this Order to a Provincial Government of any jurisdiction theretofore exercisable by the Local Government of the Province shall not be construed as excluding that jurisdiction from the operation of sub-section (2) of section two hundred and ninety-six of the said Act;

(c) nothing in this Order shall affect the provisions of any Order in Council for the time being in force made under section one hundred and fifty-eight, section one hundred and fifty-nine or section one hundred and sixty of the said Act (which empower Orders to be made regulating the relations of India and Burma as to their monetary systems, relief from double taxation, customs, and ancillary and related matters), or under any corresponding provisions in the Government of Burma Act, 1935, and

(d) no repeal effected by this Order shall affect the operation of sub-paragraph (2) of paragraph fifteen of the Government of India (Commencement and Transitory Provisions) Order, 1936.

THE ACTING JUDGES' ACT (XVI OF 1867).¹

Short title given, Act XIV of 1897.

[1st March, 1867.]

An Act to authorize the making of acting appointments to certain Judicial Offices.

WHEREAS the Governor-General of India in Council or the Local Government, as the case may be, is empowered by diverse enactments to appoint the Judges of certain Courts in British India: And whereas it has been doubted whether he or it is empowered to appoint persons to act temporarily as such Judges, and it is expedient to remove such doubts; it is hereby enacted as follows:—

1. In every case in which the Governor-General of India in Council, or the Local Government, as the case may be, has power under any Act or Regulation to appoint a Judge of any Court in British India, such power shall be taken to include the power to appoint any person capable of being appointed a permanent Judge of such Court, to act as Judge of the same Court for such time as the Governor-General of India in Council or the Local Government, as the case may be, shall direct. Every person so appointed to act temporarily as a Judge of any such Court shall have the powers and perform the duties which he would have had and been liable to perform in case he had been duly appointed a permanent Judge of the same Court.

Certain enactments to be construed as if they contained a clause like section 1 of this Act

2. Every such Act and Regulation shall be construed as if it contained a special class to the purport or effect of the first section of this Act.

Leg. Ref

¹ Short title, "The Acting Judges' Act, 1867". See the Indian Short Titles Act (XIV of 1897). The bill which was passed on the 1st March, 1867, and published as Act XVI of 1867, was introduced and passed at one sitting. See the Proceedings in Council published in *Gazette of India*, 1867, Sup-

plement, p. 180. This Act has been declared by notification under S. 3 (a) of the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts, namely—The Districts Hazaribagh, Lohardaga and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum—see *Gazette of India*, 1881, Pt. I, p. 504.

THE ADMINISTRATOR-GENERAL'S ACT (III OF 1913).

Prefatory Note.—The jurisdiction of the Court to compel due administration of the estate of deceased persons has existed from a very early period. It seems to have been of gradual growth, and founded rather on the necessity of supplying the defects of the Courts of common law and the ecclesiastical Courts, than on execution of trusts cognizable in equity alone. (Ency. of Laws of England, Vol. I, p. 176.)

In ancient times, when a man died without making any disposition of such of his goods as were testable, it is said that the king, who is *parens patriæ*, and has the supreme care to provide for all his subjects, used to seize the goods of the intestate, to the intent that they should be preserved and disposed for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood. This prerogative the king continued to exercise for some time by his own Ministers of Justice, and probably in the County Court, where matters of all kinds were determined, and it was granted as a franchise to many lords of manors, and others, who had, until the passing of the Court of Probate Act, a prescriptive right to grant administration to their intestate tenants and suitors in their own Courts Baron and other Courts. Afterwards the Crown, in favour of the Church, invested the prelates with this branch of the prerogative; for it was said, none could be found more fit to have such care and charge of the transitory goods of the deceased than the Ordinary, who all his life had the cure and charge of his soul. (*Williams on Executors*, 11th Edn, 312, 313.)

The flagrant abuses of this power by the Ecclesiastical Courts occasioned the Legislature to interpose, in order to prevent the Ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents and therefore, S. 31 Edw III, St. 1, was passed.

The term "administration" applied broadly denotes the management of an estate by a person appointed by authority of law to take charge thereof in place of the proper owner. (*Ame Cyc*, Vol 1,—*Title, Administration*.)

Referring to the origin of the office of Administrator-General in British India, Mr Kenny in his book on Administration Practice in British India says—"The office of the Administrator-General in this country grew out of the Mercantile and Trading Community in Bengal, whose interest were safeguarded by the Charter establishing the Supreme Court of Judicature at Fort William in Bengal, dated the 26th March, 1774. Its functions have been developed, and regulated on lines which experience have shown to be necessary, and it is an illustration of the adoption, and modification, to suit local circumstances of those principles which underlie the law of trusts, and the law affecting the administration of the estates, of deceased persons."

The earliest office out of which the office of the Administrator-General was developed is that of the Ecclesiastical Registrar in Bengal. The first parliamentary statute which dealt with the powers of Ecclesiastical Registrar in Bengal and the other provinces to obtain administration to estates was 39 and 40 Geo III, Cap 79. In order to understand the position of the Registrar under this statute, attention may be directed to S. 21 of the Act which reads as follows—"And whereas great inconveniences have arisen from the practice of granting Letters of Administration by the said Supreme Court of Judicature at Fort William aforesaid in cases where the next of kin or any of the creditors of the deceased do not apply for the same, to persons calling themselves friends of the deceased. Be it therefore further enacted that from and after the first day of March which will be in the year of our Lord one thousand eight hundred and one, whenever, any British subject shall die intestate within either of the presidencies of Fort William, Fort Saint George or Bombay, or the territories subordinate to either of the said Presidencies or to become subordinate thereto, and on return of the citation to be issued from the proper Ecclesiastical Court, no next-of-kin or creditors shall appear and make out their claim to the administration of the effect of the intestate deceased to the satisfaction of the said Court, it shall and may be lawful for the Registrar of such Court, and he is hereby required and directed to grant such letters of administration and colligenda as to such Court shall seem meet, by virtue whereof such Registrar shall collect the assets of the deceased and shall bring them for safe custody into such Court and account for them regularly in like manner as is now by law provided in cases where assets are vested in the hands of any officer of the Court under or by virtue of the equitable jurisdiction of any such Court."

It was not long before it became necessary to further develop the law on the subject. To this end Stat 55, Geo III, Cap. 84, was enacted.

The Registrar, under the old Act, had not by any means such a monopoly of administration of estates as was at one time considered to be the case: but private administrators were not by any means subject to similar restrictions in regard to the question of the method of keeping and filing their accounts, etc. The precautions, however, above referred to prove to be quite inadequate.

Gross irregularities and abuses were discovered in respect of estates under the charge of certain persons who held the office of Ecclesiastical Registrar, with the result that an order was passed by the Supreme Court on the 8th March, 1848, appointing a Committee to enquire into the working of that office. The Committee so appointed, duly

enquired into the working of the office, and presented their report on the 24th January, 1849. Among other things it proved the Registrars had abused their powers that they had employed the monies in their hands in trade and that heavy losses had been incurred.

The Government of India, in view of the disclosures above alluded to, considered it advisable to take steps to protect the interests of the beneficiaries and next-of-kin of persons dying intestate as well as those who left wills, and after some consideration it was resolved that a public official should be appointed, who would protect the property of persons dying in cases where no steps were taken by the next-of-kin (if any) or where the next-of-kin were resident out of British India. It was also considered advisable to give such official power to deal with the estates of persons who had left wills where either the beneficiaries under the will were resident out of British India, or where they, or the executors named, took no steps to protect the estate. After carefully considering the position of matters the Government of India passed Act VII of 1849, which may be termed the first Administrator-General's Act in British India.

The next was Act II of 1850 (passed on 11th January, 1850) by which the Act of 1849 was extended to Madras and Bombay. It was provided that the rate of commission charged was not to be the same that the Administrator-General of these two provinces were not to cease to hold the office of Ecclesiastical Registrar and by S 4 of the Act, the Administrator-General was strictly prohibited from trading, etc. This Act remained in force until the year 1855 when a further Act was passed (Act VIII of 1855), which repealed both the last mentioned Acts.

This Act (VIII of 1855) remained in force until the year 1867, when Act XXXI of 1867 was passed as a repealing and re-enacting Code relating to the subject.

Act II of 1874, which was the Act in force until it was repealed and re-enacted by the present Act was presented to the Legislative Council on the 27th January, 1874. It related that having regard to the fact of certain amendments, and also to the fact that the Act of 1867 had already been amended by Act XIX of 1867 and Act V of 1870, it was thought advisable to repeal the then existing Acts and re-enact them, so as to have the law conveniently within the compass of one Act. The Act again came up for discussion on 10th February 1874, when it was discussed and finally received the assent of the Governor-General.

In 1913 it was thought expedient to consolidate Act II of 1874 and its several amending enactments, and also to make certain amendments in the law relating to the powers and duties of the Administrator-General, and this was effected by the Act which is now in force, Act III of 1913 (*See Preface to Kinney's Administration Practice in India, Statement of Objects and Reasons; Report of Select Committee and Proceedings in Council.*)

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THE ADMINISTRATOR-GENERAL'S ACT (III OF 1913).¹

[27th February, 1913.

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| Year. | No. | Short Title. | How repealed or otherwise affected by Legislation. |
|-------|-----|---------------------------------------|--|
| 1913 | III | The Administrators-General Act, 1913. | Repealed in part, V of 1917; XIX of 1927. Amended, X of 1914; XXI of 1922; XXXII of 1926; X of 1927 |

Leg. Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1912, Pt. V, p. 188;

for Report of Select Committee, see *ibid.*, 1913, Pt. V, p. 3; and for Proceedings in

An Act to consolidate and amend the law relating to the office and duties of Administrator-General.

WHEREAS it is expedient to consolidate and amend the law relating to the office and duties of Administrator-General; it is hereby enacted as follows.—

PART I.

PRELIMINARY.

Short title, extent and commencement. 1. (1) This Act may be called THE ADMINISTRATOR-GENERAL'S ACT, 1913.

(2) It extends to the whole of British India, including the Sonthal Parganas and British Baluchistan, and applies also to all [British subjects on Indian States].

(3) It shall come into force on such date² as the Governor-General in Council may, by notification in the Gazette of India, direct.

Interpretation clause. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "assets" means all the property, moveable and immoveable, of a deceased person, which is chargeable with and applicable to, the payment of his debts and legacies, or available for distribution among his heirs and next-of-kin:

(2) "exempted person" means an Indian Christian, a Hindu, Muhammadan, Parsi or Buddhist, or a person exempted under S. 332 of the Indian Succession Act, 1865,³ from the operation of that Act:

(3) 4["Government" or 'the Government' means, in relation to any Province, the Provincial Government, and in relation to British subjects in Indian States, the Central Government.]

(4) "Indian Christian" means a Native of India who is or in good faith claims to be of unmixed Asiatic descent, and who professes any form of the Christian religion:

(5) "Letters of Administration" includes any letters of administration whether general or with a copy of the will annexed, or limited in time or otherwise:

(6) "next-of-kin" includes a widower or widow of a deceased person, or any other person who by law would be entitled to letters of administration in preference to a creditor or legatee of the deceased:

(7) 5[* * * *]

(8) "Prescribed" means prescribed by rules under this Act:

(9) to (11) 5[* * *]

6[(12) 'High Court' means—

(a) in relation to Bengal, Assam and the Andaman and Nicobar islands, the High Court at Calcutta;

(b) in relation to Madras and Coorg, the High Court at Madras;

(c) in relation to Bombay and British Baluchistan, the High Court at Bombay;

Leg. Ref.

Council, see *ibid.*, 1912, Pt. VI, p. 697; and *ibid.*, 1913, Pt. VI, pp. 14, 28 and 64

¹ Substituted by Order in Council, 1937, sub-S. (3).

² The 1st April, 1914, see *Gazette of India*, 1914, Pt. I, p. 365.

³ See now the Indian Succession Act (XXXIX of 1925).

⁴ Sub-section (3) substituted by Order in Council, 1937.

⁵ Sub-sections (7), (9), (10) and (11) omitted by Order in Council, 1937.

⁶ Sub-Ss (12) and (13) inserted by Order in Council, 1937.

Notes.

Sec 2 (1) —"Assets," meaning of, see 51 M.L.J. 334.

(d) in relation to the United Provinces and Ajmer-Merwara, the High Court at Allahabad;

(e) in relation to the Punjab and Delhi, the High Court at Lahore;

(f) in relation to the Provinces of Bihar and Orissa, the High Court at Patna;

(g) in relation to the Central Provinces and Berar, the High Court at Nagpur;

(h) in relation to Sind, the Judicial Commissioner's Court;

(i) in relation to the North-West Frontier Province, the Judicial Commissioner's Court; and

(j) in relation to British subjects in any Indian State, that one of the aforesaid courts which the Central Government may from time to time notify in this behalf.

(13) 'Division' means the Province or State or group of States for which an Administrator-General has been appointed under this Act.]

PART II.

THE OFFICE OF ADMINISTRATOR-GENERAL.

Appointment and designation of the Administrators-General in the three Presidencies.

3 (1) ¹[The Provincial Government for each Province, and the Central Government for British subjects, in any Indian State or group of Indian States, shall appoint an Administrator-General:

Provided that nothing herein contained shall be deemed to bar the appointment of the same person as Administrator-General for two or more divisions.]

2[* * *] (2) No person shall be appointed to the office of Administrator-General who is not—

(a) a Barrister; or

(b) an Advocate, Attorney, or Vakil enrolled by a High Court; or

(c) a person holding the office of Deputy Administrator-General at the commencement of this Act

2[(d) * * * In the case of a Province other than Bengal, Madras or Bombay, a person already in the service of the crown.]

(3) 2[* * *]

4. The Government may appoint a Deputy or Deputies to assist the Administrator-General; and any Deputy so appointed

Appointment and powers of Deputy Administrators-General.

shall, subject to the control of the Government and the general or special orders of the Administrator-General, be competent to discharge any of the duties and to exercise any of the powers of the Administrator-General, and when discharging such duties or exercising such powers shall have the same privileges and be subject to the same liabilities as the Administrator-General.

5. The Administrator-General shall be a corporation sole by the name of the Administrator-General of the ³[Division] for which he is appointed and, as such Administrator-General, shall have perpetual succession and an official seal, and may sue and be sued in his corporate name.

Leg. Ref.

¹ Sub-section (1) substituted by Order in Council.

² Some words in sub-section (2) and the

whole of sub-section (3) omitted and sub-section (2), clause (d) inserted by Order in Council, 1937.

³ Substituted by Order in Council, 1937.

PART III.

RIGHTS, POWERS, DUTIES AND LIABILITIES OF THE ADMINISTRATOR-GENERAL.

(a) *Grants of Letters of Administration and Probate.*

As regards Administrator-General, High Court [1] [2] to be deemed a Court of competent jurisdiction for the purpose of granting probate or letters of administration.

6. So far as regards the Administrator-General of any [2] [Division] the High Court [1] [2] [3] shall be deemed to be a Court of competent jurisdiction for the purpose of granting probate or letters of administration under any law for the time being in force wheresoever within the [2] [Division] estate to be administered is situate.

Administrator-General entitled to letters of administration, unless granted to next-of-kin.

7. Any letters of administration, which are granted after the commencement of this Act by the High Court [1] [2] [3] shall be granted to the Administrator-General of the [2] [Division] unless they are granted to the next-of-kin of the deceased.

Administrator-General entitled to letters of administration in preference to creditor, non-universal legatee or friend.

8. The Administrator-General of the [2] [Division] shall be deemed by all the Courts in the [2] [Division] to have a right to letters of administration other than letters *pendente lite* in preference to that of—

- (a) a creditor; or
- (b) a legatee other than an universal legatee; or
- (c) a friend of the deceased.

When Administrator-General is to administer estates of persons other than exempted persons.

9. If any person, not being an exempted person, has died leaving within any [2] [Division] assets exceeding the value of [3] [two thousand] rupees

and if no person to whom any Court would have jurisdiction to commit administration of such assets has, within one month after his death, applied in such [2] [Division] for probate of his will, or for letters of administration of his estate,

the Administrator-General of the [2] [Division] in which such assets are shall, subject to any rules made by the Government, within a reasonable time after he has had notice of the death of such person, and of his having left such assets, take such proceedings as may be necessary to obtain from the High Court [1] [2] [3] letters of administration of the estate of such person.

10. Whenever any person has died leaving assets within the local limits of the ordinary original civil jurisdiction of the High Court at a Presidency-town, the Court, on being satisfied that danger is to be apprehended of misappropriation, deterioration or waste of such assets

Leg. Ref.

¹ Omitted by Order in Council, 1937.

² Substituted by *ibid*

³ Substituted for the words "one thousand" by Act XXXII of 1926.

Notes.

Secs 6, 7 and 8.—As to who are next-of-kin, see Succession Act (XXXIX of 1925), S. 24. Administrator-General can be granted letters of administration to estate of illegitimate persons. 1 M.H.C. 171; 11 Beng L.R. App. 6. On these sections, see also 4 C. 770. Calcutta High Court cannot grant letters to attorney of executor of deceased in respect of assets in Punjab. Such letters can be granted to Administrator-General in Bengal. 1 B.L.R. (O.C.) 3. As to power of Court in case of a deadlock

in administration, see 1934 Lah. 331.

Sec 9.—Effect of the section as to administration of estates of less than Rs. 1,000 in value. See 1 Boul 622. See also 1 C. 905=12 Bom. L.R. 171.

Sec 10.—Possession not to be taken by Administrator-General without previous order of Court. 10 C.W.N. 241. As to when the title of the Administrator-General accrues generally and as to the circumstances in which title of Administrator-General relates back to date of death of deceased, see 8 B.H.C. (O.C.) 140. As to when Administrator-General can be directed to apply for administration, see 1 M.H.C. 231. (Mere possibility of debts being barred by limitation, not always sufficient ground—case under old Act.)

unless letters of administration of the estate of such person are granted, may upon the application of the Administrator-General or of any person interested in such assets or in the due administration thereof make an order, upon such terms as to indemnifying the Administrator-General against costs and other expenses as the Court thinks fit, directing the Administrator-General to apply for letters of administration of the estate of such person:

Provided that in the case of an application being made under this section for letters of administration of the estate of an exempted person, the Court may refuse to grant letters of administration, if it is satisfied that such grant is unnecessary for the protection of the assets; and in such case the Court shall make such order as to the costs of the application as it thinks fit.

11. (1) Whenever any person has died leaving assets within the local limits of the ordinary original civil jurisdiction of

Power to direct Administrator-General to collect and hold assets until right of succession or administration is determined.

any of the said High Courts, and such Court is satisfied that there is no person immediately available, who is legally entitled to the succession to such assets, or that danger is to be apprehended of misappropriation, deterioration or waste

of such assets, before it can be determined who may be legally entitled to the succession thereto, or whether the Administrator-General is entitled to letters of administration of the estate of such deceased person,

the Court may, upon the application of the Administrator-General or of any person interested in such assets, or in the due administration thereof, forthwith direct the Administrator-General to collect and take possession of such assets, and to hold, deposit, realize, sell or invest the same according to the direction of the Court, and in default of any such directions according to the provisions of this Act so far as the same are applicable to such assets.

(2) Any order of the Court made under the provisions of this section shall entitle the Administrator-General,

(a) to maintain any suit or proceeding for the recovery of such assets, and

(b) if he thinks fit, to apply for letters of administration of the estate of such deceased person, and

(c) to retain out of the assets of the estate any fees chargeable under rules made under this Act, and to reimburse himself for all payments made by him in respect of such assets which a private administrator might lawfully have made.

Grant of probate or letters of administration to person appearing in the course of proceedings taken by Administrator-General under sections 9, 10 and 11

12. If, in the course of proceedings to obtain letters of administration under the provisions of section 9, section 10, or section 11, any person appears and establishes his claim—

(a) to probate of the will of the deceased; or

(b) to letters of administration as next-of-kin of the deceased, and gives such security as may be required of him by law,

Notes.

Sec 11—"Succession" in S. 11 should not be read as meaning intestate succession only. 56 I C 431=24 C W N. 326.

WHO CAN APPLY.—Direction to collect assets can be given under this section to Administrator-General, not to a legal representative, 21 Bom. 102; nor to a creditor or debtor to estate. See 1 M H C.R. 234. Where an Administrator-General is appointed executor of a will he can obtain an order to take possession of the assets under S. 11

before applying for probate, 56 I.C. 431=24 C.W.N. 326; but he cannot take possession without orders of Court previously obtained. 10 C.W.N. 241. Pending grant of letters of administration, the Administrator-General cannot make payment to prejudice of estate. 11 C.W.N. 193. As to right of Administrator-General to reimburse himself for costs, see 10 Bom. 350. On this section, see also 23 Bom. 428, 8 Bom. 140.

the Court shall grant probate of the will or letters of administration accordingly, and shall award to the Administrator-General the cost of any proceeding taken by him, under those sections to be paid out of the estate as part of the testamentary or intestate expenses thereof

13. If, in the course of proceedings to obtain letters of administration under the provisions of section 9, section 10 or section 11, no person appears and establishes his claim to probate of a will, or to a grant of letters of administration as next-of-kin of the deceased, within such period as to the Court seems reasonable,

Grant of administration to Administrator-General in certain cases

or if a person who has established his claim to a grant of letters of administration as next-of-kin of the deceased fails to give such security as may be required of him by law,

the Court may grant letters of administration to the Administrator-General.

Administrator - General not precluded from applying for letters within one month after death.

14. Nothing in this Act shall be deemed to preclude the Administrator-General from applying to the Court for letters of administration in any case within the period of one month from the death of the deceased.

(b) *Estates of Persons subject to the Army Act 1[or the Air Force Act].*

Act not to affect Regimental Debts Act, 1893.

15. Nothing in this Act shall be deemed to affect the provisions of the Regimental Debts Act, 1893.

16. It shall not be necessary for the Administrator-General to take out letters of administration of the estate of any deceased person which is being administered by him in accordance with the provisions of the Regimental Debts Act, 1893, if the value of such estate does not on the date when such administration is committed to him exceed rupees one thousand, but he shall have the same power in regard to such estate as he would have had if letters of administration had been granted to him.

Letters of administration not necessary in respect of small estates administered by Administrator-General in accordance with the Regimental Debts Act, 1893.

17. If the Administrator-General applies, in accordance with the provisions of the Regimental Debts Act, 1893, for letters of administration of the estate of any person subject to the Army Act, 1[or the Air Force Act] the Court may grant to him letters of administration limited to the purpose of dealing with such estate in accordance with the provisions of the Regimental Debts Act, 1893.

Power to grant Administrator-General letters limited to purpose of dealing with assets in accordance with the Regimental Debts Act, 1893.

(c) *Revocation of Grants.*

18. If an executor or next-of-kin of the deceased, who has not been personally served with a citation or who has not had notice thereof in time to appear pursuant thereto establishes to the satisfaction of the Court a claim to probate of a will or to letters of administration in preference to the Administrator-General, any letters of administration granted in accordance with the provisions of this Act to the Administrator-General may be revoked, and probate or letters of administration may be granted to such executor or next-of-kin as the case may be:

Recall of Administrator-General's administration and grant of probate, etc., to executor or next-of-kin.

Provided that no letters of administration granted to the Administrator-General shall be revoked for the cause aforesaid, except in cases in which a will of the deceased is proved in the 1[Division] unless the application for that purpose is made within six months after the grant to the Administrator-General and the Court is satisfied that there has been no unreasonable delay in making the application, or in transmitting the authority under which the application is made.

19. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked, the Court may order the costs of obtaining such letters of administration, and the whole or any part of any fees which would otherwise have been payable under this Act, together with the costs of the Administrator-General in any proceedings taken to obtain such revocation, to be paid to or retained by the Administrator-General out of the estate:

Provided that nothing in this section shall affect the provisions of clause (c) of sub-section (2) of section 11.

20. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked, the same shall, so far as regards the Administrator-General and all persons acting under his authority in pursuance thereof, be deemed to have been only voidable, except as to any act done by any such Administrator-General or other person as aforesaid, after notice of a will or of any other fact which would render such letters void:

Provided that no notice of a will or of any other fact which would render any such letters void shall affect the Administrator-General or any person acting under his authority in pursuance of such letters unless, within the period of one month from the time of giving such notice, proceedings are commenced to prove the will, or to cause the letters to be revoked, and such proceedings are prosecuted without unreasonable delay.

21. If any letters of administration granted to the Administrator-General in accordance with the provisions of this Act are revoked, upon the grant of probate of a will, or upon the grant of letters of administration with a copy of the will annexed, all payments made or acts done by or under the authority of the Administrator-General in pursuance of such letters of administration, prior to the revocation, which would have been valid under any letters of administration lawfully granted to him with a copy of such will annexed shall be deemed valid notwithstanding such revocation.

(d) General.

22. Whenever any Administrator-General applies for letters of administration in accordance with the provisions of this Act, it shall be sufficient if the petition required to be presented for the grant of such letters states,

Administrator-General's petition for grant of letters of administration.

Leg Ref.

¹ Substituted by Order in Council, 1937.

Notes.

Secs. 22 to 24.—The estate vests in Administrator-General on grant of letters of administration. 38 M. 1134=27 M.L.J. 400. As to vesting of estate in successor of Administrator-General, see 33 C. 713.

SUITS BY ADMINISTRATOR-GENERAL.—See 28 Bom. 529; 30 C. 927. Administrator-General may sue and be sued in name of his office. See also 8 C.W.N. at p. 93.

SUITS AGAINST ADMINISTRATOR-GENERAL.—See 6 M.H.C.R. 346; 25 Cal. 54. Suit by creditor. See also 10 Cal. 929; 38 Mad. 500=22 I.C. 566. Suit under S. 26 for assets improperly distributed by Administrator-General is not suit for administration.

- (i) the time and place of the death of the deceased to the best of the knowledge and belief of the petitioner,
 (ii) the names and addresses of the surviving next of-kin of the deceased if known,
 (iii) the particulars and value of the assets likely to come into the hands of the petitioner,
 (iv) particulars of the liabilities of the estate if known.

23 (New.) 1[All probates or letters of administration granted to any Administrator-General shall be granted to him by that name.]

Name in which probate or letters to be granted.

24. Probate or letters of administration granted by the High Court 2[* *] to the Administrator-General of any 1[Division] shall have effect over all the assets of the deceased throughout such 1[Division] and shall be conclusive as to the representative title against all debtors of the deceased and all persons holding such assets, and shall afford full indemnity to all debtors paying their debts and all persons delivering up such assets to such Administrator-General:

Effect of probate or letters granted to Administrator-General.

Provided that the High Court may direct, by its grant, that such probate or letters of administration shall have like effect throughout one or more of the other 1[Divisions].

Whenever a grant is made by a High Court to the Administrator-General with such effect as last aforesaid, the Court shall send to the other High Courts a certificate that such grant has been made, and such certificate shall be filed by the Courts receiving the same.

3[A grant made by the High Court at Rangoon before the separation of Burma from India shall have the same effect for the purposes of this section as it would have had if the separation had not taken place.]

25. (1) Any private executor or administrator may, with the previous consent of the Administrator-General of the 1[Division] in which any of the assets of the estate, in respect of which such executor or administrator has obtained probate or letters of administration, are situate, by an instrument in writing under his hand notified in the official Gazette, transfer the assets of the estate vested in him by virtue of such probate or letters to the Administrator-General by that name or any other sufficient description.

(2) As from the date of such transfer the transferor shall be exempt from all liability as such executor or administrator, as the cases may be, except

Leg Ref.

¹ Substituted by Order in Council, 1937.

² Omitted by Order in Council, 1937.

³ Inserted by Order in Council, 1937.

Notes.

POWERS OF ADMINISTRATOR-GENERAL.—Whereas the Administrator-General is, pending the grant of letters of administration in the same position as a private administrator the only payment he is entitled to make is for the benefit of or for the preservation of the assets, and not a payment to the prejudice of the estate 11 C.W.N. 193 Where the letters of administration have been granted, he can exercise his ordinary powers as Administrator-General and dispose of immovable property without the consent of the Court. 38 Mad. 1134=27 M.L.J. 400. An adminis-

tration cannot be treated as closed until every act necessary for its completion has been done and where, to realise his commission he sells an item which had been previously sold by the son of the deceased on attaining majority, the sale by the son was held a nullity (*Ibid.*) There is no provision of law by which an insolvent's estate in respect of which letters of administration have been granted to the Administrator-General, can be administered under the insolvency law. 38 Mad. 500. An Administrator-General in such cases can claim no higher than the deceased himself and he has not the rights of either the trustee or Official Assignee in insolvency. (*Ibid.*)

Secs. 25 and 26.—See 8 C.W.N. 362; 22 I.A. 107=22 C. 788; 22 Bom. 1.

in respect of acts done before the date of such transfer, and the Administrator-General shall have the rights which he would have had, and be subject to the liabilities to which he would have been subject, if the probate or letters of administration, as the case may be, had been granted to him by that name at the date of such transfer.

26. (1) When the Administrator-General has given the prescribed notice for creditors and others to send into him their claims against the estate of the deceased, he shall, at the expiration of the time therein named for sending in claims, be at liberty to distribute the assets or any part thereof in discharge of such lawful claims as he has notice of.

(2) He shall not be liable for the assets so distributed to any person of whose claim he had not notice at the time of such distribution.

(3) No notice of any claim which has been sent in and has been rejected or disallowed in part by the Administrator-General shall affect him unless proceedings to enforce such claim are commenced within one month after notice of the rejection or disallowance of such claim has been given in the prescribed manner and unless such proceedings are prosecuted without unreasonable delay.

(4) Nothing in this section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively.

(5) In computing the period of limitation for any suit, appeal or application under the provisions of any law for the time being in force, the period between the date of submission of the claim of a creditor to the Administrator-General and the date of the final decision of the Administrator-General on such claim shall be excluded.

27. (1) When the Administrator-General has, so far as may be, discharged all the liabilities of an estate administered by him, he shall notify the fact in the Official Gazette, and he may, by an instrument in writing, with the consent of the Official Trustee and subject to any rules made by the Government, appoint the Official Trustee to be the trustee of any assets then remaining in his hands.

(2) Upon such appointment such assets shall vest in the Official Trustee as if he had been appointed trustee in accordance with the provisions of the Official Trustees Act, 1913, and shall be held by him upon the same trusts as the same were held immediately before such appointment.

28. (1) The High Court [* * *] may, on application made to it, give to the Administrator-General of the [Division] any general or special directions as to any estate in his charge or in regard to the administration of any such estate.

Power for High Court to give directions regarding administration of estate.

(2) Applications under sub-section (1) may be made by the Administrator-General or any person interested in the assets or in the due administration thereof.

29. (1) No Administrator-General shall be required by any Court to enter into any administration-bond, or to give other security to the Court, on the grant of any letters of administration to him by that name.

No security nor oath to be required from Administrator-General.

Leg. Ref.

¹ Omitted by Order in Council, 1937.

² Substituted by Order in Council, 1937.

Notes.

Sec. 28.—The High Court should not advise disputed points of law and fact but

only on such questions as to management, advancement, change of investment, etc. 111 I C 16=1928 L. 514.

Sec. 29.—As to mode of verification by Administrator-General, see 26 Cal 404. See also 20 Cal. 879.

- (2) No Administrator-General or Deputy Administrator-General shall be required to verify, otherwise than by his signature,

Manner in which petition to be verified by Administrator-General and his Deputy.

any petition presented by him under the provisions of this Act, and, if the facts stated in any such petition are not within the Administrator-General's own personal knowledge, the petition may be subscribed and

verified by any person competent to make the verification.

- (3) The entry of the Administrator-General by that name in the books of a Company shall not constitute notice of a trust, and a

Entry of Administrator-General not to constitute notice of a trust.

Company shall not be entitled to object to enter the name of the Administrator-General on its register by reason only that the Administrator-General is a cor-

poration and in dealing with assets the fact that the person dealt with is the Administrator-General shall not of itself constitute notice of a trust.

30. The Administrator-General may, whenever he desires, for the purposes of this Act, to satisfy himself regarding any question

Power to examine on oath.

of fact, examine upon oath (which he is hereby authorised to administer) any person who is willing to be

so examined by him regarding such question.

(e) *Grant of Certificates.*

31. Whenever any person has died leaving assets within any 1[Division] and the Administrator-General of such 1[Division] is

In what case Administrator-General may grant certificate.

satisfied that such assets excluding any sum of money deposited in a Government Savings Bank, or in any Provident Fund to which the provisions of the Provi-

dent Funds Act, 1897,² apply, did not at the date of death exceed in the whole 3[two thousand] rupees—in value, he may, after the lapse of one month from the death if he thinks fit, or before the lapse of the said month if he is requested so to do by writing under the hand of the executor or the widow or other person entitled to administer the estate of the deceased, grant to any person, claiming otherwise than as a creditor to be interested in such assets, or in the due administration thereof, a certificate under his hand entitling the claimant to receive the assets therein mentioned left by the deceased, within the 1[Division] to a value not exceeding in the whole 3[two thousand] rupees.

Provided that no certificate shall be granted under this section—

(i) where probate of the deceased's will or letters of administration of his estate has or have been granted, or

(ii) in respect of any sum of money deposited in a Government Savings Bank or in any Provident Fund to which the provisions of the Provident Funds Act, 1897, apply.

32. If, in cases falling within section 31, no person claiming to be interest-

Grant of certificate to creditors and power to take charge of certain estates.

ed otherwise than as a creditor in such assets or in the due administration thereof obtains, within three months of the death of the deceased a certificate from the Administrator-General under the same section, or probate of a will or letters of administration of the estate of the deceased, and

Leg. Ref.

¹ Substituted by Order in Council, 1937

² See now the Provident Funds Act, XIX of 1925.

³ Substituted by Act XXXII of 1926

Notes.

Sec 31.—Certificate entitling claimants to receive assets may be granted by Admi-

nistrator-General without the necessity of taking out probate. 31 B. 506. Although the Limitation Act nowhere provides that time should cease to run upon a claim being filed or a certificate being issued by the Administrator-General, yet claims covered by such a certificate containing a memorandum that all debts will be paid as soon as possible, are not barred. 22 I.C. 262 (Cal.).

such deceased was not an exempted person, or was an exempted person who has left assets within the ordinary original civil jurisdiction of the High Court, or within any area notified by the Government in this behalf in the official Gazette, the Administrator-General may administer the estate without letters of administration, in the same manner as if such letters had been granted to him;

and if he neglects or refuses to administer such estate, he shall, upon the application of a creditor, grant a certificate to him in the same manner as if he were interested in such assets otherwise than as a creditor;

and such certificate shall have the same effect as a certificate granted under the provisions of section 31, and shall be subject to all the provisions of this Act which are applicable to such certificate:

Provided that the Administrator-General may, before granting such certificate, if he thinks fit, require the creditor to give reasonable security for the due administration of the estate of the deceased.

33. The Administrator-General shall not be bound to grant any certificate under section 31 or section 32 unless he is satisfied of

Administrator - General not bound to grant certificate unless satisfied of claimant's title, etc.

the title of the claimant and of the value of the assets left by the deceased within the Presidency either by the oath of the claimant, or by such other evidence as he requires.

34. The holder of a certificate granted in accordance with the provisions of section 31 or section 32 shall have in respect of the

Effect of certificate.

assets specified in such certificate the same powers and duties, and be subject to the same liabilities as he would have had or been subject to if letters of administration had been granted to him.

Provided that nothing in this section shall be deemed to require any person holding such certificate,

(a) to file accounts or inventories of the assets of the deceased before any Court or other authority, or

(b) save as provided in section 32 to give any bond for the due administration of the estate

35. The Administrator-General may revoke a certificate granted under the provisions of section 31 or section 32 on any of the

Revocation of certificate

following grounds, namely:—

(i) that the certificate was obtained by fraud or misrepresentation made to him,

(ii) that the certificate was obtained by means of an untrue allegation of a fact essential in law to justify the grant though such allegation was made in ignorance or inadvertently.

36. (1) When a certificate is revoked in accordance with the provisions of section 35, the holder thereof shall, on the requisition

Surrender of revoked certificate.

of the Administrator-General, deliver it up to such Administrator-General, but shall not be entitled to the

refund of any fee paid thereon

(2) If such person wilfully and without reasonable cause omits to deliver up the certificate, he shall be punishable with imprisonment which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

37. The Administrator-General shall not be bound to take out letters of administration of the estate of any deceased person

Administrator-General not bound to take out administration on account of assets for which he has granted certificate.

on account of the assets in respect of which he grants any certificate, under section 31 or section 32, but he may do so if he revokes such certificate under section 35 or ascertains that the value of the estate exceeded 1[two thousand] rupees.

38. Where a person not having his domicile in British India has died leaving assets in any 1[Division] and in the country in

Transfer of certain assets from British India to executor or administrator in country of domicile for distribution.

which he had his domicile at the time of his death, and proceedings for the administration of his estate with respect to assets in any such 1[Division] have been taken under section 31 or section 32, and there

has been a grant of administration in the country of domicile with respect to the assets in that country,

the holder of the certificate granted under section 31 or section 32, or the Administrator-General, as the case may be, after having given the prescribed notice for creditors and others to send in to him their claims against the estate of the deceased, and after having discharged, at the expiration of the time therein named, such lawful claims as he has notice of, may, instead of himself distributing any surplus or residue of the deceased's property to persons residing out of British India who are entitled thereto transfer, with the consent of the executor or administrator, as the case may be, in the country of domicile, the surplus or residue to him for distribution to those persons.

(f) *Liability.*

39. (1) The revenues of the Government 2[¹ * 1] shall be liable to make

Liability of Government.

good all sums required to discharge any liability which the Administrator-General, if he were a private administrator, would be personally liable to discharge, except when the liability is one to which neither the Administrator-General nor any of his officers has in any way contributed, or which neither he nor any of his officers could, by the exercise of reasonable diligence have averted, and in either of those cases the Administrator-General shall not, nor shall the revenues 3[¹ of the Government] be subject to any liability.

(2) Nothing in sub-section (1) shall be deemed to render 4[the Government or] the Government of India or the Administrator-General liable for anything done before the commencement of this Act, by or under the authority of the Administrator-General.

40. (1) If any suit be brought by a creditor against any Administrator-

Creditors' suits against administrator-General.

General, such creditor shall be liable to pay the cost of the suit unless he proves that not less than one month previous to the institution of the suit he had applied in writing to the Administrator-General, stating the amount and other particulars of his claim, and had given such evidence in support thereof as, in the circumstances of the case, the Administrator-General was reasonably entitled to require.

(2) If any such suit is decreed in favour of the creditor, he shall, nevertheless, unless he is a secured creditor, be only entitled to payment out of the assets of the deceased equally and rateably with the other creditors.

41. Nothing in section 80 of the Code of Civil Procedure, 1908, shall apply to any suit against the Administrator-General in which no relief is claimed against him personally.

Notice of suit not required in certain cases.

PART IV.

FEES.

42. (1) There shall be charged in respect of the duties of the Adminis-

Leg Ref

¹ Substituted by Order in Council, 1937

² The words "of India" omitted by Act XXI of 1922, S. 6 (a)

³ Inserted by Act XXI of 1922, S. 6 (a)

⁴ Inserted by Act XXI of 1922, S. 6 (b).

Notes

Sec 42 —For the purpose of arriving at the amount of commission payable to the Administrator-General in the administration of an intestate's estate in cases where the

| | |
|-------------|--|
| Fees. | trator-General such fees, whether by way of percentage or otherwise, as may be prescribed by the |
| Government: | |

Provided that, in the case of any estate, the administration of which has been committed to the Administrator-General before the commencement of this Act, the fees prescribed under this section shall not exceed the fees leviable in respect of such estate under the Administrator-General's Act, 1874, as subsequently amended:

Provided further that, in respect of the duties of the Administrator-General under the Regimental Debts Act, 1893, the fees prescribed in this section shall be determined in accordance with the provisions of that Act.

(2) The fees under this section may be at different rates for different estates or classes of estates or for different duties, and shall, so far as may be, be arranged so as to produce an amount sufficient to discharge the salaries and all other expenses incidental to the working of this Act (including such sum as Government may determine to be required to insure the revenues of the Government [* *] against loss under this Act).

43. (1) Any expenses which might be retained or paid out of any estate in the charge of the Administrator-General, if he were a private administrator of such estate, shall be so retained or paid and the fees prescribed under section 42 shall be retained or paid in like manner as and in addition to such expenses.

(2) The Administrator-General shall transfer and pay to such authority, in such manner and at such time as the Government may prescribe, all fees received by him under this Act, and the same shall be carried to the account and credit of the Government [**]1.

PART V.

AUDIT OF THE ADMINISTRATOR-GENERAL'S ACCOUNTS.

44. The accounts of every Administrator-General shall be audited at least once annually, and at any other time if the Government so direct, by the prescribed person and in the prescribed manner.

Auditors to examine accounts and report to Government

(a) whether they contain a full and true account of everything which ought to be inserted therein,

(b) whether the books which by any rules made under this Act are directed to be kept by the Administrator-General, have been duly and regularly kept, and

(c) whether the assets and securities have been duly kept and invested and deposited in the manner prescribed by this Act, or by any rules made thereunder, or (as the case may be) that such accounts are deficient, or that the Administrator-General has failed to comply with this Act or the rules made thereunder, in such respects as may be specified in such certificate.

Leg. Ref.

¹ The words "of India" were omitted by Act XXI of 1922, S. 7.

Notes.

Notes.
administration commenced before April 1914, the value of the assets is to be taken as at the date of their distribution. 43 M.

L J 347 On this section, *see also* 22 I.C. 262 (Cal.); 31 Cal. 572; 25 Cal. 65; 4 Cal. 770 Under this section commission not to be charged by executor or administrator 6 Cal. 70 Moneys retained as fees of Administrator-General are deemed to be assets distributed. *See* 1 Mad. 148; 31 Cal. 572.

Power of auditors to summon and examine witnesses, and to call for documents

46. (1) Every auditor shall have the powers of a Civil Court under the Code of Civil Procedure, 1908,

(a) to summon any person whose presence he thinks necessary to attend him from time to time; and

(b) to examine any person on oath to be by him administered; and

(c) to issue a commission for the examination on interrogatories or otherwise of any person; and

(d) to summon any person to produce any document or thing the production of which appears to be necessary for the purpose of such audit or examination.

(2) Any person who when summoned refuses, or without reasonable cause, neglects to attend or to produce any document or things or attends and refuses to be sworn, or to be examined, shall be deemed to have committed an offence within the meaning of, and punishable under, section 188 of the Indian Penal Code, and the auditor shall report every case of such refusal or neglect to Government.

47. The costs of and incidental to such audit and examination shall be determined in accordance with rules made by the Government, and shall be defrayed in the prescribed manner.

PART VI.

MISCELLANEOUS.

General powers of administration.

48. The Administrator-General may, in addition to and not in derogation of, any other powers of expenditure lawfully exercisable by him, incur expenditure—

(a) on such acts as may be necessary for the proper care and management of any property belonging to any estate in his charge; and

(b) with the sanction of the High Court^[1] on such religious, charitable and other objects, and on such improvements as may be reasonable and proper in the case of the property.

49. Any person interested in the administration of any estate, which is in the charge of the Administrator-General shall, subject to such conditions and restrictions as may be prescribed, be entitled at all reasonable times to inspect the accounts relating to such estate and the reports and certificates of the auditor, and on payment of the prescribed fee, to copies thereof and extracts therefrom.

50. (1) The Government shall make rules for carrying into effect the objects of this Act and for regulating the proceedings of the Administrator-General.

Power to make rules.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the accounts to be kept by the Administrator-General and the audit and inspection thereof.

Leg. Ref.

¹ Omitted by Order in Council, 1937.

² For rules under this section, see *Gazette of India*, 1914, Pt. I, p. 369.

For such rules, for Bengal, see *Gen. St Rules and Orders*, Vol. IV, p 406; for Madras, see *Madras Local Rules and Orders*, 1923, Vol. I, Pt II, p 231; for Bombay, see *Bombay Local Rules and Orders*, 1924, Vol II, p 773; for the provinces of Assam, U. P., Burma, and the Punjab, see the local

Gazettes of 1914 or the latest editions of the *Local Rules and Orders* of these provinces.

Notes.

Sec 50 — "Assets" includes both movable and immovable property 51 M.L.J. 334. The Administrator General does not earn a commission by merely taking out letters of administration. (*Ibid*)

(b) the safe custody, deposit and investment of assets and securities which come into the hands of the Administrator-General,

(c) the remittance of sums of money in the hands of the Administrator-General in cases in which such remittances are required.

(d) subject to the provisions of this Act, the fees to be paid under this Act, and the collection and accounting for any such fees

(e) the statements, schedules and other documents to be submitted to the Government or to any other authority by the Administrator-General, and the publication of such statements, schedules, or other documents,

(f) the realisation of the cost of preparing any such statements, schedules or other such documents,

(ff) [* *]¹

(g) the manner in which and the person by whom the costs of and incidental to any audit under the provisions of this Act are to be determined and defrayed,

(h) the manner in which summonses issued under the provisions of section 46 are to be served and the payment of the expenses of any persons summoned or examined under the provisions of this Act and of any expenditure incidental to such examination, and

(i) any matter in this Act directed to be prescribed.

(3) All rules made under this Act shall be published in the official Gazette and, on such publication, shall have effect as if enacted in this Act.

51. Whoever, during any examination authorised by this Act, makes upon oath a statement which is false and which he either knows or believes to be false or does not believe to be true, shall be deemed to have intentionally given false evidence in a stage of a judicial proceeding.

False evidence

52. All assets in the charge of the Administrator-General which have been in his custody for a period of twelve years or upwards whether before or after the commencement of this Act without any application for payment thereof having been made and granted by him shall be transferred, in the prescribed manner, to the account and credit of the Government [1 *]²:

Assets unclaimed for twelve years to be transferred to Government

Provided that this section shall not authorise the transfer of any such assets as aforesaid, if any suit or proceeding is pending in respect thereof in any Court.

53. (1) If any claim is hereafter made to any part of the assets transferred to the account and credit of the Government [1 *]² under the provisions of this Act, or any Act hereby repealed, and if such claim is established to the satisfaction of the prescribed authority, the Government [1 *]² shall pay to the claimant the amount of the principal so transferred to its account and credit or so much thereof as appears to be due to the claimant

Mode of proceeding by claimant to recover principal money so transferred

(2) If the claim is not established to the satisfaction of the prescribed authority, the claimant may, without prejudice to his right to take any other proceedings for the recovery of such assets, apply by petition to the High Court [* *]³ against the [Government]⁴ and such Court, after taking such evidence as it thinks fit, shall make such order in regard to the payment of the whole or any part of the said principal sum as it thinks fit, and such order shall be binding on all parties to the proceeding.

(3) The Court may further direct by whom the whole or any part of the cost of each party shall be paid, [provided that nothing in this section affects

Leg. Ref.

¹ Cl. (ff) which was inserted by Act X of 1914 was repealed by Act V of 1917, S. 7 and Schedule

² The words "of India" omitted by Act XXI of 1922, S. 7.

³ Omitted by Order in Council, 1937.

⁴ Substituted by *ibid*.

any option afforded to a claimant by section 179 of the Government of India Act, 1935.]¹

District Judge in certain cases to take charge of property of deceased persons, and to report to Administrator-General

54. (1) Whenever any person, other than an exempted person, dies leaving assets within the limits of the jurisdiction of a District Judge, the District Judge shall report the circumstance without delay to the Administrator-General of the [Division]² stating the following particulars so far as they may be known to him:—

- (a) the amount and nature of the assets,
- (b) whether or not the deceased left a will and if so, in whose custody it is,
- (c) the names and addresses of the surviving next-of-kin of the deceased and, on the lapse of one month from the date of the death,
- (d) whether or not any one has applied for probate of the will of the deceased or letters of administration of his estate.

(2) The District Judge shall retain the assets under his charge, or appoint an officer under the provisions of section 39 of the Indian Succession Act, 1865³ to take and keep possession of the same until the Administrator-General has obtained letters of administration, or until some other person has obtained probate or such letters or a certificate from the Administrator-General under the provisions of this Act, when the assets shall be delivered over to the holder of such probate, letters of administration or certificate:

Provided that the District Judge may, if he thinks fit, sell any assets which are subject to speedy and natural decay, or which for any other sufficient cause he thinks should be sold, and he shall thereupon credit the proceeds of such sale to the estate.

(3) The District Judge may cause to be paid out of any assets of which he or such officer has charge, or out of the proceeds of such assets or of any part thereof, such sums as may appear to him to be necessary for all or any of the following purposes, namely:—

- (a) the payment of the expenses of the funeral of the deceased and of obtaining probate of his will or letters of administration of his estate or a certificate under this Act,
- (b) the payment of wages due for services rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant,
- (c) the relief of the immediate necessities of the family of the deceased and,
- (d) such acts as may be necessary for the proper care and management of the assets left by the deceased,

and nothing in section 279, section 280 or section 281 of the Indian Succession Act, 1865,⁴ or in any other law for the time being in force with respect to rights of priority of creditors of deceased persons shall be held to affect the validity of any payment so caused to be made.

Succession Act and Companies Act not to affect Administrator-General, and saving of provisions of Presidency Police Acts as to petty estates.

55. (1) Nothing contained in the Indian Succession Act, 1865, or the Indian Companies Act, 1882, shall be taken to supersede or affect the rights, duties and privileges of any Administrator-General.

(2) Nothing contained in the Indian Succession Act, 1865, or in this Act shall be deemed to affect, or to have affected, any law for the time being in force

Leg Ref.

¹ Inserted by Order in Council, 1937

² Substituted by *ibid*

³ See now S. 269 of the Indian Succession

Act (XXXIX of 1925).

⁴ For corresponding sections of the new Act, see Ss. 320, 321, and 322 of Act XXXIX of 1925.

relating to the movable property under two hundred rupees in value or persons dying intestate within any of the Presidency-towns [* *]¹ which shall be or has been taken charge of by the police for the purpose of safe custody.

Order of Court to be equivalent to decree.

56. Any order made under this Act by any Court shall have the same effect as a decree.

57. Notwithstanding anything in this Act, or in any other law for the time being in force, the Governor-General in Council may, by general or special order, direct that, where a subject of a foreign State dies in British India, and it appears that there is no one in British India other than the Administrator-General, entitled to apply to a Court of a competent jurisdiction for letters of administration of the estate of the deceased, letters of administration shall, on the application to such Court of any Consular Officer of such foreign State, be granted to such Consular Officer on such terms and conditions as Court may, subject to any rules made in this behalf by the Governor-General in Council by notification in the Gazette of India, think fit to impose.

58. [* * *],¹

Saving of provisions of Indian Registration Act, 1908

59. Nothing in this Act shall be deemed to affect the provisions of the Indian Registration Act, 1908.

259-A. [New.] [The amendments of this Act which come into force on the commencement of Part III of the Government of India Act, 1935, shall not affect the jurisdiction of

Saving.

any Court with respect to any proceedings then pending before it and shall not be construed as transferring the administration of any property or estate then in the hands of any Administrator-General to any other Administrator-General]

Repeals.

60. The enactments specified in the Schedule are hereby repealed to the extent specified in the third

column thereof:

Provided that any administration, by or in pursuance of any Act hereby repealed, committed to any Administrator-General at the commencement of this Act shall be deemed to be committed to the Administrator-General under this Act.

THE SCHEDULE.

ENACTMENTS REPEALED.

[Repealed by the Repealing Act, 1927 (XII of 1927).]

THE AGRICULTURAL PRODUCE (GRADING AND MARKING) ACT (I OF 1937).

[24th Feb. 1937.

An Act to provide for the grading and marking of agricultural produce.

WHEREAS it is expedient to provide for the grading and marking of agricultural produce; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE AGRICULTURAL PRODUCE (GRADING AND MARKING) ACT, 1937.

Leg. Ref.

¹ Omitted by Order in Council, 1937.

² This section has been newly inserted by Order in Council, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas but excluding Burma.

Explanations

2. In this Act, unless the contrary appears from the subject or context,—

(a) "agricultural produce" includes all produce of agriculture or horticulture and all articles of food or drink wholly or partly manufactured from any such produce, and fleeces and the skins of animals;

(b) "counterfeit" has the meaning assigned to that word by section 28 of the Indian Penal Code;

(c) "covering" includes any vessel, box, crate, wrapper, tray or other container;

(d) "grade designation" means a designation prescribed as indicative of the quality of any scheduled article;

(e) "grade designation mark" means a mark prescribed as representing a particular grade designation;

(f) "quality", in relation to any article, includes the state and condition of the article;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "scheduled article" means an article included in the Schedule; and

(i) an article is said to be marked with a grade designation mark, if the article itself is marked with a grade designation mark or any covering containing or label attached to such article is so marked.

Prescription of grade designations.

3. The Governor-General in Council may, after previous publication by notification in the Gazette of India, make rules—

(a) fixing grade designations to indicate the quality of any scheduled article;

(b) defining the quality indicated by every grade designation;

(c) specifying grade designation marks to represent particular grade designations;

(d) authorising a person or a body of persons, subject to any prescribed conditions, to mark with a grade designation mark any article in respect of which such mark has been prescribed or any covering containing or label attached to any such article;

(e) specifying the conditions referred to in clause (d) including in respect of any article conditions as to the manner of marking, the manner in which the article shall be packed, the type of covering to be used, and the quantity by weight, number or otherwise to be included in each covering;

(f) providing for the payment of any expenses incurred in connection with the manufacture or use of any implement necessary for the re-production of a grade designation mark or with the manufacture or use of any covering or label marked with a grade designation mark; and

(g) providing for the confiscation and disposal of produce marked otherwise than in accordance with the prescribed conditions with a grade designation mark.

Penalty for unauthorised marking with grade designation mark

rupees

4. Whoever marks any scheduled article with a grade designation mark, not being authorised to do so by rule made under section 3, shall be punishable with fine which may extend to five hundred

5. Whoever counterfeits any grade designation mark or has in his possession any die, plate or other instrument for the purpose of counterfeiting a grade designation mark shall be punishable with imprisonment which may extend to two years, or with fine, or with both.

Penalty for counterfeiting grade designation mark.

6. The Governor-General in Council, after such consultation as he thinks fit of the interests likely to be affected, may by notification in the Gazette of India declare that the provisions of this Act shall apply to an article of agricultural produce not included in the Schedule, and on the publication of such notification such article shall be deemed to be included in the Schedule.

THE SCHEDULE.

(See section 2.)

- | | |
|-------------------|---------------------|
| 1. Fruit | 5. Tobacco. |
| 2. Vegetables. | 6. Coffee. |
| 3. Eggs | 7. Hides and Skins. |
| 4. Dairy produce. | |

THE AGRICULTURISTS' LOANS ACT (XII OF 1884).

Prefatory Note.—In a country like India, where agriculture is the main source of income for the vast majority of the people, and the income from which source contributes by far the largest portion of the revenues of State, the progress of agriculture is one of the main concerns of Government

The poverty of the people engaged in agriculture necessitates the advance of loans by the Government to the raiyats engaged in the cultivation of land, for necessary agricultural purposes, as for instance, for purchase of seed and ploughing cattle in proper seasons, and for obtaining other agricultural implements.

The legislature has therefore provided for the granting of such loans on moderate and reasonable rates of interest and for their recovery in small instalments, spread over a number of years. But for such help, these poor raiyats, many of them illiterate, would fall into the hands of greedy and usurious money-lenders. This Act as well as the Northern India Takkavi Act were passed for the purpose of giving relief to agriculturists by grant of loans from Government funds for purposes connected with cultivation

Effect of Legislation.

| Year | No | Short title | How repealed or otherwise affected by legislation |
|------|-----|--------------------------------------|---|
| 1884 | XII | The Agriculturists' Loans Act, 1884. | S 4 Am Act VIII of 1906, Act IV of 1914. Rep except Ss. 1, 4, 5 6, in talukas of Nurgur, Albaka and Cherla, Reg I of 1909, S. 3 (2) Declared in force in Upper Burma (except the Shan States), Act XIII of 1898, S 4 S 2 declared in force in British Baluchistan, Reg. II of 1913, S. 3 Declared in force in the Arakan Hill District, Reg I of 1916 S 2. S. 2 declared in force in British Baluchistan, Reg II of 1913, S. 3. |

[24th July, 1884.

An Act to amend and provide for the extension of the Northern India Takkavi Act, 1879.

WHEREAS it is expedient to amend the Northern India Takkavi Act, 1879, and provide for its extension to any part of British India; It is hereby enacted as follows:—

1. (1) This Act may be called THE AGRICULTURISTS' LOANS ACT, 1884; and

Short title.

Commencement. (2) It shall come into force on the first day of August, 1884.

Local extent. 2. (1) This section and section 3 extend to the whole of British India

(2) The rest of this Act extends in the first instance only to the territories respectively administered by the Governor of Bombay in Council, the Lieutenant-Governors of the North-Western Provinces and the Punjab, and the Chief Commissioners of Oudh, the Central Provinces, Assam and Ajmere.

(3) But ¹[any provincial Government] may, from time to time, by notification in the Official Gazette, extend the rest of this Act to the whole or any part of the territories under its administration.²

3. (1) On and from the day on which this Act comes into force, the Northern India Takkavi Act, 1879, and sections 4 and 5 of the Bombay Revenue Jurisdiction Act, 1880, shall, except as regards the recovery of advances made before this Act comes into force and of the interest

thereon, be repealed.

(2) All rules made under those Acts shall be deemed to be made under this Act.

4. (1) The Local Government [or in a Province for which there is a Board of Revenue, or Financial Commissioner, such Board or Financial Commissioner subject to the control of the Local Government]³ may, from time to time, [* * *]⁴ make rules as to loans to be made to owners and occupiers of arable land for the relief of distress, the purchase of seed or cattle, or any other purpose not specified in the Land Improvement Loans Act, 1883, but connected with agricultural objects.

(2) All such rules shall be published in the local official Gazette.

5. Every loan made in accordance with such rules, all interest (if any) chargeable thereon, and costs (if any) incurred in making or recovering the same, shall when they become due, be recoverable from the person to whom the loan was made, or from any person who has become surety for the repayment thereof, as if they were arrears of land-revenue or costs incurred in recovering the same due by the person to whom the loan was made or by his surety.

6. When a loan is made under this Act to the members of a village community or to any other persons on such terms that all of them are jointly and severally bound to the Government for the payment of the whole amount payable in respect thereof, and a statement showing the portion of that amount which as among themselves each is bound to contribute is entered upon the order granting the loan and is signed, marked, or sealed by each of them or his agent duly authorized in this behalf and by the officer making the order, that statement shall be conclusive evidence of the portion of that amount which as among themselves each of those persons is bound to contribute.

Leg Ref.

¹ Substituted by Order in Council, 1937

² The Act has been declared in force in the whole of Upper Burma (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898) Burma Code, S. 2 of the Act was previously declared in force by notification under S. 5 of the Scheduled Districts Act, 1874 (XIV of 1874), see *Burma Gazette*, 1896, Pt. I, p. 112, and under that section, Ss. 4, 5 and 6 of the Act were extended there, see *ibid.*, p. 121

It has been declared in force in the Angul District by notification under S. 3 (2) of the

Angul District Regulations, 1891 (Beng. Code), see *Calcutta Gazette*, 1896, Pt. I, p. 1231.

³ Inserted by Act IV of 1914, S. 4 (1).

⁴ The words "with the previous sanction of the Governor-General in Council" subsequently altered into "subject to the control" by Act VII of 1906 were omitted by Act IV of 1914

Notes.

Sec 5 —Claim under S. 5 not cognizable by Civil Court. 19 A.L.J. 360.

Even by sale 26 A. 540; 29 C. 537; 22 A. 321.

THE INDIAN AIRCRAFT ACT (XXII OF 1934).

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[19th August, 1934.]

An Act to make better provision for the control of the manufacture, possession, use, operation, sale, import and export of aircraft.

WHEREAS it is expedient to make better provision for the control of the manufacture, possession, use, operation, sale, import and export of aircraft. It is hereby enacted as follows:—

Short title and extent 1. (1) This Act may be called THE INDIAN AIRCRAFT ACT, 1934.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

Definitions. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "aircraft" means any machine which can derive support in the atmosphere from reactions of the air, and includes balloons whether fixed or free, airships, kites, gliders and flying machines;

(2) "aerodrome" means any definite or limited ground or water area intended to be used, either wholly or in part, for the landing or departure of aircraft, and includes all buildings, sheds, vessels, piers, and other structures thereon or appertaining thereto;

(3) "import" means bringing into British India, and

(4) "export" means taking out of British India.

3. The Governor-General in Council may, by notification in the *Gazette of India*, exempt from the provisions of this Act and of the rules made thereunder, or from any of such provisions, any aircraft or class of aircraft and any person or class of persons, or may direct that such provisions shall apply to such aircraft or persons subject to such modifications as may be specified in the notification.

4. The Governor-General in Council may, by notification in the *Gazette of India*, make such rules as appear to him to be necessary for carrying out the Convention relating to the regulation of Aerial Navigation signed at Paris, October 13, 1919, with Additional Protocol, signed at Paris, May 1, 1920, and any amendment which may be made thereto under the provisions of Article 34 thereof.

Power of Governor-General in Council to make rules.

5. (1) The Governor-General in Council may, by notification in the *Gazette of India*, make rules regulating the manufacture, possession, use, operation, sale, import or export of any aircraft or class of

aircraft

(2) Without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the authorities by which any of the powers conferred by or under this Act are to be exercised;

(b) the licensing, inspection and regulation of aerodromes, the conditions under which aerodromes may be maintained and the fees which may be charged thereat, and the prohibition or regulation of the use of unlicensed aerodromes;

(c) the inspection and control of the manufacture, repair and maintenance of aircraft and of places where aircraft are being manufactured, required or kept;

(d) the registration and marking of aircraft;

(e) the conditions under which aircraft may be flown, or may carry passengers, mails or goods; or may be used for industrial purposes and the certificates, licences or documents to be carried by aircraft;

(f) the inspection of aircraft for the purpose of enforcing the provisions of this Act and the rules thereunder, and the facilities to be provided for such inspection;

(g) the licensing of persons employed in the operation, manufacture, repair or maintenance of aircraft;

(h) the air-routes by which and the conditions under which aircraft may enter or leave British India, or may fly over British India, and the places at which aircraft shall land;

(i) the prohibition of flight by aircraft over any specified area, either absolutely or at specified times or subject to specified conditions and exceptions;

(j) the supply, supervision and control of air-route beacons, aerodrome lights, and lights at or in the neighbourhood of aerodromes or on or in the neighbourhood of air-routes;

(k) the signals to be used for purposes of communication by or to aircraft and the apparatus to be employed in signalling;

(l) the prohibition and regulation of the carriage in aircraft of any specified article or substance;

(m) the measures to be taken and the equipment to be carried for the purpose of ensuring the safety of life;

(n) the issue and maintenance of log-books;

(o) the manner and conditions of the issue or renewal of any licence or certificate under the Act or the rules, the examinations and tests to be undergone in connection therewith, the form, custody, production, endorsement, cancellation, suspension or surrender of such licence or certificate, or of any log-books;

(p) the fees to be charged in connection with any inspection, examination, test, certificate or licence, made, issued or renewed under this Act;

(q) the recognition for the purposes of this Act of licences and certificates issued elsewhere than in British India relating to aircraft or to the qualifications of persons employed in the operation, manufacture, repair or maintenance of aircraft; and

(r) any matter subsidiary or incidental to the matters referred to in this sub-section.

Power of Governor-General in Council to make orders in emergency.

6. (1) If the Governor-General in Council is of opinion that in the interests of the public safety or tranquillity the issue of all or any of the following orders is expedient, he may, by notification in the

Gazette of India,—

(a) cancel or suspend, either absolutely or subject to such conditions as he may think fit to specify in the order, all or any licences or certificates issued under this Act;

(b) prohibit, either absolutely or subject to such conditions as he may think fit to specify in the order, or regulate in such manner, as may be contained in the order, the flight of all or any aircraft or class of aircraft over the whole or any portion of British India;

(c) prohibit, either absolutely or conditionally, or regulate the erection, maintenance or use of any aerodrome, aircraft factory, flying-school or club, or place where aircraft are manufactured, repaired or kept, or any class or description thereof; and

(d) direct that any aircraft or class of aircraft or any aerodrome, aircraft factory, flying-school or club, or place where aircraft are manufactured, repaired or kept, together with any machinery, plant, material or things used for the operation, manufacture, repair or maintenance of aircraft shall be delivered, either forthwith or within a specified time, to such authority and in such manner as he may specify in the order, to be at the disposal of His Majesty for the public service.

(2) Any person who suffers direct injury or loss by reason of any order made under clause (c) or clause (d) of sub-section (1) shall be paid such compensation as may be determined by such authority as the Governor General in Council may appoint in this behalf.

(3) The Governor General in Council may authorize such steps to be taken to secure compliance with any order made under sub-section (1) as appear to him to be necessary.

(4) Whoever knowingly disobeys, or fails to comply with, or does any act in contravention of, an order made under sub-section (1) shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both and the Court by which he is convicted may direct that the aircraft or thing (if any) in respect of which the offence has been committed, or any part of such thing, shall be forfeited to His Majesty.

7 (1) The Governor General in Council may, by notification in the *Gazette of India*, make rules providing for the investigation of any accident arising out of or in the course of air navigation in or over British India.

Power of Governor General in Council to make rules for investigation of accidents

(2) Without prejudice to the generality of the foregoing power, such rules may—

(a) require notice to be given of any accident in such manner and by such person as may be prescribed;

(b) apply for the purposes of such investigation, either with or without modification, the provisions of any law for the time being in force relating to the investigation of accidents;

(c) prohibit pending investigation access to or interference with aircraft to which an accident has occurred, and authorize any person so far as may be necessary for the purposes of an investigation to have access to, examine, remove, take measures for the preservation of, or otherwise deal with any such aircraft; and

(d) authorize or require the cancellation, suspension, endorsement or surrender of any licence or certificate granted or recognized under this Act when it appears on an investigation that the licence ought to be so dealt with, and provide for the production of any such licence for such purpose.

8. (1) Any authority authorized in this behalf by the Governor-General in

Power to detain aircraft. Council may detain any aircraft, if in the opinion of such authority—

(a) having regard to the nature of an intended flight, the flight of such aircraft would involve danger to persons in the aircraft or to any other persons or property; or

(b) such detention is necessary to secure compliance with any of the provisions of this Act or the rules applicable to such aircraft, or such detention is necessary to prevent a contravention of any rule made under clause (h) or clause (i) of sub-section (2) of section 5.

(2) The Governor General in Council may, by notification in the *Gazette of India*, make rules regulating all matters incidental or subsidiary to the exercise of this power.

9. (1) The provisions of Part VII of the Indian Merchant Shipping Act, 1923, relating to Wreck and Salvage shall apply to aircraft on or over the sea or tidal waters as they apply to ships, and the owner of an aircraft shall be entitled to a reasonable reward for salvage services rendered by the aircraft in like manner as the owner of a ship.

(2) The Governor General in Council may, by notification in the *Gazette of India*, make such modifications of the said provisions in their application to aircraft as appear necessary or expedient.

10. In making any rule under section 5, section 7 or section 8 the Governor General in Council may direct that a breach of it shall be punishable with imprisonment for any term not exceeding three months, or with fine of any amount not exceeding one thousand rupees, or with both.

11. Whoever wilfully flies any aircraft in such a manner as to cause danger to any person or to any property on land or water or in the air shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

12. Whoever abets the commission of any offence under this Act or the rules, or attempts to commit such offence, and in such attempt does any act towards the commission of the offence, shall be liable to the punishment provided for the offence.

13. Where any person is convicted of an offence punishable under any rule made under clause (i) or clause (l) of sub-section (2) of section 5, the Court by which he is convicted may direct that the aircraft or article or substance, as the case may be, in respect of which the offence has been committed, shall be forfeited to His Majesty.

14. Any power to make rules conferred by this Act is subject to the condition of the rules being made after previous publication for a period of not less than three months.

15. The provisions of section 42 of the Indian Patents and Designs Act, 1911, shall apply to the use of an invention on any aircraft not registered in British India in like manner as they apply to the use of an invention in a foreign vessel.

16. The Governor General in Council may, by notification in the *Gazette of India*, declare that any or all of the provisions of the Sea Customs Act, 1878, shall, with such modifications and adaptations as may be specified in the notification, apply to the import and export of goods by air.

17. No suit shall be brought in any Civil Court in respect of trespass or in respect of nuisance by reason only of the flight of aircraft over any property at a height above the ground which having regard to wind, weather and all the circumstances of the case is reasonable, or by reason only of the ordinary incidents of such flight.

18. No suit, prosecution or other legal proceeding shall lie against any person for anything in good faith done or intended to be done under this Act.

19. (1) Nothing in this Act or in any order or rule made thereunder shall apply to or in respect of any aircraft belonging to or exclusively employed in His Majesty's naval, military or air forces, or to any person in such forces employed in connection with such aircraft.

(2) Nothing in this Act or in any order or rule made thereunder shall apply to or in respect of any lighthouse to which the Indian Lighthouse Act, 1927, applies or prejudice or affect any right or power exercisable by any authority under that Act.

20. The Indian Aircraft Act, 1921, the entry relating thereto in the First Schedule to the Repealing and Amending Act, 1914, and the Indian Aircraft (Amendment) Act, 1914, are hereby repealed.

THE ANAND MARRIAGE ACT (VII OF 1909).¹

Prefatory Note Reasons for the passing of the Act.—The Anand Marriage Act, 1909, was passed in order to remove all doubts as to the validity of the marriage ceremony common among the Sikhs called "Anand". The object of this Act was to set at rest doubts as to the validity of the marriage rite of the Sikhs called "Anand". This form of marriage had long been practised among the Sikhs, but it was apprehended that there were good reasons to believe that, in the absence of a validating enactment, doubts might be thrown upon it, and the Sikhs might have had to face great difficulties in the future, and incur heavy expenses on suits instituted in the Civil Courts. It was also apprehended that, in the absence of such a law, some judicial officers might be uncertain as to the validity of this orthodox Sikh custom. It was therefore thought desirable that all doubts should be set at rest for the future, by passing this enactment, which merely validates an existing rite and involves no new principle. See Statement of Objects and Reasons.

[22nd October, 1909.]

An Act to remove doubts as to the validity of the marriage ceremony common among the Sikhs called Anand.

WHEREAS it is expedient to remove any doubts as to the validity of the marriage ceremony common among the Sikhs called Anand; It is hereby enacted as follows:

1. (1) This Act may be called THE ANAND MARRIAGE ACT, 1909; and
- (2) It extends to the whole of British India.
2. All marriages which may be or may have been duly solemnized according to the Sikh marriage ceremony called Anand shall be, and shall be deemed to have been with effect from the date of the solemnization of each respectively, good and valid in law.
3. Nothing in this Act shall apply to—
 - (a) any marriage between persons not professing the Sikh religion, or
 - (b) any marriage which has been judicially declared to be null and void.
4. Nothing in this Act shall affect the validity of any marriage duly solemnized according to any other marriage ceremony customary among the Sikhs.

Leg. Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1908, Pt. V, p. 357; for Report of Select Committee, see *ibid.*,

1909, Pt. V, p. 1034, and for Proceedings in Council, see *ibid.*, 1908, Pt. VI, p. 156; and *ibid.*, 1909, Pt. VI, pp. 156, 161 and 165.

Non-validation of marriages within prohibited degrees.

5. Nothing in this Act shall be deemed to validate any marriage between persons who are related to each other in any degree of consanguinity or affinity which would, according to the customary law of the Sikhs, render a marriage between them illegal.

THE ANCIENT MONUMENTS PRESERVATION ACT (VII OF 1904).¹

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Effect of Legislation.

| Year. | No. | Short title. | How repealed or otherwise affected by legislation |
|-------|-----|---|---|
| 1904. | IV | The Ancient Monuments Preservation Act, 1904. | Amended Act XVIII of 1932. |

[18th March, 1901.

An Act to provide for the preservation of Ancient Monuments and of objects of archaeological, historical or artistic interest.

WHEREAS it is expedient to provide for the preservation of ancient monuments, for the exercise of control over traffic in antiquities and over excavation in certain places, and for the protection and acquisition in certain cases of ancient monuments and of objects of archaeological, historical or artistic interest; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE ANCIENT MONUMENTS PRESERVATION ACT, 1904.

Leg Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1903, Pt V, p. 513; for Report of Select Committee, see *ibid.*,

1904, Pt V, p. 57; and for Proceedings in Council, see *ibid.*, 1903 Pt. VI, pp. 166, 191; *ibid.*, 1904, Pt VI, pp. 20 and 76.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Sonthal Parganas and the Pargana of Spiti.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) “ancient monument” means any structure, erection or monument, or any tumulus or place of interment, or any cave, rock-sculpture, inscription or monolith, which is of historical, archaeological or artistic interest, or any remains thereof, and includes—

(a) the site of an ancient monument;

(b) such portion of land adjoining the site of an ancient monument as may be required for fencing or covering in or otherwise preserving such monument, and

(c) the means of access to and convenient inspection of an ancient monument;

(2) “antiquities” include any movable objects which the ¹[Central Government] by reason of their historical or archaeological associations, may think it necessary to protect against injury, removal or dispersion;

(3) “Commissioner” includes any officer authorized by the ¹[Central Government] to perform the duties of a Commissioner under this Act:

(4) “maintain” and “maintenance” include the fencing, covering in repairing, restoring and cleansing of a protected monument, and the doing of any act which may be necessary for the purpose of maintaining a protected monument or of securing convenient access thereto:

(5) “land” includes a revenue-free estate, a revenue-paying estate, and a permanent transferable tenure, whether such estate or tenure be subject to incumbrances or not: and

(6) “owner” includes a joint owner invested with powers of management on behalf of himself and other joint owners, and any manager or trustee exercising powers of management over an ancient monument, and the successor in title of any such owner and the successor in office of any such manager or trustee:

Provided that nothing in this Act shall be deemed to extend the powers which may lawfully be exercised by such manager or trustee.

3 (1) The ¹[Central Government] may, by notification² in the local official Gazette, declare an ancient monument to be a

Protected monuments protected monument within the meaning of this Act

(2) A copy of every notification published under sub-section (1) shall be fixed up in a conspicuous place on or near the monument, together with an intimation that any objections to the issue of the notification received by the ¹[Central Government] within one month from the date when it is so fixed up will be taken into consideration.

(3) On the expiry of the said period of one month, the ¹[Central Government] after considering the objections, if any, shall confirm or withdraw the notification

(4) A notification published under this section shall, unless and until it is withdrawn, be conclusive evidence of the fact that the monument to which it relates is an ancient monument within the meaning of this Act.

Ancient Monuments

Acquisition of rights in
or guardianship of an
ancient monument

4. (1) The Collector, with the sanction of the ¹[Central Government] may purchase or take a lease of any protected monument.

(2) The Collector, with the like sanction, may accept a gift or bequest of any protected monument.

Leg. Ref.

¹ Substituted by Order in Council, 1937.

² For notification under this section, see General Rules and Orders and the different Local Rules and Orders.

(3) The owner of any protected monument may, by written instrument, constitute the Commissioner the guardian of the monument, and the Commissioner may, with the sanction of the 1[Central Government] accept such guardianship.

(4) When the Commissioner has accepted the guardianship of a monument under sub-section (3), the owner shall, except as expressly provided in this Act, have the same estate, right, title and interest in and to the monument as if the Commissioner had not been constituted guardian thereof.

(5) When the Commissioner has accepted the guardianship of a monument under sub-section (3), the provisions of this Act relating to agreements executed under section 5 shall apply to the written instrument executed under the said sub-section.

(6) Where a protected monument is without an owner, the Commissioner may assume the guardianship of the monument.

5. (1) The Collector may, with the previous sanction of the 1[Central Government] propose to the owner to enter into an agreement with the 1[Central Government] for the preservation of any protected monument in his district.

(2) An agreement under this section may provide for the following matters, or for such of them as it may be found expedient to include in the agreement:—

(a) the maintenance of the monument;

(b) the custody of the monument, and the duties of any person who may be employed to watch it;

(c) the restriction of the owner's right to destroy, remove, alter or deface the monument or to build on or near the site of the monument;

(d) the facilities of access to be permitted to the public or to any portion of the public and to persons deputed by the owner or the Collector to inspect or maintain the monument;

(e) the notice to be given to the 1[Central Government] in case the land on which the monument is situated is offered for sale by the owner, and the right to be reserved to 1[Central Government] to purchase such land, or any specified portion of such land, at its market value;

(f) the payment of any expenses incurred by the owner or by the Government in connection with the preservation of the monument,

(g) the proprietary or other rights which are to vest in His Majesty in respect of the monument when any expenses are incurred by the 1[Central Government] in connection with the preservation of the monument,

(h) the appointment of an authority to decide any dispute arising out of the agreement; and

(i) any matter connected with the preservation of the monument which is a proper subject of agreement between the owner and the 1[Central Government].

(3) 2[* * *].

(4) The terms of an agreement under this section may be altered from time to time with sanction of the 1[Central Government] and with the consent of the owner.

(5) With the previous sanction of the 1[Central Government] the Collector may terminate an agreement under this section on giving six months' notice in writing to the owner.

(6) The owner may terminate an agreement under this section on giving six months' notice to the Collector.

(7) An agreement under this section shall be binding on any person claiming to be owner of the monument to which it relates, through or under a party by whom or on whose behalf the agreement was executed.

(8) Any rights acquired by ¹[Central Government] in respect of expenses incurred in protecting or preserving a monument shall not be affected by the termination of an agreement under this section.

6. (1) If the owner is unable, by reason of infancy or other disability, to act for himself, the person legally competent to act on his behalf may exercise the powers conferred upon an owner by section 5.

Owners under disability or not in possession.

(2) In the case of village-property, the headman or other village-officer exercising powers of management over such property may exercise the powers conferred upon an owner by section 5.

(3) Nothing in this section shall be deemed to empower any person not being of the same religion as the persons on whose behalf he is acting to make or execute an agreement relating to a protected monument which or any part of which is periodically used for the religious worship or observances of that religion.

7. (1) If the Collector apprehends that the owner or occupier of a monument intends to destroy, remove, alter, deface, or imperil the monument or to build on or near the site thereof in contravention of the terms of an agreement for its preservation under section 5, the Collector may make an order prohibiting any such contravention of the agreement.

Enforcement of agreement.

(2) If an owner or other person who is bound by an agreement for the preservation or maintenance of a monument under section 5 refuses to do any act which is in the opinion of the Collector necessary to such preservation or maintenance, or neglects to do any such act within such reasonable time as may be fixed by the Collector, the Collector may authorise any person to do any such act, and the expense of doing any such act or such portion of the expense as the owner may be liable to pay under the agreement may be recovered from the owner as if it were an arrear of land-revenue.

(3) A person aggrieved by an order made under this section may appeal to the Commissioner, who may cancel or modify it and whose decision shall be final.

8. Every person who purchases, at a sale for arrears of land-revenue or any other public demand, or at a sale made under the Bengal Patni Taluks Regulation, 1819, an estate or tenure in which is situated a monument in respect of which any instrument has been executed by the owner for the time being, under section 4 or section 5, and every person claiming any title to a monument from, through or under an owner who executed any such instrument, shall be bound by such instrument.

Purchasers at certain sales and persons claiming through owner bound by instrument executed by owner.

9. (1) If any owner or other person competent to enter into an agreement under section 5 for the preservation of a protected monument, refuses or fails to enter into such an agreement when proposed to him by the Collector, and if any endowment has been created for the purpose of keeping such monument in repair, or for that purpose among others, the Collector may institute a suit in the Court of the District Judge, or, if the estimated cost of repairing the monument does not exceed one thousand rupees, may make an application to the District Judge for the proper application of such endowment or part thereof.

Application of endowment to repair of an ancient monument

Leg. Ref.

¹ Substituted by Order in Council, 1937,

(2) On the hearing of an application under sub-section (1), the District Judge may summon and examine the owner and any person whose evidence appears to him necessary, and may pass an order for the proper application of the endowment or of any part thereof, and any such order may be executed as if it were the decree of a Civil Court.

10. (1) If the 1[Central Government] apprehends that a protected monument is in danger of being destroyed, injured or allowed to fall into decay, 1[the Central Government] may direct the provincial Government to acquire it] under the provisions of the Land Acquisition Act, 1894, as to the preservation of a protected monument were a "public purpose" within the meaning of that Act.

(2) The powers of compulsory purchase conferred by sub-section (1) shall not be exercised in the case of—

(a) any monument which or any part of which is periodically used for religious observances; or

(b) any monument which is the subject of a subsisting agreement executed under section 5.

(3) In any case other than the cases referred to in sub-section (2) the said powers of compulsory purchase shall not be exercised unless the owner or other person competent to enter into an agreement under section 5 has failed, within such reasonable period as the Collector may fix in this behalf, to enter into an agreement proposed to him under the said section or has terminated or given notice of his intention to terminate such an agreement.

10-A. (1) If the 1[Central Government] is of opinion that mining, quarrying, excavating, blasting and other operations of a like nature should be restricted or regulated for the purpose of protecting or preserving any ancient monument, the 1[Central Government] may by notification in the local official Gazette, make rules—

(a) fixing the boundaries of the area to which the rules are to apply.

(b) forbidding the carrying on of mining, quarrying, excavating, blasting or any operation of a like nature except in accordance with the rules and with the terms of a licence, and

(c) prescribing the authority by which, and the terms on which, licences may be granted to carry on any of the said operations.

(2) The power to make rules given by this section is subject to the condition of the rules being made after previous publication.

(3) A rule made under this section may provide that any person committing a breach thereof shall be punishable with fine which may extend to two hundred rupees.

(4) If any owner or occupier of land included in a notification under sub-section (1) proves to the satisfaction of the 1[Central Government] that he has sustained loss by reason of such land being so included, the Local Government shall pay compensation in respect of such loss.

11. (1) The Commissioner shall maintain every monument in respect of which the Government has acquired any of the right mentioned in section 4 or which the Government has acquired under section 10.

(2) When the Commissioner has accepted the guardianship of a monument under section 4, he shall, for the purpose of maintaining such monument,

Leg. Ref.

¹ Substituted by Order in Council, 1937.

Notes.

Sec. 10-A.—S. 10-A was inserted by the Amending Act, XVIII of 1932. S. 20 was also recast by that Act. The object of the

Amending Act was "to empower the Government (i) to control excavations by or enlist the aid of the archaeologists, Indian or foreign, outside the Department and (ii) to regulate the disposal of antiquities found by such agencies". Vide *Gazette of India*, dated 8th October, 1932.

have access to the monument at all reasonable times, by himself and by his agents, subordinates and workmen, for the purpose of inspecting the monument, and for the purpose of bringing such materials and doing such acts as he may consider necessary or desirable for the maintenance thereof.

12. The Commissioner may receive voluntary contributions towards the cost of maintaining a protected monument and may give orders as to the management and application of any funds so received by him:

Provided that no contribution received under this section shall be applied to any purpose other than the purpose for which it was contributed.

13. (1) A place of worship or shrine maintained by the Government under this Act shall not be used for any purpose inconsistent with its character.

(1) Where the Collector has, under section 4, purchased or taken a lease of any protected monument, or has accepted a gift or bequest, or the Commissioner has, under the same section, accepted the guardianship thereof, and such monument, or any part thereof, is periodically used for religious worship or observances by any community, the Collector shall make due provision for the protection of such monument, or such part thereof, from pollution or desecration—

(a) by prohibiting the entry therein, except in accordance with conditions prescribed with the concurrence of the persons in religious charge of the said monument or part thereof, of any person not entitled so to enter by the religious usages of the community by which the monument or part thereof is used, or

(b) by taking such other action as he may think necessary in this behalf.

14. With the sanction of the 1[Central Government] the Commissioner may—

(a) where rights have been acquired by 1[Central Government] in respect of any monument under this Act by virtue of any sale, lease, gift or will, relinquish the rights so acquired to the person who would for the time being be the owner of the monument if such rights had not been acquired; or

(b) relinquish any guardianship of a monument which he has accepted under this Act.

15. (1) Subject to such rules as may, after previous publication, be made by the 1[Central Government] the public shall have a right of access to any monument maintained by the 1[Central Government] under this Act.

(2) In making any rule under sub-section (1) the 1[Central Government] may provide that a breach of it shall be punishable with fine which may extend to twenty rupees.

16. Any person other than the owner who destroys, removes, injures, alters, defaces or imperils a protected monument, and any owner who destroys, removes, injures, alters, defaces or imperils a monument maintained by 1[the Central Government] under this Act or in respect of which an agreement has been executed under section 5, and any owner or occupier who contravenes an order made under section 7, sub-section (1), shall be punishable with fine which may extend to five thousand rupees, or with imprisonment which may extend to three months, or with both.

Traffic in Antiquities.

17. (1) If the Governor-General in Council apprehends that antiquities

Power to Governor-General in Council to control traffic in antiquities.

are being sold or removed to the detriment of India or of any neighbouring country, he may, by notification¹ in the *Gazette of India*, prohibit or restrict the bringing or taking by sea or by land of any antiquities or class of antiquities described in the notification into or out of British India or any specified part of British India.

(2) Any person who brings or takes or attempts to bring or take any such antiquities into or out of British India or any part of British India in contravention of a notification issued under sub-section (1), shall be punishable with fine which may extend to five hundred rupees.

(3) Antiquities in respect of which an offence referred to in sub-section (2) has been committed shall be liable to confiscation.

(4) An officer of Customs, or an officer of Police of a grade not lower than Sub-Inspector, duly empowered by the ²[Central Government] in this behalf, may search any vessel, cart or other means of conveyance, and may open any baggage or package of goods, if he has reason to believe that goods in respect of which an offence has been committed under sub-section (2) are contained therein.

(5) A person who complains that the power of search mentioned in sub-section (4) has been vexatiously or improperly exercised may address his complaint to the ²[Central Government] and the ²[Central Government] shall pass such order and may award such compensation, if any, as appears to it to be just.

Protection of Sculptures, Carvings, Images, Bas-reliefs, Inscriptions, or like objects.

18. (1) If the ²[Central Government] considers that any sculptures, car-

Power to ²[Central Government] to control moving of sculptures, carvings or like objects.

vings, images, bas-reliefs, inscriptions or other like objects ought not to be moved from the place where they are without the sanction of the ²[Central Government] the ²[Central Government] may, by notification³ in the local official Gazette, direct that any

subject or any class of such objects shall not be moved unless with the written permission of the Collector.

(2) A person applying for the permission mentioned in sub-section (1) shall specify the object or objects which he proposes to move, and shall furnish, in regard to such object or objects, any information which the Collector may require.

(3) If the Collector refuses to grant such permission, the applicant may appeal to the Commissioner, whose decision shall be final.

(4) Any person who moves any object in contravention of a notification issued under sub-section (1), shall be punishable with fine which may extend to five hundred rupees.

(5) If the owner of any property proves to the satisfaction of the ²[Central Government] that he has suffered any loss or damage by reason of the inclusion of such property in a notification published under sub-section (1), the ²[Central Government] shall either—

(a) exempt such property from the said notification;

(b) purchase such property, if it be movable, at its market-value; or

(c) pay compensation for any loss or damage sustained by the owner of such property, if it be immovable.

Leg. Ref.

¹ Notification No. 110, dated 28th May, 1917, *Gazette of India*, 1917, Pt. I, p. 989; and notification No. 1385, dated 8th July, 1924, *ibid.*, 1924, Pt. I, p. 641, Genl. R. & O., Vol. III.

² Substituted by Order in Council, 1937.

³ For notification by the Government of—

(1) Bengal, see *Calcutta Gazette*, 1908, Pt. I, p. 1248, and *ibid.*, 1909 Pt. I, p. 23; and p. 957 as to Gaya District.

(2) Central Provinces, see *C. P. Gazette*, 1906, Pt. III, p. 616;

(3) Chief Commissioner, N.-W. F. P. see *Gazette of India*, 1909, Pt. II, p. 1554;

(4) Burma, see *Burma Gazette*, Pt. I, p. 596.

19. (1) If the ¹[Central Government] apprehends that any object mentioned in a notification issued under section 18, sub-section (1), is in danger of being destroyed, removed, injured or allowed to fall into decay, the ¹[Central Government] may pass orders for the compulsory purchase of such object at its market value, and the Collector shall thereupon give notice to the owner of the object to be purchased.

(2) The power of compulsory purchase given by this section shall not extend to—

(a) any image or symbol actually used for the purpose of any religious observance; or

(b) anything which the owner desires to retain on any reasonable ground personal to himself or to any of his ancestors or to any member of his family.

Archaeological Excavation.

²[20. (1) If the Governor-General in Council, ³[* * *] is of opinion that excavation for archaeological purposes in any area should be restricted and regulated in the interests of archaeological research, the Governor-General in Council may, by notification⁴ in the Gazette of India specifying the boundaries of the area, declare it to be a protected area.

(2) From the date of such notification all antiquities buried in the protected area shall be the property of the Government and shall be deemed to be in the possession of ¹[the crown] and shall remain the property and in the possession of Government until ownership thereof is transferred; but in all other respects the rights of any owner or occupier of land in such area shall not be affected.

20-A. (1) Any officer of the Archaeological Department or any person holding a licence under section 20-B may, with the written permission of the Collector, enter upon and make excavations in any protected area.

(2) Where, in the exercise of the power conferred by sub-section (1), the rights of any person are infringed by the occupation or disturbance of the surface of any land, ¹[the Central Government] shall pay to that person compensation for the infringement.

Power of Governor-General in Council to make rules regulating archaeological excavation in protected areas.

20-B. (1) The Governor-General in Council may make rules—

(a) prescribing the authorities by whom licenses to excavate for archaeological purposes in a protected area may be granted;

(b) regulating the conditions on which such licenses may be granted, the form of such licenses, and the taking of security from licensees;

(c) prescribing the manner in which antiquities found by a licensee shall be divided between ¹[the Central Government] and the licensee; and

(d) generally to carry out the purposes of section 20.

(2) The power to make rules given by this section is subject to the condition of the rules being made after previous publication.

Leg. Ref.

¹ Substituted by Order in Council, 1937.

² New Ss. 20, 20-A, 20-B and 20-C were substituted for the old S. 20 by the Amending Act, XVIII of 1932.

³ Omitted by Order in Council, 1937.

⁴ For notification by the Government of—

(1) Central Provinces, *See* C. P. Gazette,

1906, Pt. III, p. 617

(2) Madras, *See* Madras R. and O.

(3) Bengal, *See* Calcutta Gazette, 1909, Pt. I, pp. 703 and 1642.

(4) Burma, *See* Burma Gazette, 1909, Pt. I, p. 448.

(5) Bihar and Orissa, *See* B. and O. Gazette, 1914, Part II, p. 733.

(3) Such rules may be general for all protected areas for the time being, or may be special for any particular protected area or areas.

(4) Such rules may provide that any person committing a breach of any rule or of any condition of a licence shall be punishable with fine which may extend to five thousand rupees, and may further provide that where the breach has been by the agent or servant of a licensee, the licensee himself shall be punishable.

20-C. If the Governor-General in Council is of opinion that a protected area contains an ancient monument or antiquities of national interest and value, he may direct the Local Government to acquire such area, or any part thereof, and the Local Government may thereupon acquire such area or part under the Land Acquisition Act, 1894, as for a public purpose.]

General.

21. (1) The market-value of any property which Government is empowered to purchase at such value under this Act, or the compensation to be paid by Government in respect of anything done under this Act, shall, where any dispute arises in respect of such market-value or compensation, be ascertained in the manner provided by the Land Acquisition Act, 1894, sections 3, 8 to 34, 45 to 47, 51, and 52, so far as they can be made applicable:

Provided that when making an inquiry under the said Land Acquisition Act, 1894, the Collector shall be assisted by two assessors, one of whom shall be a competent person nominated by the Collector, and one a person nominated by the owner or, in case the owner fails to nominate an assessor within such reasonable time as may be fixed by the Collector in this behalf, by the Collector.

22. A Magistrate of the third class shall not have jurisdiction to try any person charged with an offence against this Act.

23. (1) The Governor-General in Council may make rules² for carrying out any of the purposes of this Act.

(2) The power to make rules given by this section is subject to the condition of the rules being made after previous publication.

24. No suit for compensation and no criminal proceeding shall lie against any public servant in respect of any act done, or in good faith intended to be done, in the exercise of any power conferred by this Act.

THE APPRENTICES ACT (XIX OF 1850).

Effect of legislation.

| Year. | No. | Short title | How repealed or otherwise affected by legislation. |
|-------|-----|---------------------------|--|
| 1850. | XIX | The Apprentices Act, 1850 | Short title given, Act XIV of 1897 Rep. in pt., Act XIV of 1870; Act XIV of 1874; Act XXI of 1923. Am., Act XII of 1891. |

Leg. Ref.

¹ The words "amount of" before the word "compensation" were omitted and the words "in respect" substituted for the words "touching the amount" by the Amending Act, XVIII of 1932.

² Omitted by Order in Council, 1937.

³ For Rules made by the Government of Madras for the decipherment, publication,

and custody of Indian inscriptions on stone or copper, see Madras Local Rules and Orders.

Notes.

Sec 21 —Section applies to the purchase of movable antiquities. Regarding mode of determining compensation, see 19 Bom. L. R. 937=42 Bom. 100.

Prefatory Note—An Apprentice is a person bound in the form of law to a master, to learn from him his art, trade, or business, and to serve him during the time of his apprenticeship [1 Black. Com. 426, 2 Kent 211; *Attenuus v. Ely*, 3 Rawle (Pa) 307.]

Apprenticeship is a contract by which one person who understands some art, trade, or business, and is called the master, undertakes to teach the same to another person, commonly a minor, and called the apprentice, who, on his part, is bound to serve the master, during a definite period of time, in such art, trade, or business. The term "apprenticeship" is also used to denote the term during which an apprentice is to serve (Pardessus, *Droit Comm.* n. 34)

A contract of apprenticeship is not invalid because the master to whom the apprentice is bound is a corporation. [(1891) 1 Q.B. 75.]

At common law, an infant may bind himself apprentice by indenture, because it is for his benefit. [5 M. & S. 257, 5 D. & R. 339.] But this contract, on account of its liability to abuse, has been regulated by statute, and is not binding upon the infant unless entered into by him with the consent of the parent or guardian.

To be binding on the apprentice, the contract must be made as prescribed by statute.

Education is necessary for an infant. What particular kind of education is necessary is a matter that is settled having regard to the infant's inclinations, state of mind and condition in life. Therefore, where an infant executes an apprenticeship deed by which he covenants to pay a certain premium, and it is found that the arrangement is provident and proper and beneficial for him and that the premium is fair and reasonable, and that instruction has been given under the deed, it is held that he is liable to pay the premium, as being a necessary, and the fact that he enters into a covenant for the payment of it does not prevent his being liable. [*Waller v. Everard* (1881) 2 Q.B. 369.]

A contract of apprenticeship is generally to be regarded as for the benefit of an infant, and, therefore, he may make a legal binding contract of apprenticeship, under conditions laid down by this Act [R. v. *St. Petrox*, 4 T.R. 196.] If he could not do so, he could not be bound at all, for a father has no common law authority to bind his infant son as an apprentice without his consent. [R. v. *Arnesby*, 3 B. & Ald. 584.]

The contract of apprenticeship need not specify the particular trade to be taught, but it is sufficient if it be a contract to teach such manual occupation or branch of business as shall be found best suited to the genius or capacity of the apprentice [Fowler v. *Hollenbeck*, 9 Barb. (N.Y.) 309, *People v. Pillow*, 1 Sandf. (N.Y.) 672.]

A contract of apprenticeship, of hiring and service, may be beneficial to an infant, and would, generally speaking, be binding upon him, and may be made even with his own father or mother. [R. v. *Chillisford*, 4 B. & C. 94.] Such a contract would subject him to the statutable regulations applicable to masters and servants, although he might not be liable to any action upon the contract. For if an infant of five years of age or other person who is *non potens in corpore*, be retained and served in the best manner he can his master must pay him his wages [See *Phillips v. Jones*, 1 A. & E. 333.]

Difficult questions sometimes arise whether or not an agreement of hiring and service, of an infant is so beneficial as to be binding upon him. It is impossible to frame a deed between a master and an apprentice in which some stipulations are not in favour of the master. When any stipulation is relied upon by the infant as being unfair to him, it is the duty of the Court to decide on the construction of the whole contract, and then to say whether, as a whole, it is clearly and manifestly for the benefit of the infant. The question is whether the agreement taken as a whole is so much to the detriment of the infant as to render it unfair that he should be bound by his agreement. If there is any stipulation such as to make the whole contract an unfair one, then the whole contract is void [Corn v. *Matthews* (1893) 1 Q.B. 310. See also (1894) 2 Q.B. 65, (1894) 2 Q.B. 482.]

The duties of the master are to instruct the apprentice by teaching him the knowledge of the art which he has undertaken to teach him, though he will be excused for not making a good workman if the apprentice is incapable of learning the trade, the burden of proving which is on the master. [Barger v. *Caldwell*, 2 Dana (Ky.) 131; *Clancy v. Overman*, 18 N.C. 402.] He ought to watch over the conduct of the apprentice, giving him prudent advice and showing him a good example, and fulfilling towards him the duties of a father, as in his character of master he stands *in loco parentis*. He is also required to fulfil all the covenants he has entered into by the contract. He must not abuse his authority, either by bad treatment or by employing his apprentice in menial employments wholly unconnected with the business he has to learn, or in any service which is immoral or contrary to law. [4 Clark & F. 234; *Hall v. Gardner*, 1 Mass. 172] but may correct him with moderation for negligence and misbehaviour [Com. v. *Baird*, 1 Ashm. (Pa.) 267; 4 Keb. 661, pl. 50; *People v. Sniffen*, 1 Wheel. Cr. Cas. (N.Y.) 502.]

An apprentice is bound to obey his master in all his lawful commands, take care of his property, and promote his interest, endeavour to learn his trade or business, and perform all the conditions of his contract not contrary to law. He must not leave his master's service during the terms of his apprenticeship. [James v. *Le Roy*, 6 Johns. (N.Y.) 274, *Coffin v. Bassett*, 2 Pick. (Mass.) 357.]

Apprenticeship is a relation which cannot be assigned at common law though if under such an assignment the apprentice continue with his new master, with the consent of all the parties and his own, it will be construed as a continuation of the old apprenticeship. [See *Bowdler's Law Dictionary*, Tit. "Apprentice".]

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SCHEDULES A and B.

THE APPRENTICES ACT (XIX OF 1850).¹

[11th April, 1850.]

Concerning the binding of Apprentices.

For better enabling children, any especially orphans and poor children brought up by public charity, to learn trades, crafts and employments, by which, when they come to full

Preamble

age, they may gain a livelihood; It is enacted as follows:--

Leg. Ref.

¹ Short title, "The Apprentices Act, 1850"
See the Indian Short Titles Act, 1897 (XIV of 1897).

This Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

It has been declared in force in Upper Burma generally (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), Bur. Code, Vol. I.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:--

Sindh

West Jalpaiguri, the Western Duars, the Western Hills of Darjiling, the Darjiling Tarai, and the Damson Sub-division of the Darjiling District

The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum;

See Gazette of India, 1880, Pt. 1, p. 672.

Ditto

1881, Pt. I, p. 74.

1. Any child, above the age of ten, and under the age of eighteen years, may be bound apprentice by his or her father or guardian to learn any fit trade, craft or employment, for such term as is set forth in the contract of apprenticeship, not exceeding seven years, so that it be not prolonged beyond the time when such child shall be of the full age of twenty-one years, or, in the case of a female, beyond the time of her marriage.

Evidence of age in questions as to right to service

2. The age set forth in the contracts shall be evidence of the age of the child, in all questions which arise as to the right of the master to the continuance of the service.

3. Any Magistrate or Justice acting for orphans, etc.

Justice of the Peace may act with all the powers of a guardian under the Act, on behalf of any orphan, or poor child abandoned by its parents, or of any child convicted before him, or any other Magistrate, of vagrancy, or the commission of any petty offence.

4. An orphan or poor child brought up by public charity

may be bound apprentice by the governors, directors or managers thereof, as his or her guardians for this purpose.

5. [*Apprenticing of such boy in sea service.*] *Rep. by Act XXI of 1923.*

6. [*Apprenticing of such boy in ship of the East India Company.*] *Rep. by the Repealing Act, 1870 (XIV of 1870).*

7. [*Who to be agent of master of apprentice serving in ship.*] *Rep. by Act XXI of 1923.*

Leg Ref

and Paigana Dhalbhum and the Kolhan in the District of Singhbhum ..

See Gazette of India, 1881, Pt. I, p. 504.

The Scheduled portion of the Mirzapur District ..

Ditto 1879, Pt. I, p. 383.

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Ditto 1879, Pt. I, p. 382.

The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan [*Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the North-West Frontier Province, see Gazette of India, 1901, Pt. I, p. 857, and ibid., 1902, Pt. I, p. 575; but its application has been barred in that part of the Hazara District known as Upper Tanawal, by the Hazara (Upper Tanawal) Regulation (II of 1900, S. 3), Punjab and N.-W. Code*] ..

Ditto 1880, Pt. I, p. 48

The Scheduled Districts of the Central Provinces ..

Ditto 1879, Pt. I, p. 771.

The Scheduled Districts in Ganjam and Vizagapatam ..

Ditto 1898, Pt. I, p. 870.

The District of Sylhet ..

Ditto 1879, Pt. I, p. 631.

The rest of Assam (except the North Lushai Hills) ..

Ditto 1897, Pt. I, p. 299.

It has been extended, by notification under S. 5 of the last-mentioned Act, to the following Scheduled Districts, namely,—

Kumaon and Garhwal ..

See Gazette of India, 1876, Pt. I, p. 606

The Tarai of the Province of Agra ..

Ditto 1876, Pt. I, p. 505

It has been declared, by notification under S. 3 (b) of the same Act, not to be in force in the Scheduled Districts of Lahaul, *See Gazette of India, 1886, Pt. I, p. 301.*

Instruments of apprenticeship executed

by a Magistrate under this Act, or by which a person is apprenticed by or at the charge of a public charity, are exempted from stamp duty by the Stamp Act, 1899 (II of 1899), Sch. I, Art. No. 9,

8. Every contract of apprenticeship shall be in writing, according to the form given in the schedule (A) annexed to this Act, or to the like effect, which shall set forth the conditions agreed upon, particularly specifying the age of the apprentice, the term for which he is bound, and what he is to be taught.

Form and contents of contract of apprenticeship.

9. Every such contract shall be signed by the person to whom the apprentice is bound, and by the person by whom he is bound, and by the apprentice, when he is of the age of fourteen years or more at the time of binding; but when the apprentice is bound by the governors, directors or managers of a public charity, the signature of two of them, or of their secretary or officer shall be sufficient on behalf of the persons binding the apprentice.

Signatures to contract.

10. No such contract shall be valid unless it be executed in the manner aforesaid, nor until it has been deposited in the office of the Chief Magistrate of the place or district where it has been executed 1[*]; and the person in whose office any such contract is deposited shall give to each of the parties a copy thereof, certified under his hand, which certified copies shall be received as evidence of the contract, without formal proof of the handwriting of the Magistrate 2[*].

Contract not valid unless essential as prescribed and deposited.

Copies to be given to parties.

received as evidence of the contract, without formal proof of the handwriting of the Magistrate 2[*].

11. The terms of service may be changed at any time during the apprenticeship, or the contract may be determined, with the consent of both parties to the contract or their personal representatives, and with the consent of the apprentice if he is above the age of fourteen years:

Alteration of terms of service and termination of contract.

Provided that the changes agreed to or the termination of the contract shall be expressed in writing on the original contract, with the signature of the proper parties according to section 3[9] of this Act; and the magistrate 2[*] shall thereupon make under his hand corresponding endorsements on the office copies, which shall be brought to him at the same time for that purpose.

12. The master of any apprentice bound under this Act may, with the consent of the person by whom he was bound, and with the consent of the apprentice if he is above the age of fourteen years, assign such apprentice to any other person, who is willing to take him for the residue of his apprenticeship, and subject to the conditions thereof: Provided that such person shall by endorsement under his own hand on the contract, declare his acceptance of such apprentice, and acknowledge himself bound by the agreements and covenants therein mentioned, to be performed on the part of the master, and that the consent of the other parties aforesaid shall be expressed in writing on the same, and signed by them respectively: And every such assignment shall be certified on the office copies of the contract under the hand of the Magistrate 2[*] according to the form given in Schedule (B) annexed to this Act.

Assignment of apprentice to new master

13. Upon complaint made to any Magistrate in the said territories, by or on behalf of any apprentice bound under this Act, of refusal or neglect to provide for him, or to teach him according to the contract of apprenticeship, or of cruelty, or other ill-treatment by his master, or by the agent under whom he shall have been placed by his master, the Magistrate may

Powers of Magistrate in case of complaint by apprentice against master

Leg. Ref.

¹ The words "or, if the apprentice is bound to the sea service, in the office of the person appointed under Act X, 1841, to make registry of ships at the port where the apprentice is to begin his service" were

omitted by Act XXI of 1923.

² The words "or Registering Officer" in Ss. 10 to 12 were omitted by *ibid.*

³ The figure "9" was substituted for the figure "8" by the Amending Act, 1891 (XII of 1891).

summon the master or his agent, as the case may be, if he shall be within his jurisdiction, to appear before him at a reasonable time, to be stated in the summons, to answer the complaint,

and at such time, whether the master or his agent be present or not (service of the summons being proved), may examine into the matter of the complaint; and, upon proof thereof, may cancel the contract of apprenticeship, and assess upon the offender, whether he shall be the master or his agent, a reasonable sum for behoof of the apprentice, not exceeding four times the amount of the premium paid upon the binding, or if no premium, or a less premium than fifty rupees was paid, not exceeding two hundred rupees;

and, if the offender shall not pay the sum so assessed, may levy the same by distress and sale of his goods and chattels, and, if the offender shall not be the master but his agent, by distress and sale of the goods and chattels of the master also.

14 No contract of apprenticeship shall be cancelled, nor shall any master or his agent be liable to any criminal proceeding, on

Powers of master or his agent to chastise apprentice.

Liability of master or agent for assault, etc.

account of such moderate chastisement for misbehaviour given to any apprentice by his master or the agent of his master, as may lawfully be given by a father to his child; and the provision for enabling the

contract of apprenticeship to be cancelled shall not bar any criminal proceeding against any master or his agent for an assault or other offence committed against his apprentice, for which he would be liable to be punished had it been against his child, whether or not any proceedings be taken for cancelling the contract of apprenticeship.

15 Upon complaint made to any Magistrate, by or on behalf of the master of any apprentice bound to him under this Act, of

Power of Magistrate in case of complaint by master against apprentice.

any ill-behaviour of such apprentice, or if such apprentice shall have absconded, the Magistrate may issue his warrant for apprehending such

apprentice, and may hear and determine the complaint, and punish the offender by an order for keeping the offender, if a boy, in confinement in any debtor's prison or other suitable place, not being a criminal gaol, for any time not exceeding one month, of which one week may be in solitary confinement, during which time such allowance shall be made for his subsistence by the master or his agent as the Magistrate shall order; and, if the offender be a boy of not more than fourteen years of age, may order him to be privately whipped; or, if the offender be a girl, or in the case of any boy, the Magistrate deem any such punishment unfit, he may pass an order empowering the master of the apprentice or his agent to keep the offender in close confinement in his own house, or on board the vessel to which he belongs, upon bread and water, or such other plain food as may be given without injury to the health of the apprentice, for a period not exceeding one month.

Notes.

Sec 14—It is conceived, notwithstanding passages which may be found in the books apparently to the contrary that no master would be justified by the law of England even in moderately chastising a hired servant of full age for dereliction of duty, and that where the books speak of a master being justified in moderately chastising his servant or apprentice, they must be taken to apply only to the case of a servant or apprentice under age; and the only

civil remedies a master has for idleness, disobedience or other dereliction of duty, or breach of contract on the part of a servant are, to bring an action against him, or, as Puffendorf expressed it, "to expel the lazy drone from his family, and leave him to his own beggarly condition". The circumstances which justify the discharge of a servant will also sometimes justify the non-payment of his wages. (See Smith's Master and Servant, 5th Ed., p. 107)

16. Upon complaint of wilful and repeated ill-behaviour on the part of the apprentice, and on the demand of the master, the Magistrate may order the contract of apprenticeship to be cancelled, whether or not the charge is proved; but only with the consent of the apprentice and of his father or guardian, if the charge is not proved; and such cancelling shall be with or without refund of the whole or part of any premium that may have been paid to the master on binding such apprentice, as to the Magistrate seems fit on consideration of the case; and all sums so refunded shall be applied under the direction of the Magistrate for behoof of the apprentice.

17. The Magistrate may order any sum recovered for behoof of the apprentice on cancelling the contract to be either laid out in binding him to another master, or otherwise for his benefit, or to be paid to the person by whom any premium was paid when he was bound apprentice.

18. No Magistrate shall entertain a complaint on the part of a master against an apprentice under this Act unless it be brought within one month after the cause of complaint arose, or, if the cause of complaint arose on board ship during a voyage, within one month after the arrival thereof at a port or place in the said territories, and no Magistrate shall entertain a complaint on the part of an apprentice against his master or the agent of his master under this Act unless it be brought within three months after the cause of complaint arose, or, if the cause of complaint arose on board ship during a voyage, within three months after the arrival thereof at a port or place in the said territories.

19. If the master of any apprentice shall die before the end of the apprenticeship, the contract of apprenticeship shall be thereby determined; and a proportionate part, corresponding to the unexpired portion of the term of any premium, which shall have been paid to such master on the binding of the apprentice to him, shall be returned by the executors or administrators out of the estate of the deceased to the person or persons who shall have paid the same; unless the executors or administrators of the deceased master shall continue the business in which such apprentice shall have been employed, and shall, within three months from the death of the late master, make offer in writing to keep the apprentice on the terms of the original contract; in which case the estate of the deceased shall be discharged from all liabilities on account of such premium.

20. If such offer to keep the apprentice shall be made as aforesaid, the same shall be fully expressed and certified by the executors 1[or] administrators on the original contract of apprenticeship, and also on the office copies thereof, by the Magistrate 2[*] and the apprentice shall be bound to the executors or administrators so keeping him for the remaining term of his apprenticeship.

21. Any apprentice bound under this Act, whose master shall die during the apprenticeship, shall be entitled to maintenance for three months from and after the death of his master, out of the assets left by him: Provided that during such three months such apprentice shall con-

Leg Ref.

¹ The word "or" was substituted for the word "and" by the Amending Act, 1891

(XII of 1891).

² The words "or Registering Officer" were omitted by Act XXI of 1923.

tinue to live with, and serve as an apprentice, the executors or administrators of such master, or such person as they appoint.

22. The apprentice of any person against whom a commission of bankruptcy shall be issued, or who shall be adjudged to have committed an act of insolvency, during the apprenticeship, shall be discharged from all obligation under the contract of apprenticeship, and, if any premium was paid on binding him as an apprentice, he or a person by whom he was bound shall be entitled to claim the amount thereof as a debt against the estate of the bankrupt or insolvent¹.

23. For the purposes of this Act all British subjects, wherever or of whatever parents born, as well as other persons in ²[British India] without the towns of Calcutta and Madras and the town and island of Bombay, shall be amenable to the jurisdiction of the Courts and ²[Magistrates of British India].

24. An appeal shall lie from any order passed by any Magistrate without the said towns and island to the Court of Session to which such Magistrate is subordinate, provided the appeal is made within one month from the date of the order.

25. In this Act the words "master", "owner", "person", and the pronoun "he" shall be understood to include several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless there is something in the context repugnant to such construction.

SCHEDULE A.

FORM OF AGREEMENT

This agreement made the _____ day of _____ in the year _____ between *A. B.* of _____, and *C. D.* of _____, witnesseth that the said *A. B.*, doth this day bind *E. F.*, a boy (or girl) of the age of _____ years completed, son (or daughter) of the said *A. B.* (or otherwise describing the relation in which *A. B.* and *E. F.* stand), to dwell with and serve the said *C. D.*, as an apprentice, from this day forth for _____ years (in the case of a girl add, or until the time of her marriage, which shall first happen), during all which term the said apprentice shall duly and faithfully serve the said *C. D.*, according to his (or her) skill and ability in all lawful business, and demean and behave himself (or herself) honestly, orderly and obediently, in all things, towards the said *C. D.* and his (or her) family. And the said *C. D.* for himself (or herself) and his (or her) executors and administrators, in consideration [of the premium or sum of _____ paid by the said *A. B.* to the said *C. D.*, the receipt whereof the said *C. D.* hereby acknowledges, and] of the faithful service of the said *E. F.*, doth covenant and agree with the said *A. B.*, his (or her) executors and administrators, that he (or she) will teach or cause to be taught to the said *E. F.*, in the best way and manner that he (or she) can, the trade (craft or employment) of _____ during the said term, and will also, during the said term, find and allow unto the said apprentice good, wholesome and sufficient food, clothes, lodging, * washing, and all other things necessary, fit and reasonable for an apprentice. (and further, *here insert and special covenants*).

Leg. Ref.

¹ Cf. the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict., c. 106), S. 170.

² Substituted by Order in Council, 1937.

SCHEDULE A.

¹SUPPLY OF FOOD, CLOTHES AND LODGING.—At common law the duty of a master or mistress to supply food and other necessities to their servants, and apprentices arises solely from a contract, either express or implied, on their part to do so. And the omission to perform this duty was formerly merely a breach of contract, for which they were civilly, but not criminally, liable, except

in the case of a person of tender years. But at a meeting of all the Judges (except Lord Kenyon and Rooke, J.), held 25th February, 1802, the general opinion was, that it was indictable as a misdemeanor to refuse or neglect to provide sufficient food, bedding, etc., to any infant of tender years unable to provide for and take care of itself (whether the such infant were child, apprentice or servant), whom a man was obliged by duty or contract to provide for, so as thereby to injure its health. (*See Friends' case*, Russ. and Ry. C. C. 20, *Smith's Master and Servant*, 5th Ed., p. 190).

In witness whereof the parties have heretofore set their hands and seals the day and year above written.

A.B. [L. S.]
C.D. [L. S.]

SCHEDULE B.

FORM OF ORDER OF ASSIGNMENT.

(To be endorsed on the Agreement.)

Be it known to all men that on the _____ day of _____ in the year _____ personally appeared before G.H., Magistrate of _____ C.D., of _____ with E.F., his (or her) apprentice and J.K., or _____ and desired that the agreement of apprenticeship whereby the said E.F. was bound to the said C.D. might be assigned and made over to the said J.K., and the said G.H., having satisfied himself, by personal examination of the said E.F., and by other lawful ways and means, that such assignment is for the benefit of the said E.F., and is made with the consent of (the said E.F., and of) all persons whose consent thereto by law is required, doth allow such assignment, and the contract of apprenticeship whereby the said E.F. was on the _____ day of _____ in the year _____ bound to the said C.D., as an apprentice to learn the trade (craft or employment) of _____ shall henceforth endure, unto the end of the _____ and term, as if the said J.K. had been originally party to the said deed, and had executed the same, in the place and stead of the said C.D., and shall be bound, for himself (or herself), his (or her) executors or administrators, to fulfil the covenants by the said C.D. to be performed, and said E.F. shall henceforth be bound unto the said J.K., in like manner as he (or she) was by the said agreement bound unto the said C.D.

If E.F. is not above the age of fourteen years, the words between brackets may be omitted.

In witness whereof the said C.D., E.F., and J.K., have heretofore set their hand before me the day and year above written

G.H., Magistrate

THE ARBITRATION ACT (IX OF 1899).¹

| Year. | No. | Short title | How repealed or otherwise affected by legislation |
|-------|-----|-----------------------------------|--|
| 1899 | IX | The Indian Arbitration Act, 1899. | S. 3 rep. in pt., Act VII of 1913, S. 23 (as to Lower Burma) and Act I of 1900, S. 47. S. 4 (b) am. (in U.P.) by Act I of 1912. Application restricted in (Punjab) Punjab Act I of 1911. S. 2—Am. Act XXXVIII of 1920. S. 23 (1)—Am. Act XI of 1923. |

Prefatory Note.—THE INDIAN ARBITRATION ACT has been drawn on the lines of the English Arbitration Act of 1889 and was the outcome of certain representations received from the Chambers of Commerce at Rangoon, Karachi and Calcutta. The proposal thus made was circulated for opinion and elicited very general support from all including the Bengal, Madras and Bombay Chambers of Commerce, the Bengal National Chamber of Commerce, and the British Indian Association. The case for legislation was based upon the inadequacy of the then existing law. The provisions of the subject which prior to the present Act were to be found in the Contract and Specific Relief Acts amounted to this, that if a person who had contracted to refer to arbitration any dispute that might arise between him and another, refuses to do so, his contract will be a bar to his afterwards bringing a suit in respect of the matter which he originally agreed so to refer. These

Leg. Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1898, Pt. V, p. 286; for Report of Select Committee, see *ibid.*,

1899, Pt. V, p. 31; for Proceedings in Council, see *ibid.*, 1898, Pt. VI, p. 366; and *ibid.*, 1899, Pt. VI, pp. 17; 52 and 60.

provisions were, however, of a negative kind and ineffective in practice, for the recalcitrant party has, as a rule, only to remain inactive in order to be beyond the reach of the other party. The Code of Civil Procedure no doubt aimed at what was required, but the sections in point were defective in that (1) they were held to apply only to disputes which had arisen at the time of the agreement to refer, and not to dispute which might arise in the future and (2) they required the agreement to refer either to name the particular arbitrator or to leave the Court to appoint one. The first of these defects had been to some extent removed by a Full Bench ruling of the Bombay High Court delivered just before the passing of the present Act in the case of *Fazulbhoy Meral Chmoy v The Bombay and Persian Steam Navigation Company, Ltd.*, (20 B. 232), in which it was held that the Code applied to future disputes also, but the second defect remained, with the result, that the case of an agreement to refer, for example, to the arbitration of a person to be nominated by the Bengal Chamber of Commerce, was apparently unprovided for. Moreover it was then uncertain whether the other High Courts would follow the Bombay Judges, who had expressed that the provisions of Chapter XXXVII of the Code required revision in view of the many conflicting decisions found regarding them in the Law Reports. To remedy these defects the present Act was passed.

THE ARBITRATION ACT (IX OF 1899).

[3rd March, 1899.

In Act to amend the Law relating to Arbitration.

WHEREAS it is expedient to amend the law relating to arbitration by agreement without the intervention of a Court of Justice; It is hereby enacted as follows:—

Short title, extent and commencement 1. (1) This Act may be called THE INDIAN ARBITRATION ACT, 1899;

(2) It extends to the whole of British India, and

(3) It shall come into force on the first day of July, 1899.

Notes.

Sec. 1: SCOPE OF THE ACT—GENERAL.—THE Act is an independent enactment, and has no connection with rules relating to appeals under C. P. Code. 1 Rang 661 This is an amending Act and must be construed strictly. 43 B. 809. See also 1934 Sind 29 Even Arbitration Courts must act according to the principles of natural justice and not deliberately refuse a hearing or take evidence from one side behind the back of the other. 64 I. C. 706 Though arbitrators are not bound by technical rules of evidence they are nevertheless expected to conform to the fundamental rules of evidence and procedure (*Ibid*) 11 Mys. L. J. 300=39 Mys. H. C. R. 51. Private inquiries behind the backs of parties by arbitrators is against the ordinary rules of justice. 1934 Pat. 550 Statement of arbitrators as to what transpires before them—Conclusiveness of. See 17 L. W. 648=75 I. C. 850=1924 Mad 274. The Indian law as to arbitration is irrelevant where the parties agreed in referring to an arbitration to be bound by English law and procedure. 15 M. 496=43 M. L. J. 422 (P.C.). Questions of fact and law upon which the jurisdiction of the arbitrators depends are for the Courts. 44 All. 472. An application to Court to appoint fresh arbitrators amounts to an abandonment of the previous proceedings 46 Bom. 854. The provisions of the C. P. Code, as to joinder of claims cannot be strictly applied to arbitration proceedings. 9 I. C. 712=4 S.L.R. 196. Judge cannot put himself in the position of arbitrator without the consent of the parties. 1930

Rang 8 A Court has very limited jurisdiction to review awards passed by arbitrators The nature of the jurisdiction of the Court is not that of a Court of appeal reviewing the decision of an inferior Court. 122 I. C. 516 A reference to arbitration deprives a party of his right to resort to the ordinary tribunals, and it *must be strictly construed*, more so against the party who is responsible for the reference being drawn up in a particular manner 148 I. C. 977=1934 Sind 29, 43 Bom 809. A clause in a contract providing for reference to arbitration does not oust jurisdiction of Court or make it obligatory on plaintiff to submit to arbitration before going to Court. The only effect of such a clause is that if a suit is brought, the defendant may apply for a stay of the suit 142 I. C. 351=33 P.L.R. 1020=1933 Lah 79. An arbitration clause can be incorporated into a contract by reference 27 S. L. R. 159=140 I. C. 626=1933 Sind 75. Such a clause in a contract will be binding on an assignee if the subject-matter of reference is capable of assignment. (*Ibid*) It is clear law that it is not necessary that there should be the signatures of both parties to a written submission. A document signed by one party and accepted by the other party is enough, for the purposes of the Arbitration Act, to constitute a submission. 61 Cal. 702=1934 Cal. 796=38 C.W.N. 737. As to validity of oral submission to arbitration, see 36 Bom. L. R. 47=1934 Bom. 79. A Court has jurisdiction to entertain an application to file an award or enforce it as a decree only if it has jurisdiction to entertain a suit the subject

2. Subject to the provisions of section 23, this Act shall apply only in cases where, if the subject-matter submitted to arbitration were the subject of a suit the suit could, whether with Application leave or otherwise, be instituted in a Presidency-town:

Provided that the Local Government, [1* *] may, by notification in the local official Gazette, declare this Act applicable in any other local area² as if it were a Presidency-town.

3. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, and sections 523 to 526 of the Code of Civil Procedure³ shall not apply to any submission or arbitration to which the provisions of the Act for the time being apply:

Exclusion of certain enactments in certain cases where Act applies. Provided that nothing in this Act shall affect any arbitration pending in a Presidency-town at the commencement of this Act or in any local area at the date of the application thereto of this Act as aforesaid, but shall apply to every arbitration commenced after the commencement of this Act or the date of the application thereof, as the case may be, under any agreement or order previously made.

4[* * * * *

Definitions.

4. In this Act, unless there is anything repugnant in the subject or context,—

Leg. Ref.

¹ The words "with the previous sanction of the Governor-General in Council" were omitted by Act XXXVIII of 1920, Pt. I.

² The Act has been declared applicable to the town of Karachi. See *Bombay Government Gazette*, 1899, Pt. I, p. 1127.

³ See now C. P. Code, V of 1908, Sch. II, paras. 17 to 21.

⁴ The 2nd proviso repealed by Act VII of 1913.

Notes.

of which is the subject-matter submitted to arbitration. 148 I. C. 977=1934 Sind 29. See also 1934 Sind 183; 1935 Sind 228, 1934 Lah 652. An arbitrator cannot abdicate his functions in favour of a third party. If the parties desire the arbitrator to take the opinion of the members of a panchayat, he can do so but he would act illegally if he undertakes to be bound by the decision of the panchayat and to give his award in accordance with the wishes of the panchayat. 152 I. C. 1023.

ACT AS AMENDED BY U. P. LOCAL ACT, S. 2.—Under the Arbitration Act as amended by the U. P. Local Act, in order to make the Act applicable, the parties themselves should agree that the arbitration proceedings should take place under the Arbitration Act. It is, therefore, necessary that there should be a specific reference in the agreement to the Indian Arbitration Act, and a mere reference to arbitration in general would not bring in the operation of the Act. 1937 A. L. J. 98=1937 A. W. R. 52.

Sec. 2: APPLICABILITY OF THE ACT.—The Act does not apply to arbitrations in the course of litigation. 49 Cal. 608. See also 38 C. W. N. 648=1934 Cal. 643; 60 C. L. J. 173. But is applicable to suits which can be instituted at plaintiff's option in a Presidency-

town or elsewhere. 15 I. C. 402=37 P. R. 1912. See also 8 S. L. R. 107 27 I. C. 129; 4 S. L. R. 20=7 I. C. 593; 1 S. L. R. 10 7 I. C. 588. "Presidency town," meaning of. 56 Cal. 755=33 C. W. N. 888. A case falls within the purview of S. 2 of the Arbitration Act only where the subject-matter in dispute is of such a nature as to be the subject of dispute in a Presidency town, and not where the subject-matter is not of such a nature and the suit could be filed because the defendant resides there. 1937 A. L. J. 98=1937 A. W. R. 52. Where a dispute relating to property was referred to arbitration and it appeared that only a small portion of the property was situated within the limits of the original jurisdiction of the High Court, held, that the reference was competent under S. 2 of the Act though a suit could not be maintained on the Original Side without leave. 31 C. W. N. 208; 50 M. L. J. 35=114 I. C. 818. The Act has been made applicable to Karachi. See *Bombay Gazette*, 1899, Pt. I, p. 112. See also 1934 Lah 652; to Lahore only if specially mentioned in the agreement that it is to apply. 145 I. C. 129=1933 Lah 173; 35 P. L. R. 482=1934 Lah 652 152 I. C. 135. It is not accurate to say that the Arbitration Act only applies to arbitration in a Presidency-town. Reading S. 2 in conjunction with Cl. 12 of the Letters Patent it may be said generally that the Act applies to arbitrations which are connected, either as to the subject-matter or as to the parties, with a Presidency-town. 36 Bom. L. R. 47=58 Bom. 369=1934 Bom. 79. As to applicability of the Act to references to arbitration under the *Companies Act*, see 14 Lah. 249=141 I. C. 64=33 P. L. R. 1048=1933 Lah 44; 143 I. C. 435=1933 Pesh. 66. Where one of the parties to an arbitration

(a) "the Court" means, in the Presidency-towns, the High Court, and, elsewhere, the Court of the District Judge; and

(b) "submission," means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not.¹

Leg Ref.

¹ The definition has been supplemented in U. P. by U. P. Act (I of 1912)

Notes.

is a corporation registered under the Companies Act, S 152 (3) of that Act applies and an award obtained by it may be filed under the provisions of the Arbitration Act. (1933 Lah 44 and 1933 Pat 49, Foll.). 1935 Sind 228. An award made against a firm is executable against an individual partner thereof personally even though he has not received notice of the arbitration or of the filing of the award. It is not necessary to give notice of the filing of an award made under the Arbitration Act to the parties to the reference or to every number of a firm who is sought to be made liable. 61 C. L. J. 515. As to *arbitrator's fees*, see 1933 Sind 300.

Sec. 4 (a).—The District Court is specially described as the Arbitration Court under the Act. 52 I. C. 139=13 S. L. R. 23. See also 151 I. C. 860=1934 Pesh 103.

Sec. 4 (b).—A *submission* is a written agreement signed by both parties to submit differences to arbitration; and this agreement may be collected from a series of documents even though connected by parol evidence. 42 A. 525; 53 A. 384, or contained in the bye-laws framed under Bombay Cotton Contract Act 32 Bom. L. R. 1451. One of the essential ingredients of a submission to arbitration is that the parties should intend to have the dispute referred determined quasi-judicially. If it is not to be so determined, the agreement is not a submission, nor the person deciding it an arbitrator. That is the distinction between an agreement for submission to an arbitrator and an agreement to accept the decision of a valuer or appraiser or of a racing steward or of counsel for the parties. In these latter cases there is no *ammut arbandi*. 28 S. L. R. 223=1934 Sind 200.

The term *submission* is construed very broadly. Where a contract between the parties was subject to the rules and bye-laws of an Association, which provided that disputes in relation to the contract should be referred to arbitration by two disinterested persons, prescribed the procedure provided for an appeal to the Board of Directors of the Association, and finally made provision for the award being filed in the High Court, a reference to arbitration under the bye-laws in question would amount to a submission as defined by S. 4 (b) of the Act. 36 Bom. L. R. 1005=1934 Bom. 476. The requirements of S. 4 are duly complied with, if the submission is in writing and is binding on both the parties as their agreement or as the

equivalent in law to an agreement between them. Their actual signatures are not essential. 49 I. C. 135; 32 C. W. N. 1101=56 C. 118 (dissenting from 53 C. 65). See also 19 I. C. 925=6 S. L. R. 278; 1929 Sind 83. But see 61 C. 702=38 C. W. N. 737 (Signatures of both parties necessary for validity of a written submission to arbitration). When a party interested in the dispute does not join in making the reference the Court has no jurisdiction to refer the dispute to arbitration. 1929 Lah 171. The existence of a "dispute" is essential to the validity of a reference to arbitration under the terms of a contract. A dispute involves the assertion of a right by one party and its denial by the other. 64 I. C. 798=33 C. L. J. 545. See also 47 Cal. 799; 46 Cal. 534. Only matters in dispute between the parties to a litigation which affect private rights can be referred to arbitration. 72 I. C. 1016=1923 Nag. 112. Withholding of payment is a 'dispute' between the parties. 46 Cal. 534. But see 1931 B. 164. What amounts to submission to arbitration, see 33 C. 1237; 33 C. 1169. See also 6 S. L. R. 278, 4 S. L. R. 14. The definition of submission in S. 4 covers what is ordinarily termed an arbitration clause as well as what is commonly called a reference. 35 I. C. 536=10 S. L. R. 1. See also 71 I. C. 817=1924 Lah 405.

ORAL SUBMISSION.—Award based on—Validity of. See 63 M. L. J. 610; 1931 Pat. 92. "Submission" is, of course, defined as a submission in writing and all the operative sections of the Act proceed on the assumption that it is in writing. But an *oral submission* is not in terms prohibited by the Act. An oral agreement to refer to arbitration can therefore be proved and sued on. 36 Bom. L. R. 47=1934 Bom. 79=150 I. C. 478=58 B. 369.

WHAT ARE SUBMISSIONS.—Where an association, at the instance of and on a claim by the members against another member, lays the matter before arbitrators and the latter member in his own hand and over his signature sent an answer to the claim, the document constituted a written agreement to submit their difference to arbitrators within S. 4 (b). 43 All. 348. A policy of marine insurance provided, "all disputes must be referred to in England for settlement and no legal proceedings shall be taken to enforce any claim except in England where the under-writers are domiciled and carry on business." Held, that the clause amounted to a *submission to arbitration*. 26 Bom. L. R. 224=80 I. C. 523=1924 Bom. 381. A clause in a Bill of lading that all disputes shall be settled by the British Consul at the port of destination is similar to a submission to arbitration. 15 S. L. R. 88. The

Submission to be irrevocable except by leave of Court.

5. A submission, unless a different intention is expressed therein, shall be irrevocable, except by leave of the Court.

Notes.

petition of compromise in a suit for accounts amounts to a submission to arbitration within the meaning of S. 4 71 I.C. 817=1924 L. 405.

WHAT ARE NOT 'SUBMISSIONS' TO ARBITRATION.—A document embodying the terms of an agreement to refer to arbitration, which is not signed by or on behalf of both parties is not a submission as defined in S. 4. 19 I.C. 925=6 S.L.R. 278. Writing amounting to a bond does not amount to a submission to arbitration. 16 I.C. 861=6 S.L.R. 89. The words "office dhara" (office terms) do not constitute a written agreement to submit differences to arbitration. They are used merely as symbols to denote that such an agreement had been made and the use of such symbols does not justify the Court in accepting oral evidence of the agreement 19 I.C. 925=6 S.L.R. 278.

WHO MAY SUBMIT.—(i) As to infant, see 14 C.L.J. 188. As an infant is unable to bind himself by contract, he cannot enter into a submission which will render the award absolutely binding on him. In the case of a pending suit, the Court may authorise a submission to arbitration so as to render the award binding on the infant. 14 C.L.J. 188=11 I.C. 481. (ii) Guardian (*Ibid.*, 12 L. 767, 59 C.L.J. 521; 38 B. 153). (iii) Father, manager of Hindu family. 24 I.C. 863, 1930 Lah. 388. (iv) Mother of minors. 29 I.C. 800=8 Bur. L. T. 122. (v) Manager of Court of Wards. 1930 Sind 195=121 I.C. 164.

WHAT MATTERS MAY BE REFERRED TO ARBITRATION. See 24 I.C. 264=5 S.L.R. 4. Criminal complaint cannot be referred 1929 Lah. 394. In a suit for restitution of conjugal rights, the question of validity of marriage can be referred. 1929 Lah. 177=118 I.C. 464. See also 1930 Sind 195=121 I.C. 164.

CONSTRUCTION OF REFERENCES TO ARBITRATOR to be liberal. 15 I.C. 321. See also 43 Bom. 809; 148 I.C. 977=1934 Sind 29. The intention of the parties is to be the sole guide for determining the mode of working out the submission and reaching a final decision. 36 Bom. L. R. 1005=1934 Bom. 476. Reference to arbitration and proceedings thereon, how far affected by rules of special bodies or corporations. 42 C. 1140; 20 C.W.N. 365. See also 47 C. 849, 46 C. 534. Effect of award on oral submission. 33 B. 69.

LEGALITY AND BINDING NATURE OF AWARD.—Opportunity to prove to be given to the parties. 65 I.C. 497=1922 L. 149. There cannot be two tribunals each with jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. 26 C.W.N. 967=69 I.C. 863=

1923 C. 135 (2). Motive award if prevents fresh reference.—Court's power to decide if there was a valid contract. 44 A. 472.

STAMP.—Stamp duty on agreement to refer to arbitration. 33 C. 669; 13 C.W.N. 63, 19 Bom. 32, 40 C. 219. Want of proper stamp when and how can be called in question. 39 C. 669. On this section, see also 27 Bom. L. R. 1098.

Sec. 5: SCOPE OF SECTION. Once a valid submission has been made it is irrevocable without good cause. 12 M.L.A. 112 at 130; 7 A. 273, 8 M.H.C.R. 40; 27 M. 112; 20 A. 145, 29 A. 13; 1914 M.W.N. 52. The Court has jurisdiction, in a proper case, to grant leave to revoke an arbitration on good cause being shown. But that jurisdiction has to be exercised with great care and caution and should never be considered a venue for making applications, from time to time in pending arbitrations with a view to obstruct the progress of the arbitration. Unless, therefore, a strong and irresistible case is made out, the Court should be reluctant to supersede an arbitration. 36 Bom. L. R. 827=1934 B. 388. If the arbitrator refuses or neglects to act, the procedure under S. 8 of the Act should be followed. 44 I.C. 360=20 I.C. 504.

POWERS OF ARBITRATOR. An arbitrator has jurisdiction to inquire and decide whether a party to the submission has signed it or whether the signature is that of a partnership and if so, who the individual partners are. 11 I.C. 271 (S.).

PROCEDURE.—The ordinary rule is to refer to a single arbitrator. An intention to refer to more than one arbitrator must be plain and clear. 12 I.C. 662=5 S.L.R. 97. An order refusing to set aside an award based purely on evidence recorded by Court itself is not bad in law. 11 I.C. 274 (S.). Leave to revoke a reference to arbitration will not be given unless a substantial miscarriage of justice will take place in the event of leave being refused. 1933 Sind 317.

WHAT ARE PROPER GROUNDS.—Good grounds for revocation (i) Collusion (29 A. 131), (ii) Partiality (29 C. 278); (iii) Incompetence of arbitrator to one of the parties (29 C. 278, 3 C.W.N. 361; 25 C. 141); (iv) Unreasonable delay (17 C. 200); (v) Neglect of arbitrator (11 S.L.R. 101, 11 I.C. 360). See also 144 I.C. 42; 1933 S. 115.

WHAT ARE NOT PROPER GROUNDS. (i) Excess of authority by arbitrator not proper ground. 37 B. 183=24 M.L.J. 328 (P.C.). (ii) Mere delay in making award. 1 Pat. L. J. 394. See also 44 A. 432.

DEATH OF PARTY.—Effect on reference, see 15 C.L.J. 360; 4 S.L.R. 14=7 I.C. 590; 14 C.W.N. 759; 10 C.L.J. 419=4 I.C. 370.

"LEAVE OF COURT."—Granted only when

6. A submission, unless a different intention is expressed therein, shall be deemed to include the provisions set forth in the First Schedule, in so far as they are applicable to the reference under submission.

Provisions implied in submissions.

Reference to arbitrator to be appointed by third person.

7. The parties to a submission may agree that the reference shall be to an arbitrator or arbitrators to be appointed by a person designated therein.

Such person may be designated either by name or as the holder for the time being of any office or appointment.

Illustration.

The parties to a submission may agree that any dispute arising between them in respect of the subject-matter of the submission shall be referred to an arbitrator to be appointed by the Bengal Chamber of Commerce, or, as the case may be, to an arbitrator to be appointed by the President for the time being of the Bengal Chamber of Commerce.

Power for the Court in certain cases to appoint an arbitrator, umpire or third arbitrator.

8. (1) In any of the following cases:

(a) where a submission provides that the reference shall be to a single arbitrator, and all the parties do not, after differences have arisen, concur in the appointment of an arbitrator;

(b) if an appointed arbitrator neglects or refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy;

Notes.

there would be failure of justice 10 Bom L. R. 351 But see 11 Bom. L. R. 1. Irregularity in reference may be waived. 14 C.L.J. 188 If an award is valid, it is operative, even though neither party has sought to enforce it by a regular suit or by summary procedure. 28 C W N 140 Agreement to refer—Subsequent suit on contract not maintainable 45 A 472 See also 26 C W N 69=69 I C 863.

POWER OF ARBITRATOR—Once the arbitrator has parted with the award he is *functus officio* and he cannot exercise the power given to him by S. 7; nonetheless the Court is able to remit to him if satisfied that an honest mistake has been made 1923 A. 31

Sec 6—The intention of the parties is to be the sole guide for determining the mode of working out the submission and reaching a final decision. The law of arbitration is based upon the principle of withdrawing the dispute from the ordinary Court and enabling the parties to substitute a domestic tribunal. Once that tribunal reaches a final decision as contemplated or agreed upon by the parties, then the Arbitration Act steps in to help the parties to enforce the said decision. 36 Bom. L. R. 1005=1934 Bom 476.

Sec. 7.—Where a clause in the contract between the parties relating to certain drainage works provided for reference of the disputes to the Chief Engineer of the Karachi Municipality, the mere fact that the Chief Engineer had a duty to look after the interests of the Municipality and as an interested party might have already formed

an opinion upon the matters in dispute is not sufficient to prevent him from being a proper person to decide the disputes. 27 S.L.R. 169=140 I C 626=1933 Sind 75.

Sec 8: SCOPE OF SECTION.—43 B 809 Act does not limit number of arbitrators. 43 A 456

APPLICABILITY OF SECTION—Section is not applicable where a different course is provided by contract 44 M 406=40 M L J. 166 Nor to the case of independent appointments of two arbitrators 43 B 809 Not to independent appointment of second arbitrator 1924 Sind 29.

Sec 8, Cl. (1) (a)—When according to the agreement an arbitrator has been nominated and the same is communicated to the other party in clear and unequivocal language, it *ipso facto* confers authority to arbitrate. If he refuses to act and the submission does not show that it was intended the vacancy should not be supplied. Section 8 provides for the appointment of another but the right of the party to nominate is exhausted 1925 Sind 12.

Sec 8, Cl (1) (b).—The Court has no power to appoint new arbitrators in place of those who declined to proceed further in a case submitted to them, when the number of arbitrators is more than two. 43 B. 809. Any vacancy is to be filled up by original appointer as mentioned in S. 9. (*Ibid.*) The neglect of an arbitrator in not acting for nearly three years is in itself a sufficient ground for appointing another arbitrator in his place 144 I.C. 42=1933 Sind 115. Where two arbitrators were mutually agreed upon and appointed by the parties but there

(c) where the parties or two arbitrators are at liberty to appoint an umpire or third arbitrator and do not appoint him;

(d) where an appointed umpire or third arbitrator refuses to act, or is incapable of acting, or dies, or is removed, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in appointing an arbitrator, umpire or third arbitrator.

(2) If the appointment is not made within seven clear days, after the service of the notice, the Court may, on application by the party who gave the notice and after giving the other party an opportunity of being heard, appoint an arbitrator, umpire or third arbitrator, who shall have the like power to act in the reference and make an award as if he had been appointed by consent of all parties.

9. Where a submission provides that the refer-

ence shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed therein,—

(a) if either of the appointed arbitrators refuses to act, or is incapable of acting, or dies, or is removed, the party who appointed him may appoint a new arbitrator in his place;

Notes.

was no provision made as to filling up of a vacancy, and it so happened that one of the arbitrators refused to act, *held*, that S. 8 (1) (b) of the Arbitration Act and not S. 9 or S. 8 (1) (a) would apply. Meaning of the expression "appointed arbitrator" discussed. 56 C. 848.

Sec. 8, Cl. (1) (c).—If the arbitrators are directed to appoint an umpire in the first instance, they cannot appoint an umpire after they have entered on the reference. 13 C.W.N. 297.

Sec. 8, Cl. (2).—Where agreement have twenty days' time after receipt of notice within which the other party was to appoint an arbitrator failing which the other arbitrator was entitled to make a binding award, *held*, the failure to give the requisite number of days was fatal to the award delivered by the only arbitrator. 42 A. 525. Section 8 of the Arbitration Act deals only with cases of appointment of a single arbitrator or of an umpire or a third arbitrator. Where, therefore, the intention of the parties, as expressed in the agreement of reference, is that the submission should be to more than one arbitrator, the District Judge has no jurisdiction to appoint an arbitrator under S. 8 (2). 152 I.C. 319 (1)=11 O.W.N. 1347=1935 Oudh 26.

Secs 8 and 9: DIFFERENCE BETWEEN.—Under S. 8 an application must be made to the Court and the Court appoints an arbitrator, while under S. 9 appointment may be made by a party, whether originally or by way of substitution. 1927 Sind 177. See also 1929 Sind 55.

Sec. 9: APPLICABILITY OF SECTION.—Section applies only where a different intention is not expressed in the submission. 7 S.L.R. 1=20 I.C. 504. Section 9 does not

apply where the parties by their contract provide that a different course should be adopted if one of the parties fails to nominate an arbitrator as provided in the contract. 40 M.L.J. 166. 44 M. 406. See also 1927 Sind 177. Section 9 provides for an appointment by way of substitution in a case when each party is entitled to appoint an arbitrator. It does not provide for the case where one party is entitled in certain circumstances to appoint two arbitrators. 112 I.C. 706=1933 Sind 6. Official Receiver is not a "party" within this section. 1926 Sind 209. Where the agreement between the parties contained a term that on the default of either party to appoint an arbitrator in time, the chairman of the Trade Association was to appoint one on behalf of the defaulter, *held*, that S. 9 (b) would not apply and an award made by one arbitrator alone, who was appointed by one of the parties was without jurisdiction. 50 C. 1. 44 M.L.J. 758 (P.C.). Where the indent provided that in case of dispute there was to be a reference to arbitration and that if the buyers failed to appoint an arbitrator the sellers would have the power to appoint an arbitrator on behalf of the buyers but no such power was conferred on the buyers in the event of the sellers failing to appoint an arbitrator, *held*, that in such an eventuality, the right of the buyers was to appoint the arbitrator nominated by them as sole arbitrator under S. 9 of the Act. 27 S.L.R. 186=1933 Sind 328. (Case-law discussed.) Where in pursuance of an agreement, both parties appoint an arbitrator each, it is not necessary that there should be a reference in writing or that they should accept the appointment formally in writing. The fact that the arbitrators peruse relevant papers in the absence of parties does not

(b) if, on such a reference, one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for seven clear days after the other party, having appointed his arbitrator, has served the party making default with a written notice to make the appointment the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court may set aside any appointment made in pursuance of clause (b) of this section.

10. The arbitrators or umpire acting under a submission shall, unless a different intention is expressed therein,—

(a) have power to administer oaths to the parties and witnesses appearing;

(b) have power to state a special case for the opinion of the Court on any question of law involved; and

(c) have power to correct in an award any clerical mistake or error arising from any accidental slip or omission.

Notes.

amount to misconduct. They are judges of law and fact and an erroneous decision on a point of law will not justify interference. 76 I C 36=1924 Sind 91.

Sec. 10: POWER OF COURT—Civil Courts have no power to issue a summons or commission to a witness to give evidence in a private arbitration. Consent of parties cannot confer this power 47 B. 250. The arbitrators have no power to summon witnesses and procure their attendance when the arbitrators are acting under the provisions of the Arbitration Act. If parties go to private arbitration under the Act it is for them to produce witness before the arbitrators 1933 Sind 300. Where questions of fact under the Arbitration Act as to the conduct of arbitrators or the umpire, the procedure adopted and the instructions and so forth are raised, the Court should have evidence properly brought before it. 64 I.C 706 (All)

POWERS OF ARBITRATORS—Powers depend on clause of reference the scope of which is to be decided by the Court 47 B 378=44 M L J 706 (P C.). The arbitrator has the power to act on any evidence which would satisfy a reasonable man without reference to strict rules of evidence. 49 I C. 135=12 S R. 55, or to strict judicial procedure, 1928 M. 48, in a reference for partition to determine everything incidental or consequential relating to the mode of partition and the rights of female members, 1924 Oudh 54, to allow interest on amount awarded after date of award, 27 C W N. 933, dissenting from 27 C W. N 494, when a party to reference is a firm to decide whether a person is a partner, 19 I.C. 363; but see 1932 B 375, if so empowered to appoint a receiver, 1929 Sind 200.

Re his power to use personal knowledge, see 1926 B 527, Re his power to make successive award. But they have no power to delegate their powers, e.g., of appointing

an umpire, 17 B. 129, unless the reference is to an association consisting of a large and fluctuating body who can only select individuals as arbitrators. 33 C. 1169, or the delegated work is of a ministerial nature, 4 Pat 670

DUTIES OF ARBITRATORS—To hear each side only in the presence of the other, if one of the parties should not appear to give notice of his intention to proceed *ex parte*, 66 I C. 389=34 C L J 39; to give effect to all legal defences, e.g., plea based on limitation; 56 C 1048=56 M L J. 614 (P C.).

POWERS OF UMPIRE—Same as those of arbitrator. He has a discretion to state a special case for the opinion of the Court and his refusal to do so is not misconduct. 27 C W N 494, 1928 M 107, 61 M L J. 623 (P C.). He cannot take evidence from the notes of arbitrators in the face of objection by parties unless so authorised by the submission 64 I.C 706

FORM OF OATH—See 2 L W 320=29 I C. 49

PROCEDURE—Where an umpire is appointed owing to disagreement he must re-hear the evidence if applied to, and failure to do so would be misconduct, but if no application is made to that effect, he can proceed with the case and decide it on the evidence already produced 63 I C 141=15 S L R 68. An award of an umpire without hearing parties is against principles of equity and justice. Award of costs, without mentioning the amount, is bad for uncertainty, and the umpire can award costs only for the reference and award. The costs of obtaining an order from the Court is at the discretion of the Court. 12 I.C. 637.

IRREGULARITY—WAIVER OF—The party who makes an objection must prove that he objected at the time to the umpire's proceedings in making a final award without hearing his witnesses. He cannot, in law, be allowed to question the regularity, subsequently if there

11. (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice to the parties of the making and signing thereof and of the amount of the fees and charges payable to the arbitrators or umpire in respect of the arbitration and award.

Notes.

was any decision upon merits. 64 I.C. 706 (All.), 61 M.L.J. 761; 1931 M. 619. But if the party in fact objected, his proceeding with the case and defending himself as best as he can does not amount to waiver of his objection. 1931 B. 81; 55 B. 503=33 Bom. L.R. 759.

EFFECT AND NATURE OF ORDER UNDER S. 10 (b).—Where arbitrators state a case for the opinion of the Court, the order thereon is not necessarily binding on them, as they still remain the final Judges of the fact and law. Nor can such order amount to a judgment or operate as *res judicata*. Distinction between the English and Indian Acts pointed out. 79 I.C. 986=1925 S. 83.

AMBIGUITY IN AWARD.—In the case of a reference to arbitration the umpire is *functus officio* after he has published his umpirage or award and the document must speak for itself. Where an ambiguity in the award is patent it would not be competent to the Court to launch into an inquiry to ascertain which of the two possible interpretations of the document the Court should accept. 1927 Bom. 428=29 Bom. L.R. 660.

INTERFERENCE WITH AWARDS.—It is necessary that Courts should be very cautious in interfering with awards and the grounds on which the Court will remit the matter for reconsideration are.—(1) that the award is bad on the face of it, (2) that there has been misconduct on the part of the arbitrator, (3) that there has been an admitted mistake and the arbitrator asks that the matter may be remitted to him, (4) where additional evidence has been discovered after the making of the award. 49 C. 646. Mere errors in law unless distinctly appearing on the face of the award or from any document accompanying or forming part of the award are not sufficient ground for remitting an award. (*Ibid.*) The decision of the arbitrators is final. If there is on the face of the award, a patent inconsistency such as a flat contradiction in measurement, or a mistake of arithmetical calculation the Court to which application is made can send the award back to the arbitrators to correct it before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings. 45 A. 628. Award beyond reference but with consent of parties is valid.—*Arithmetical error does not vitiate award.* 42 A. 277. Award as to division of testator's property is not invalid by reason of the pendency of probate proceedings. 25 Bom. L.R. 437=1923 B. 365.

SECS. 10 TO 15: FILING AWARD OF OTHERS THAN ARBITRATOR OR UMPIRE.—Where by an association contract the arbitrator's award was made subject to the decision of the

committee in appeal and in the particular case the committee reversed the arbitrator's award and their decision was sought to be filed in Court; *held*, that the award of the committee is not within the terms of the Arbitration Act and cannot be filed under it. 1927 C. 391. But see 1927 C. 647. *Per Pearson, J.*—Ss. 10 to 15 of the Act are general sections applying to all awards under the Act whether the provisions of the first schedule are applicable to the particular arbitration, whether they are excluded by the expressed intention of the parties or not. (*Ibid.*) Unless therefore the meaning of the word 'umpire' itself in the Act can be enlarged beyond its ordinary meaning, there is no recognition to be found in the Act for an award by a tribunal superior to the umpire. It would be impossible to hold that 'umpire' meant 'umpire or any higher domestic tribunal upon which the parties may agree'. (*Ibid.*)

AGAINST WHOM AWARD CAN BE EXECUTED.—An award obtained against a firm cannot be executed against a party who is alleged to have been a partner in the firm but who was not served either with the notice of arbitration or the filing of the award. 1927 Bom. 428.

Sec. 11: SCOPE OF SECTION. See 76 I.C. 1007; 35 P.L.R. 482. 1934 Lah. 652; 61 M.L.J. 341 (P.C.). 36 Bom. L.R. 1005=1934 Bom. 476.

Per C. C. Ghose, J. "There is nothing to prevent the parties from agreeing to a submission containing in it a further submission to arbitration. No doubt in S. 11 of the Arbitration Act there is not to be found any reference to arbitration by a committee, but it does not matter in the slightest whether the committee is described as a committee of appeal or whether they are described as a fresh set of arbitrator. The contract contains as it were two submissions or a submission within a submission." 1927 Cal. 647. But see 1927 Cal. 391.

ESSENTIALS.—An award under S. 11 must be in writing and signed. 3 Bom. L.J. 102=82 I.C. 802=1924 Rang. 319. See also 7 M.L.T. 355=5 I.C. 374. If not signed, it cannot be made a rule of Court. 56 M.L.J. 35. Where a third arbitrator resigned because there was a majority against his view and did not sign the award, *held*, that did not affect the validity of the award. 76 I.C. 1007=1923 Lah. 411. Under S. 11 of the Act, the award must be signed by all the arbitrators who join in making the award. But the omission on the part of some of them to so sign it is a mere irregularity capable of being rectified. 36 Bom. L.R. 1005=1934 Bom. 476. Where the

(2) The arbitrators or umpire shall, at the request of any party to the submission or any person claiming under him, and upon payment of the fees and charges due in respect of the arbitration and award, and of the costs and charges of filing the award, cause the award, or a signed copy of it, to be filed in the Court; and notice of the filing shall be given to the parties by the arbitrators or umpire.

Notes.

arbitrators take a reasonable fee for their services before entering upon their duties with a view to avoid the necessity of suing the parties in Court, their conduct in so doing, does not amount to misconduct and does not vitiate the award 17 L.W. 648 =75 I.C. 850=1924 Mad. 274. An application to file in Court, a compromise, settling the differences independently of arbitrators appointed, and signed by the parties and arbitrators, cannot be granted inasmuch as such a deed does not amount to an award. 48 P.L.R. 1915=28 I.C. 298.

NOTICE.—Where an arbitrator proceeds *ex parte* he should give notice to the parties before he so proceeds, otherwise his award is liable to be set aside 47 C. 951 See also 47 C. 29. Failure to give notice of filing an award does not by itself vitiate award. 1926 Sind 242. Award—Legality of—Ministerial Act—Notice to parties—No necessity for 17 L.W. 648=75 I.C. 850 =1924 Mad. 274.

AWARD WHEN ENFORCEABLE.—An award becomes enforceable as soon as it is filed in Court and no notice of filing need be given to the parties by the arbitrator. 47 C. 951 =60 I.C. 987. See also 5 R. 171=102 I. C. 800. The filing of an award is an act to be done at the instance of an arbitrator, and when it is filed the result is not that there is a suit in which a decree has been passed, but that there is an award enforceable as if it were a decree 40 C. 219

PROCEDURE.—The provisions of the Act and the requirements of the rules and orders of the High Court must be complied with before the Registrar can file the award and that it is only when the award is legally and properly filed that it will be executable as a decree 5 R. 171 The procedure laid down by the Act seems to be that the various stages to be found in Ss. 11 to 15 are to be followed in the same chronological order as the numerical order of the sections and that an application to set aside is not as a rule within the jurisdiction of the Court, until some application or attempt has been made to file the award or some other similar step is taken to enforce it 1923 All. 31. See also 160 I.C. 693=1936 Pesh. 2 There are express provisions to be found in S. 11 of the Act as to what is to be done by an arbitrator, if he has made his award. When the question, when an arbitrator in India becomes *functus officio* comes to be decided, the line will have to be drawn somewhere in the procedure which is laid down in S. 11 for getting the award into Court. It is difficult to hold that an arbitrator is *functus*

officio, while there are still express statutory duties laid upon him by the Act 1923 All. 31. A rule framed by the Court under, but not in accordance with, the Arbitration Act will not be given effect to. 40 C. 219.

FILING OF THE AWARD.—Any one of the arbitrators can legally file the award, the filing being a purely ministerial act 29 I.C. 602=8 S.L.R. 302. Irregularities in filing can be rectified by Court in exercise of its inherent jurisdiction. 5 R. 171. But part of an award cannot be filed. 56 M.L.J. 35. Though under the proviso to S. 2 the Act is made applicable to Karachi, the Act is rendered inapplicable by S. 2 to an award made on a reference to arbitration in Karachi entitling a party to realise a certain sum of money by the sale of the properties at Lahore which were mortgaged in his favour, as a suit relating to the subject-matter submitted to arbitration could be instituted only at Lahore and not at Karachi according to S. 16, C. P. Code Such an award could not therefore be legally filed under the Act. 152 I.C. 135=35 P.L.R. 482=1934 Lah. 652.

APPOINTMENT WHEN COMPLETE.—The appointment of a certain person as arbitrator is not complete, until such person has accepted the reference and consented to act. 29 I.C. 602=8 S.L.R. 302.

Arbitrators can decide questions of law as well as points involving construction of agreement 53 B. 271=31 Bom.L.R. 21 =117 I.C. 417=1929 Bom. 19 (See also 32 Bom.L.R. 43 construction of clause in bill of lading excluding jurisdiction of Courts in that respect) Arbitrator can also appoint receiver for estate in dispute. 119 I.C. 529=1929 Sind 200 [29 C. 590 (P.C.), Rel. on] See also 1928 Sind 144 As to power of arbitrator to make successive awards, see 1930 Lah. 425 and cases referred to therein.

APPEAL.—An order refusing to set aside an award is a judgment within Letters Patent and is appealable. There is no right of appeal against such an order under S. 104, C.P. Code, which has no application to the filing of an award under S. 11, Cl. (2) of the Arbitration Act 46 I.C. 687=45 C. 502. No appeal lies unless it is given by law There can be no appeal from an order setting aside an award. 5 Bur. L. T. 155 =6 L.B.R. 88; 1934 Lah. 1019 (1)=36 P.L.R. 283.

SECS. 11 TO 14.—Application by arbitrator to District Judge for filing award—District Judge transferring file to Sub-Judge—Procedure not legal. 160 I.C. 693=1936 Pesh. 2.

(3) Where the arbitrators or umpire state a special case under section 10, clause (b), the Court shall deliver its opinion thereon, and such opinion shall be added to, and shall form part of the award.

Power for Court to enlarge time for making award. 12. The time for making an award may, from time to time, be enlarged by order of the Court, whether the time for making the award has expired or not.

Power to remit award. 13. (1) The Court may, from time to time, remit the award to the re-consideration of the arbitrators or umpire.

(2) Where an award is remitted under sub-section (1) the arbitrators or umpire shall, unless the Court otherwise directs, make a fresh award within three months after the date of the order remitting the award.

14. Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set aside the award.

Notes.

Sec. 12: POWER OF COURT TO EXTEND TIME.—Under S. 12 of the Arbitration Act, the Court has power to extend the time though the time for making the award is over. The Appellate Court can extend the time under O. 41, R. 33 of C. P. Code 40 C. 1059. See also 1935 Sind 30; 19 I. C. 374; 1926 Sind 8; 54 M. L. J. 49 (F. B.) (18 I. A. 55, Dist.); 1935 Lah. 191.

Before extending the time under S. 12 the Court is bound to consider whether the case is a fit one for the grant of the indulgence asked for and is not confined merely to the consideration of the question whether or not, the arbitrator had been diligent. 22 I. C. 16=8 S. L. R. 269. See also 78 I. C. 521. Appeal against order refusing extension of time, 46 C. 1059. When time is not extended and the award is not made within time, the award is worthless. 64 I. C. 706 (A.).

Sec. 13: AWARD WHEN CAN BE REMITTED.—When the award is set aside for legal and not moral misconduct, it can be remitted to the same arbitrator for further consideration. 41 C. 313. See also 66 I. C. 389=34 C. L. J. 39. Ordinarily an Appellate Court will not interfere with discretion of the first Court in declining to remit an award, but the Appellate Court will interfere where no grounds have been shown. 70 I. C. 353=16 L. W. 657=1923 Mad 222. Where an arbitration is made without the intervention of a Court and an application is made to file the award, then if the award is good in part, the Court cannot remit the arbitrator for amendment or declare valid the part to which no exception is taken even if it is separable from the bad part. 74 I. C. 649=1923 Pat 470. When an award is remitted for reconsideration by arbitrator with specific direction on certain points, the arbitrator has power to indicate the method by which his decisions can be carried out. This incidental and consequential power is always implied in a remittal of the award 1936 Lah. 865.

AWARD WHEN CANNOT BE REMITTED.—When

the misconduct is one justifying the removal of the arbitrator, the Court will not remit the award but will set it aside. 60 I. C. 319=34 C. L. J. 39. Order by a Court to arbitrators to make an award anew, is equal to refusal to file an award and is not appealable either under the C. P. Code or the Arbitration Act. 1 Rang. 661.

Sec. 14: SCOPE AND APPLICABILITY OF SECTION.—See 38 Bom. L. R. 480 60 Bom. 645=1930 Bom. 259. Section 14 of the Act applies not only in cases where there has been misconduct on the part of the arbitrators but it also applies to cases where the arbitration itself has been improperly or illegally procured. 1932 Lah. 378. See also 60 Bom. 615=1936 Bom. 259, 157 I. C. 607=41 L. W. 261=1935 M. 319 68 M. L. J. 537. Therefore, an objection alleging that consent to a submission has been obtained by misrepresentation would come within the purview of the section. 1930 S. 195. An objection that an award out of Court is invalid for want of jurisdiction may be taken by way of a notice of motion under S. 14 of the Act and a separate suit is not necessary. 121 I. C. 760. The fact that an arbitrator fixed the damages for breach of contract at a particular figure though, in his opinion, there were no sufficient materials to assess the damages, is no ground for holding that there is an objection to the legality of the award apparent on the face of it. 122 I. C. 516. Where several persons joined together to give one reference in very wide terms in favour of a set of arbitrators referring all the disputes to them arising out of different contracts which formed a chain of contracts between them and the arbitrators gave their award, held; that an objection to the award on the ground of multifariousness could not be taken under S. 14 of the Act. 1930 S. 170.

WHAT AMOUNTS TO 'MISCONDUCT.'—The failure on the part of an arbitrator to give a reasonable opportunity to one of the parties to appear before him amounts to *misconduct*. Misconduct does not necessarily involve any moral turpitude, dishonesty, partiality or

Notes.

has on the part of the arbitrator. 1924 S. 132. An arbitrator who does not give a party an opportunity to put his case before him and does not decide all points of dispute, is guilty of legal misconduct. 41 C. 313. Where the arbitrators held their sittings for about 14 or 15 months and every opportunity was given to the parties to place their case before the arbitrators and to adduce their evidence, *held*; that the arbitrators are not guilty of misconduct in giving time to a party to produce their witnesses or in deciding the matter on such evidence as was placed before them. 1933 Sind 300. See also 12 Mys. L. J. 81=39 Mys. H. C. Rep 263. It is imperative that arbitrators should always scrupulously avoid any course of action which even remotely bears the completion of their having put themselves into a position where it might be said against them that they had received a pecuniary inducement which might have had some effect on their determination of the matters submitted to their adjudication. They ought altogether avoid a mode of collecting their fees which might lay them to imputations of corruption or prejudice—however unfounded such imputations might prove on close examination. 38 C.W.N. 784. The failure of an arbitrator to sign the award is legal flaw, but when his refusal to sign was at the instance of one of the parties though he had agreed to the award, that party cannot take advantage of the flaw. 20 A L J 392. Arbitrators not acting together—Award not legal. 74 I. C. 299. See also 2 Bur L.J. 229=1924 Rang 153; 1930 Cal 255, 65 I.C. 339=1922 Oudh 108, 30 I C 384.

Award is vitiated by the legal misconduct of the umpire, if he proceeds with the reference without giving any notice to the parties of the enquiry by him 70 I.C 353=16 L.W 657=1923 Mad 232. An award given in the absence of one of the parties and without any notice as to the time or the place where the arbitrators would sit to decide the dispute is illegal 65 I.C 577. See also 13 C.W.N. 63. Failure of umpire to take fresh evidence. 27 C.W.N. 601. Irregularities in procedure which amount to no proper hearing of the matters in dispute may amount to misconduct enough to vitiate the award. 66 I.C. 349=34 C.L.J. 39. An award passed on reference by a guardian and based on information received in the absence of the parties or on the arbitrator's own knowledge of the facts in regard to the matters in issue between the parties would be invalid. 44 M.L.J. 263. But parties who are *sui juris* may agree to a reference that the arbitrator shall decide the dispute on his own knowledge or that there is no need for him to take any evidence and they will be bound by such a reference and no legal misconduct can be imputed to the arbitrator, if he based his award on such

materials. (*Ibid.*) See also 42 A. 185.

OBJECTIONS TO AWARD.—Any objection to an award on the ground of misconduct or irregularity on the part of the arbitrator ought no doubt to be taken by motion to set aside the award but where it is alleged that an arbitrator has acted wholly without jurisdiction, his award can be questioned in a suit brought, for that purpose. 50 C. 1=44 M.L.J. 758=49 I.A. 366 (P.C.). Where an award by arbitrators is based on grounds, some of which did not justify the exercise of their jurisdiction, and the Court cannot hold with certainty that the arbitrators were exclusively within their jurisdiction the award is null and void. 66 I.C. 342=34 C.L.J. 253. As to objecting to award on the ground of incompleteness or indefiniteness of the award, see 1930 Lah. 425 and cases referred to therein; see also 1930 P.C. 110=59 M.L.J. 336 (P.C.). Award by umpire—Appeal to Board of Directors under bye-law—Composition of Board changing from time to time during hearing—Validity of award. See 36 Bom.L.R. 1005=1934 Bom. 476.

AWARD WHEN CAN BE SET ASIDE.—A party to an arbitration can get an *ex parte* award passed against him set aside by a Court if he shows sufficient cause for non-appearance. 27 I.C 135 (2). See also 29 Bom L R. 1087. The Arbitration Court has exclusive jurisdiction to adjudicate on matters arising under S. 14 76 I.C 953. Where an agreement to refer to arbitration is impeached, an *injunction* may be issued to restrain arbitration proceedings. But when the agreement is not impeached, and a suit covering the matter referred to arbitration is pending, injunction ought not to be issued. 9 I C. 707. The principles under which the validity of an arbitration should be judged are more rigid than those which apply to a case of family agreement. Where the parties to it were under a misapprehension as to their legal position and right, the award is had 2 Pat. 554. Where charges of misconduct and corruption are levelled against an arbitrator, he should be given an opportunity to explain, the charges being put fairly and squarely before him (113 I.C. 360) and the onus is upon the party to prove the charges 64 I.C 706 (All.). In case of an agreement to allow the disputes to be tried by another tribunal, the Court will take into consideration all those grounds as in a case of submission to arbitration. 15 S.L.R. 88. Setting aside award for patent error of law, see 1924 S. 75, for collusion, 46 M.L.J. 334 (P.C.). Error of law or fact by itself no ground 3 Pat. 443. Nor is the fact that the award is not in accordance with the law of limitation a sufficient ground for setting the award aside, when party took no objection at the time. 1931 M. 619. An agreement that neither party shall take objection to the award or file an appeal cannot control the unrestricted dis-

15. (1) An award on a submission, on being filed in the Court in accordance with the foregoing provisions, shall (unless the Court remits it to the reconsideration of the arbitrators or umpire, or sets it aside) be enforceable as if it were a decree of the Court.

(2) An award may be conditional or in the alternative

Notes.

cretion vested in a Court by a statute to set aside the award when it is sought to be filed. The question is not whether a party shall be compelled to carry out the terms of the contract but whether the Court would be exercising a proper discretion in conferring on the award the efficacy of its own decree. 42 I.C. 706.

SEPARATE SUIT WHEN CAN LIT.—A person dissatisfied with an award, made without the intervention of a Court of justice, is entitled to bring an action to set it aside on the ground that no contract providing for a reference to arbitration was made or that the contract if made was cancelled before the reference in favour of the arbitrator had been executed. 81 I.C. 782=1924 S. 25. It is not open to a party to move a Court to set aside an award only on some of his objections and to reserve other objections falling within the scope of S. 14 for a separate suit. The principle of constructive *res judicata* in S. 11, Expl IV, C.P. Code, will apply 76 I.C. 953. There is no appeal against an order refusing to set aside an award. 17 I.C. 902; 1922 C. 73. Where an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy lies in regular suit and not in an application under S. 14. 47 C. 806. See also 32 Bom. L. R. 389. Where a party objects to a reference and award on grounds which go to the very root of the reference, it is open to him to file a suit to set aside the reference and award. 1930 S. 170; 31 C.L.J. 283=56 I.C. 541=24 C.W.N. 454. Award is no bar to a suit is not stayed under para. 18, C.P. Code, Sch. 2 or S. 19 of this Act. See 1926 Sind 86. When an award under the Act has been made and filed, a party affected thereby can maintain a suit to impeach it on grounds not included within S. 14. Law does not permit the same question to be decided by a Court of law as well as by an arbitrator and it is only when the dispute before two tribunals is identical that the decision given by the arbitrator must be treated as *ultra vires*. But where the dispute before arbitration and Civil Court is not the same the jurisdiction of the arbitrator is not ousted. 117 I.C. 74=1929 Lah. 564.

Sec. 15: SCOPE OF SECTION.—The fact that an award has been enforced by execution under S. 15 is not a bar to a suit to have it declared void and for consequential relief. Section 15 does not enact that award when filed is to be deemed a decree of Court, but only that it is to be enforceable as if it were

a decree. 50 C. 1=44 M.L.J. 758 (P.C.), 1927 B. 428. When the legislature provided under S. 15 that an award on being filed was enforceable as if it were a decree of Court, its intention was that all the provisions of the C.P. Code applicable to the execution of decree should apply to an award so filed. 27 C.W.N. 666=1924 C. 117, 50 S. 47 C.P. Code is applicable for purpose of appeal 1929 L. 228. See also 31 C.W.N. 1097=104 I.C. 808. 1927 C. 853, 56 M.L.J. 35. An award is a decree and executable as such on and from the date it is available in the Court for putting it on the file, that is the day on which it is received in the Court for that purpose. 27 S.L.R. 109=142 I.C. 489=1933 Sind 78. See also 143 I.C. 435=1933 Pesh. 66. Award on submission cannot be made decree of Court, but only to be filed in Court. 1929 L. 882, 115 I.C. 584. Though an award can be executed by Court, it cannot pass a decree on the basis of the award. 31 C.W.N. 268. Where Court is itself appointed to act as arbitrator, no separate award need be passed inviting objections. The award is itself a decree. 26 I.C. 355 (M.) Where the disputes between the parties are referred by agreement to arbitration and the arbitrator files the award in Court and no order is made for remitting the award to the consideration of the arbitrator not is the award set aside, the award remains filed in Court and it is enforceable as if it were a decree of the Court. The Arbitration Act does not contain any provision for making a decree on an award such as is contained in Sch. II, para 21, C.P. Code, and if such a decree is made it is one without jurisdiction and therefore a nullity. But a party to the arbitration is however entitled under the Act to enforce the arbitrator's award through the Court in exactly the same way as if it was a decree. 60 I.A. 71. 60 C. 670=142 I.C. 324=1933 P.C. 61=64 M.L.J. 341 (P.C.). Even after an award is enforced under the Arbitration Act, it is open to a party affected by it to sue for its being set aside on the ground that the arbitrator had acted wholly without jurisdiction. It follows, therefore, that the mere pendency of proceedings under S. 15 of the Arbitration Act is no bar to a suit for a declaration that the award is null and void and for a perpetual injunction to restrain the defendants from executing it. 1935 Lah. 76. See also 1935 Sind 184.

Per *Niyogi, A.I.C.*—Where an award filed by a party under S. 15, Arbitration Act, is registered as such in the High Court of Bombay and the Court on basis of the award,

Illustration.

A dispute concerning the ownership of a diamond ring is referred to arbitration. The award may direct that the party in possession shall pay the other party Rs. 1,000, the said sum to be reduced to Rs. 5 in the ring is returned within fourteen days.

Power to remove arbitrator or umpire.

16. Where an arbitrator or umpire has misconducted himself, the Court may remove him.

Costs.

17. Any order made by the Court under this Act may be made on such terms as to costs or otherwise as the Court thinks fit.

18. The forms set forth in the Second Schedule, or forms similar hereto with such variations as the circumstances of each case require, may be used for the respective purposes

there mentioned, and, if used, shall not be called in question.

19. Where any party to a submission to which this Act applies, or any

Notes.

passes an order purporting to mortgage certain property owned by the other party situate beyond its jurisdiction, the order is valid in so far as it records under O. 21, R. 2, C. P. Code, an agreement between the parties although the High Court has no jurisdiction to entertain a suit to enforce the mortgage. The order is operative as mortgage of the property specified in it, but although binding on the parties as an agreement it cannot be enforced by the Bombay High Court as a decree as it has no jurisdiction to entertain a suit on the mortgage. 159 I. C. 739=1935 N. 250 (F. B.)

LIMITATION—For purposes of execution of an award filed in Court it is governed by the period of limitation prescribed for execution of decree by that Court. 1927 C. 853. So, award filed in a High Court is governed by Art. 183, Limitation Act. (*Ibid.*) An award made on a reference under the Arbitration Act becomes enforceable as a decree only when it has been filed, and it is only then that the execution can arise. Consequently an application to execute an award more than three years from the making of the award is not barred by limitation, if it is within three years from the date of the filing thereof. There is no provision of law which bars an application to file an award presented more than three years after the making thereof. 61 C. L. J. 515.

NATURE OF PROCEEDING—A proceeding under the Act is not a suit and does not end in a decree. The Act does not provide for the Court making an order filing or refusing to file an award. The award is filed by the arbitrators under S. 11 and unless it is remitted to them under S. 13 (1) or set aside under S. 14, it becomes enforceable as if it were a decree of Court. The order of a Court in whatever terms it may be expressed under the Act is one setting aside or refusing to set aside an award. 10 I. C. 211=5 S. L. R. 61. Provisions of C. P. Code, if apply. 77 I. C. 868=1924 C. 117.

STAY OF EXECUTION—Stay of execution of award cannot be ordered. 12 Bom. L. R.

860=8 I. C. 179. (*See also notes under S. 19, infra.*)

FILING OF AWARD—(i) Procedure for filing award. 15 C. L. J. 110, 13 C. W. N. 63. (ii) Effect of filing award. 40 C. 219. (iii) Effect of not filing award. 5 I. C. 425. Cost of the filing award is in discretion of Court. 27 I. C. 526=8 S. L. R. 136. Conditions under which award can be made rule of Court. *See* 56 M. L. J. 35.

ESTOPPEL—If a part of an award is found to be invalid as being in excess of the arbitrators' powers and is separable from the rest, the remainder of the award being good can be maintained and acted upon, while the excessive part of the award can be declared to be unenforceable. But if a party has taken advantage of the invalid part of the award he is estopped from setting up that this clause of the award is invalid. 1935 Rang. 34.

APPEAL—No appeal lies against an order under the Arbitration Act as the orders are neither decrees nor appealable orders under Ss. 104 and 146 of the C. P. Code. There can be only a revision under S. 115 of the C. P. Code. 10 I. C. 211, 19 I. C. 405 (Cal.). The proceedings for enforcement of an award under S. 15, Arbitration Act, are governed by S. 47, C. P. Code, and an appeal is competent from an order rejecting such application. The fact that an objection was raised that the award was given without jurisdiction does not preclude the applicability of S. 47. 151 I. C. 881=1934 Lah. 49=35 P. L. R. 635.

Sec. 17—Costs incurred before umpire or arbitrator are not to be regarded as costs incurred in Court. Costs in S. 17 refers to costs incurred in Court where there is no valid reference or valid award. Court has no jurisdiction to award costs. 1928 Mad. 370=54 M. L. J. 580.

Sec. 19: APPLICABILITY—The section does not apply and there is no dispute between the parties and the mere failure to pay what is admittedly due does not amount to a dispute. 1931 B. 164. Where a party to a contract containing arbitration clause brings a suit to impeach the validity of that clause it is not a suit in respect of "any matter agreed to be

Power to stay proceedings where there is a submission. person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to 1[the judicial authority before which the proceedings are pending] to stay the proceedings; and 1[such authority], if satisfied that there is no sufficient reason why the matter should not be referred in

Leg Ref.

* Substituted for the words "the Court" by Act XXI of 1933, S. 2.

Notes.

referred to arbitration" and so the section does not apply. 58 I C 790 (S), 61 I C. 141 (S). Before the jurisdiction of a Court to make an order for stay under S. 19, can be invoked, it must be established beyond doubt that there is a valid submission. It cannot be said that an arbitration clause is an ordinary incident of a contract for the sale or purchase of goods, and such a clause cannot be incorporated into a contract by reference to another contract between one of the parties and a third party. 38 C.W.N. 737=61 Cal 702=1934 Cal. 796. Where a party seeks to avoid the contract for reasons dehors it, the arbitration clause cannot be resorted to by him. In other words a party cannot rely on a term of the contract to repudiate it and still say the arbitration clause should not apply. 53 Bom 573. If in consequence of misrepresentation or other circumstances the clause for reference is invalid, if there is a binding contract at all between the parties, such questions do not constitute disputes arising out of a contract so that when such questions are raised in a suit. S. 19 has no application and the Court has no power to stay. 82 I.C. 81 (S); 44 All 472 at 480; but see 24 C W N 567.

MEANING OF TERMS.—The words "a submission to which this Act applies" in S. 19 provide for the case where a suit is filed in an upcountry Court in an area to which the Act has not been applied though part of the cause of action has arising in a Presidency-town. The Court has power to stay the suit, if the suit could with leave or otherwise have been filed in a Presidency-town. (31 Bom. 236, diss.) 45 Bom 1. The expression "after appearance" in S. 19 is merely directory and the section is intended to prevent a party from filing an application after he has attained to the jurisdiction of the Court. 48 I C 434 (S). An appearance for the purpose of making a stay application may be treated as an appearance in the suit. (*Ibid.*) An oral application for the time to file a written statement by defendant's counsel in answer to a Court's question is taking a "step in the proceedings" within the meaning of S. 19. 28 C W N 771=1924 Cal. 789. Any application to the Court, even one for time is a "step in the proceedings" within S. 19. 40 I C 81 (S). But merely applying for a copy of plaint is not. 52 Cal 453.

BURDEN OF PROOF.—When a suit is filed in connection with a dispute, the *onus* is on the plaintiff to show why he should not be bound by the agreement to refer. 75 I.C. 1041=1924 S. 49. See also 47 Cal. 819. The burden of proving that a particular dispute cannot be referred to arbitration lies on the party alleging it. 53 Bom 271. Where a defendant does not plead at the early stages of a trial a subsisting agreement to refer to arbitration but submits to the jurisdiction of the Court and allows the trial to proceed, he cannot afterwards raise the plea. 20 A L. J. 975=71 I.C. 141-1923 A. 139.

COURT EMPOWERED TO STAY.—The "Court" means the Court trying the suit and not the District Court. 1928 Bom 275; 1931 Lah. 66; 1931 Lah. 641; 1931 Sind 106. "The Court in S. 19 means the Court seized of the case, whether such Court be a High Court or a District Court, or any other Court, of inferior jurisdiction, such as the Court of Small Causes or a subordinate Court. It is that Court which is in a better position to know and to decide expeditiously whether the application for stay has been filed after appearance in Court and before taking any step in the proceedings. (Case law reviewed.) 1933 Sind 376 (F.B.); 150 I.C. 839. Court in S. 19 of the Act is the one in which the proceedings or other attempts to bring a suit are in fact. 43 All. 553. Suit in Cal. Pres. S.C.C.—Application for stay can be made in Calcutta High Court. 56 Cal 755=33 C W N 888.

STAY.—The Court is vested with a discretion either to stay or not to stay the suit; but the discretion must be guided by judicial principles. 75 I.C. 1041-1924 S. 49; 43 C. L. J. 297; 54 Bom 197; 56 C. 848, 55 I.C. 817 (C). As to what must be proved by an applicant before granting his application for stay, see 1928 Sind 94. There can be no stay of proceedings under S. 19 when there is no "submission" in the true sense of the word. A submission to arbitration, which deprives a party of his right under the law to have his disputes decided by a Court of law, must be construed strictly; and unless it clearly appears from the terms of the submission that a party has so deprived himself, no stay should be granted. Stay ought to be refused in a case where the tribunal contemplated by the parties has irrevocably committed itself to certain views. 28 S. L. R. 223=1934 Sind 200. Where legal proceedings were for a long time threatened against a person in respect of a contract which provided for all settlement of disputes

accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

Notes.

by arbitration, and when instituted that person applied for a stay of suit pending arbitration he can claim it as a matter of right. His failure to object to the litigation is no ground for refusing stay. 45 M.L.J. 653=47 Mad 164 Stay of suit pending arbitration—Discretion of Court—Charges of fraud. 22 A L J. 1031 An order staying a suit is a permanent one unless otherwise provided in the order itself and an order staying suit where the subject-matter was referred to arbitration and a decree was passed in terms of the award is sufficient to finally dispose of the suit. 43 All 270, 43 All 533 See also 47 Cal. 849. The case would be different if by a reference and award before the suit the rights and liabilities of the parties had been determined at the date of the suit. 47 Cal. 752; 56 I.C. 160 Institution of suit after reference to arbitration by one of the parties and omission on the part of the other to apply for stay of suit amounts to waiver of right to arbitration. 44 A 292. Provision for reference to two arbitrators—One arbitrator to be named by each party—No provision in case of the refusal by a party to nominate—Suit by party who has not nominated—Stay of suit can be granted. 107 I.C. 434=1928 Sind 94 See also 1935 Sind 62=155 I.C. 895 (Refusal of stay—Charge of fraud and forgery, if and when sufficient cause)

"STEPS IN THE PROCEEDINGS"—MEANING OF —If a party formally appears before the Registrar of the Court through his advocate's clerk, before he has had a reasonable time to enable him to decide on the course of action to be taken, that cannot ordinarily debar him from applying for stay of suit; that cannot amount to a step in the proceeding within the meaning of S 19 28 S L R 223=1934 Sind 200 Application for adjournment is not a step in the proceedings. 61 Cal. 702=38 C. W N 737=1934 Cal. 796. An application made to the Court for postponement of the hearing of the suit is a step in the proceedings within the meaning of S 19 irrespective of the intention with which the application is made. Whether the applicant wishes to have further time to file a written statement or to raise as a bar to the suit the agreement to refer to arbitration, in either event, his application is an application to invite the Court to do something which would enable him to establish his defence. It is for the Court to determine whether any particular act or application is a step in the proceeding 155 I.C. 895=28 S L R 366=1935 S 62.

EVIDENCE.—Before an order staying proceedings, can be made, it must be proved that

there is a valid submission, that there is no sufficient reason why the matter should not be referred according to the submission and that the applicant was and is ready to do all things necessary to the proper conduct of the arbitration. 47 Cal. 1020. It is largely in the discretion of the Court to make an order staying proceedings in such a matter and when the discretion has been exercised, the Appellate Court will interfere only when a strong case is made out. 47 Cal. 1020. A suit is not barred by a reference to arbitration made before, but the award in which is delivered after the suit. 56 I.C. 150=13 S L.R. 193 Arbitrators can decide questions of law and the occurrence of a difficult or complicated question of law is not a sufficient ground to take the matter out of the arbitrator's hands. 58 C. 1107. So long as the authority delegated to an arbitrator is not revoked he has the power to make an award and there would be no impropriety of conduct on his part in proceeding with the reference after a suit is filed unless he has notice that there has been an application for leave to revoke the authority conferred on him to some competent Court. 35 I. C. 536=10 S L R. 1 Though it appears desirable to have the matter tried in Court the proper course is not to ignore the arbitration but to direct the defendant to take necessary steps to revoke the submission. 35 I.C. 536=10 S L R 1 See also 11 I. C 274 (S) An arbitration clause in a contract does not oust the jurisdiction of the Court in case of its breach 20 I. C 504=7 S L R 1. Where an action has been commenced upon a contract which contains a provision for reference to arbitration then even if a reference to arbitration has taken place before the suit is instituted and if no application is made to stay the suit pending the arbitration, the award is of no effect. 38 C L J 67

ESTOPPEL.—Where after the trial Court dismissed the defendants' application for stay under S 19 and pending an appeal therefrom, the defendants applied for an adjournment to file a written statement and consented to the issues being referred to the Commissioner, held, that those facts did not constitute evidence of consent on the part of the defendants precluding them from urging their application for stay in the appellate Court. (4 I.C. 359, Rel) 27 S L.R. 169=140 I.C. 626=1933 Sind 75.

STAY—GROUNDS FOR—CONSIDERATIONS FOR COURT.—Under S. 19, a suit can only be stayed when it is in respect of any matter agreed to be referred but not otherwise. If it is not in respect of the same matter which is agreed to be referred there can be no

Power for High Court to make rules.

20. The High Court may make rules consistent with this Act as to—

(a) the filing of awards and all proceedings consequent thereon or incidental thereto;

(b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto;

Notes.

stay of suit and there can be no question that the arbitrators are *functus officio* until such suit is stayed. Where one of the parties who have agreed to refer the dispute to arbitration files a suit praying for a declaration that the other party has no right to refer any matter to arbitration and that the arbitrators have no jurisdiction in any matter relating to the agreements between the parties, their claim strikes at the very root of the submission clause, but does not come within the submission clause as to render the arbitrators *functus officio*. The mere fact that the other party has applied for stay of suit under S. 19 and that the application is pending does not affect the question nor does the institution of suit by the party objecting to the award when it is instituted subsequent to the filing of award. 1935 Sind 228. See also 155 I.C. 932=1935 Bom 155. What is a sufficient cause for refusing to stay on an application for stay under S. 19 depends on the particular facts of each case. The fact that a submission clause does not include all the matters which are the subject of legal proceedings may be a sufficient cause for refusing to stay. When there is a charge of fraud or forgery against one of the parties to a submission clause, a Court has discretion to refuse a stay. Generally speaking where the party charged desires a public inquiry, the Court will generally refuse to send the case to arbitration, but where the party making the charge desires that the matter should be dealt with in Court, the Court will be less inclined to stay the suit. 155 I.C. 895=1935 Sind 62.

PRACTICE—In respect of a suit pending on the file of the Judicial Commissioner at Sind, the practice is to file a separate application for stay under S. 19 of the Act and not an application in the suit. 27 S.L.R. 169=140 I.C. 626=1933 Sind 75.

MISCELLANEOUS.—A decision of a Judge as an arbitrator with the consent of the parties is binding on the parties as if it were an award of an arbitrator, even though the Judge, as such, had no jurisdiction over the matter in controversy. But this doctrine cannot apply where the Judge was chosen as arbitrator not voluntarily but under great judicial pressure. 15 C.L.J. 142=13 I.C. 898=16 C.W.N. 444. An agreement to refer to arbitrator is not bad merely for the reason that it included dis-

putes other than that before the Court, if there was a distinct clause to the effect that the arbitrators would only report to the Court their decision on the subject-matter of the suit. 76 I.C. 1007=1923 Lah. 411. Where a private information got by an arbitrator was, in the presence of the parties, communicated to the other arbitrators, an award by them is not invalid. Courts proceed very warily in allowing revision is awards. 41 M.L.J. 676. The umpire is not justified in the face of an objection by either party in taking any part of the evidence from the notes of the arbitrators unless there are specific provisions in the submission permitting him to do so. 64 I.C. 706. When a Court is asked to file an award, it is not sitting as a Court of appeal from the arbitrators, but the Court can certainly decide if the award sought to be filed is the production of a tribunal duly constituted under the terms of a contract binding on both parties. 41 A. 481. Where the Court below had cancelled the reference to arbitration on account of the delay in making the award, it is not competent to the appellate Court to look into the award or treat it as if it were the report of a commissioner. 4 Lah.L.J. 48=1922 L. 194 (2). On this section, see also 39 C. 669 (Rules of Bengal Chamber of Commerce); 1923 Lah. 453, 28 C.W.N. 110. 27 Bom. L.R. 1898; 1925 Bom. 449; 38 C.L.J. 67 (Specific performance of agreement to refer to arbitration), 56 M.L.J. 291; 27 Bom. L.R. 568 (Sole arbitrator appointed by one party).

RES JUDICATA.—Where an application for stay is rejected and the order is not set aside, a second application for stay is barred as *res judicata* even if the first order is erroneous. 1935 Sind 62. 155 I.C. 895. 28 S.L.R. 366.

APPEAL.—From an order refusing stay under S. 19 no appeal lies, only revision is competent. 1937 Lah. 206.

REVISION.—An application made under S. 19 is not an interlocutory proceeding or a mere branch of a suit within the meaning of S. 115 of the C. P. Code. It is a case in itself and decides finally between the parties whether the matter shall or shall not be decided by arbitration, therefore an application in revision will lie and is not excluded by S. 115. 1936 Sind 205. See also 1937 Lah. 206.

(c) the transfer to Presidency Courts of Small Causes for execution of awards filed, where the sum awarded does not exceed two thousand rupees;

(d) the staying of any suit or proceeding in contravention of a submission to arbitration; and,

(e) generally, all proceedings in Court under this Act.

21. In section 21 of the Specific Relief Act, 1877, after the words "Code of Civil Procedure" the words and figures "and the Indian Arbitration Act, 1899," shall be inserted, and for the words "a controversy" the words "present or future or differences" shall be substituted.

Crown to be bound

22. The provisions of this Act shall be binding on the Crown.

23. 1[* * * *]

THE FIRST SCHEDULE.

(See Section 6)

PROVISIONS TO BE IMPLIED IN SUBMISSIONS.

I. If no other mode of reference is provided, the reference shall be to a single arbitrator

II. If the reference is to two arbitrators, the two arbitrators may appoint an umpire at any time within the period during which they have power to make an award.

III. The arbitrators shall make their award in writing within three months after entering on the reference, or after having been called on to act by notice in writing from any party to the submission, or on or before any later day to which the arbitrators, by any writing signed by them, may, from time to time, enlarge the time for making the award

IV. If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

V. The umpire shall make his award within one month after the original or extended time appointed for making the award of the arbitrators has expired, or on or before any later day to which the umpire, by any writing signed by him, may from time to time, enlarge the time for making his award.

VI. The parties to the reference, and all persons claiming through them respectively shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire, all books, deeds, papers, accounts, writings, and documents within their possession or power respectively which may be required or called for, and do all other things which during the proceedings on the reference the arbitrators or umpire may require

VII. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath.

VIII. The award to be made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

IX. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom, and in what manner, those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

THE SECOND SCHEDULE.

(See Section 18.)

FORM I.

Submission to single arbitrator

In the matter of the Indian Arbitration Act, 1899.—

Whereas differences have arisen and are still subsisting between A. B. of _____ and C. D. of _____ concerning _____

Now we, the said A. B. and C. D., do hereby agree to refer the said matters in difference to the award of X. Y.

(Signed) A. B.
C. D.

Dated the _____

189 .

Leg. Ref.

¹ Omitted by Order in Council, 1937.

FORM II.

Submission of particular dispute to single arbitrator

In the matter of the Indian Arbitration Act, 1899:—

Whereas differences have arisen and are still subsisting between *A. B.* of _____ and *C. D.* of _____ concerning _____
 Now we, the said *A. B.* and *C. D.*, do hereby agree to refer the said matters in difference to the award of *X. Y.*

(Signed) *A. B.*
C. D.

Dated the _____ 189 .

FORM III.

Appointment of single arbitrator under agreement to refer future differences to arbitration.

In the matter of the Indian Arbitration Act, 1899:—

Whereas, by an agreement in writing, dated the _____ day of _____ 18____, and made between *A. B.* of _____ and *C. D.* of _____, it is provided that differences arising between the parties thereto shall be referred to an arbitrator as therein mentioned,

And whereas differences within the meaning of the said provision have arisen and are still subsisting between the said parties concerning _____

Now we, the said parties *A. B.* and *C. D.*, do hereby refer the said matters in difference to the award of *X. Y.*

(Signed) *A. B.*
C. D.

Dated the _____ 189 .

FORM IV.

Enlargement of time by arbitrator by endorsement on submission

In the matter of the Indian Arbitration Act, 1899, and an arbitration between *A. B.* of _____ and *C. D.* of _____:—

I hereby enlarge the time of making my award in respect of the matters in difference referred to me by the within (or above) submission until the _____ day of _____ 189 .

(Signed) *X. Y.*
Arbitrator.

Dated the _____ 189 .

FORM V

Special case.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between *A. B.* of _____ and *C. D.* of _____:—

The following special case is, pursuant to the provisions of Section 10, clause (b), of the said Act, stated for the opinion of the _____

(Here state the facts concisely in numbered paragraphs.)

The questions of law for the opinion of the said Court are:—

First, whether.....

Secondly, whether.....

(Signed) *X. Y.*
Arbitrator.

Dated the _____ 189 .

FORM VI.

Award.

In the matter of the Indian Arbitration Act, 1899, and an arbitration between *A. B.* of _____ and *C. D.* of _____:—

Whereas in pursuance of an agreement in writing, dated the _____ day of _____ 189 , and made between *A. B.* of _____ and *C. D.* of _____

the said *A. B.* and *C. D.* have referred to me, *X. Y.*, the matters in difference between them concerning _____

(or as the case may be),

Now I, the said *X. Y.*, having duly considered the matters submitted to me, do hereby make my award as follows:—

I award—

(1) that.....

(2) that.....

(Signed) *X. Y.*
Arbitrator.

Dated the _____ 189 .

¹Here specify the Court.

THE ARBITRATION (PROTOCOL AND CONVENTION) ACT (VI OF 1937).

[4th March, 1937.

An Act to make certain further provisions respecting the law of arbitration in British India.

WHEREAS India was a State signatory to the Protocol on Arbitration 'Clauses set forth in the First Schedule, and to the Convention on the Execution of Foreign Arbitral Awards set forth in the Second Schedule, subject in each case to a reservation of the right to limit its obligations in respect thereof to contracts which are considered as commercial under the law in force in British India;

AND WHEREAS it is expedient, for the purpose of giving effect to the said Protocol and of enabling the said Convention to become operative in British India, to make certain further provisions respecting the law of arbitration;

It is hereby enacted as follows:—

Short title, extent and operation 1. (1) This Act may be called THE ARBITRATION (PROTOCOL AND CONVENTION) ACT, 1937.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) The provisions of this Act, except this section, shall have effect only from such date as the ¹[Central Government] may, by notification in the ¹[Official Gazette,] appoint in this behalf, and the ¹[Central Government] may appoint different dates for the coming into effect of different provisions of the Act.

2. In this Act "foreign award" means an award on differences relating to matters considered as commercial under the law in force in British India, made after the 28th day of

Interpretation
July, 1924,—

(a) in pursuance of an agreement for arbitration to which the Protocol set forth in the First Schedule applies, and

(b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the ¹[Central Government,] being satisfied that reciprocal provisions have been made, may, by notification in the [Official Gazette,] declare to be parties to the Convention set forth in the Second Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and

(c) in one of such territories as the ¹[Central Government,] being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies,

and for the purposes of this Act an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

3. Notwithstanding anything contained in the Indian Arbitration Act, 1899, or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Protocol set forth in the First Schedule as modified by the reservation subject to

Stay of proceedings in respect of matters to be referred to arbitration

which it was signed by India applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings, and the Court unless satisfied that the agreement or arbitration has become inoperative

¹ Substituted by Order in Council, 1937.

or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings,

4 (1) A foreign award shall, subject to the provisions of this Act, be enforceable in British India as if it were an award made on a matter referred to arbitration in British India.

(2) Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in British India, and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.

5. (1) Any person interested in a foreign award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

6. (1) Where the Court is satisfied that the foreign award is enforceable under this Act, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

7. (1) In order that a foreign award may be enforceable under this Act it must have—

(a) been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed,

(b) been made by the tribunal provided for in the agreement or constituted in manner agreed upon by the parties,

(c) been made in conformity with the law governing the arbitration procedure,

(d) become final in the country in which it was made,

(e) been in respect of a matter which may lawfully be referred to arbitration under the law of British India,

and the enforcement thereof must not be contrary to the public policy or the law of British India.

(2) A foreign award shall not be enforceable under this Act if the Court dealing with the case is satisfied that—

(a) the award has been annulled in the country in which it was made, or

(b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented, or

(c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that if the award does not deal with all questions referred the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(c) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in clauses (a), (b) and (c) of sub-section (1), or the existence of the conditions specified in clauses (b) and (c) of sub-section (2), entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Evidence 8. (1) The party seeking to enforce a foreign award must produce—

(a) the original award or a copy thereof duly authenticated in manner required by the law of the country in which it was made;

(b) evidence proving that the award has become final; and

(c) such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in clauses (a), (b) and (c) of sub-section (1) of section 7 are satisfied.

(2) Where any document requiring to be produced under sub-section (1) is in a foreign language, the party seeking to enforce the award shall produce a translation into English certified as correct by a diplomatic or consular agent of the country to which that party belongs or certified as correct in such other manner as may be sufficient according to the law in force in British India.

Saving 9. Nothing in this Act shall—

(a) prejudice any rights which any person would have had of enforcing in British India any award or of availing himself in British India of any award if this Act had not been passed, or

(b) apply to any award made on an arbitration agreement governed by the law of British India.

Rule-making powers of the High Court 10. The High Court may make rules consistent with this Act as to—

(a) the filing of foreign awards and all proceedings consequent thereon or incidental thereto;

(b) the evidence which must be furnished by a party seeking to enforce a foreign award under this Act; and

(c) generally, all proceedings in Court under this Act.

THE FIRST SCHEDULE.

PROTOCOL ON ARBITRATION CLAUSES.

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:

1. Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations in order that the other Contracting States may be so informed.

2. The arbitral procedure, including the constitution of the Arbitral Tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3. Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4. The Tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the Arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5. The present Protocol, which shall remain open for signature by all States, shall be ratified. The ratification shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the Signatory States.

6. The present Protocol will come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7. The present Protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other Signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8. The Contracting States may declare that their acceptance of the present Protocol does not include any or all of the undermentioned territories: that is to say, their colonies, overseas possessions or territories, protectorates or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all Signatory States. They will take effect one month after the notification by the Secretary General to all Signatory States.

The Contracting States may also denounce the Protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

THE SECOND SCHEDULE.

CONVENTION ON THE EXECUTION OF FOREIGN ARBITRAL AWARDS.

Article 1.—In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2.—Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied:

(a) That the award has been annulled in the country in which it was made;

(b) That the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented,

(c) That the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country where recognition or enforcement of the award is sought can, if it thinks fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3 —If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1 (a) and (c), and Article 2 (b) and (c), entitling him to contest the validity of the award in a Court of law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4 —The party relying upon an award or claiming its enforcement must supply, in particular:

(1) The original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) Documentary or other evidence to prove that the award has become final, in the sense defined in Article 1 (d), in the country in which it was made;

(3) When necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2 (a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this Article into the official language of the country where the award is sought to be relied upon may be demanded. Such translations must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5.—The provisions of the above Articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article 6.—The present Convention applies only to arbitral awards made after the coming into force of the Protocol on Arbitration Clauses, opened at Geneva on September 24, 1923.

Article 7.—The present Convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those Members of the League of Nations and non-Member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

Article 8.—The present Convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9.—The present Convention may be denounced on behalf of any Member of the League or non-Member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notifications, to all the other Contracting Parties, at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, *ipso facto*, the denunciation of the present Convention.

Article 10.—The present Convention does not apply to the Colonies, Protectorates or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this Convention to one or more of such Colonies, Protectorates or territories to which the Protocol on Arbitration Clauses opened at Geneva on September 24, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the Convention for all or any of the Colonies, Protectorates or territories referred to above. Article 9 hereof applies to such denunciation.

Article 11.—A certified copy of the present Convention shall be transmitted by the Secretary-General of the League of Nations to every Member of the League of Nations and to every non-Member State which signs the same.

THE BANKERS' BOOKS EVIDENCE ACT (XVIII OF 1891).

Prefatory Note.—The following is the *Statement of Objects and Reasons* attached to the Bill:—

"It is some time since the Imperial Parliament recognised the great inconvenience which is caused to bankers from their being required to produce their books in Courts of Justice. In the first place, these books are usually of great size and weight, and, in the second place, they are required for entering the daily transactions of the bank. Facilities were provided for proving the contents of bankers' books by means of certified copies, and in the year 1891, an Act was passed for British India upon the same lines. Unfortunately the definition of a company adopted in the Act was too narrow. It failed to provide for banking companies carrying on business in the country but registered or incorporated in the United Kingdom, and in a criminal case which was recently tried in Calcutta it was discovered that the entries in the books of the Delhi and London Bank could not be proved by copies. The Advocate-General immediately called attention to this defect in the law and suggested the draft of a Bill for removing it. This Act was intended to widen the definition of the company adopted in the Act of 1891.

"The Bengal Chamber of Commerce had asked the Government to consider the question of extending the definition so as to include all foreign banks in India, but, after carefully considering the question, the Government of India came to the conclusion that it would be better to leave these foreign banks to be admitted in particular cases one by one under the power of notification given by S. 3 of the Act of 1891" (*See Proceedings in Council, Fort St George Gazette, 20th July, 1900.*)

The Hon'ble Sir Alexander Miller in presenting the Report of the Select Committee on the Bill to amend the Law of Evidence with respect to Bankers' Books said:—

"The Select Committee have made several considerable changes in detail, but none which, I think, affects the principle of the Bill. The alterations are briefly these. Instead of the elaborate machinery proposed in the Bill in which it is to be proved by a system of affidavits that the books were examined and the extracts verified, we propose to introduce a system of certified copies, exactly analogous to that in the present law in respect to certified copies of public documents and we do not propose to permit any evidence to be given otherwise than by the production of the books themselves, or by the certified copies. We were asked to extend the Act to all kinds of mercantile concerns but that was not desirable. We have omitted all reference to Government Savings Banks and to the Post Office because we think that the books of these bodies are "public documents" within the meaning of the Evidence Act. We have, however, introduced a clause enabling the Local Government in any case to extend the provisions of the Act to the books of any company which keeps a regular set of books analogous to the recognized bankers' books and to which the Local Government consider it desirable to extend them. We have also introduced provisions enabling the bank, if it thinks fit, to offer to produce certified copies instead of allowing its books to be examined. We thought there might be very good reasons for this course, and that in the interest of the bank or its clients the clause which proposed to enable any party to obtain authority to look through the books of the bank may offer to give copies of the necessary certificates. There is one point in connection with this matter, which is, that we propose in that case, that the bank should have to certify that it has given all the relevant entries. One of the District Judges has made a note to the effect that it is impossible for a bank to judge what entries are or are not relevant. The answer is that the bank is not bound to take advantage of this provision. If for the purpose of concealing the accounts it chooses to take advantage of it and does not insert all relevant entries, it must act on its own responsibility and at its own risk.

We have inserted no clauses with reference to the payment of any fee to a bank for the supply of certified copies, but we have given a discretionary power to the Court, where the matter comes before it, to award costs to or against the bank as it may think just; and the reason is that we think that in most cases it would be more beneficial to the bank to give these certificates free of cost than to have their books produced, and possibly detained for days, or even weeks, for purposes of legal proceedings, but if in any case the bank does not choose to grant these certified copies without payment, the party will have it in his own power either to pay what the bank asks, or to go before the Court and get an order. Probably in many cases an agreement with the bank would be come to in preference to going before the Court, but if the matter does go before the Court, then we give the Court complete power to make any order which it thinks proper as to costs for or against the bank.

The Bill does not contain any express power to the Court to require the production of the books instead of acting on the certified copies.

I think the power is given incidentally, because we say that these certified copies shall be received as *prima facie* evidence of the existence of the entries and also that no

officer of a bank shall in proceedings to which the bank is not a party be compelled to produce the books without special order; but I am not quite sure that it may not be desirable to insert a clause to the effect that notwithstanding anything in the Act the Court may order the production of the books themselves whenever it thinks this necessary." (See Proceedings in Council, *Fort St. George Gazette*, 6th October, 1891 Supp., pp. 1, 2)

LOCAL EXTENT OF THE OPERATION OF THE ACT—The Act has been extended by notification under S. 5 of the Scheduled Districts Act XIV of 1874 to British Baluchistan, see *Gazette of India*, 1896, Pt. II, p. 1004. It was declared in force in Upper Burma (except the Shan States) by the Burma Laws Act XIII of 1898. It has been declared in force in the Santhal Parganas by S. 3 of Santhal Parganas Settlement Regulation III of 1872 as amended by the Santhal Parganas Justice and Laws Regulation III of 1899. See *Calcutta Gazette*, 1892, Pt. I, p. 448.

THE BANKERS' BOOKS EVIDENCE ACT (XVIII OF 1891).¹

[1st October, 1891.]

An Act to amend the Law of Evidence with respect to Bankers' Books.

Effect of Legislation.

| Year | No | Short title. | Repealed or otherwise how affected by legislation |
|------|-------|---------------------------------------|---|
| 1891 | XVIII | The Bankers' Books Evidence Act, 1891 | Repealed in Part, Act X of 1911 Amended, Acts I of 1893; XII of 1900 |

WHEREAS it is expedient to amend the Law of Evidence with respect to Bankers' books; it is hereby enacted as follows:—

Title, extent and commencement. 1. (1) This Act may be called THE BANKERS' BOOKS EVIDENCE ACT, 1891.

(2) It extends to the whole of British India.

2[(3) * * * *].

Definitions.

2 In this Act, unless there is something repugnant in the subject or context—

3[‘Company’ means a Company registered under any of the enactments relating to Companies for the time being in force in any part of His Majesty’s dominions or incorporated by an Act of Parliament or by an Indian law or by Royal Charter or by Letters Patent.]

(2) “bank” and “banker” mean—

(a) any company carrying on the business of bankers,

(b) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided.

4[(c) any post office savings bank or money order office:]

(3) “bankers’ books” include ledgers, day-books, cash-books, account-books and all other books used in the ordinary business of a bank:

(4) “legal proceeding” means any proceeding or inquiry in which evidence is or may be given, and includes an arbitration:

Leg. Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1891, Pt. V, p. 24; for Report of Select Committee, see *ibid.*, p. 189; and for Proceedings in Council, see *ibid.*, Pt. VI, pp. 15, 25, 117; 135 and 140

² Repealed by Act X of 1914, Sch. II.

³ Substituted by Order in Council, 1937.

⁴ Added by Act I of 1893, S. 2.

Sec. 2 (2) (c): BANK.—See 58 I.C. 893.

Sec. 2 (3). “BANKERS’ BOOKS”.—Meaning of As to whether Loan Register in Public Debt Office in the Bank of Bengal is a Bankers’ book, see 31 C. 284-8 C.W.N. 125

(5) "the Court" means the person or persons before whom a legal proceeding is held or taken:

(6) "Judge" means Judge of a High Court:

(7) "trial" means any hearing before the Court at which evidence is taken; and

(8) "certified copy" means a copy of any entry in the books of a bank together with a certificate written at the foot of such copy that it is a true copy of such entry, that such entry is contained in one of the ordinary books of the bank and was made in the usual and ordinary course of business, and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.

3. The [Provincial Government] may, from time to time, by notification¹ in the [Official Gazette], extend the provisions of the

Power to extend provisions of Act.

Act to the books of any partnership or individual carrying on the business of bankers within the territories under its administration, and keeping a set of not less than three ordinary account books, namely, a cash-book, a day-book or journal, and a ledger, and may in like manner rescind any such notification.

4. Subject to the provisions of this Act, a certified copy of any entry in

Mode of proof of entries in bankers' books.

a banker's book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

5. No officer of a bank shall in any legal proceeding to which the bank is

Case in which officer of banks not compellable to produce books.

not a party be compellable to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made for special cause.

6. (1) On the application of any party to a legal proceeding, the Court or

Inspection of books by order of Court or Judges.

a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

Leg Ref.

¹ Substituted by Order in Council, 1937.

² For notifications, see *Bombay Government Gazette*, 1902, Pt. I, p. 1289 and as to Madras, see *Mad. R. and O.*, Vol. I (List).

Notes.

Sec. 2 (8) —As to who can inspect and obtain *certified copies*, see 31 C. 284=8 C. W.N. 125.

Sec. 4 —See as to copy of entry in the books of a Bank not falling within the definition of company, 4 C.W.N. 433 (F.B.);

18 A. at pp. 94-95. As to who could order production of books, see 32 C. 498

Sec. 5 —Police officer conducting investigation has right to inspect Bankers' books. 17 Lah. 593

Sec. 6 —An order under the section cannot ordinarily, in the absence of special circumstances, be made without notice to the other side. 5 Bom. L. R. 865; 1932 Bom. 428. See also 20 M. 189 (196). No revision from order under the section 237 P.L.R. 1900.

(3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order.

7. (1) The costs of any application to the Court or a Judge under or for the purposes of this Act and the costs of anything done or to be done under an order of the Court or a Judge made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the bank.

(2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.

(3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs.

THE INDIAN BAR COUNCILS ACT (XXXVIII OF 1926).

Prefatory Note.—The necessity for, and the circumstances under which this Act is passed is thus explained in the Statement of Objects and Reason—The recommendation of the Indian Bar Committee in regard to the constitution of Bar Councils and their functions were as follows.—

1. An all India Bar or Council is impracticable. Statutory Bar Councils should, however, be established at Calcutta, Madras, Bombay, Allahabad, Patna and Rangoon, but provision should be made permitting the constitution of councils at Lahore, Nagpur, Karachi and Lucknow later on (Paragraphs 48 and 55)

2 The Council should consist of 15 members, four of whom should be nominated by the High Court, including, where possible, the Advocate-General or the Government Advocate and the Government Pleader. The remaining eleven, of whom six should be advocates of at least 10 years' standing, should be elected by advocates of the High Court, provided that in Calcutta and Bombay the High Courts should determine how many of the eleven should be advocates entitled to practise on the original side. The nominated members should ordinarily be advocates, but it should be left to the High Courts to nominate Judges past and present. (Paragraphs 57 and 58)

3 The first Councils should hold office for 3 years, the term of office of subsequent Councils being determined by rules to be framed by the Councils themselves (Paragraph 57.)

4. A Bar Council should have power to make rules subject to the approval of the High Court in respect of the following matters —

(a) the qualifications, admission and certificates of proper persons to be advocates of the High Court,

(b) the powers and duties of advocates,

(c) the conduct of any examination which may be prescribed by it and the fees to be paid for appearing at the same,

(d) legal education including the delivery of lectures to students and the fees to be chargeable therefor,

(e) matters relating to the discipline and professional conduct of advocates,

(f) procedure and practice in cases falling within the disciplinary jurisdiction of the Council,

(g) the method of holding elections of members of the Council and all matters incidental thereto,

(h) the meetings of the Council, the quorum necessary for the transaction of business, the election of a President or other officer and the appointment of committees for special purposes,

(i) the period for which a Council, after the first Council, should hold office and the filling of vacancies occurring between elections,

(j) the terms on which advocates of another High Court may be permitted to appear occasionally in the High Court to which the Council is attached, and

(k) any other matter prescribed by the High Court. (Paragraph 59.)

5. The rules regulating the election of the first Council and the filling of vacancies before rules are made by the Council should be made by the High Court, and it should be provided that no rules shall be made affecting the special provisions suggested for the original sides of the Calcutta and Bombay High Courts so long as those provisions remain in force (Paragraph 59.)

6. A Bar Council should have power either of its own motion or on complaint or on a reference by the High Court to inquire into all matters of the kind referred to in Sections 12 and 13 of the Legal Practitioners Act, 1879, breaches of rules and other improper conduct in which an advocate of the Court is concerned, and make a report to the High Court with a recommendation as to the action, if any, to be taken by the Court.

A Bar Council should also be entitled to be heard in any matter relating to the admission of an advocate or in support of any report made by it to the Court. (Paragraph 60.)

7. The existing disciplinary jurisdiction of the High Court should be maintained, but the Court should be bound before taking disciplinary action against an advocate, except in regard to contempt of Court and the like to refer the case to the Bar Council for inquiry and report. On receipt of a report from the Bar Council the Court should be empowered itself to make or require the Council to make further inquiry. At the request of a Bar Council or on its own motion a High Court should be authorised to order an inquiry to be held by a local Court. (Paragraph 61.)

8. Provision should be made for procuring with the sanction of the Court the attendance of witnesses and production of documents required by the Council for an inquiry and witnesses should receive the same protection as when they give evidence before a Court. (Paragraph 61.)

(The paragraphs referred to are paragraphs in the Report.)

The Government of India consulted Local Governments and High Courts upon these recommendations. In certain respects it appeared necessary to amplify them and in some respects to modify them in the light of the views urged by the authorities consulted. It is intended that these recommendations with the amplifications and modifications should be given effect to by or under the Bill.

2. The Bill is intended also to carry out as far as possible the following miscellaneous recommendations of the committee—

(a) The ideal to be kept in view should be the disappearance of different grades of legal practitioners so that ultimately there may be a single grade entitled to appear in all Courts. At present the largest degree of unification possible should be effected. (Paragraphs 11 and 17.)

(b) In all High Courts a single grade of practitioners entitled to plead should be enrolled, to be called advocates (not barristers), the grade of High Court Vakils or Pleaders being abolished, and when special conditions are maintained for admission to plead on the original side the only distinction should be within that grade which shall consist of advocates entitled to appear on the original side and advocates not so entitled. (Paragraph 19.)

(c) Advocates of one High Court should be entitled to practise in another High Court subject to conditions to be imposed by the Bar Council of the latter Court or by the Court where there is no Bar Council. (Paragraph 20.)

(d) Where there is a compulsory dual agency system at present it should be allowed to continue. (Paragraph 26.)

(e) The High Courts should retain their power to fix the amount payable by a party in respect of the fees of an adversary's legal practitioner. (Paragraph 61.)

(f) Partnerships between legal practitioners should be permitted wherever all classes of legal practitioners are entitled to act as well as to appear and plead. (Paragraph 69.)

(g) The High Courts, where this is not now permitted, should consider the advisability of allowing Indian barristers applying for enrolment as advocates to read with an approved Indian practitioner instead of reading in chambers in England, at least when it is shewn that the individual cannot obtain entry in suitable chambers in England. (Paragraph 68.)

3. Incidentally it is intended that the provisions of the Bill and the rules which may be made under it shall, in regard to advocates entitled as of right to practise in the High Courts, replace the relevant provisions of the Legal Practitioners' Act, the Bombay Pleaders' Act and the Letters Patent of the various High Courts of Judicature as well as the rules made under those provisions. In regard to certain matters for which provision has not been made in the Bill it has, however, been necessary to retain the residuary powers of the High Courts of Judicature under their Letters Patent.

In accordance with the recommendation of the Committee in paragraph 56 of their Report the enrolment and control of legal practitioners other than Advocates is left to the High Courts under the Legal Practitioners' Act and the Bombay Pleaders' Act as amended by the Bill.

4. The principal modifications of the Committee's recommendations which are contained in the Bill are as follows—

(a) the constitution of the Bar Councils differs slightly from the recommendations in that the Advocate-General must be a member and the number of members to be elected is ten, instead of eleven;

(b) the rules regarding all election of the Councils instead of only the election of the first Councils are to be made by the High Courts, the powers of the Councils in this respect being restricted to the making of bye-laws in regard to matters not provided for by the rules made by the High Courts. For the making of these bye-laws, however, the approval of the High Court will not be required;

(c) power is given to the Councils, with the sanction of the High Court, to prescribe fees to be payable to the Councils in respect of admission and enrolment and of the issue of certificates, and

(d) the powers of the Councils to hold inquiries into complaints of unprofessional conduct are restricted to cases referred to the Council by the High Court, and the inquiries are to be held by a Tribunal consisting of members of the Council appointed for the purposes of the inquiry by the Chief Justice or Chief Judge of the High Court. The High Court is, however, required to refer all complaints of unprofessional conduct which it does not dismiss either to the Bar Council or to a subordinate Court for inquiry. Instead of requiring the sanction of the Court for compelling the attendance of witnesses in each case a Tribunal is given power to enforce such attendance. A Tribunal is also given power to administer oaths to witnesses, and the protection of the witnesses who give evidence, which was recommended by the Committee, is secured by applying the provisions of section 132 of the Indian Evidence Act to proceedings before a Tribunal. On the other hand, rules governing the procedure of a Tribunal are to be prescribed by the High Courts instead of by the Council with the approval of the High Court. (Statement of Objects and Reasons)- [*Gazette of India*, dated 2nd January, 1927, Part V, pages 6, 7 and the Report of the Bar Committee.]

When the Bill was referred to a Select Committee, several other alterations and amendments were made, with reference to which they said:-

"We have made a large number of alterations in the Bill, but we have not radically altered its scope in view of the fact that, although many of the opinions received are in favour of the conferment of much wider powers upon Bar Councils, many others, including some of great weight reveal considerable opposition to the innovations already proposed. In these circumstances, we think it would be unwise to depart from the present scheme of the Bill as a more or less tentative measure which is intended to be the first step towards the unification and eventual autonomy of the legal profession. With these preliminary remarks we now proceed to refer in detail to the more important amendments which we have made."

Clause 1—We wish to record a suggestion that the Local Government of the United Provinces and the Chief Judge of the Chief Court of Oudh might well be consulted as to the desirability of applying the provisions of the Act to that Court.

Clause 4.—We think it desirable to indicate clearly that Judges of the High Court may be represented on the Bar Council, and have provided that two out of the four persons nominated by the Court may be Judges.

Sub-clause (3) of this clause was intended to provide for the representation on the Bar Council of advocates entitled to practise on the Original Side of the two High Courts to which it refers and more especially for the representation of the barrister element among them, an element which will no doubt tend to diminish with the course of time. We have accordingly provided definitely that at least one-half of the representation of Original Side advocates on the Bar Councils of these two High Courts shall be Barristers.

We think it is essential, in view of the status of the Advocate-General in the Presidency towns, that they should be made *ex-officio* Chaimen of the Bar Councils to which they respectively belong.

Clause 6—The matters to be dealt with by rules made under this clause are, we think, matters which should ordinarily be dealt with by the Bar Councils themselves. We have accordingly provided that the rules should be made only in the first instance by the High Court and thereafter by the Bar Council with the previous sanction of the High Court. This involves the omission of sub-clause (c) of clause 7, which in the Bill as introduced was not altogether consistent with the provisions of clause 6.

Clause 8.—We have, in the first place, omitted the last part of the proviso to sub-clause (1) of this clause, as we are of opinion that it would not be possible to hold that a person appearing, pleading or acting on his own behalf or by his recognized agent could be held to be "practising".

We are also of opinion that the objection to sub clause (2) which has been raised by several High Courts, namely, that the preparation and maintenance of the roll of advocates should be entrusted to the High Court instead of to the Bar Council, is well founded. We have accordingly provided for the maintenance of the roll by the High Court and for the maintenance of a copy of it by the Bar Council, principally in order that the election roll of persons entitled to elect members to the Bar Council may be kept up to date. In order to enable this to be done we lay upon the High Court the duty of furnishing a copy of the roll to the Bar Council and of communicating to it all alterations and additions as they are made.

Objection has been taken to the provision for the imposition of a fee in respect of enrolment of persons who are advocates, vakils or pleaders of the High Court at the time when the provisions of the Act come into force in respect thereof. We think that, if only for the purpose of starting the Bar Council in funds, some nominal fee should be payable

by such persons and we have fixed this at the sum of Rs 10. In cases of new entrants the fee payable will be that prescribed by rules made by the Bar Council under the next following clause. We desire to point out that persons who have once been enrolled in a High Court as advocates, vakils or pleaders will not, in view of the provisions of Article 30 in Schedule I to the Indian Stamp Act, 1899, be required to pay stamp duty again in respect of their enrolment under this Act.

We have added to this clause two sub-clauses providing respectively for the seniority of advocates *inter se* and their respective rights of pre audience. Sub-clause (4) as drafted by us enables the High Court in individual cases to grant precedence to an advocate out of the order of his seniority. We think a provision of this kind might be used to the advantage not only of a rising and successful, but also of a senior and less successful, advocate.

Finally, in view of some of the opinions received, we consider it desirable to point out that clause 1 (3) of the Bill is designed to enable the various provisions of the Bill to be brought into force on different dates and thus to prevent the possibility of any period intervening between the operation of the prohibition contained in sub-clause (1) of clause 8 and the preparation of the new roll.

Clause 9.—Objections were raised to the provisions of sub-clause (4) of this clause in the Bill as introduced which was intended merely to preserve the existing powers of the Chartered High Courts under their Letters Patent to regulate the numbers of admissions and to refuse admission to individuals at their discretion. As, however, no High Court has, we believe, attempted to restrict in any way the numbers of new entrants, we think a provision enabling them to do so is unnecessary. But we do consider it essential that the High Court should have power to refuse admission to any person otherwise qualified if it considers that he would be on other grounds an undesirable addition to the Bar, and have made provision accordingly by means of a proviso to sub-clause (1).

We have added a new sub-clause (4) to this clause to meet a criticism advanced by the High Court of Judicature at Bombay that under the Bill as introduced, the powers of the High Court in respect of admissions to the Original Side were not sufficiently defined. The new sub-clause is intended to make it clear that the powers of the High Courts at Calcutta and Bombay to regulate absolutely the qualifications for admission to practise on the Original Side will remain unimpaired.

Clause 10.—It has been pointed out that the expression 'unprofessional conduct' does not cover the whole range of cases in which it may be necessary to take disciplinary action against advocates, and we have made some drafting alterations in this clause to meet this point.

Some misunderstanding appears to have arisen as to the object of providing for a reference of cases of misconduct to Subordinate Courts. Such a provision is necessary as a Tribunal of the Bar Council will not in all cases be in a position to inquire satisfactorily into matters which have occurred in the mofussil. We think that the allocation of inquiries between Subordinate Courts and the Bar Council must be left to the discretion of the High Court, but we have provided that the High Courts shall be bound to consult the Bar Council in any case before referring it to such a Court, and we have further provided that Courts to which such reference may be made shall be the Courts of District Judges.

We have omitted the punishment of fine for which the Bill originally provided.

Clause 12.—The alterations which we have made in this clause provide, firstly, that the Advocate-General shall have notice of, and shall be entitled to appear at the hearing of, every case before the High Court, whether the inquiry has been made by a Tribunal of a Bar Council or by a District Court, and secondly, that the High Court shall have the power to review its orders. This power will enable it to accept a belated apology, if it thinks fit, and remit or reduce the punishment.

Clause 13.—We have added a proviso to sub-clause (1) to give effect to a suggestion made by the High Court of Judicature at Bombay that the Tribunal should not have unrestricted power to enforce the attendance of judicial officers, a power which might result in dislocation of judicial business and inconvenience to the public. We therefore, require the Tribunal to obtain the previous sanction of the High Court or of the Local Government, as the case may be, before issuing a summons to the presiding officer of any Court.

We have further thought it advisable to make definite provision as to the manner in which Tribunals may be enabled to utilise the powers conferred by this section.

Clause 14.—We think the provisions of the Bill as introduced were somewhat too stringent in refusing to allow an advocate of one High Court to appear before another unless rules had been made by the latter Court or by the Bar Council, where such exists, regulating the conditions of such appearances. We think it reasonable to give advocates the right of appearing in another High Court unconditionally unless conditions are imposed by such rules and we have re-drafted the clause accordingly. We have also made an addition to sub-clause (1) to provide for certain cases which have been brought to our notice in which legal practitioners are at present entitled to appear before certain public officers or bodies not legally authorised to take evidence.

Clause 15.—We have given effect to a suggestion that provision should be made for rules to regulate the investment and general management of the funds of the Bar Council.

We have also added a clause which will enable rules to be made in respect of other matters which experience may reveal as requiring regulation.

Clause 17.—We have inserted this clause in the usual form to provide indemnity for bona fide action taken by Bar Councils and Committees, Tribunals and members of Bar Councils.—[*Gazette of India*, dated 21st August, 1926, Part V, pages 119-121.]

THE INDIAN BAR COUNCILS ACT (XXXVIII OF 1926).¹

An Act to provide for the constitution of Bar Councils in British India and for other purposes.

Effect of Legislation

| Year. | No | Short title. | Repealed or otherwise how affected by legislation. |
|-------|---------|-----------------------------------|--|
| 1926 | XXXVIII | The Indian Bar Councils Act, 1926 | Amended Act XIII of 1927. |

WHEREAS it is expedient to provide for the constitution and incorporation of Bar Councils for certain Courts in British India, to confer powers and impose duties on such Bar Councils, and to consolidate and amend the law relating to legal practitioners entitled to practise in such Courts; It is hereby enacted as follows:—

Preliminary.

Short title, extent, application and commencement.

1. (1) This Act may be called THE INDIAN BAR COUNCILS ACT, 1926.

(2) It extends to the whole of British India, and shall apply to the High Courts of Judicature at Fort William in Bengal, and at Madras, Bombay, Allahabad² [and Patna] and to such other High Courts within the meaning of clause (24) of section 3 of the General Clauses Act, 1897, as the² [Provincial Government] may, by notification³ in the² [Official Gazette], declare to be High Courts to which this Act applies.

Leg Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1926, Pt. V, p. 5; and for Report of Select Committee, see *ibid*, p. 119.

² Substituted by Order in Council, 1937

³ For Notification declaring the Chief Court of Oudh to be a High Court to which this Act applies, see *Gazette of India*, 1928, Pt. I, p. 325

Notes.

Sec 1 —(Per Sulaiman, Banerjee and Sen, JJ) —Independently of the Indian Bar Councils Act, the High Court does not any longer possess any inherent jurisdiction to punish an advocate for *professional misconduct* or to adopt a procedure for enquiry other than that laid down in the Act or to pass an order for costs against him or to impose a fine not contemplated by the Act 1930 A 225=52 A 619=125 I C 477=1930 A L J 402 (F B.)

The High Court has power to refuse admission to the Bar to any person at its discretion. But weight should be attached to the recommendation of the Bar Council which represents the view of the legal profession 1930 A 22=1929 A L J. 1105=123 I C. 683; 6 O W N 1080=124 I C. 5 Luck. 615.

Advocates enrolled in the Madras High Court under the provisions of the Bar Councils Act are entitled to *act and plead* in the *insolvency jurisdiction* of the High Court 52 M 92=113 I C 876 1928 M 1182 55 M L J 551

It is right and proper that all judicial officers should keep a vigilant eye on the conduct of legal practitioners of whatever status, who are all ministers of the Court and should in proper cases institute inquiries under the Bar Councils Act according to the status of the legal practitioner concerned; but legal practitioners are one and all entitled also to the protection of the Court and inquiries should not be instituted on complaints made without having given very grave consideration to the reasonable probability of the case against the legal practitioner being well founded. As much in justice may be done to a legal practitioner by ill-conceived proceedings against him as may be done to the public interest and to the general body of legal practitioners by failure to keep a vigilant eye upon and take proper and strong action against cases of misconduct. Complaint rejected 1931 A.L.J. 678=1931 A 580

In a proceeding against a legal practitioner under the Bar Councils Act it is open to the

(3) This section and sections 2, 17, 18 and 19 shall come into force at once; and the 1[Central Government] may, by notification² in the 1[Official Gazette] direct that the other provisions of this Act, or any provisions thereof specified in the notification, shall come into force in respect of any High Court to which this Act applies on such date as he may by the notification appoint.

Interpretation

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

(a) "advocate" means an advocate entered in the roll of advocates of a High Court under the provisions of this Act;

(b) "Advocate-General" includes, where there is no Advocate-General, the Government Advocate and, where there is no Advocate-General or Government Advocate, such officer as the 1[Provincial Government] may declare to be the Advocate-General for the purposes of this Act;

(c) "High Court" means a High Court to which this Act applies, and

(d) "prescribed" means prescribed by rules made under this Act.

³(2) In this Act 'the Provincial Government' means in relation to any High Court, the Provincial Government of the Province in which the High Court has its principal seat.]

Constitution of Bar Councils.

Constitution and incorporation of Bar Councils

3. (1) For every High Court a Bar Council shall be constituted in the manner hereinafter provided.

(2) Every Bar Council so constituted shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property, both moveable and immovable, and to contract, and shall by the name of the Bar Council of the High Court for which it has been constituted sue and be sued.

Leg. Ref.

¹ Substituted by Order in Council, 1937.

² For such Notifications appointing the 1st March, 1928, as the date on which the rest of the Act will come into force in respect of the Chief Court of Oudh and Ss. 3 to 7 in respect of Calcutta High Court, see *ibid*

Provisions of Ss. 8—16 came into force from the 1st July, 1928, in respect of Calcutta High Court, see *Gazette of India*, 1928, Pt. I, p. 382

The rest of the Act came into force from the 16th July, 1928, in respect of Madras High Court, see *Gazette of India*, 1928, Pt. I, p. 382, in respect of Allahabad High Court from 1st June, 1928, see *Gazette of India*, 1928, Pt. I, p. 400; in respect of Patna High Court from 1st January, 1929, see *ibid*, p. 103, in respect of Bombay and Rangoon High Courts from 1st January, 1929, see *ibid*, p. 714

³ Sub-section (2) has been inserted by Order in Council, 1937.

Notes.

High Court to consider the case on the evidence and arrive at a different conclusion to that of the Bar Tribunal 1930 M W N 216 An advocate convicted for an offence of perjury although struck off the roll of vakils must be dealt with under the Indian Bar Councils Act, he having been enrolled as the Advocate of the High Court under the provisions of the Act 131 I C 67=8 O W N 267=1931 O 161

Where the High Court went into the report of the Bar Council and inflicted punishment

on a legal practitioner, and a counsel appeared on behalf of a Bar Council all the time, held, that the legal practitioner should be directed to pay a fee to the counsel. In all such cases it is desirable that a fee should be paid to the counsel appearing on behalf of the Bar Council 1930 M W N 216 Where a complaint against a legal practitioner is made before the Bar Councils Act came into force but the enquiry takes place under the Act, the High Court has the power to direct the practitioner to pay the costs of the proceedings before the Tribunal of the Bar Council and before the High Court 54 M 857=134 I C 33=61 M L J. 148 (F B). Before the Court will set aside a bar council election because of certain irregularities in the conduct of the election, it must be satisfied that the election was not an election in substance conducted under existing law according to the rules framed for the holding of the election. An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive in the conduct of the election, if the Court is satisfied that the result of the election was not and could not have been affected by those transgressions 1935 A. W R. 110=1935 A. 295

Sec 2 (c): HIGH COURT —High Court referred to in the Act is a chartered High Court. Benares State Chief Court is neither a High Court within the meaning of the Act nor subordinate to the Allahabad High Court 1930 A. 91 (1)=27 A L J. 1195.

Composition of Bar Councils. 4. (1) Every Bar Council shall consist of fifteen members, of whom—

- (a) one shall be the Advocate-General;
- (b) four shall be persons nominated by the High Court, of whom not more than two may be Judges of that Court; and
- (c) ten shall be elected by the advocates of the High Court from amongst their number.

(2) Of the elected members of every Bar Council not less than five shall be persons who have for not less than ten years been entitled as of right to practise in the High Court for which the Bar Council has been constituted.

(3) Of the elected members of the Bar Councils to be constituted for the High Courts of Judicature at Fort William in Bengal and at Bombay such proportion as the High Court may direct in each case shall be persons who have, for such minimum period as the High Court may determine, been entitled to practise in the High Court in the exercise of its original jurisdiction, and such number as may be fixed by the High Court out of the said proportion shall be barristers of England or Ireland or members of the Faculty of Advocates in Scotland.

(4) There shall be a Chairman and Vice-Chairman of each Bar Council elected by the Council in such manner as may be prescribed:

Provided that the Advocates-General of Bengal, Madras and Bombay shall be Chairman *ex-officio*, respectively, of the Bar Councils constituted for the High Courts of Judicature at Fort William in Bengal, at Madras and at Bombay.

Special provisions regarding constitution of first Bar Councils. 5. (1) Notwithstanding anything contained in clause (c) of sub-section (1) of section 4, the elected members of the first Bar Council constituted under this Act for any High Court shall be elected by and from amongst the advocates, vakils and pleaders who are on the date of the election entitled as of right to practise in the High Court.

(2) The terms of office of the nominated and elected members of any such first Bar Council shall be three years from the date of the first meeting of the Council.

Power to make rules regarding constitution and procedure of Bar Councils. 6 (1) Rules, consistent with this Act, may be made to provide for the following matters, namely:—

(a) the manner in which elections of members of the Bar Council shall be held; the method of determining; in accordance with the provisions of sub-sections (2) and (3) of section 4, the candidates who shall be declared to have been elected; the manner in which the result of elections shall be published; and the manner in which and the authority by which doubts and disputes as to the validity of an election shall be finally decided;

(b) the terms of office of nominated and elected members of the Council;

Notes.

Secs. 4, 5, 6, 7 and 8 are cumulative and must be read together 163 I.C. 510 =1936 Sind 75 (S.B.).

Secs. 5 (2) and 6 and R. 21: PERMISSION OF CONTINUANCE OF MEMBER BEYOND THREE YEAR—NOT ULTRA VIRES—While it is true that under the provisions of S. 5 (2) the term of office of the members of the first Bar Council is to be three years, there is nothing in the section which prevents rules being framed whereby certain members elected to the first Bar Council may continue in office thereafter so that a certain continuity may be maintained between the first Bar

Council and its successor R. 21 is not *ultra vires* of the Act. 163 I.C. 510-1936 Sind 75 (S.B.).

Sec 6 (1) (b) and (4): POWERS AND RULES UNDER—OPERATION OF.—Under S. 6 (1) (b) and (4) of the Act, rules may be made to provide for the retirement of members from office by rotation, and for the manner in which the order of such retirement shall be determined, and there is no reason to suppose that the powers conferred by this section and rules made thereunder should not relate to the first Bar Council but only to its successors. 163 I.C. 510=1936 Sind 75 (S.B.).

(c) the filling of casual vacancies in the Council;
 (d) the convening of meetings of the Council, and the quorum necessary for the transaction of business thereat;

(e) the manner of election and the respective terms of office of the Chairman, in cases where the Chairman is to be elected, and of the Vice-Chairman; and

(f) any matter incidental or ancillary to any of the foregoing matters.

(2) The first rules under this section shall be made by the High Court, but the Bar Council may, thereafter, with the previous sanction of the High Court, add to, amend or rescind any rules so made.

(3) No election of a member or members to the Council shall be called in question on the ground that due notice thereof has not been given to any person entitled to vote thereat, if notice of the date fixed for the election has, not less than thirty days before that date, been published in the local official Gazette of the province, or of each province, as the case may be, in which the High Court exercises jurisdiction.

(4) Rules made under clause (b) of sub-section (1) may provide for the retirement of members from office by rotation and for the manner in which the order of such retirement shall be determined.

7. The Bar Council may make by-laws consistent with this Act and any rules made thereunder to provide for any of the following matters, namely:—

(a) the appointment of such ministerial officers and servants as the Bar Council may deem necessary, and the pay and allowances and other conditions of service of such officers and servants; and

(b) the appointment and constitution of Committees of the Council, the procedure of such Committees, and the determination of the powers or duties of the Council which may be delegated to such Committees.

Admission and enrolment of advocates.

8. (1) No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under this Act:

Provided that nothing in this sub-section shall apply to any attorney of the High Court.

(2) The High Court shall prepare and maintain a roll of advocates of the High Court in which shall be entered the names of—

(a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practise in the High Court immediately before the date on which this section comes into force in respect thereof; and

(b) all other persons who have been admitted to be advocates of the High Court under this Act:

Provided that such persons shall have paid in respect of enrolment the stamp duty, if any, chargeable under the Indian Stamp Act, 1899, and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in clause (a) and in other cases such amount as may be prescribed.

¹[(3) Entries in the roll shall be made in the order of seniority, and such seniority shall be determined as follows, namely:—

Leg. Ref.

¹ Sub-secs (3) and (4) inserted and Sub-secs (5), (6) and (7) re-numbered by Act XIII of 1927

Notes.

Sec. 6 (2) —Where, in framing the rules, there is substantial compliance with the provisions of the Bar Councils Act, the omission on the part of the Bar Council strictly

to follow the procedure enjoined in S. 6 (2) does not amount to an illegality and it is no more than an irregularity. 1935 A.W.R. 110=157 I.C. 220=1935 All. 295.

Sec. 8: PRACTICE—MEANING OF.—Advocates enrolled in the High Court of Madras are entitled not only to appear and plead but also act in the insolvency jurisdiction of the High Court. 52 M. 92=55 M.L.J. 551=1928 Mad. 1182.

(a) all such persons as are referred to in clause (a) of sub-section (2) shall be entered first in the order in which they were respectively entitled to seniority *inter se* immediately before the date on which this section comes into force in respect of the High Court; and

(b) the seniority of any other person admitted to be an advocate of the High Court under this Act after the date shall be determined by the date of his admission, or, if he is a barrister, by the date of his admission or the date on which he was called to the Bar, whichever date is earlier:

Provided that, for the purposes of clause (b), the seniority of a person who before his admission to be an advocate was entitled as of right to practise in another High Court shall be determined by the date on which he became so entitled.

(4) The respective rights of pre-audience of advocates of the High Court shall be determined by seniority:

Provided that the Advocate-General shall have pre-audience over all other advocates, and King's Counsel shall have pre-audience over all advocates except the Advocate-General.]

1 (5) The High Court shall issue a certificate of enrolment to every person enrolled under this section.

1 (6) The High Court shall send to the Bar Council a copy of the roll as prepared under this section, and shall thereafter communicate to the Bar Council all alterations in, and additions to, the roll as soon as the same have been made.

1 (7) The Bar Council shall enter in the copy of the roll all alterations and additions so communicated to it.

9. (1) The Bar Council may, with the previous sanction of the High Court, make rules to regulate the admission of persons to be advocates of the High Court:

Provided that such rules shall not limit or in any way affect the power of the High Court to refuse admission to any person at its discretion.

(2) In particular and without prejudice to the generality of the foregoing power, such rules shall provide for the following matters, namely:

(a) the qualifications to be possessed by persons applying for admission as advocates;

Leg Ref.

1 *Vide* footnote (1), p. 97, *supra*

Notes.

Sec 8 (4): ACTING ADVOCATE-GENERAL.—THE ACTING ADVOCATE-GENERAL is entitled, as much as the Advocate-General, to a right of pre-audience over all other advocates in respect of all business whether for the Crown or of a private nature. 136 I.C 793=33 Bom L. R. 1500 (F.B.)

Secs 8 and 9 —The applicant passed his law examination in 1919; he was enrolled as a pleader in 1920 and as a pleader of the first grade in 1922. He applied for admission as an advocate of the Chief Court, which application was objected to by the Bar Council. It was found from record that in a suit wherein he had appeared, even though he had received a payment of sum which was due on a decree passed in favour of the decree-holder the pleader had retained the money from August 1924 till April 1926, and had then paid to the decree-holder, under circumstances not free from suspicion.

Held, that in this instance the Bar Council had not acted otherwise than honestly, fairly and without prejudice and therefore the applicant was refused admission as an advocate of the Chief Court. 6 O.W.N. 1080=1930 Oudh 121=5 Luck. 615.

If the Bar Council can establish that as fair-minded men, who have treated the application for admission as advocate on its merits and in a reasonable manner, they are convinced that a certain member of the profession does not deserve to be enrolled as an advocate and that his enrolment will be prejudicial to the credit of the body of advocates their objections should prevail. It may not be that the conduct in question deserves suspension or removal. Such conduct may not be such as to debar the applicant from practising in the Courts subordinate to the Chief Court. It may well be said that a man is not good enough to be an advocate, although he may be allowed to practise in such Courts. 6 O.W.N. 1080=1930 Oudh 121. *See also* 1930 All. 22=123 I.C 683.

(b) the form and manner in which applications shall be made to the High Court for admission;

(c) the giving of notice by the High Court to the Bar Council of all such applications;

(d) the hearing by the High Court of any objection preferred on behalf of the Bar Council to the admission of any applicant; and

(e) the charging of fees payable to the Bar Council in respect of enrolment.

(3) Rules made under this section shall provide that no woman shall be disqualified for admission to be an advocate by reason only of her sex.

(4) Nothing in this section or in any other provision of this Act shall be deemed to limit or in any way affect the powers of the High Courts of Judicature at Fort William in Bengal and at Bombay to prescribe the qualifications to be possessed by persons applying to practise in those High Courts respectively in the exercise of their original jurisdiction or the powers of those High Courts to grant or refuse, as they think fit, any such application [or to prescribe the conditions under which such persons shall be entitled to practise or plead].

Misconduct.

10. (1) The High Court may, in the manner hereinafter provided, reprimand, suspend or remove from practice any advocate of the High Court whom it finds guilty of professional or other misconduct.

Leg. Ref.

¹ Inserted by Act XIII of 1927.

Notes.

Sec 9 (4).—"High Court" referred to in Bar Councils Act, R 1 is a Chartered High Court. 1929 A L J 1195=122 I. C. 894=1930 All. 91 (1)

BENARES STATE CHIEF COURT is neither a High Court within the meaning of Bar Council, R. 1, nor is it subordinate to the Allahabad High Court, and hence a legal practitioner who enrolls himself as a pleader in Allahabad District Court and practises in the Benares State Courts cannot be treated as having practised in any High Court or a Court subordinate to Allahabad High Court and as such he is not entitled to be enrolled as an advocate of the Allahabad High Court. 1929 A L J 1195=122 I C 894=1930 All. 91 (1) See also 1930 A L J 839=1930 All. 887=128 I C 388

The Subordinate Courts referred to in the proviso to R 1 of the Allahabad High Court Rules framed under the section are Courts within the province. *Courts in Ay-mere* are not Courts subordinate to the Allahabad High Court. 1930 A.L.J. 839=128 I.C 388=1930 All. 887

Rule 10 of the Appellate Side Rules of the Bombay High Court is not *ultra vires*. Advocates on the Appellate Side did not come within the definition of "pleader" as defined in S 4 of the Cr P Code, because they are not authorised by law for the time being in force to practise in the Court side and they have no right of audience in that Court. 148 I.C 664=36 Bom.L R 1=1934 Bom. 70=58 B 456 (F.B.)

Sec 10.—See 1936 Sind 49; 1936 Cal. 158 (S.B.); 1935 Sind 180 (S.B.); 1935 Sind 196=158 I. C. 707. Unprofessional

conduct—Notice issued by High Court after the Act came into force—*Ultra vires*. See 51 A 79. See also 1930 All 225=52 A. 619 (F B). The principle has to be recognised that the disciplinary jurisdiction vested in the High Court to reprimand, suspend or remove from practice an advocate for misconduct, should not be employed merely to supplement, as it were, by way of a further punishment, a punishment which the advocate has received under the law for the misconduct of which he is guilty. 63 Cal 867=162 I C 170=40 C W N 366=1936 Cal 158 (S B). See also 1935 Rang. 458

The word "may" in S 10 (1) makes it plain that while the High Court has unrestricted jurisdiction in all cases of misconduct, a discretion is left to the Court to take action in suitable cases only. It is not possible to lay down any hard and fast rule or any general principles with regard to exercise of such discretion. It must be exercised judicially. The test to which the Court has to apply is whether the proved misconduct of the advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted, or unfit to be entrusted with the responsible duties that an Advocate is called upon to perform. This test would be a sound working rule applicable to all branches of the profession. 63 Cal. 867=162 I.C. 170=40 C W N 366=1936 Cal. 158 (S.B.).

There is no reason why the words "professional or other misconduct" in S. 10 (1) should not be read in their plain and natural meaning. The legislature intended by the aforesaid words to confer on the High Court jurisdiction to take action in all

Notes.

cases of misconduct, misconduct in a professional or other capacity. The Court has a discretion to take action in suitable cases. 63 Cal 867=162 I.C. 170=40 C.W.N. 366=1930 Cal. 158 (S.B.).

In re *Wallace* (L.R. 1 P.C. 283) is no authority for holding that an advocate should never be punished professionally for *contempt of Court* committed by him in his personal capacity, however gross the offence may be. Each case must be dealt with according to the circumstances. Where a pleader in his capacity as a suitor in the Small Cause Court made a grossly improper remark reflecting upon the Judges of the High Court who at that stage had no concern whatever with the suit and a gratuitous hit at the Chief Justice without the slightest justification and was fined Rs. 75 for contempt of Court, *held*, that the fine was not under the circumstances sufficient and that he should be suspended from practice for six months. 55 A. 148=145 I.C. 847=1933 All. 224. But see also 1932 All. 492 (S.B.). It is beyond question that conviction for a criminal offence is *per se* evidence of misconduct. But all criminal convictions are not grounds for the exercise of the Court's disciplinary jurisdiction. A conviction for the offence of sedition under S. 124-A I.P. Code cannot be regarded as such misconduct as would, in all circumstances, require action to be taken under the Court's disciplinary jurisdiction and as would demand the removal of the advocate from practice. 63 Cal. 867=162 I.C. 170=40 C.W.N. 366=1936 Cal. 158 (S.B.). See also 1935 Rang. 458; 59 Bom. 676=69 M.L.J. 43 (P.C.). An advocate took a prominent part in Labour and Trade Union Movements and delivered a number of speeches advocating certain reforms. For some of these speeches he was bound over for one year under S. 107, Cr. P. Code. For others, he was prosecuted under S. 124-A, I.P. Code, and convicted thrice. There was no indication that he made any organised or persistent attempt to create a breach of peace or to incite acts tending to subvert law and order. The general tenor of the speeches was inoffensive and except on some particular occasions his views were not in any way hostile to the Government; and indeed several passages in them advocated obedience to law and order. The Tribunal of the Bar Council which held an enquiry reported that apart from his activities in connection with the labour movement, he was a young man of good character, inexperienced in his profession, honest and straight in his dealings, and while acquitting him of professional misconduct, the tribunal found him guilty of other misconduct and also observed that the case seemed to be very near the border line. *Held*, no further action was called for in the case. 63 Cal. 867=162 I.C. 170=37 Cr.L.J. 534=40 C.W.N. 366=1936 Cal. 158 (S.B.), 1935 Rang. 458. Where proceedings are taken against an advocate who has

been convicted for offences, as to why his name should not be struck off from the roll of advocates, the application is not in the nature of a second trial or a new punishment. But the question is whether after the conduct of such advocate, it is proper that he should continue a member of a profession which should stand free from all suspicion. 1935 Rang. 458. See also 63 Cal. 907. Where proceedings are taken before the High Court for taking disciplinary action against an advocate who is convicted for a criminal offence, it is not incumbent on the Advocate-General to adduce evidence of the grounds on which the conviction is based. It is for the Court to decide whether conviction is evidence of such misconduct on the part of an advocate as to render him unfit for the exercise of his profession, or to call for the Court's censure. It is for the impugned advocate to adduce any considerations which might induce the Court to refrain from taking disciplinary action. 59 Bom. 676=157 I.C. 428=39 C.W.N. 1281=1935 P.C. 168=60 M.L.J. 431 (P.C.). But see also 1932 All. 492 (S.B.). The test that the Court has to apply in considering whether an advocate should be struck off the roll of advocates is whether the proved misconduct of the advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted, and unfit to be entrusted with the responsible duties that an advocate is called upon to perform. An advocate was convicted for submitting a false return of his income to the income-tax authorities and for taking up a false defence and maintaining it even up to the High Court, even though he knew such defence to be false. *Held*, that his conduct involved moral turpitude and that his name should be struck off the roll of advocates. 12 R. 110=1934 R. 33=149 I.C. 856. An advocate deliberately making false allegations involving imputations upon the fairness and impartiality of judicial officers in proceedings connected with an execution case to which he was himself a party cannot be punished under the disciplinary side under Bar Councils Act 1932 A.L.J. 773=1932 A. 492 (S.B.). An advocate was guilty of misconduct involving moral turpitude by falsely verifying an application and endeavouring to deceive the Court and to deprive the decreeholder of money due to him. But the complainant did not file his complaint out of any high sense of public duty. A third person, who had been engaged in litigation with the advocate in his personal capacity, was behind the application and had paid the expenses. The application was made out of a desire further to harass the advocate. The advocate was not acting for a client in this matter but was engaged in his own litigation, and in the end no one had suffered by his action. He was subjected to heavy expenses in defending himself upon all these charges. *Held*, that an

Notes.

order suspending the advocate from practice for the term of three calendar months would be sufficient in the peculiar circumstances 1932 A.L.J. 773=1932 All. 492 (S.B.).

COMPLAINT—LOCUS STANDI TO MAKE—It is open to any person to complain to the Court as to the undesirability of certain remarks made by a Counsel during the course of a trial. Where a Mahomedan Counsel is alleged to have made certain communal remarks during the course of a trial it is open to a Hindu Association to make a complaint to the High Court for taking action in the matter 162 I.C. 919=37 Cr. L.J. 783=1936 Sind 49.

When a complaint is made, the Court under the Act can only dismiss it summarily or else refer it to a Tribunal of the Bar Council to inquire into. The Court would not generally be justified in dismissing a petition summarily unless it was satisfied that, even if the allegations made in the petition be proved, there would be no case for taking action 138 I.C. 543=34 Bom. L.R. 443=1932 Bom. 199. As to specific cases of misconduct, see 158 I.C. 278=1935 O.W.N. 1029, 1935 All. 1023 (Advocate engaging as partner in a firm), 13 Rang 518=1935 R. 178 (Advocate bribing Judge). Mere negligence on the part of an advocate, however gross, does not amount to misconduct, professional or otherwise, under S. 10 (1) when it is not accompanied by moral delinquency 62 Cal. 158=157 I.C. 374=1935 Cal. 484 (S.B.). Negligence on the part of an advocate accompanied by suppression of truth or by deliberate misrepresentation would be misconduct 62 Cal. 158=157 I.C. 374=1935 Cal. 484 (S.B.).

Per *Costello, J*—If an advocate does not tell the truth in connection with a matter which he has undertaken to carry through on behalf of his client, such conduct might easily be said to involve moral delinquency. 62 Cal. 158=157 I.C. 374=1935 Cal. 484.

SECS. 10 AND 11: "PROFESSIONAL OR OTHER MISCONDUCT"—Merely having been member, or assisted the operation or managed the affairs, of an unlawful association does not render an advocate unfit to exercise his profession. Nor does such conduct necessarily involve any moral turpitude, or any attack upon the system of which the Court forms part, or embarrass in any way the administration of justice by the Court. No action is therefore called for in such a case. 59 B. 57=1935 Bom. 1=36 Bom. L.R. 1136 (F.B.). It is not part of the duty of the High Court to impose penalties for misconduct, unconnected with the exercise of the profession, which is either not punishable or has been, or can be, punished under the law of the land. The State imposes suitable penalties for the infringement of its laws, and provides proper sanctions for the en-

forcement of such penalties; and there is no reason why the Court's disciplinary jurisdiction should be employed merely in aid of the criminal law. In cases of misconduct involving moral turpitude, the Court has to see whether the advocate has shown himself to be unworthy of the confidence of the Court, or unfit to be entrusted with the business of his client or a person with whom his professional brethren cannot be expected to associate. But these are not the only cases in which the High Court may be called upon to take action. An advocate might engage in revolutionary activities designed to destroy the system of which the Court forms part, or activities likely to hamper or embarrass the administration of justice by the Courts. What has to be considered in such cases is the conduct of the advocate as it affects his position as an advocate and his relations to the Court. It will not tolerate on its rolls an advocate who is trying to undermine or destroy the authority of the Court. Anyone electing to engage in activities of that nature must do so without the authority and prestige attached to the position of an advocate 36 Bom. L.R. 1136=59 Bom. 57=1935 Bom. 1 (F.B.).

PROCEEDING UNDER JUDGMENT OF CIVIL COURT—RELEVANCY AND VALUE—Per *Bennet and Ganga Nuth, JJ*—The judgment and evidence in a civil suit are admissible as evidence in an enquiry under the Bar Councils Act but the judgment and decree are not conclusive proof. Per *Iqbal Ahmad, J.*—The finding recorded against an advocate by a Civil Court is not final and conclusive in proceedings taken against the advocate under the Bar Councils Act. When a case is referred to the Bar Council under S. 10 for an enquiry into the conduct of an advocate, it is the duty of the Council to inquire into the matter and to record a finding on the materials produced before it, irrespective of any finding on the point recorded by a Civil Court. The enquiry by the Council is with a view to ascertain whether or not the advocate concerned has been guilty of misconduct. The enquiry is of a quasi-criminal nature and a finding has to be arrived at on a consideration of the materials before the Council 159 I.C. 561=1935 A.W.R. 1229=1935 All. 1023.

HIGH COURT REFRAINING FROM DISCIPLINARY ACTION—SPECIAL LEAVE TO APPEAL TO PRIVY COUNCIL—Where the High Court in the exercise of its statutory discretion proceeded to consider whether in the circumstances the misconduct proved called for any disciplinary action, whether in the nature of reprimand, suspension, or removal from practice and the Judges decided that it did not. Held, that the action of the High Court in thus exercising their discretion was not such as His Majesty can be advised further to consider 59 Bom. 676=42 L.W. 480=157 I.C. 428=39 C.W.N. 1281=37 Bom. L.R. 722=1935 P.C. 168=69 M.L.J. 431 (P.C.).

(2) Upon receipt of a complaint made to it by any Court or by the Bar Council or by any other person that any such advocate has been guilty of misconduct, the High Court shall, if it does not summarily reject the complaint, refer the case for inquiry either to the Bar Council or, after consultation with the Bar Council, to the Court of a District Judge (hereinafter referred to as a District Court) and may of its own motion so refer any case in which it has otherwise reason to believe that any such advocate has been so guilty.

11. (1) Where any case is referred for inquiry to the Bar Council under section 10, the case shall be inquired into by a Committee of the Bar Council (hereinafter referred to as the Tribunal).

(2) The tribunal shall consist of not less than three and not more than five members of the Bar Council appointed for the purpose of the inquiry by the Chief Justice or Chief Judge of the High Court, and one of the members so appointed shall be appointed to be the President of the Tribunal.

12 (1) The High Court shall make rules to prescribe the procedure to be followed by Tribunals and by Districts Courts, respectively, in the conduct of inquiries referred under section 10.

Notes.

Secs. 10 to 13—Where a complaint has been made to the Chief Justice and the Judges of a High Court under S. 10, Bar Councils Act, and such complaint has been referred to the Bar Council to be enquired into by a tribunal, it is incumbent upon the tribunal to come to some finding or other and it cannot abandon the proceeding merely because the complainant withdrew the complaint 1930 Cal. 574=57 C 724. It is highly unsatisfactory from the point of view of advocates and of the public that any one should make a solemn complaint against one of them to the High Court and have the matter referred to the tribunal and that then, without any finding which could clear the advocate, the enquiry should be dropped. The complainant after the matter has been referred to the tribunal is not in any way a person who is like a plaintiff *dominus lites* and if such complainant withdraws the complaint, and if from circumstances and evidence the tribunal is of opinion that there is no need to investigate and the charge preferred has no substance it can so report. In other circumstances it is open to the tribunal to exercise its own discretion whether to employ its power to summon the complainant personally or other people. The Act requires that the tribunal should come to a finding 57 C. 724=1930 Cal. 574 (*Per Rankin, C.J.*). See also 1931 A. 580. The Bar Council is in the position of a trustee and guardian of the dignity and privileges of the Bar and the rights and duties of its members, and it is to the interest of the profession that when a charge is made against an advocate it should either be cleared or brought home to him. The rules are so designed that on a charge of misconduct there should be a finding one way or the other 57 C 724=1930 Cal 574 (*Per Buckland, J.*)

Secs 10 and 19.—A notice was issued

on the 13th June, 1928, by the High Court against a pleader calling upon him to show cause why he should not be dealt with under the Legal Practitioners Act for professional misconduct. Objection was taken by the pleader in view of the Bar Councils Act which had come into force on 1st June, 1928. *Held*, that the provisions of the latter Patent in so far as they may conflict with the provisions of the Act, were abrogated by S. 19 (2), and therefore it was necessary for the case to be either referred to the Bar Council or at any rate for the Bar Council to be consulted. The Court was not properly seized of the case and that the notice issued to show cause was, as framed, *ultra vires* and a nullity 51 A 76=26 A I. T. 1039=112 I.C. 214=1928 All 439 (F.B.).

Sec. 12—In order to prevent counsel appearing for the other party, he must have a definite retainer, with a fee paid, or he must have such confidential instructions from one of the parties as would make it improper for him to appear for the other party. In the absence of either, it cannot be said to be unprofessional on the part of the counsel to appear for the other party (1932 All. 536, Ref.) 147 I C 1080=11 O.W.N. 23=1934 Oudh 58 (S B).

The High Court in considering what orders ought to be passed in a case that falls within S 12, Bar Councils Act, 1926, is not in any way fettered by the report of the tribunal or of the District Court, and although no doubt the greatest weight ought to be attached to the findings contained in such a report, it is competent to the Court to go into the facts for itself and to decide whether or not it agrees with those findings. The value of the report of the tribunal in a case is lessened where, in respect of the more serious charges, it is not unanimous and to some extent ambiguous. Where the report of the tribunal is ambiguous and not explicit on findings it is not necessary to send it back

(2) The finding of a Tribunal on an inquiry referred to the Bar Council under section 10 shall be forwarded to the High Court through the Bar Council, and the finding of a District Court on such an inquiry shall be forwarded direct to the High Court which shall cause a copy thereof to be sent to the Bar Council.

(3) On receipt of the finding, the High Court shall fix a date for the hearing of the case and shall cause notice of the day so fixed to be given to the Advocate concerned and to the Bar Council and to the Advocate-General, and shall afford the Advocate concerned and the Bar Council and the Advocate-General an opportunity of being heard before orders are passed in the case.

(4) The High Court may thereafter either pass such final orders in the case as it thinks fit or refer it back for further inquiry to the Tribunal through the Bar Council or to the District Court, as the case may be, and, upon receipt of the finding after such further inquiry, deal with the case in the manner provided in sub-section (3) and pass final orders thereon.

Notes.

to the tribunal if after investigating the facts itself the Court is in no doubt as to the order that ought to be passed in the case. 1933 Rang 10. See also 155 I.C. 1054=1935 All 503 (1) (S.B.).

The Court's decision must rest not upon suspicion, but upon legal grounds established by legal testimony. [58 M.L.J. 635 (P.C.), Rel on.] 147 I.C. 1080=11 O.W.N. 23=1934 Oudh 58 (F.B.).

Sec. 12 (2).—The members of the Tribunal of the Bar Council can record separate findings and make more than one report and the High Court is entitled to consider the report and findings of the minority as well as the majority of the Tribunal. 54 Mad. 857=134 I.C. 33=61 M.L.J. 148=1932 Mad 131 (F.B.).

The offence of perjury always involves moral turpitude in varying degree according to the particular facts of each case. Although the High Court in proceedings under S. 12 against an Advocate convicted of perjury, cannot question the propriety of the conviction, it can with a view to fix the quantum of punishment look into the circumstances of the case and ascertain the degree of moral turpitude and extenuating circumstances if any. Thus the absence of direct evidence can be taken into account. It can also take into consideration testimonials speaking highly of the character of the Advocate. Advocate suspended for six months. 131 I.C. 67=8 O.W.N. 267=1931 Oudh 161.

Sec 12 (3).—Sub-S. (3) provides that on receipt of the finding of the Tribunal of the Bar Council, the Court shall fix a date for hearing and give notice of the day so fixed to the Advocate concerned and to the Advocate-General. It follows that the original petitioner is not entitled to be served with notice or to be heard on the hearing before the Court. The Bar Council is there in order to assist the Court in any way it can and the Advocate concerned is of course entitled to be heard. The correct course is for the Advocate-General to open by submitting the report of the Tribunal to the

Court. Then the Advocate is entitled to be heard and, if necessary, the Advocate-General will have a right of reply. 33 Bom. L.R. 1215=1931 Bom. 557. Section 12 (3) cannot be intended to exclude the right of the Court to hear any person other than the persons mentioned therein when the object of it is to ensure that certain people shall have notice. Where the finding of the tribunal is considered by the High Court it is in the power of the High Court to hear the complainant. 35 C.W.N. 293=134 I.C. 1270=1931 Cal 680 (S.B.).

Sec. 12 (4).—It would need very good reasons to induce the High Court to throw over the findings of fact which have been arrived at by a Tribunal after a careful and elaborate enquiry. 35 C.W.N. 293=1931 Cal. 680. The exact extent of the rights of the complainants in such a matter may be left to be considered as occasion arises (*Ibid*). See also 1930 M.W.N. 216; 147 I.C. 139. See Notes under S. 1. Per Thom, J.—Although it is usual for the High Court to accept the findings of the Bar Tribunal upon charges of professional misconduct, especially when there is no objection preferred by the Government Advocate the High Court is not bound to do so in every case. 155 I.C. 1043=1935 A.L.J. 759=1935 A.W.R. 285=1935 All 425 (F.B.).

The finding of the Bar Council Tribunal can be reversed by a Bench of the High Court even though all the Judges constituting the Bench are not unanimous, and an order of the majority of the Judges reversing such finding, is not *ultra vires*. Cl. 8 of the Letters Patent confers jurisdiction upon the High Court to remove or suspend advocates, whereas S. 10 of the Bar Councils Act lays down the procedure according to which such jurisdiction should be exercised. The Benches of the High Court are, therefore, governed by the rule as to the opinion of the majority mentioned in the Letters Patent, as there is nothing in the Bar Councils Act or in any rules made thereunder which is inconsistent with such rule. 150 I.C. 653=1935 A.W.R. 1245.

(5) In passing final orders the High Court may pass such order as regards the payment of the costs of the inquiry and of the hearing in the High Court as it thinks fit.

(6) The High Court may, of its own motion or on application made to it in this behalf, review any order passed under sub-section (4) or sub-section (5) and maintain, vary or rescind the same, as it thinks fit.

(7) When any advocate is reprimanded or suspended under this Act, a record of the punishment shall be entered against his name in the roll of advocates of the High Court, and when an advocate is removed from practice his name shall forthwith be struck off the roll; and the certificate of any advocate so suspended or removed shall be recalled.

13 (1) For the purposes of any such inquiry as aforesaid, a Tribunal or a District Court shall have the same powers as are vested in a Court under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

(a) enforcing the attendance of any person and examining him upon oath,

(b) compelling the production of documents, and

(c) issuing commissions for the examination of witnesses:

Provided that the Tribunal shall not have power to require the attendance of the presiding officer of any Court save with the previous sanction of the High Court or, in the case of an officer of a Criminal or Revenue Court, of the Local Government.

(2) Every such inquiry shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code; and a Tribunal shall be deemed to be a Civil Court for the purposes of sections 480, 482 and 485 of the Code of Criminal Procedure, 1898.

(3) For the purpose of enforcing the attendance of any person and examining him upon oath or of compelling the production of documents or of issuing commissions—

(a) the local limits of the jurisdiction of a Tribunal shall be those of the jurisdiction of the High Court by which the Tribunal has been constituted; and

(b) a Tribunal may send to any Civil Court having jurisdiction in the place where the Tribunal is sitting any summons or other process for the attendance of a witness or the production of a document required by the Tribunal, or any commission which it desires to issue, and the Civil Court shall serve such process or issue such commission, as the case may be, and may enforce any such process as if it were a process for attendance or production before itself.

(4) Proceedings before a Tribunal or a District Court in any such inquiry shall be deemed to be civil proceedings for the purposes of section 132 of the Indian Evidence Act, 1872, and the provisions of that section shall apply accordingly.

Notes.

Sec. 12 (5)—The Rules framed under the Act empower the High Court to assess the costs directed to be paid to the Advocate by the complainant. At the same time it is open to the Court to direct an enquiry by the Registrar as to what sums had been paid by the complainant and the Advocate and pass final orders after the amount spent has been ascertained. 35 C.W.N. 293=134 I.C. 1270=1931 Cal. 680 (S.B.). See also 54 M. 857 (F.B.).

Sec. 12 (6).—The power of review conferred upon High Courts under sub-S. (6), S. 12, cannot be extended to an order passed

under S. 41, Legal Practitioners Act. 148 I.C. 299=1934 Oudh 140=11 O.W.N. 368 (S.B.).

Sec. 13—Inherent powers of the Supreme Court of Calcutta were not conferred on the Allahabad High Court by the Indian High Courts Act of 1861, and no power to exercise inherent disciplinary jurisdiction over legal practitioners independently of the Legal Practitioners Act and the Indian Bar Councils Act now exists in the Allahabad High Court in respect of their professional or other misconduct. 52 All. 619=1930 A.L.J. 402=1930 All. 225 (F.B.).

Miscellaneous.

Right of Advocates to practise. 14. (1) An advocate shall be entitled as of right to practise—

(a) subject to the provisions of sub-section (4) of section 9, in the High Court of which he is an advocate, and

(b) save as otherwise provided by sub-section (2) or by or under any other law for the time being in force, in any other Court in British India and before any other Tribunal or person legally authorized to take evidence, and

(c) before any other authority or person before whom such advocate is by or under the law for the time being in force entitled to practise.

(2) Where rules have been made by any High Court within the meaning of clause (24) of section 3 of the General Clauses Act, 1897, or in the case of a High Court for which a Bar Council has been constituted under this Act, by such Bar Council under section 15, regulating the conditions subject to which advocates of other High Courts may be permitted to practise in the High Court, such advocates shall not be entitled to practise therein otherwise than subject to such conditions.

(3) Nothing in this section shall be deemed to limit or in any way affect the power of the High Court of Judicature at Fort William in Bengal or of the High Court of Judicature at Bombay to make rules determining the persons who shall be entitled respectively to plead and to act in the High Court in the exercise of its original jurisdiction.

15. A Bar Council may, with the previous sanction of the High Court for which it is constituted, make rules consistent with this Act to provide for and regulate any of the following matters, namely:—

(a) the rights and duties of the advocates of the High Court and their discipline and professional conduct;

(b) the conditions subject to which advocates of other High Courts may be permitted to practise in the High Court;

(c) the giving of facilities for legal education and training and the holding and conduct of examinations by the Bar Council;

(d) the charging of fees payable to the Bar Council in respect of the enjoyment of educational facilities provided, or of the right to appear at examinations held, by the Bar Council,

(e) the investment and management of the funds of the Bar Council; and

(f) any other matter in respect of which the High Court may require rules to be made under this section.

Notes.

Sec. 14: ENTRY IN THE ROLL OF ADVOCATES
—EFFECT OF.—An ex-Judge of the Patna High Court, after his retirement as a Judge, applied to have his name entered on the roll of advocates. It was allowed with a condition refusing him the permission to appear in the Courts of the Province. *Held*, that the applicant's name being entered on the roll of advocates, he was entitled as of right to practise in the Courts of the Province. 58 I.A. 38=130 I.C. 305=1931 P.C. 22 (2)=60 M.L.J. 179 (P.C.).

Secs. 14 and 15.—Where an application is made on behalf of an advocate of one High Court for permission to appear in a case in another High Court under the rules framed under the Bar Councils Act, good reasons must be shown for the grant of such permission. The permission cannot be granted

on mere application or as a matter of course. The Chief Justice of the High Court must use a judicial discretion in the matter and then grant or refuse permission. The right of an advocate of a particular bar to appear in other High Courts does not exist as a matter of right. Nor is there any question of reciprocity involved in the matter. The Chief Justice will apply his mind to the circumstances of the application and see whether good reasons have been made out for the grant of permission in any particular case. 17 Pat L.T. 861.

Sec. 15, R. 16: RULE APPLIES TO ELECTION OF ALL CANDIDATES—Rule 16 cannot be restricted to the election of any one candidate; the singular covers the plural and validity of the election of all the elected members can be challenged thereunder. 163 I.C. 510=1936 Sind 75 (S.B.).

16. The High Court shall make rules for fixing and regulating by taxation or otherwise the fees payable as costs by any party in respect of the fees of his adversary's advocate upon all proceedings in the High Court or in any Court subordinate thereto.

17. No suit or other legal proceeding shall lie against a Bar Council or any Committee, Tribunal or member of a Bar Council for any act in good faith done or intended to be done in pursuance of the provisions of this Act or of any rule made thereunder.

18. All rules made under this Act shall be published in the local official Gazette of the province, or of each province, as the case may be, in which the High Court by which or with whose sanction the rules are made exercises jurisdiction.

19. (1) When sections 8 to 16 come into force in respect of any High Court, any enactment mentioned in the first column of the Schedule which is in force in any province in which the High Court exercises jurisdiction shall, for the purpose of its application to that province, be amended to the extent and in the manner specified in the second column of the Schedule.

(2) When sections 8 to 16 come into force in respect of any High Court of Judicature established by Letters Patent, this Act shall have effect in respect of such Court notwithstanding anything contained in such Letters Patent, and such Letters Patent shall, in so far as they are inconsistent with this Act or any rules made thereunder, be deemed to have been repealed.

(3) When sections 8 to 16 come into force in respect of the High Court of Judicature at Bombay, the Bombay Pleaders' Act, 1920, except section 7 thereof, shall cease to apply to or in respect of any person enrolled as an advocate of the High Court under this Act, and nothing in that Act shall be deemed to authorize the admission or enrolment of any person as a vakil or pleader of the High Court.

(4) When this Act has come into force in respect of any High Court, any provision of any other enactment or any order, scheme, rule, form or bye law made thereunder, which was before that date applicable to advocates, vakils or pleaders entitled to practise in such High Court shall, unless such a construction is repugnant to the context or to any provision made by or under this Act, be construed as applying to advocates of the High Court enrolled under this Act.

THE SCHEDULE

(See Section 19)

AMENDMENT OF ENACTMENT.

Enactments amended.

The Legal Practitioners' Act, 1879.

Extent and manner of amendment.

- (1) In section 4, after the words "with the permission of the Court" the words and figures "or, in the case of a High Court in respect of which the Indian Bar Councils Act, 1926, is in force, subject to rules made under that Act" shall be inserted.
- (2) In section 6, clauses (a) and (b) after the words "Royal Charter" the words and figures "in respect of which the Indian Bar Councils Act, 1926, is not in force" shall be inserted.

Notes.

Sec. 18 of the Indian Bar Councils Act does not make the publication of the Rules in local official gazette a condition precedent to their coming into force and it merely provides for the manner of their publication.

1935 A.W.R. 110.

Sec. 19 (2) — See 51 All. 76, cited under S. 10. As to the effect of Bar Councils Act on rules 128 and 129 of the Madras High Court Insolvency Rules, see 52 Mad. 92=113 Ind. Cas. 876 (F.B.).

*Enactments amended.**Extent and manner of amendment.*

- (3) To section 38 the following words and figures shall be added, namely:—
 "and, except as provided by section 36, nothing in this Act applies to persons enrolled as advocates of any High Court under the Indian Bar Councils Act, 1926".
- (4) In section 41, sub-section (1), after the words "Royal Charter" the words and figures "in respect of which the Indian Bar Councils Act, 1926, is not in force" shall be inserted
- The Indian Stamp Act, 1899. In Article 30 of the First Schedule after the words "High Court", where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted
- The Madras Stamp (Amendment) Act, 1922. In Article 25 of Schedule 1-A, after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted
- The Bengal Stamp (Amendment) Act, 1922. In Article 30 of Schedule 1-A after the words "High Court," where they first occur, the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted
- The Indian Stamp (Punjab Amendment) Act, 1922. In Article 30 of Schedule 1-A, after the words "High Court," where they first occur the words and figures "under the Indian Bar Councils Act, 1926, or" shall be inserted
- The Assam Stamp (Amendment) Act, 1922. In Article 30 of Schedule 1 A, after the words "High Court" where they first occur, the words and figures "under the Indian Bar Council Act, 1926, or" shall be inserted

THE INDIAN BILLS OF LADING ACT (IX OF 1856).¹

Short title given, Act XIV of 1897

Declared in force throughout B I., except as regards the Scheduled Districts, Act XV of 1874, S 3

[11th April, 1856.]

ACT IX OF 1856 IS BASED ON THE BILLS OF LADING ACT, 1855.

(18 and 19 VICT., c. 111).

An Act to amend the law relating to Bills of Lading.

WHEREAS by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a *bona fide* holder for value

Leg Ref.

¹ Short title, "The Indian Bills of Lading Act, 1856." See the Indian Short Titles Act, 1897 (XIV of 1897).

Act IX of 1856 is based on the Bills of Lading Act, 1855 (18 and 19 Vict., c. 111).

Thus Act has been declared to be in force

Sindh
 West Jalspaiguri
 The Districts of Hazaribagh, Lohardaga (now the Ranchi, District, see Calcutta Gazette, 1899, Pt. I, p. 44), and Manbhum; and Pargana Dhalbhum and the Kolhan in the District of Singhbhum
 The District of Sylhet
 The rest of Assam (except the North Lushai Hills)

in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

See *Gazette of India*, 1880, Pt. I, p. 672.
 Ditto 1881, Pt. I, p. 74.

Ditto 1881, Pt. I, p. 504.

Ditto 1879, Pt. I, p. 631.

Ditto 1897, Pt. I, p. 299.

should not be questioned by the master or other person signing the same, on the ground of the goods not having been laden as aforesaid; it is enacted as follows:—

1. Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself

Rights under bills of lading to vest in consignee or endorsee.

2. Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*,¹ or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

Not to affect right of stoppage *in transitu* or claims for freight.

3. Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board:

Bill of lading in hands of consignee, etc., conclusive evidence of the shipment as against master, etc.

Provided that the master or other person so signing may exonerate himself, in respect of such misrepresentation, by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder or some person under whom the holder claims.

Proviso.

THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT (VI OF 1886).

Prefatory Note.—The following is the *Statement of Objects and Reasons* appended to the Births, Deaths and Marriages Registration Bill.—It is proposed by this Act (1) to establish a system of voluntary registration of births and deaths for the benefit of such classes of the community as would be likely to avail themselves of registration, (2) to establish general registry offices for keeping registers of the births and deaths so registered and of marriages registered under Act III of 1872 or the Indian Christian Marriage Act (XV of 1872), and (3) to provide a machinery for giving evidential value to certain existing registers of births, baptisms, deaths, burials and marriages, which have been kept under no law. The subject of the registration of births and deaths among Europeans in India had been frequently long under the consideration of the Government, whose attention had moreover been frequently directed to it by memorials from various Christian religious bodies, urging very strongly the need for legislation. The Indian Statute book contained at that

Leg. Ref.

¹ As to stoppage in transit, see the Indian Contract Act, 1872 (IX of 1872), Ss. 99-106.

Notes.

Secs 1-3—The *object of a bill of lading* is to provide for the rights and liabilities of the parties in reference to the contract to carry and it is not concerned with liabilities to contribution in general average. The question whether an exemption clause covers the liability to contribution in general average in a case of proper jettison depends on the intention of the parties. If the shipowner wishes to relieve himself, he must do so in clear words. 78 I.C. 972. Where a

bill of lading contains the *usual exemption clause* as regards the liability for acts of God, Kings enemies and the perils of the sea, in a suit by the consignee for damages for loss of goods, etc., the defendant ship-owner must plead and prove *perils of the sea* if that is his defence. If he makes out a *prima facie* case plaintiff can rebut it by proving negligence on the part of the defendant. 47 Mad. 610=47 M.L.J. 150. "At Merchants Risk," meaning of 78 I.C. 972. Section 3 of the Bills of Lading Act is limited to the master or the person signing the bills. 1925 S. 221.

Sec. 3—See 9 B.H.C. 321; see also 45 I.C. 168 (Liability of carrier under bill of lading).

time no general law for the registration of births and deaths. There were, indeed, enactments which provided for the registration of births and deaths within certain specified areas, principally municipalities and cantonments, but, in the first place, these enactments were strictly local in their nature, leaving the greater portion of the country unprovided for, and in the next place, their provisions being directed primarily to statistical purposes were not of such a nature as to make the registers of births and deaths kept under them of value for purposes of evidence. As to the numerous registers of baptisms and burials which were kept by ministers of religion in all parts of the country, it was doubtful how far they could be relied on for giving accurately the requisite particulars as to births and deaths, and most of them were, moreover, inadmissible in evidence. Such being the state of the law and considering the importance of the subject generally and having regard to the fact that references were frequently made to the Secretary of State for India and to the Government of India for proof of age or of death in connection with questions involving large individual interest, such as rights to property, the Government of India was of opinion that it was expedient to enact a permissible law under which full facilities for registering births and deaths should be given to persons valuing unimpeachable evidence of these events. As to the second object of the Bill, it was obvious that no system of registration of births and deaths could be complete or of practical value unless it provided for the establishment, at certain centres of general offices where the information registered at the various local offices should be collected and so arranged as to be readily available for public reference. In this connection the attention of the Government of India has been directed to the unsatisfactory nature of the system of registration of marriages under the Indian Christian Marriage Act, 1872 and Act III of 1872. Documentary evidence of all marriages under the former Act was, by the provisions of the Act or the orders thereunder, sent to the Secretary to the Local Government, who was also empowered to grant certified copies which were receivable in evidence. It would seem, therefore, at first sight that nothing further was required. But, as a matter of fact, not only were no arrangements made for maintaining an index to the marriages, the records of which were retained in the local Secretariate, but the greater portion of the marriage records which were received in the local Secretariate had, under section 81 of the Act and the orders in force, to be sent on in original to the Government of India in the Home Department for transmission to the Secretary of State, so that the greater number of the marriage records which reached the local Secretariate did not remain there for purposes of reference, and such as did remain were, owing to the absence of an index, practically valueless. As to Act III of 1872, this Act made no provisions for the marriages solemnized under it being reported to any central authority. The marriage certificate books for which it provided were retained by the Registrar, who was not even required to index them. Their value as records of the marriages to which they referred was accordingly much diminished. The Government of India had, therefore, availed themselves of the opportunity of the proposed legislation for the registration of births and deaths, to remove those defects in the marriages registration law by providing for general registry offices for keeping registers not only for the births and deaths which may be registered under the proposed law, but also of marriages which may be registered under Act III of 1872 or the Christian Marriage Act, 1872. (See *Statements of Objects and Reasons*)

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THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT (VI OF 1886)¹.

Effect of Legislation.

[5th March, 1886.

| Year. | No. | Short title. | Repealed or otherwise how affected by legislation. |
|-------|-----|--|---|
| 1886 | VI | The Births, Deaths and Marriages Registration Act, 1886. | Repealed in part, II of 1891, S. 4; XII of 1891. Repealed in part and amended, IX of 1911. Amended, XVI of 1890; XXXVIII of 1920. |

An Act to provide for the voluntary Registration of certain Births and Deaths, for the establishment of General Registry Offices for keeping Registers of certain Births, Deaths and Marriages, and for certain other purposes.

WHEREAS it is expedient to provide for the voluntary registration of births and deaths among certain classes of persons, for the more effectual registration of those births and deaths and of the marriages registered under Act III of 1872, or the Indian Christian Marriage Act, 1872, and of certain marriages registered under the Parsi Marriage and Divorce Act, 1865, and for the establishment of general registry offices for keeping registers of those births, deaths and marriages;

And whereas it is also expedient to provide for the authentication and custody of certain existing registers made otherwise than in the performance of

Leg. Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1885, Pt V, p. 12; for Report of the Select Committee, see *ibid.*, 1886, Pt IV, p. 103, and for proceedings in Council, see *ibid.*, 1885, Supplement, pp. 14 and 37, and *ibid.*, 1886, p. 290. By the

Amending Act IX of 1911, it is provided (S. 6) that "all the rules heretofore made under the Act by the Governor-General in Council shall, after the commencement of this Act, be deemed to have been made by the Local Government."

a duty specially enjoined by the law of the country in which the registers were kept, and to declare that copies of the entries in those registers shall be admissible in evidence; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title and commencement. 1. (1) This Act may be called THE BIRTHS, DEATHS AND MARRIAGES REGISTRATION ACT, 1886; and

(2) It shall come into force on such day¹ as the Governor-General in Council, by notification in the *Gazette of India*, directs.

(3) 1-a[* * *].

Local extent. 2. This Act extends to the whole of British and India and applies also, 2[to British subjects in Indian States.]

Definitions. 3. In this Act, unless there is something repugnant in the subject or context,—

“sign” includes mark, when the person making the mark is unable to write his name:

“prescribed” means prescribed by a rule made 3[* * *] under this Act; and

“Registrar of Births and Deaths” means a Registrar of Births and Deaths appointed under this Act.

4. Nothing in this Act, or in any rule made under this Act, shall affect any law heretofore or hereafter passed providing for the registration of births and deaths within particular local areas.

Powers exercisable from time to time. 5 All powers conferred by this Act may be exercised from time to time as occasion requires.

CHAPTER II.

GENERAL REGISTRY OFFICES OF BIRTHS, DEATHS AND MARRIAGES

Establishment of general registry offices and appointment of Registrars-General

6. (1) Each 2[Provincial Government]—

(a) shall establish a general registry office for keeping such certified copies of registers of births and deaths registered under this Act, or marriages registered under Act III of 1872 (*to provide a form of marriage in certain cases*)

Leg. Ref.

¹ The 1st October, 1888, see *Gazette of India*, 1888, Pt. I, p. 336.

1-a Sub-section (3) of S. 1, which was repealed by the Repealing and Amending Act (XII of 1891), was as follows:—

“(3) Any power conferred by the Act to make rules or to issue orders may be exercised at any time after the passing of this Act, but a rule or order so made or issued shall not take effect until the Act comes into force.”

² Substituted by Order in Council, 1937.

³ Omitted by Order in Council, 1937.

Notes.

Sec. 2.—The Act has been declared in force in the Sonthal Parganas by S. 3 of the Sonthal Parganas Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Bengal Code. It has been declared in force

in British Baluchistan by the British Baluchistan Laws Regulation (II of 1913), S. 3 and Schedule, Baluchistan Code.

The Act has been declared in force in Upper Burma (except the Shan States) by the Burma Laws Act (XIII of 1898), see the first Schedule and S. 4, Bur Code. It had been previously extended there by notification under S. 5 of the Scheduled Districts Act (XIV of 1874), see *Gazette of India*, 1888, Pt. I, p. 528. It has been declared in force in Arakan Hill District by S. 2 of Reg. I of 1916, and in a certain area in the Northern Shan States by S. 10 of Act XIII of 1898. See Notification No. 42, dated 26th August, 1926, *Burma Gazette*, 1926; Pt. I; p. 792; and in the Chittagong Hill tracts by notification under S. 4 (2) of the Chittagong Hill Tracts Regulation I of 1900. See Notification No. 13083—E. A., dated 13th August, 1927, *Calcutta Gazette*, Pt. I, p. 1728.

or the Indian Christian Marriage Act, 1872, or beyond the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Bombay, under the Parsi Marriage and Divorce Act, 1865, as may be sent to it under this Act, or under any of the three last-mentioned Acts, as amended by this Act;¹ and

(b) may appoint to the charge of that office an officer, to be called the Registrar-General of Births, Deaths and Marriages for the territories under its administration;²

(2) [Omitted by Order in Council, 1937].

7. Each Registrar-General of Births, Deaths and Marriages shall cause indexes of all the certified copies of registers sent to his office under this Act, or under Act III of 1872, the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1865, as amended by this Act, to be made and kept in his office in the prescribed form.

8. Subject to the payment of the prescribed fees, the indexes so made shall be at all reasonable times open to inspection by any person applying to inspect them, and copies of entries in the certified copies³ of the registers to which the indexes relate shall be given to all persons applying for them.

9. A copy of an entry given under the last foregoing section shall be certified by the Registrar-General of Births, Deaths and Marriages, or by an officer authorized in this behalf by the 4[Provincial Government], and shall be admissible in evidence for the purpose of proving the birth, death or marriage to which the entry relates.

10. Each Registrar-General of Births, Deaths and Marriages shall exercise a general superintendence over the Registers of Births and Deaths in the territories for which he is appointed.

CHAPTER III.

REGISTRATION OF BIRTHS AND DEATHS.

A.—Application of this Chapter.

11. (1) The persons whose births and deaths shall, in the first instance, be registrable under this Chapter are the following, namely:—

(a) in British India, the members of every race, sect or tribe to which the Indian Succession Act, 1865 applies, and in respect of which an order under section 312 of that Act is not for the time being in force, and all persons professing the Christian religion;

(b) in [Indian States]⁴ British subjects being members of a like race, sect or tribe, or professing the Christian religion;

(2) But the 4[Provincial Government], by notification in the official Gazette, may 5[* * * *] extend the operation of this Chapter to any other class or persons either generally or in any local area.

B.—Registration Establishment.

612. The 4[Provincial Government] may appoint, either by name or by

Leg Ref.

¹ For General Registry Offices appointed for different provinces see the different Local Rules and Orders; for Delhi, see *Gazette of India*, 1912, Pt I, p. 1105

² For Registrars-General appointed for different provinces, see different Local Rules and Orders

³ For officers authorised to certify copies of entries given under S. 8 in different provinces, see different Local Rules and Orders.

⁴ Substituted by Order in Council, 1937.

⁵ In Cl 2 of S. 11 the words "with the previous approval of the Governor-General in Council" were omitted by Act XXXVIII of 1920, Sch I.

⁶ As to Registrars appointed under this section, see different Local Rules and Orders, and General Rules and Orders, Vol. II, p 559.

Power for ¹[Provincial Government] to appoint Registrars for its territories.

any class of persons within any part of those territories.

13. The ¹[Central Government] may, by notification in the *Gazette of India*, appoint, either by name or by virtue of their office, so many persons as he thinks necessary to be Registrars of Births and Deaths for such local areas within ¹[any Indian State] as he may define and, if he sees fit, for any class of persons within any

part of those ¹[States]²
³[* * *]

Registrar to be deemed a public servant.

14. Every Registrar of Births and Deaths shall be deemed to be a public servant within the meaning of the Indian Penal Code.

15. [Omitted by Order in Council, 1937.]

Office and attendance of Registrar appointed.

16. (1) Every Registrar of Births and Deaths shall have an office in the local area, or within the part of the territories or dominions for which he is

(2) Every Registrar of Births and Deaths to whom the ¹[Provincial Government] may direct this sub-section to apply shall attend at his office for the purpose of registering births and deaths on such days and at such hours as the Registrar-General of Births, Deaths and Marriages may direct, and shall cause to be placed in some conspicuous place on or near the outer door of his office his name, with the addition of Registrar of Births and Deaths for the local area or class for which he is appointed, and the days and hours of his attendance

17. (1) When any Registrar of Births and Deaths to whom the Local Government may direct this section to apply, not being a Registrar of Births and Deaths for a local area in the town of Calcutta, Madras or Bombay, is absent, or when his office is temporarily vacant, any person whom the Registrar-General of Births, Deaths and Marriages appoints in this behalf, or, in default of such appointment, the Judge of the District Court within the local limits of whose jurisdiction the Registrar's office is situate, or such other officer as the ¹[Provincial Government] appoints in this behalf, shall be the Registrar of Births and Deaths during such absence or until the ¹[Provincial Government] fills the vacancy.

Leg. Ref.

¹ Substituted by Order in Council, 1937

² For Registrars of Births and Deaths appointed under this section for—

(1) Native States in the Bombay Presidency, see *Brit. Enact.*, N S,

(2) States of Puddu Kottai, Banganapalle, and Sandur, see *Gazette of India*, 1889, Pt. I, p. 52,

(3) State of Mysore, see *Gazette of India*, 1889, Pt. I, p. 54, and *ibid.*, 1893, Pt. I; p. 381;

(4) Hyderabad State, see *Gazette of India*, 1889 and 1890, Pt. I, pp. 621 and 468, respectively;

(5) Rampur and Tehri States, see *Gazette of India*, 1891, p. 424;

(6) Kashmir and Jammu, see *Brit. Enact.*, N. S.,

(7) Nepal, see *Brit. Enact.*, N S.;

(8) Central Provinces Feudatory States, see *Brit. Enact.*, N S, and *Gazette of India*, 1895, Pt. I, p. 404,

(9) States in the Central India Agency, see *Brit. Enact.*, N S,

(10) The territory of the Raja of Nahan (Sirmur), see *Gazette of India*, 1899, Pt. I; p. 277

(11) Certain States in Rajputana see *Gazette of India*, 1912, Pt. I, p. 1051;

(12) Baluchistan Agency Territories, see *Gazette of India*, 1903, Pt. I; p. 916.

³ Proviso omitted by Order in Council, 1937

Notes.

Sec 17 (1).—The section has been declared by the Government of Madras to apply to all Registrars appointed by that Government under the notification issued under S. 12, see Madras R. and O.

(2) When any such Registrar of Births and Deaths for a local area in the town of Calcutta, Madras or Bombay is absent, or when his office is temporarily vacant, any person whom the Registrar-General of Births, Deaths and Marriages appoints in this behalf shall be the Registrar of Births and Deaths during such absence or until the 1[Provincial Government] fills the vacancy.

(3) The Registrar-General of Births, Deaths and Marriages shall report to the 1[Provincial Government] all appointments made by him under this section.

18. The 1[Provincial Government] shall supply every Registrar of Births and Deaths with a sufficient number of register books of births and of register books of deaths, and shall make suitable provision for the preservation of the records connected with the registration of births and deaths.

Register books to be supplied and preservation of records to be provided for.

C.—Mode of Registration.

19. Every Registrar of Births and Deaths on receipt of notice of birth or death within the local area or among the class for which he is appointed, shall, if the notice is given within the prescribed time and in the prescribed mode by a person authorized by this Act to give the notice, forthwith make an entry of the birth or death in the proper register book:

Provided that—

(a) if he has reason to believe the notice to be in any respect false, he may refuse to register the birth or death until he receives an order from the Judge of the District Court directing him to make the entry and prescribing the manner in which the entry is to be made; and

(b) he shall not enter in the register the name of any person as father of an illegitimate child, unless at the request of the mother and of the person acknowledging himself to be the father of the child.

Persons authorized to give notice of birth. 20. Any of the following persons may give notice of a birth, namely:—

(a) the father or mother of the child;

(b) any person present at this birth;

(c) any person occupying, at the time of the birth, any part of the house wherein the child was born and having knowledge of the child having been born in the house;

(d) any medical practitioner in attendance after the birth and having personal knowledge of the birth having occurred;

(e) any person having charge of the child.

Persons authorized to give notice of death. 21 Any of the following persons may give notice of a death, namely:—

(a) any relative of the deceased having knowledge of any of the particulars required to be registered concerning the death;

(b) any person present at the death;

(c) any person occupying, at the time of the death, any part of the house wherein the death occurred and having knowledge of the deceased having died in the house;

(d) any person in attendance during the last illness of the deceased;

(e) any person who has seen the body of the deceased after death.

22. (1) When an entry of a birth or death has been made by the Registrar of Births and Deaths under section 19, the person giving notice of the birth or death must sign the entry in the register in the presence of the Registrar:

²[Provided that it shall not be necessary for the person giving notice to attend before the Registrar or to sign the entry in the register, if he has given

Leg. Ref.

¹ Substituted by Order in Council, 1937.

² The proviso to sub-S. (1) and the words

in sub-S. (2) within brackets were inserted by the amending Act IX of 1911.

such notice in writing and has furnished to the satisfaction of the Registrar such evidence of his identity as may be required by any rules made by the 1[Provincial Government], in this behalf.]

(2) Until the entry has been so signed 1-a[or the conditions specified in the proviso to sub-section (1) have been complied with,] the birth or death shall not be deemed to be registered under this Act.

(3) When the birth of an illegitimate child is registered, and the mother and the person acknowledging himself to be the father of the child jointly request that that person may be registered as the father, the mother and that person must both sign the entry in the register in the presence of the Registrar.

23. The Registrar of Births and Deaths shall, on application made at the time of registering any birth or death by the person giving notice of the birth or death, and on payment by him of the prescribed fee,² give to the applicant a certificate in the prescribed form, signed by the Registrar, of having registered the birth or death.

24. (1) Every Registrar of Births and Deaths in British India shall send to the Registrar-General of Births, Deaths and Marriages for the territories within which the local area or class for which he is appointed is situate or resides, at the prescribed intervals, a true copy certified by him, in the prescribed form, of all the entries of births and deaths in the register book kept by him since the last of those intervals:

Provided that in the case of Registrars of Births and Deaths who are clergymen of the Churches of England, Rome and Scotland, the Registrar may, if so directed by his ecclesiastical superior, send the certified copies in the first instance to that superior, who shall send them to the proper Registrar-General of Births, Deaths and Marriages.

In this sub-section "Church of England" and "Church of Scotland" mean the Church of England and the Church of Scotland as by law established respectively; and "Church of Rome" means the Church which regards the Pope of Rome as its spiritual head.

(2) The provisions of sub-section (1) shall apply to every Registrar of Births and Deaths in 1[any Indian State] with this modification that the certified copies referred to in that sub-section shall be sent to such one of the Registrars-General of Births, Deaths and Marriages as the 1[Central Government] by notification³ in the 1[*Official Gazette*] appoints in this behalf: [Proviso omitted by order in Council, 1937]

25. (1) Every Registrar of Births and Deaths shall, on payment of the prescribed fees, at all reasonable times, allow searches to be made in the register books kept by him, and give a copy of any entry in the same

(2) Every copy of an entry in a register book given under this section shall be certified by the Registrar of Births and Deaths and shall be admissible in evidence for the purpose of proving the birth or deaths to which the entry relates.

26. Notwithstanding anything in section 19, the 1[Provincial Government]

Leg Ref.

¹ Substituted by Order in Council, 1937.

^{1-a} *Vide* foot-note 1 at p. 114

² As to stamps in which such fees are to be paid, see *Gazette of India*, 1899, Pt. I, p. 82, paragraph 14 (c) of Notification No 786 S.R.

³ For an instance of such application, see

Gazette of India, 1899, Pt. I, p. 424.

Notes.

Sec. 23.—A certificate granted under S. 23 of the Births, Deaths and Marriages Registration Act becomes evidence of the fact of marriage in a divorce case 13 Pat. 129=15 Pat. L. T. 353=1934 Pat. 475

Exceptional provision for registration of certain births and deaths.

they are appointed.

may make rules authorising Registrars of Births and Deaths, on conditions and in circumstances to be specified in the rules, to register births and deaths, occurring outside the local areas or classes for which

D.—Penalty for False Information.

27. If any person wilfully makes, or causes to be made for the purpose of being inserted in any register of births or deaths, any false statement in connection with any notice of a birth or death under this Act, he shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

E—Correction of Errors.

28. (1) If it is proved to the satisfaction of a Registrar of Births and Deaths that any entry of a birth or death in any register kept by him under this Act is erroneous in form or substance, he may, subject to such rules as may be made by the 1-a [Provincial Government] with respect to the conditions and circumstances on and in which errors may be corrected, correct the error by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry and add thereto the date of the correction.

(2) If a certified copy of the entry has already been sent to the Registrar-General of Births, Deaths and Marriages, the Registrar of Births and Deaths shall make and send a separate certified copy of the original erroneous entry and of the marginal correction therein made.

CHAPTER IV.

AMENDMENT OF MARRIAGE ACTS.

Addition of new section after section 13, Act III of 1872

29. After section 13 of Act III of 1872 *(to provide a form of marriage in certain cases)* the following section shall be inserted, namely:—

“13-A The Registrar shall send to the Registrar-General of Births, Deaths and Marriages for the territories within which his district is situate, at such intervals as the 1-a [Central Government] from time to time, directs, a true copy certified by him in such form as the 1-a [Central Government] from time to time, prescribes, of all entries made by him in the said marriage certificate book since the last of such intervals.”

Amendment of the Indian Christian Marriage Act, 1872.

30 In the Indian Christian Marriage Act, 1872, the following amendments shall be made, namely.

(a) at the end of section 3, the words “Registrar-General of Births, Deaths and Marriages, means of Registrar-General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886,” shall be added,

(b) for the words “Secretary to the Local Government” wherever they occur, and for the words “Secretary to a Local Government” in section 7^a, the words “Registrar-General of Births, Deaths and Marriages” shall be substituted;⁸

Leg Ref.

¹ For rules made under S. 26 conjointly with Ss. 28 and 36, see *Gazette of India*, 1888, Pt. I; p. 336, and *ibid.*, 1894, Pt. I; p. 436, *Gen. Rules and Orders*, Vol. II, p. 562 and different Local Rules and Orders. All Rules made by the Governor-General in Council under this Act before 1911 shall

be deemed to have been made by the Local Government. See S. 6 of Act IX of 1911.

^{1-a} Substituted by Order in Council, 1937.

⁸ Clause (c) which amended S. 62 of the Indian Christian Marriage Act (XV of 1872) was repealed by the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), S. 4 (2).

1(c) [* * * * *]

(d) in section 81, after the words "Registrar-General of Births, Deaths and Marriages" the words "in England" shall be added.

Addition of new section after section 8 of the Parsi Marriage and Divorce Act, 1865.

31. After section 8 of the Parsi Marriage and Divorce Act, 1865, the following section shall be inserted, namely:—

"8-A. Every Registrar, except the Registrar appointed by the Chief Justice of the High Court of Judicature at Bombay, shall, at

Transmission of certified copies of certificates in marriage register to Registrar-General of Births, Deaths and Marriages.

such intervals as the ²[Central Government] from time to time directs, send to the Registrar-General of Births, Deaths and Marriages for the territories administered by the ²[Provincial Government]

him, in such form as the ²[Central Government] from time to time prescribes, of all certificates entered by him in the said Register of marriages since the last of such intervals."

CHAPTER V.

SPECIAL PROVISIONS AS TO CERTAIN EXISTING REGISTERS.

32. If any person in British India, or in ²[any Indian State] has for the time being the custody of any register or record of birth, baptism, naming, dedication, death or burial of any persons of the classes referred to in section 2, sub-section (1), or of any register or record of marriage of any persons of the classes to which

Act III of 1872 or the Indian Christian Marriage Act, 1872, or the Parsi Marriage and Divorce Act, 1865, applies, and if such register or record has been made otherwise than in performance of a duty specially enjoined by the law of the country in which the register or record was kept he may, ³[at any time before the first day of April, 1891] send the register or record to the office of the Registrar-General of Births, Deaths and Marriages for the territories within which he resides, or, if he resides within ²[any Indian State] to such one of the Registrars-General as aforesaid as the ²[Central Government] by notification⁴ in the ²[Official Gazette] directs in this behalf.

Provided that such register or record shall, in the case of ²[any Indian States] which are within the political charge of a ²[Provincial Government] be sent to Registrar-General of Births, Deaths and Marriages for the territories under the administration of that ²[Provincial Government].⁵

33. ⁶(1) Any ²[Provincial Government], in the case of registers or records sent under section 32 to the Registrar-General for the territories under its administration, and the ²[Central Government], in the case of registers or records so sent to any other Registrar-General appointed by him under the said section, may appoint so many persons as it ⁷[* * *] thinks fit to be Commissioners for examining such registers or records]

(2) The Commissioners so appointed shall hold office for such period as the ⁸[authority appointing them] by the order of appointment, or any subsequent order, directs

Leg Ref

¹ Vide foot-note 3 at p 117.

² Substituted by Order in Council, 1937.

³ These words were substituted for the words "within one year from the date on which this Act comes into force" by the Births, Deaths and Marriages Registration Act (1886), Amendment Act (XVI of 1890), S. 1

⁴ For an instance of such notification, see

Gazette of India, 1899, Pt. I, p. 424.

⁵ To S. 32, the proviso was added by Act XXXVIII of 1920, Sch. I.

⁶ Sub-S. (1) to S. 33 was substituted by Act XXXVIII of 1920, Sch. I

⁷ Omitted by Order in Council, 1937.

⁸ In S. 33 (2) the words "authority appointing them" were substituted for the words "Governor-General in Council" by Act XXXVIII of 1920, Sch. I

34. (1) The Commissioners appointed under the last foregoing section shall enquire into the state, custody and authenticity of every such register or record as may be sent to the Registrar-General of Births, Deaths and Marriages under section 32;

Duties of Commissioners. and shall deliver to the Registrar-General a descriptive list or descriptive lists of all such registers or records, or portions of registers or records, as they find to be accurate and faithful

(2) The list or lists shall contain the prescribed particulars and refer to the registers or records, or to the portions of the registers or records, in the prescribed manner.

(3) The Commissioners shall also certify in writing, upon some part of every separate book or volume containing any such register or record, or portion of a register or record, as is referred to in any list or lists made by the Commissioners, that it is one of the registers or records, or portions of registers or records, referred to in the said list or lists.

35. (1) Subject to the payment of the prescribed fees, the descriptive list or lists of registers or records, or portions of registers or records, delivered by the Registrar-General of Births, Deaths and Marriages shall be, at all reasonable times, open to inspection by any person applying to inspect it or them, and copies of entries in those registers or records shall be given to all persons applying for them.

(2) A copy of an entry given under this section shall be certified by the Registrar-General of Births, Deaths and Marriages, or by an officer or person authorized in this behalf by the ²[Provincial Government], and shall be admissible in evidence for the purpose of proving the birth, baptism, naming, dedication, death burial or marriage to which the entry relates

³[35-A. (1) The ³[Central Government] or the ³[Provincial Government] ³[may by notification in the official Gazette] appoint more commissions⁴ than one for the purposes of section 33, each such commission consisting of so many and such members, and having its functions restricted to the disposal, under this Act and the rules thereunder, of such registers and records sent under section 32 to the Registrar-General, as may be specified in the notification.

(2) If more commissions than one are appointed in exercise of the power conferred by sub-section (1), then references in this Act to the Commissioners shall be construed as references to the members constituting a commission so appointed.]

CHAPTER VI.

RULES.

536. (1) ²[The Provincial Government, for each Province, and the Central Government, for British subjects in Indian States, may make rules to carry out the purposes of this Act.]

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

Leg. Ref.

¹ For officers appointed under sub-S. (2) of S 35, see different Local Rules and Orders.

² Substituted by Order in Council, 1937.

³ Section 35-A was inserted by Act XVI of 1890 and sub-S. (1) was substituted for the original Act XXXVIII of 1920. Sub-

section (2) was added by Act XXIV of 1934, Sch. I.

⁴ For commissions appointed under this section, see *Gen. Rules and Orders*, Vol. II, p. 571.

⁵ Section 36 was substituted by S. 2, Sch. I of Act XXXVIII of 1920

- (a) fix the fees payable under this Act;¹
 (b) prescribe the forms required for the purposes of this Act;
 (c) prescribe the time within which, and the mode in which, persons authorized under this Act to give notice of a birth or death to a Registrar of Births and Deaths must give the notice;
 (d) prescribe the evidence of identity to be furnished to a Registrar of Births and Deaths by persons giving notice of a birth or death in cases where personal attendance before such Registrar is dispensed with;
 (e) prescribe the registers to be kept and the form and manner in which Registrars of Births and Deaths are to register births and deaths under this Act, and the intervals at which they are to send to the Registrar-General of Births, Deaths and Marriages true copies of the entries of births and deaths in the registers kept by them;²
 (f) prescribe the conditions and circumstances on and in which Registrars of Births and Deaths may correct entries or births and deaths in registers kept by them;
 (g) prescribe the particulars which the descriptive list or lists to be prepared by the Commissioners appointed under Chapter V are to contain, and the manner in which they are to refer to the registers or records, or portions of registers or records, to which they relate; and
 (h) prescribe the custody in which those registers or records are to be kept.³
- (3) Every power to make rules conferred by this Act is subject to the condition of the rules being made after previous publication.
- (4) All rules made under this Act shall be published in the local official Gazette, and on such publication shall have effect as if enacted in this Act.

Procedure for making
and publication of rules.

37 [* * * *]⁴

THE BRONZE COIN (LEGAL TENDER) ACT (XXII of 1918).⁵

[26th September, 1918.]

An Act to provide that certain bronze coins coined outside British India shall be legal tender in British India

WHEREAS it is expedient to provide that certain bronze coins coined outside British India shall be legal tender in British India; It is hereby enacted as follows:—

Short title. 1 This Act may be called THE BRONZE COIN (LEGAL TENDER) ACT, 1918

2. (1) Where bronze coins of any of the denominations specified in section 8 of the Indian Coinage Act, 1906, are coined outside British India at the request of the ⁶[Central Government] and the ⁶[Central Government] is satisfied that such coins or in accordance with the requirements of section 9 and of any notification for the time being in force under section 10 of the said Act, he may, by notification

Leg Ref.

¹ For fees prescribed for attendance at private residences in—(1) Burma, see notification quoted in Bur R M., (2) Madras, see Madras Rules and Orders

For rules framed by the Government of India under this clause as to fees, see *Gazette of India*, 1894, Pt. I, p. 580.

² For rules for the guidance of Commissioners appointed under Chapter V, see *Gazette of India*, 1890, Pt. I, p. 745.

³ For rules for the guidance of Commissioners appointed under Chapter V, framed with regard to the powers conferred by these clauses, see *Gazette of India*, 1890 and 1892, Pt. I; pp. 745 and 123 respectively

⁴ Repealed by Act IX of 1911.

⁵ For Statement of Objects and Reasons, see *Gazette of India*, 1918, Pt. V; p. 82; and for Proceedings in Council, see *ibid.*, 1918, Pt. VI, pp. 1001 and 1140

⁶ Substituted by Order in Council, 1937.

in the [Official Gazette] direct the issue of any such coins, and thereafter any such coins shall be legal tender in payment or on account in the same way and to the same extent as if they were coins referred to in section 14 of the said Act, and the provisions of the said Act shall apply accordingly.

(2) Every coin which is declared to be legal tender by sub-section (1) shall be deemed to be Queen's coin within the meaning of sections 230 of the Indian Penal Code.

THE CANTONMENTS ACT (II OF 1924).

Prefatory Note: NECESSITY FOR A SPECIAL LAW AS TO CANTONMENTS.—The Hon'ble Mr. Scoble in introducing the old cantonments Bill of 1910 said—

"There are one or two points in connection with this Bill, to which I think it is desirable briefly to call attention.

"Although there is no definition of the word 'cantonment' in the Bill, it has a well understood popular meaning. The term has for more than a century been applied to military stations in India and these stations have almost from their first establishment been subject to special regulations. The troops themselves being under military law, it became necessary to use the language of Bengal Regulation XX of 1810—from the great number of native retainers and followers attached to military establishments in India and the importance of a prompt and orderly discharge of their duties to the welfare of the troops—to bring them also to a certain extent under military discipline, and with this view, in order to ascertain the areas within which stricter rules thus sanctioned might be enforced, it was enacted that the limits of cantonments and garrisons, including the military bazaars attached thereto, at which any division or corps of the army, or any considerable detachment not being less than half a battalion may be quartered, shall be marked out by the commanding officer in concert with the magistrate, and submitted for the final orders of Government. Similar regulation were framed in Madras and Bombay and under one or other of these enactments all the other cantonments in India have been demarcated. It seemed to the Select Committee, therefore, better to adhere to the old method of determining what places were to be treated as subject to cantonment law than to attempt a new definition, and S. 4 of the Bill accordingly provides that the Local Government with the previous consent of the Governor-General in Council may by notification in the Official Gazette, declare any place within its territories, in which any of Her Majesty's regular forces are quartered to be a cantonment and the local authorities may also from time to time declare or vary the limits of cantonments and may also declare that places are no longer cantonments; while the Governor-General in Council is specially empowered to exclude the whole or any part of a cantonment from the operation of any portion of the Act. These provisions have been introduced in order to meet the changes which necessarily occur in the distribution of troops throughout the country, and it is considered that by requiring the concurrence of the Local Authority and the supreme Government to the establishment or continuance of cantonment law in any locality, every reasonable safeguard is secured that private rights will be respected and public convenience duly regarded.

"While recognising the necessity of maintaining special laws in places primarily intended for the occupation of troops and followers, it has been the object of the framers of the Bill to assimilate, wherever it was possible, the Cantonment Law to that prevailing in Municipalities. In some parts of India, Cantonments are included within the limits of Municipalities and special provisions have been introduced to prevent any conflict of jurisdiction from this cause. But in all cantonments only such taxes as can be imposed in a Municipality in the same province may be levied; and by S. 25 of the Bill, the Governor-General in Council is authorized to extend to any cantonment any enactment in force in any Municipality in British India, subject to such restrictions and modifications as circumstances may show to be expedient. Under this section I hope many useful sanitary provisions, to be found in local laws—such, for instance, as the provisions of S. 361 of the Calcutta Municipal Consolidation Act, 1888, with regard to the sale of adulterated articles of food—will be introduced into military stations.

"Section 26 of the Bill contains a very careful enumeration of the objects and purposes for which special rules may be made. To secure uniformity, it is provided that the rules shall be made by the Governor-General in Council, and to secure publicity that they shall not be made until the persons to be affected by them have had an opportunity of examining them and submitting such criticisms or objections as they may wish to offer. Exception has been taken to the power given to make rules for the construction and maintenance to the satisfaction of the cantonment authority, of buildings and of boundary walls, hedges and other fences. I think this is a very necessary power. It is possessed by municipal authorities everywhere; and owners of property will only have themselves to blame if rules of a really more oppressive or arbitrary character than those which prevail in well organised Civil communities are passed for the lack of due remonstrance on their part.

¹ Substituted by Order in Council, 1937.

"With regard to cantonment funds, it may be observed that although the Bill requires that, as a general rule, they must be expended upon the purposes of the Act within the cantonment itself, power is taken, in S. 21, to apply them to like objects (as, for instance, the formation and conservancy of a cholera camp) beyonds the limits of the cantonment.

"One other point remains to be noticed. It will be obvious that the health and discipline of the dwellers in cantonments cannot be secured if breaches of cantonment rules can be committed with impunity, just outside their boundaries. Section 28 of the Bill accordingly provides that the Local Government may extend to the neighbourhood of a cantonment any enactment or rules in force within the cantonment itself. It will rest with the Local Government and not with the military authorities, to determine in what respects and within what area, these rules and enactments ought to be applied beyond cantonment limits, and, in order to prevent hardship or loss to owners of property in such neighbourhoods, it will be in the power of Local Government to award such compensation or to make such other conditions as the circumstances of the case may require."

See *Fort St. George Gazette Supplement*, 1910, pages 1 and 2.

Necessity for amendment of the old Act.—The following is the Statement of Objects and Reasons attached to the present Cantonments Bill.—

A committee, which was appointed by the Government of India in January, 1921, to consider what changes were necessary in order to introduce into the administration of cantonments the spirit of the reformed scheme of Government, recommended a complete revision and amalgamation of the Cantonments Act (Act XV of 1910) and the Cantonment Code, 1912, in order to bring them into conformity with ordinary Municipal Law and the system under which military cantonments are administered.

The recommendations of the committee have now been examined by the Government of India and the conclusions arrived at are embodied in the Bill.

The main features of the Bill are as follows—

(a) It is proposed to take power to municipalize Government of those cantonments which contain substantial civil population having no essential connexion with or dependence upon the military administration. In other cantonments where these circumstances do not fully exist, the administration of cantonment affairs will be vested in the hands of the commanding officer of the cantonment, who for the purpose of the Act, will be constituted a corporation sole. The general effect will be that the cantonment authority will cease to be purely executive agency of Government, which it is at present. In the larger cantonments the existing Cantonment Committee will be replaced by Cantonment Board which will be municipal in character and an essentially local self-Government body.

(b) The reformed Cantonment Authorities will have a separate legal *persona*, will be capable of suing and being sued in their name and of making contracts. They will also be empowered to make bye-laws to govern local matters of administration which require different treatment in different cantonments.

(c) The cantonment fund under the reformed system will be a local fund invested in the cantonment authority.

(d) In the reformed cantonments where a Board is constituted a proportion of the cantonment Board will be elected representatives of the civil inhabitants of the cantonment. An official majority will, however, be maintained.

(e) The Cantonment Magistrate, as such, will be eliminated. In his place an "Executive Officer" will be appointed. He will be paid by Government. He will perform amongst other things, the duty of the secretary of the Board, and he will have no judicial powers or functions.

(f) The Local Government will exercise certain larger powers of superintendence and control over cantonment affairs than they do at present.

(g) The military authorities will retain special powers in matters affecting the health, welfare and discipline of troops. (*See Statement of Objects and Reasons—Fort St. George Gazette*, 17th April, 1923, Pt. III, p. 228.)

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THE CANTONMENTS ACT (II OF 1924).¹

[16th February, 1924.

[N.B.—1 Throughout this Act, save as otherwise expressly provided, for the words "Local Government" the words "Central Government" have been substituted by Order in Council, 1937

2. In the said Act, for the expressions "Cantonment Authority", "Cantonment Authorities" and "Cantonment Authority's", wherever they

Leg Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1923, Pt V, p 220,

and for Report of Select Committee, see *ibid.*, p 270

occur, the words "Board", "Boards" and "Board's" respectively have been substituted. (Act XXIV of 1936, S. 69.)]

Effect of Legislation.

| Year | No. | Short title. | How repealed or otherwise affected by legislation |
|------|-----|---------------------------|---|
| 1924 | II | The Cantonments Act, 1924 | Am. Act VII of 1925, Act XXXV of 1926, Act X of 1927; Act XXXI of 1927; Act VIII of 1930, Act VII of 1931, Act XXII of 1932; Act XXIV of 1934. Rep. in pt., Act XII of 1927 |

An Act to consolidate and amend the law relating to the administration of cantonments.

WHEREAS it is expedient to consolidate and amend the law relating to the administration of cantonments; It is hereby enacted as follows: -

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE CANTONMENTS ACT, 1924

Notes.

Sec. 1—The Secretary of State is absolute owner of all Cantonment land, unless it can be proved that he parted with it. There can be no adverse possession against him. A person occupying land in cantonments not specifically transferred to him by the Secretary of State, can only hold it as a licensee from him, who could eject him at will by revoking his licence. 66 I.C. 582 = 1922 All 57. The mere fact that certain lands are declared by the Government to be within a cantonment area does not vest their ownership in the Government unless it is shown that the lands were acquired by the Government for that purpose. 31 C.W.N. 1033 = 105 I.C. 565 (2) = 1927 Cal 786. All land within cantonment area does not necessarily belong to Government. (*Ibid.*) It is not the necessary implication of the second paragraph of cl (6) of the Bengal Cantonment Regulations that all cantonment lands are the property of the Government, though the rules certainly suggest that the greater part of the land was at that time Government property. 57 I.A. 339 = 58 C. 858 = 35 C.W.N. 173 = 130 I.C. 616 = 1931 P.C. 1 = 60 M.L.J. 142 (F.C.). Where subsequent to the establishment of a cantonment the ownership of the land within the cantonment becomes vested in the Secretary of State and the prior owners of the land were compensated for the loss of such rights as they may have actually suffered, it is a fair presumption that the amount of compensation would vary according to whether the prior owner was deprived wholly of owner-

ship and possession or whether he was deprived only of ownership and allowed to remain in possession as licensee without the payment of any rent. 1930 All 587 = 124 I.C. 441. The Peshawar Cantonment Board, as representing the Secretary of State who acquired the Peshawar Cantonment by purchase, is the owner of all the land situate within the Cantonment and is entitled to eject a licensee in possession on payment of compensation in respect of structures or improvements, if any, made by him. 142 I.C. 657 = 1933 Pesh 56. Subsequent to the establishment of cantonment possession of one enclosed plot of land was found to be with original owner described as 'mukhl' in official records, who subsequently built on portion of land with permission of cantonment authorities and let out buildings for shops. Permission to build is not licence with regard to site for shop, only but original owner continued to be licensee of whole plot of land. 1930 All 587. Where Army Regulations were in force by which a house could not be sold at all to civilians and later on it was allowed to be sold with the sanction of the Commanding Officer, held in the absence of evidence as to the actual terms, it must be presumed that the permission was subject to a reservation about sanction. 78 I.C. 642 = 46 A. 427 = 1924 All 415. Therefore every transfer made with the permission of the military authority must be treated as indicating an admission of a new licence upon the prevailing conditions (*Ibid.*) A transfer without sanction furnishes a cause of action for a declaration

(2) It extends to the whole of British India, including British Baluchistan.

(3) The 1[Central Government] may, by notification in the 1[Official Gazette], direct that this Act, or any provisions thereof which he may specify, shall come into force on such date^{1-a} as he may appoint in this behalf.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(i) "Assistant Health Officer" means the medical officer appointed by the 2[Officer Commanding-in-Chief, the Command] to be the Assistant Health Officer for a cantonment;

(ii) "Board" means a Cantonment Board constituted under this Act,

(iii) "Brigade area" means one of the brigade areas, whether occupied by a brigade or not, into which India is for military purposes for the time being divided, and includes for all or any of the purposes of this Act any area which the 1[Central Government] may, by notification in the 1[Official Gazette], declare to be a brigade area for such purpose or purposes;

3[(iv) 'building' means a house, outhouse, stable, latrine, shed, hut or other roofed structure whether of masonry, brick, wood, mud, metal or other material, and any part thereof, and includes a well and a wall (other than a boundary wall not exceeding eight feet in height and not abutting on a street) but does not include a tent or other portable and temporary shelter;],

(v) 4[* * * * *]

(vi) "casual election" means an election held to fill a casual vacancy,

(vii) "casual vacancy" means a vacancy occurring otherwise than by efflux of time in the office of an elected member of a Board;

(viii) "Command" means one of the Commands into which India is for military purposes for the time being divided, and includes any area which the 1[Central Government] may, by notification in the 1[Official Gazette], declare to be a Command for all or any of the purposes of this Act,

(ix) 5[* * * * *]

(x) "dairy" includes any farm, cattle-shed, milk-store, milk-shop or other place from which milk is supplied or in which milk is kept for purposes of sale or is manufactured for sale into butter, ghee, cheese or curds, and, in relation to a dairyman who does not occupy any premises for the sale of milk includes any place in which he keeps the vessels used by him for the storage or sale of milk,

(xi) "dairyman" includes the keeper of a cow, buffalo, goat, ass or other animal, the milk of which is offered or is intended to be offered for sale for human consumption, and any purveyor of milk and any occupier of a dairy;

6[(xi-a) 'entitled consumer' means a person in a cantonment who is paid from the Defence Services Estimates and is authorised by general or special order of the 1[Central Government] to receive a supply of water for domestic purposes from the Military Engineer Services or the Public Works Department on such terms and conditions as may be specified in the order,]

(xii) "Executive Engineer" means the Public Works officer of that grade, or the 7[officer of the Military Engineer Services] of the corresponding grade, having charge of the military works in a cantonment,⁸ [or where more

Leg Ref.

¹ Substituted by Order in Council, 1937.

^{1-a} This Act came into force on the 1st day of May, 1924, see *Gen R and O*, Vol V, p 466

² These words were substituted by S 2 of the Cantonments (Amendment) Act, 1926 (XXXV of 1926)

³ Cl IV substituted by Act XXIV of 1936

⁴ Omitted by Act XXIV of 1936.

⁵ Omitted by Act XII of 1935, Sch. I.

⁶ Inserted by Act XXIV of 1936

⁷ These words were substituted by S. 2 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

⁸ Inserted by Act XXIV of 1936.

Notes.

that it was not binding on the Secretary of State 78 I C 642=46 A 427=1924 All 415 The rights of the occupier to sell the materials of the house are not affected by the Regulation. (*Ibid*)

than one such officer has charge of the military works in a cantonment such one of those officers as the Officer Commanding the Station may designate in this behalf]; and includes the officer of whatever grade in immediate executive engineering charge of a cantonment;

(xiii) "Executive Officer" means the person appointed under this Act to be the Executive Officer of a cantonment;

(xiv) "Health Officer" means the senior executive medical officer in military employ on duty in a cantonment,

(xv) 1[* * * *].

(xvi) "hut" means any building, no material portion of which above the plinth level is constructed of masonry or of squared timber framing or of iron framing;

(xvii) "infectious or contagious disease" means cholera, leprosy, enteric fever, small-pox, tuberculosis, diphtheria, plague, influenza, venereal disease and any other epidemic, or infectious disease which the [Central Government] may, by notification² in the 2^a[Official Gazette], declare to be an infectious or contagious disease for the purposes of this Act,

(xviii) "inhabitant", in relation to a cantonment, or local area, means any person ordinarily residing or carrying on business or owning or occupying immoveable property therein, and in case of a dispute means any person declared by the District Magistrate to be an inhabitant;

(xix) "intoxicating drug" means opium, ganja, bhang, charas and any preparation or admixture thereof, and includes any other intoxicating substance or liquid which the [Central Government]³ [' '] may, by notification⁴ in the local official Gazette, declare to be an intoxicating drug for the purposes of this Act;

(xx) "market" includes any place where persons assemble for the purpose of selling meat, fish, fruit, vegetables, live-stock or any other article of food;

⁵[(xx-a) 'Military Estates Officer' means the officer appointed by the 2^a[Central Government] to perform the duties of the Military Estates Officer under rules made under clauses (a) and (b) of sub-section (2) of S. 280;]

(xxi) "military officer" means—

(a) a person who, being an officer within the meaning of the Army Act or the Indian Army Act, 1911, or the Air Force Act ⁶[on the Indian Air Force Act, 1932] is commissioned and in pay as an officer doing military or air force duty with His Majesty's military or air forces, or is an officer doing such duty in any arm, branch or part of those forces, or

(b) a person doing military or air force duty as a warrant officer with either of those forces or with any arm, branch, or part thereof, whether he is or is not an officer within the meaning of the Army Act or the Indian Army Act, 1911, or the Air Force Act ⁶[on the Indian Air Force Act, 1932].

(xxii) "nuisance" includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing, or which is or may be dangerous to life or injurious to health or property,

(xxiii) "occupier" includes an owner in occupation of, or otherwise using, his own land or building,

(xxiv) "Officer Commanding the District" means the Officer Commanding any one of the districts into which India is for military purposes for the

Leg Ref.

¹ Omitted by Act XXIV of 1936.

² For such Notification by the Government of Assam, see *Assam Gazette*, 1924, Pt. II p. 732

^{2-a} Substituted by Order in Council

³ Certain words were omitted by S. 2 of the Cantonments (Amendment) Act, 1925

(VII of 1925).

⁴ For such Notification by the Government of Assam, see *Assam Gazette*, 1924, Pt. II, p. 943

⁵ Inserted by Act XXIV of 1936.

Notes.

Sec 2 (xxiv).—Officer does not include a police officer. 2 S.L.R. 137.

time being divided, or any brigade area which does not form part of any such district, or any area which the Central Government may, by notification in the Official Gazette, declare to be such a district for all or any of the purposes of this Act;

1[(xxiv-a) "Officer Commanding the station" means the military officer for the time being in command of the forces in a cantonment, or, if that officer is the Officer Commanding the District or Officer Commanding-in-Chief, the Command, the military officer who would be in command of these forces in the absence of the Officer Commanding the District and Officer Commanding-in-Chief, the Command;]

(xxv) "ordinary election" means an election held to fill a vacancy in the office of an elected member of a Board arising by efflux of time;

(xxvi) "owner" includes any person who is receiving or is entitled to receive the rent of any building or land whether on his own account or on behalf of himself and others or an agent or trustee, or who would so receive the rent or be entitled to receive it if the building or land were let to a tenant;

(xxvii) "party wall" means a wall forming part of a building and used or constructed to be used for the support or separation of adjoining buildings belonging to different owners, or constructed or adapted to be occupied by different persons;

(xxviii) "private market" means a market which is not maintained by a [Board] and which is licensed by a [Board] under the provisions of this Act;

(xxix) "private slaughter-house" means a slaughter-house which is not maintained by a [Board] and which is licensed by a [Board] under the provisions of this Act:

(xxx) "public market" means a market maintained by a [Board]

(xxxi) "public place" means any place which is open to the use and enjoyment of the public, whether it is actually used or enjoyed by the public or not,

(xxxii) "public slaughter-house" means a slaughter-house maintained by a [Board];

2[(xxxii-a) a person is deemed to reside in a cantonment if he maintains therein a house or a portion of a house which is at all times available for occupation by himself or his family even though he may himself reside elsewhere, provided that he has not abandoned all intention of again occupying such house either by himself or his family];

(xxxiii) "shed" means a slight or temporary structure for shade or shelter;

(xxxiv) "slaughter-house" means any place ordinarily used for the slaughter of animals for the purpose of selling the flesh thereof for human consumption;

(xxxv) "soldier" means a person who is a soldier or airman within the meaning of the Army Act or the Air Force Act, or is subject to the Indian Army Act, 1911, and who is not a military officer;

(xxxvi) "spirituous liquor" means any fermented liquor, any wine, or any alcoholic liquid obtained by distillation or the sap of any kind of palm tree, and includes any other liquid containing alcohol which the [Central Government] 3[* * *] may, by notification in the Official Gazette, declare to be a spirituous liquor for the purposes of this Act,

Leg. Ref.

¹ Cl XXIV-A inserted by Act XII of 1935.

² Inserted by Act XXIV of 1936.

³ Certain words were omitted by S 2 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

(xxxvii) "street" includes any way, road, lane, square, court, alley [or passage] in a cantonment, whether a thoroughfare or not and whether built upon or not, over which the public have a right-of-way and also the roadway or foot-way over any bridge or causeway;

(xxxviii) "vehicle" means a wheeled conveyance of any description which is capable of being used on a street, and includes a motor-car, motor lorry, motor-omnibus, cart, locomotive, tram-car, hand-cart, truck, motor-cycle, bicycle, tricycle and rickshaw; ²[*]

(xxxix) "water-work" includes all lakes, tanks, streams, cisterns, springs, pumps, wells, reservoirs, aqueducts, water-trucks, sluices, mains, pipes, culverts, hydrants, stand-pipes, and conduits, and all machinery, lands, buildings, bridges and things, used for, or intended for the purpose of, supplying water to a cantonment, ³[and

(xl) 'year' means the year commencing on the first day of April.]

CHAPTER II.

DEFINITION AND DELIMITATION OF CANTONMENTS.

3. (1) The [Central Government] may, by notification in the Official Gazette, declare any place or places in which any part of His Majesty's regular forces or regular air force is quartered or which, being in the vicinity of any such place or places, is or are required for the service of such forces to be a cantonment for the purposes of this Act and of all other enactments for the time being in force, and ⁴[* * *] may, by a like notifications, ⁵ declare that any cantonment shall cease to be a cantonment.

(2) The [Central Government] may, by a like notification, define the limits of any cantonment for the aforesaid purposes.

⁶[(3) When any place is declared a cantonment for the first time, the [Central Government] may, until a Board is constituted in accordance with the provisions of this Act, by order make any provision which appears necessary to him either for the administration of the Cantonment or for the constitution of the Board.]

4. (1) The [Central Government] may, by notification in the [Official Gazette], declare its intention to include within a cantonment any local area situated in the ⁶[*] vicinity thereof or to exclude from a cantonment any local area comprised therein.

(2) Any inhabitant of a cantonment or local area in respect of which a notification has been published under sub-section (1), may, within six weeks from the date of the notification, submit in writing to the [Central Govern-

Leg. Ref.

¹ Substituted by Act XXIV of 1936.

² The word "and" omitted by Act XXIV of 1936.

³ Inserted by Act XXIV of 1936

⁴ Omitted by Order in Council, 1937.

⁵ For Notification declaring that the Cantonments of Shwebo, Thayetnyo and Meiktila shall cease to be cantonments, see *Burma Gazette*, 1926, Pt. I, p. 244.

For a similar Notification in respect of Dibrugarh, see *Assam Gazette*, 1924, Pt. I, p. 664.

⁶ The word "immediate" was omitted by S. 2 of the Cantonments (Amendment) Act, 1927 (XXVI of 1927).

Notes.

Sec 2 (xxxvii): STREET.—The petitioner, without the permission in writing of the

Cantonment Board, paved with burnt bricks a plot of land which was situate between two houses which he had constructed with the sanction of the Board. There were gates to the two streets on either side of the land in question, which the petitioner had put up some years ago. On a charge under S. 187 of the Cantonments Act of "placing a structure, encroaching on the street". Held, that in view of the fact that the gates have been in existence on both sides for a number of years, it cannot be presumed that the public have a right of way over this space and the prosecution have failed to establish that the land in question is a "street" as defined in the Act 158 I C. 858=36 Cr. L.J. 1475=1935 Lah. 858.

Sec. 3 (2).—See 5 I.C. 905=24 P.R. 1910=37 P.W.R. 1910.

ment] through the Officer Commanding-in-Chief, the Command, an objection to the notification and the [Central Government] shall take such objection into consideration.

(3) On the expiry of six weeks from the date of the notification, the [Central Government] may, after considering the objections, if any, which have been submitted under sub-section (2), by notification in the ¹[Official Gazette], include the local area in respect of which the notification was published under sub-section (1), or any part thereof, in the cantonment or, as the case may be, exclude such area or any part thereof from the cantonment.

5. When, by a notification under section 4, any local area is included in a cantonment, such area shall thereupon become subject to this Act and to all other enactments for the time being in force throughout the cantonment and to all notifications, rules, regulations, bye-laws, orders and directions issued or made thereunder.

6. (1) When, by a notification under section 3, any cantonment ceases to be a cantonment and the local area comprised therein is immediately placed under the control of a local authority, the balance of the cantonment fund and other property vesting in the [Board] shall be transferred to such local authority, and the liabilities of the [Board] shall be transferred to such local authority.

(2) When in like manner any cantonment ceases to be a cantonment and the local area comprised therein is not immediately placed under the control of a local authority, the balance of the cantonment fund and other property vesting in the [Board] shall vest in His Majesty, and the liabilities of the [Board] shall be transferred to the ²[Central Government].

7. (1) When, by a notification under section 4, any local area forming part of a cantonment ceases to be under the control of a particular [Board] and is immediately placed under the control of some other local authority, such portion of the cantonment fund and other property vesting in the [Board] and such portion of the liabilities of the [Board] as the ³[Central Government] may, by general or special order, direct, shall be transferred to that other local authority.

(2) When, in like manner, any local area forming part of a cantonment ceases to be under the control of a particular [Board] and is not immediately placed under the control of some other local authority, such portion of the cantonment fund and other property vesting in the [Board] shall vest in His Majesty, and such portion of the liabilities of the [Board] shall be transferred to the ¹[Central Government] as the ³[Central Government] may, by general or special order, direct.

8. Any cantonment fund or portion of a cantonment fund or other property of a [Board] vesting in His Majesty under the provisions of section 6 or section 7 shall be applied in the first place to satisfy any liabilities of the [Board] transferred under such provisions to the ¹[Central Government] and in the second place for the benefit of the inhabitants of the local area which has ceased to be a cantonment or, as the case may be, part of a cantonment.

Leg. Ref.

¹ Substituted by Order in Council, 1937.

² Substituted by Order in Council, 1937.

³ Substituted by Order in Council, 1937.

Notes.

Sec. 5 —The mere fact that certain lands are declared by the Government to

be within cantonment area does not vest their ownership in the Government unless it is shown, that the lands were acquired by the Government for that purpose. 31 C.W.N. 1033=105 I.C. 565=1927 C. 786 See also notes under S. 1, *supra*,

9. The [Central Government] may, by notification in the Official Gazette, exclude from the operation of any part of this Act the whole or any part of a cantonment, or direct that any provision of this Act shall in the case of any cantonment ²(a) situated within the limits of a Presidency-town; or (b) in which the Board is superseded under S. 54] apply with such modifications as may be so specified.

CHAPTER III.

CANTONMENT AUTHORITIES AND CANTONMENT BOARDS.

Cantonment Board and Executive Officer. 3[10. For every cantonment there shall be a Cantonment Board and an Executive Officer.

11. Every Board shall, by the name of the place by reference to which the cantonment is known, be a body corporate having perpetual succession and a common seal with power to acquire and hold property both moveable and immoveable and to contract and shall, by the said name, sue and be sued.

12. (1) The Executive Officer of every cantonment shall be appointed by the 4[Central Government], or by such person as the 4[Central Government] may authorise in this behalf, from the Service of Executive Officers constituted by rules made under S. 280:

Appointment of Executive Officer. Provided that an Executive Officer appointed before the commencement of the Cantonments (Amendment) Act, 1936, shall, unless the 4[Central Government] otherwise directs in any case, be deemed to have been duly appointed in accordance with this sub-section.

(2) Not less than half the cost of the salary of the Executive Officer shall be paid 4[by the Central Government] and the balance from the cantonment fund:

Provided that the salary of an Executive Officer appointed before the commencement of the Cantonments (Amendment) Act, 1936, shall, until the 4[Central Government] otherwise directs, continue to be paid from the source from which it was being paid at the commencement of the said Act.

(3) The Executive Officer shall be the Secretary of the Board and of every committee of the Board, but shall not be a member of the Board or of any such committee

Constitution of Cantonment Boards. 13. (1) Cantonments shall be divided into three classes, namely:—

(i) Class I Cantonments, in which the civil population exceeds ten thousand;

(ii) Class II Cantonments, in which the civil population exceeds two thousand five hundred, but does not exceed ten thousand; and

(iii) Class III Cantonments, in which the civil population does not exceed two thousand five hundred:

Provided that the 4[Central Government] may, by notification in the 4[Official Gazette] place in Class II any cantonment in the North-West Frontier Province or in British Baluchistan which if it were situated elsewhere would be a Class I Cantonment, or place in Class III any such cantonment which if it were situated elsewhere would be a Class II Cantonment.

(2) For the purposes of sub-section (1), the civil population shall be calculated in accordance with the latest official census, or, if the

Leg. Ref.

¹ Omitted by Order in Council, 1937.

² Substituted by Act XXIV of 1936

³ New Ss 10 to 14 substituted for old Ss. 10 to 14 by Act XXIV of 1936.

⁴ Substituted by Order in Council, 1937

Notes.

Sec 10.—See 1 P.R. 1897 (Cr.); 9 B.

333; 5 Bom. L. R. 869; Rat. 849. As to jurisdiction of District Magistrate over Cantonment Magistrate, see Rat. 849=Cr. Rg. 16 of 1896; 9 Bom. 100. As to disqualification of Cantonment Magistrate, see 48 P.R. 1887 (Cr.). Power to cancel licence. 15 C. 452.

1[Central Government] by general or special order, so directs, in accordance with a special census taken for the purpose.

(3) In Class I Cantonments, the Board shall consist of the following members, namely:—

(a) the Officer Commanding the station or, if the 1[Central Government] so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command;

(b) a Magistrate of the first class nominated by the District Magistrate;

(c) the Health Officer;

(d) the Executive Engineer;

(e) four military officers nominated by name by the officer Commanding the station by order in writing;

(f) seven members elected under this Act.

(4) In Class II Cantonments, the Board shall consist of the following members, namely:—

(a) the Officer Commanding the station or; if the 1[Central Government] so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command,

(b) a Magistrate of the first class nominated by the District Magistrate;

(c) the Health Officer,

(d) the Executive Engineer,

(e) (i) in cantonments of which the civil population exceeds seven thousand five hundred, three military officers,

(ii) in cantonments of which the civil population exceeds five thousand, but does not exceed seven thousand five hundred, two military officers,

(iii) in cantonments of which the civil population does not exceed five thousand and in cantonments which the 1[Central Government] by notification under the proviso to sub-section (1), has placed in Class II, whatever be the population, one military officer,

nominated by name by the Officer Commanding the station by order in writing;

(f) such number of members elected under this Act as is equal to the number of members constituted or nominated by or under clauses (b) to (e).

(5) In Class III Cantonments, the Board shall consist of the following members, namely:—

(a) the Officer Commanding the station, or if the 1[Central Government] so directs in respect of any cantonment, such other military officer as may be nominated in his place by the Officer Commanding-in-Chief, the Command,

(b) one military officer nominated by name by the Officer Commanding the station by order in writing;

(c) one member elected under this Act.

(6) The Officer Commanding the station may, if he thinks fit, with the sanction of the Officer Commanding-in-Chief, the Command, nominate in place of any military officer whom he is empowered to nominate under clause (e) of sub-section (3), clause (e) of sub-section (4) or clause (b) of sub-section (5), any person, whether in the service of the [Crown]¹ or not, who is ordinarily resident in the cantonment or in the vicinity thereof.

(7) Every election or nomination of a member of a Board and every vacancy in the membership thereof shall be notified by the 1[Provincial Government] in the 1[Official Gazette].

Power to vary constitution of Boards in special circumstances

14. (1) Notwithstanding anything contained in S. 13, if the 1[Central Government] is satisfied—

- (a) that, by reason of military operations, it is necessary, or
- (b) 2[] that, for the administration of the cantonment, it is desirable,

to vary the constitution of the Board in any cantonment under this section, the 1[Central Government] may, by notification in the 1[Official Gazette] make a declaration to that effect.

(2) Upon the making of a declaration under sub-section (1), the Board in the cantonment shall consist of the following members, namely:—

- (a) the Officer Commanding the station;
- (b) one military officer nominated by name by the Officer Commanding the station by order in writing;
- (c) one member, not being a person in the service of the Government nominated by the Officer Commanding the station.

(3) Every nomination of a member of a Board constituted under this section, and every vacancy in the membership thereof, shall be notified by the 1[Provincial Government] in the 1[Official Gazette].

(4) The term of office of a Board constituted by a declaration under sub-section (1) shall not ordinarily extend beyond one year:

Provided that the 1[Central Government] may from time to time, by a like declaration, extend the term of office of such a Board by any period not exceeding one year at a time:

Provided also that the 1[Central Government] shall forthwith direct that the term of office of such a Board shall cease if, in the opinion of the 1[Central Government] the reasons stated in the declaration whereby such Board was constituted, or its term of office was extended, have ceased to exist.

(5) When the term of office of a Board constituted under this section has expired or ceased, the Board shall be replaced by the former Board which, but for the declaration under sub-section (1) would have continued to hold office, or, if the term of office of such former Board has expired, by a Board constituted under S. 13.]

15. (1) Save as otherwise provided in this section, the term of office of a

Term of office of members.

member of a Board shall be three years and shall commence from the date of the notification of his election or nomination under 3[sub-section (7) of section 13], or from the date on which the vacancy has occurred in which he is elected or nominated, whichever date is later;

4[Provided that the 1[Central Government] may, when satisfied that it is necessary in order to avoid administrative difficulty, extend the term of office of all the elected members of a Board by such period, not exceeding one year, as he thinks fit.]

(2) The term of office of an *ex officio* member of a Board shall continue so long as he holds the office in virtue of which he is such a member.

(3) The term of office of a member elected to fill a casual vacancy shall commence from the date of election, and shall continue so long only as the member in whose place he is elected would have been entitled to hold office if the vacancy had not occurred

(4) An outgoing member shall, unless the [Central Government] otherwise directs, continue in office until the election or nomination of his successor is notified under 3[sub-section (7) of section 13].

(5) Any outgoing member may, if qualified, be re-elected or re-nominated.

Leg. Ref.

¹ Substituted by Order in Council, 1937.

² Omitted by Order in Council, 1937.

³ Substituted by Act XXIV of 1936.

⁴ Added by Act XXIV of 1936.

16. (1) Vacancies arising by efflux of time in the office of an elected member of a Board shall be filled by an ordinary election to be held on such date as the [Central Government] may, by notification in the ¹[Official Gazette], direct.

(2) A casual vacancy shall be filled by a casual election the date of which shall be fixed by the [Central Government] by notification in the ¹[Official Gazette], and shall be as soon as may be after the occurrence of the vacancy:

Provided that no casual election shall be held to fill a vacancy occurring within three months of any date on which the vacancy will occur by efflux of time, but such vacancy shall be filled at the next ordinary election.

17. (1) If from any cause at an ordinary election no member is elected, or if the elected member is unwilling to serve on the Board, the outgoing member shall, if qualified and willing to serve, be deemed to have been re-elected.

(2) If in any such case the outgoing member is not qualified or is not willing to serve, or if at a casual election no member is elected, the vacancy shall be filled by nomination by the [Central Government] ¹[after consultation with] the Officer Commanding-in-Chief, the Command.

(3) The term of office of a member nominated or deemed to have been re-elected under this section shall expire at the time at which it would have expired if he had been elected at the ordinary or casual election, as the case may be.

18. (1) Every person who is by virtue of his office, or who is nominated or elected to be, a member of a Board shall, before taking his seat, make at a meeting of the Board an oath or affirmation of his allegiance to the Crown in the following form:—

become
"I, A. B., having been elected a member of this Board, do
been nominated

solemnly swear (or affirm) that I will be faithful and bear true allegiance to His Majesty the King, Emperor of India, his heirs and successors, and that I will faithfully discharge the duty upon which I am about to enter."

(2) If any such person fails to make the oath or affirmation within such time as the [Central Government] considers reasonable, the [Central Government] shall, by notification in the ¹[Official Gazette], declare his seat to be vacant.

19. (1) Any nominated or elected member of a Board who wishes to resign his office may forward his resignation in writing through the President of the Board to the Officer Commanding-in-Chief, the Command, who shall forward it for orders to the [Central Government].

(2) If the [Central Government] accepts the resignation, such acceptance shall be communicated to the Board, and thereupon the seat of the member resigning shall become vacant.

President and Vice-President. 20. (1) The ²[Officer Commanding the station] ³[if a member of the Board] shall be the President of the Board:

⁴[Provided that when a military officer holding the office of President ceases to be the Officer Commanding the station merely by reason of a tempor-

Leg. Ref.

¹ Substituted by Order in Council, 1937.

² These words were substituted by S. 14 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

³ Inserted by Act XXIV of 1936.

⁴ This proviso was added by S. 3 of the Cantonments (Amendment) Act, 1927 (XXVI of 1927).

any absence from the station on duty or on station leave, or during the transfer of his headquarters to a hull station, he shall not vacate the office of President.]

1["(2) Where the Officer Commanding the station is not a member of the Board, the military officer nominated in his place under clause (a) of sub-section (3), sub-section (4) or sub-section (5) of S. 13 shall be President of the Board.

(3) In every Board in which there is more than one elected member, there shall be a Vice-President elected by the elected members only and from among their number.]

Term of office of Vice-President. 21. 2[(1) The term of office of a Vice-President shall be three years or the residue of his term of office as a member, whichever is less.]

(2) A Vice-President may resign his office by notice in writing to the President and, on the resignation being accepted by the Board, the office shall become vacant.

Duties of President 22. (1) It shall be the duty of the President of every Board—

(a) unless prevented by reasonable cause, to convene and preside at all meetings of the Board and to regulate the conduct of business thereat;

(b) to exercise supervision and control over the financial and executive administration of the Board;

(c) to perform all the duties and exercise all the powers specifically imposed or conferred on the President by or under this Act; and

(d) subject to any restrictions, limitations and conditions imposed by this Act, to exercise executive power for the purpose of carrying out the provisions of this Act and to be directly responsible for the fulfilment of the purposes of this Act.

(2) The President may, by order in writing, empower the Vice-President to exercise all or any of the powers and duties referred to in clause (c) of sub-section (1) other than any power, duty or function which he is by resolution of the Board expressly forbidden to delegate.

(3) The exercise or discharge of any powers, duties or functions delegated by the President under this section shall be subject to such restrictions, limitations and conditions, if any, as may be laid down by the President and to the control of, and to revision by, the President.

(4) Every order made under sub-section (2) shall forthwith be communicated to the Board and to the 3[Officer Commanding-in-Chief, the Command].

Duties of Vice-President. 23. It shall be the duty of the Vice-President of every Board—

(a) in the absence of the President and unless prevented by reasonable cause, to preside at meetings of the Board and when so presiding to exercise the authority of the President under sub-section (1) of section 22;

(b) during the incapacity or temporary absence of the President or pending his appointment or succession, to perform any other duty and exercise any other power of the President, and

(c) to exercise any power and perform any duty of the President which may be delegated to him under sub-section (2) of section 22.

Leg. Ref.

¹ Sub-sections (2) and (3) substituted for sub-S. (2) by Act XXIV of 1936.

² Substituted by Act XXIV of 1936.

³ These words were substituted by S. 2 of the Cantonments (Amendment) Act, 1926 (XXXV of 1926).

24. The Executive Officer shall perform all the duties imposed upon him by or under this Act, and shall be responsible for the custody of all the records of the [Board] and shall arrange for the performance of such duties relative to the proceedings of the Board or of any Committee of the Board or of any Committee of Arbitration constituted under this Act, as those bodies may respectively impose on him, and shall comply with every requisition of the [Board] on any matter pertaining to the administration of the cantonment.

Duties of the Executive officer.

25. The Executive Officer may, in cases of emergency, direct the execution of any work or the doing of any act which would ordinarily require the sanction of the [Board] and the immediate execution or doing of which is, in his opinion, necessary for the service or safety of the public, and may direct that the expense of executing such work or doing such act shall be paid from the cantonment fund:

Special power of the Executive Officer.

Provided that—

(a) 1[* * *] he shall not act under this section without the previous sanction of the President or, in his absence, of the Vice-President;

(b) he shall not act under this section in contravention of any order of the [Board] prohibiting the execution of any particular work or the doing of any particular act; and

(c) he shall report forthwith the action taken under this section and the reasons therefor to the [Board].

Elections.

26. (1) 1[* * *] [The Board or, where a Board is not constituted in any place declared by notification under sub-section (1) of S. 3 to be a cantonment, the Officer Commanding the station]¹ shall prepare and publish an electoral roll showing the names of persons qualified to vote at elections to the Board. Such roll shall be prepared, revised and finally published in such manner and on such date in each year as the ²[Central Government] may by rule prescribe.

(2) Every person whose name appears in the final electoral roll shall, so long as the roll remains in force, be entitled to vote at an election to the Board, and no other person shall be so entitled.

(3) When a cantonment has been divided into wards, or the inhabitants into classes, the electoral roll shall be divided into separate lists for each ward or class, as the case may be.

(4) If a new electoral roll is not published in any year on the date prescribed, the [Central Government]² may direct that the old electoral roll shall continue in operation until the new roll is published.

27. (1) The following persons shall, if not otherwise disqualified, be entitled to be enrolled as electors, namely:—

(a) every person who in any year has, on or before such date as may be fixed by the [Central Government]² in this behalf by notification in the ²[Official Gazette] (hereinafter in this section referred to as the aforesaid date), been assessed directly and on his own account to taxes under this Act (other than octroi, toll or terminal tax), the aggregate value whereof is not less than such amount as the [Central Government]² may by rule prescribe, and who on the aforesaid date is not in arrears in the payment of any such tax;

(b) every person who has for a period of not less than twelve months immediately preceding the aforesaid date resided in the cantonment and on the aforesaid date—

(i) is the owner of the mortgagee in possession or the lessee of any building or land in the cantonment, of an annual value calculated in such manner, and of not less than such amount, as the [Central Government]¹ may by rule prescribe; or

(ii) is carrying on any business in the cantonment from which he derives an annual income calculated in such manner, and of not less than such amount, as the [Central Government]¹ may by rule prescribe; or

(iii) ²[has passed the Matriculation or other equivalent examination] of any University established by law in British India;

(iv) ²[is a person whose name is entered on the current electoral roll of the constituency of which the cantonment forms part for the purposes of the Central or Provincial Legislatures; or]

(v) is a retired or pensioned officer, whether commissioned or non-commissioned, of His Majesty's forces;

(c) every person who has, during a period of not less than twelve months immediately preceding the aforesaid date, resided in the cantonment and has ²[for] that period been assessed to income-tax,

(2) A person, notwithstanding that he is otherwise qualified, shall not be entitled to be enrolled as an elector if he on the aforesaid date—

(i) is not a British subject, or

(ii) is less than 21 years of age, or

(iii) has been adjudged by a competent Court to be of unsound mind, or

(iv) is an undischarged insolvent, or

(v) has been sentenced by a Criminal Court to imprisonment for a term exceeding ²[two years] or to transportation ³[for an offence which is declared by the ¹[Central Government] to be such as to unfit him to become an elector] or has been sentenced by a Criminal Court for any offence under Chapter IX-A of the Indian Penal Code:

Provided that the [Central Government]¹ may, by order in writing, remove any disqualification incurred by a person under clause (v),

³[Provided further that any disqualification incurred by a person under clause (v) shall terminate on the lapse of three years from the expiry of the sentence or order].

(3) If any person having been enrolled as an elector in any electoral roll subsequently becomes subject to any of the disqualifications referred to in clauses (i), (iii), (iv) and (v) of sub-section (2), his name shall be removed from the electoral roll unless, in the case referred to in clause (v), the disqualification is removed by the [Central Government].¹

28. (1) Save as hereinafter provided, every person, not being ²[a person in the military or Civil Service of the Crown in India] whose name is entered on the electoral roll of a cantonment shall be qualified for election as a member of the Board in that cantonment.

(2) No person shall be qualified for election or nomination as a member of a Board, if he—

(a) has been dismissed from [the service of the Crown]¹ and is debarred from re-employment therein, or is a dismissed servant of the ⁴["a Board or an authority which, before the commencement of the Cantonments (Amendment) Act, 1936, exercised and performed the powers and duties of a [Board] under this Act;]

(b) is debarred from practising as a legal practitioner by order of any competent authority;

Leg. Ref.

¹ Substituted by Order in Council, 1937

² Substituted by Act XXIV of 1936.

³ Inserted, omitted and added respectively by Act XXIV of 1936.

⁴ Substituted and inserted by Act XXIV of 1936.

S 27, cl. (b), sub-cl. (iv) has been re-numbered as sub-cl. (v) and new sub-cl. (iv) added by Act XXIV of 1936.

(c) holds any place of profit in the gift or at the disposal of the Board, or is a [1* *] police officer, or is the servant or employer of a member of the Board; or

(d) is interested in a subsisting contract made with, or in work being done for, the Board except as a shareholder (other than a director) in an incorporated company; or

2[(dd) is an officer or servant, permanent or temporary, of a Board; or],
(e) is disqualified under any other provision of this Act.

Provided that—

(i) any of the disqualifications referred to in clauses (a) and (b) may be removed by an order of the [Central Government]³ in this behalf, and

(ii) a person shall not be deemed to have any interest in such a contract or work as is referred to in clause (d) by reason only of his having a share or interest in—

(a) any lease or sale or purchase of immovable property or any agreement for the same; or

(b) any agreement for the loan of money or any security for the payment of money only; or

(c) any newspaper in which any advertisement relating to the affairs of the Board is inserted; or

(d) the sale to the Board of any articles in which he regularly trades or the purchase from the Board of any articles, to a value in either case not exceeding Rs. 1,500 in the aggregate in any year during the period of the contract or work.

Interpretation.

29. For the purposes of sections 26, 27 and 28—

(a) "person" means an individual human being, and

(b) a person shall be deemed to pay a tax directly if he pays the tax either himself or through a legally appointed agent.

30. Notwithstanding anything hereinbefore contained, the [Central Government]³ may make rules conferring on the manager

Joint families, etc.

or representative of an undivided family or of any company or firm or other association or body or on any trustee of any land a right to be enrolled as an elector or to be nominated as a candidate at elections to a Board.

31. The [Central Government]³ may, either generally or specially for any cantonment or group of cantonments, after previous

Power to make rules
regulating elections.

publication, make rules consistent with this Act to regulate all or any of the following matters for the purpose of the holding of elections under this Act, namely:—

(a) the division of a cantonment into wards, or of the inhabitants of a cantonment into classes, or both;

(b) the determination of the number of members to be elected by each ward or class of persons;

(c) the method by which the annual value of buildings and lands shall be calculated for the purposes of section 27;

(d) the preparation, revision and final publication of electoral rolls;

(e) the registration of electors, the nomination of candidates, the time and manner of holding elections and the method by which votes shall be recorded;

Leg. Ref.

¹ Certain words were omitted by S. 4 of the Cantonments (Amendment) Act, 1925 (VII of 1925),

² Substituted and inserted by Act XXIV of 1936.

³ Substituted by Order in Council, 1937.

(f) the authority by which and the manner in which disputes relating to electoral rolls or arising out of elections shall be decided, and the powers and duties of such authority and the circumstances in which such authority may declare a casual vacancy to have been created or any candidate to have been elected;

(g) any other matter relating to elections or election disputes in respect of which the [Central Government]¹ is empowered to make rules under this Chapter or in respect of which this Act makes no provision or makes insufficient provision and provision is, in the opinion of the [Central Government]¹ necessary.

Members.

32. No member of a Board shall vote at a meeting of the Board on any question relating to his own conduct or on any matter, other than a matter affecting generally the inhabitants of the cantonment, which affects his own pecuniary interest or the valuation of any property in respect of which he is directly or indirectly interested, or of any property of or for which he is a manager or agent.

33. Every member of a Board shall be liable for the loss, waste or misapplication of any money or other property belonging to the Board if such loss, waste or misapplication is a direct consequence of his neglect or misconduct while such member; and a suit for compensation for the same may be instituted against him either by the Board or by the [Central Government]¹.

34. 2[(1) The [Central Government]¹ may remove from a Board any member thereof who—

(a) becomes subject to any of the disqualifications specified in sub-section (2) of section 27, or in sub-section of section 28; or

(b) has absented himself for more than three consecutive months from the meetings of the Board and is unable to explain such absence to the satisfaction of the Board; or

(c) has knowingly contravened the provisions of section 32; or

(d) being a legal practitioner, acts or appears on behalf of any other person against the Board in any legal proceeding or against the [Crown]¹ in any such proceeding relating to any matter in which the Board is or has been concerned, or acts or appears on behalf of any person in any criminal proceeding instituted by or on behalf of the Board against such person.]

(2) The [Central Government]¹ may remove from a Board any member who, in the opinion of the [Central Government]¹ has so flagrantly abused in any manner his position as a member of the Board as to render his continuance as a member detrimental to the public interests.

(3) No member shall be removed from a Board under this section unless he has been given a reasonable opportunity of showing cause against his removal.

35. 3[(1) A member removed under clause (b) of sub-section (1) of section 34 shall, if otherwise qualified, be eligible for re-election or re-nomination.

(2) A member removed under clause (c) or clause (d) of sub-section (1) of section 34 shall not be eligible for re-election or nomination for the period during which, but for such removal, he would have continued in office.

(2) A member removed under sub-section (2) of section 34 shall not be eligible for re-election or nomination until the expiry of three years from the date of his removal.

Leg Ref.

¹ Substituted by Order in Council, 1937.

² This sub-section was substituted by S. 4 of the Cantonments (Amendment) Act,

1927 (XXVI of 1927)

³ This section was substituted by S. 5, Cantonments (Amendment) Act, 1927 (XXVI of 1927).

Servants.

36. (1) No person who has directly or indirectly by himself or his partner any share or interest in a contract with, by or on behalf of a [Board] or in any employment under, by or on behalf of a [Board], otherwise than as a servant of the [Board], shall become or remain a servant of such [Board].

(2) A servant of a [Board] who knowingly acquires or continues to have directly or indirectly by himself or his partner any share or interest in a contract with, by or on behalf of, the [Board] or, in any employment under, by or on behalf of, the [Board], otherwise than as a servant of the [Board], shall be deemed to have committed an offence under section 168 of the Indian Penal Code.

(3) Nothing in this section shall apply to any share or interest in any contract with, by or on behalf of, or employment under, by or on behalf of a [Board] if the same is a share in a company contracting with, or employed by, or on behalf of, the [Board] or is a share or interest acquired or retained with the permission of the ¹[Officer Commanding-in-Chief, the Command,] in any lease or sale to, or purchase by, the [Board] of land or buildings or in any agreement for the same.

²[(4) Every person applying for employment as a servant of a Board shall, if he is related by blood or marriage to any member of the Board or to any person, not being a menial servant, in receipt of remuneration from the Board, notify the fact and the nature of such relationship to the appointing authority before the appointment is made, and if he has failed to do so, his appointment shall be invalid but without prejudice to the validity of anything previously done by him.]

³[36-A. Every officer or servant, permanent or temporary, of a [Board] shall be deemed to be a public servant within the meaning of the Indian Penal Code, and in the definition of legal remuneration in section 161 of that Code the word "Government" shall, for the purposes of this section, be deemed to include a [Board]]

Procedure.

37. (1) Every Board shall ordinarily hold at least one meeting in every month on such day as may be fixed, and of which notice shall be given in such manner as may be provided, by regulations made by the Board under this Chapter.

(2) The President may, whenever he thinks fit, and shall, upon a requisition in writing by not less than one-fourth of the members of the Board, convene a special meeting.

(3) Any meeting may be adjourned until the next or any subsequent day, and an adjourned meeting may be further adjourned in like manner.

38. Subject to any regulation made by the Board under this Chapter, any business may be transacted at any meeting:

Provided that no business relating to the imposition, abolition or modification of any tax shall be transacted at a meeting unless notice of the same and of the date fixed therefor has been sent to each member not less than seven days before that date.

Leg. Ref.

¹ These words were substituted by S. 2 of the Cantonments (Amendment) Act, 1926 (XXXV of 1926).

² Section 36, cl. (4) added by Act XXIV

of 1936.

³ This section was inserted by S. 5 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

39. (1) The quorum necessary for the transaction of business at a meeting of a Board ¹[in which there is more than one elected member] shall be five or one half of the number of members of the board actually holding the office at the time, whichever is the greater number.

Quorum. ¹[(1-A) The quorum necessary for the transaction of business at a meeting of a Board constituted under sub-section (5) of S. 13 or under sub-section (1) of S. 14, shall be two.]

(2) If a quorum is not present, the President shall adjourn the meeting and the business which would have been brought before the original meeting if there had been a quorum present thereat shall be brought before, and may be transacted at, an adjourned meeting, whether there is a quorum present or not.

Presiding officer. ²["40. In the absence of—

(a) both the President and the Vice-President from any meeting of a Board in which there is more than one elected member.

(b) the President from a meeting of a Board constituted under sub-section (5) of S. 13 or sub-section (1) of S. 14,

the members present shall elect one from among their own number to preside."]

41. (1) Minutes of the proceedings of each meeting shall be recorded in a book and shall be signed by the President before the close of the meeting, and shall, at such times and in such place as may be fixed by the Board, be open to inspection free of charge by any inhabitant of the cantonment.

Minutes. (2) Copies of the minutes shall, as soon as possible after each meeting, be forwarded for information to ³[the Officer Commanding-in-Chief, the Command,] the Officer Commanding the District, the Officer Commanding the brigade area, [the District Magistrate and the Military Estate's officer]⁴.

42. Every meeting of a Board shall be open to the public unless in any case the President, for reasons to be recorded in the minutes, otherwise directs.

Meetings to be public. 43. (1) All questions coming before a meeting shall be decided by the majority of the votes of the members present and voting.

Method of deciding questions. (2) In the case of an equality of votes, the President shall have a second or casting vote.

(3) The dissent of any member from any decision of the Board shall, if the member so requests, be entered in the minutes, together with a short statement of the grounds for such dissent.

⁴["43-A. (1) Every Board constituted under S. 13 in a Class I Cantonment or Class II Cantonment shall appoint a committee consisting of the elected members of the Board, the Health Officer and the Executive Engineer for the administration of such areas in the cantonment as the ⁵[Central Government] may, by notification in the ⁵[Official Gazette], declare to be bazaar areas, and may delegate its powers and duties to such committee in the manner provided in clause (c) of sub-section (1) of S. 44.

(2) The Vice-President of the Board shall be the Chairman of the committee appointed under sub-section (1).]

Power to make regulations. 44. (1) A Board may make regulations consistent with this Act and with the rules made thereunder to provide for all or any of the following matters namely:—

Leg. Ref.

¹ Inserted, omitted and cl. (1-A) added by Act XXIV of 1936.

² Substituted by Act XXIV of 1936.

³ These words were inserted by S. 3 of

the Cantonments (Amendment) Act, 1926 (XXXV of 1926)

⁴ Section 43-A added by Act XXIV of 1936.

⁵ Substituted by Order in Council, 1937.

- (a) the time and place of its meetings;
- (b) the manner in which notice of the meeting shall be given;
- (c) the conduct of proceedings at meetings and the adjournment of meetings;

(d) the custody of the common seal of the Board and the purposes for which it shall be used; and

(e) the appointment of committees for any purpose and the determination of all matters relating to the constitution and procedure of such committees, and the delegation to such committees, subject to any conditions which the Board thinks fit to impose, of any of the powers or duties of the Board under this Act other than a power to make regulations or bye-laws.

(2) No regulation made under clause (e) of sub-section (1) shall take effect until it has been approved by the [Central Government]¹.

(3) No regulation made under this section shall take effect until it has been published in such manner as the [Central Government]¹ may direct.

Joint action with other local authority.

45. (1) A [Board] may—

(a) join with any other local authority—

(i) in appointing a joint committee for any purpose in which they are jointly interested and in appointing a chairman of such committee;

(ii) in delegating to such committee power to frame terms binding on the [Board] and such other local authority as to the construction and future maintenance of any joint work or to exercise any power which might be exercised by [the Board or such other Local authority]² and

(iii) in making rules for regulating the proceedings of any such committee relating to the purposes for which it has been appointed, or

(b) with the previous sanction of ²[the officer commanding-in-chief, the command and] the ¹[Provincial Government] concerned enter into an agreement with any other local authority regarding the levy of any tax or toll whereby the said tax or toll respectively leviable by the ²[Board and such other local authority] may be levied together instead of separately within the limits of the aggregate area comprising the areas subject to the control of the [Board and other local authority].²

(2) If any difference of opinion arises between any [Board and other local authority]² acting together under this section, the decision of the [Central Government]¹ or of an officer appointed by the [Central Government]¹ in this behalf shall be final.

(3) When any agreement such as is referred to in clause (b) of sub-section (1) has been entered into, then—

(a) where the agreement relates to an octroi or terminal tax or toll, the other local authority with which the [Board] has made such agreement shall have the same powers to establish octroi limits and octroi stations and places for the collection of the terminal tax and terminal toll within the Cantonment, as it has within the area ordinarily subject to its control;

(b) such other local authority shall have the same power of collecting such tax or toll in the cantonment, and the provisions of any enactment in force relating to the levy of such tax or toll by such other local authority shall apply in the same manner, as if the cantonment were comprised within the area ordinarily subject to its control; and

(c) the total of the collection of such tax and toll made in the cantonment and in the area ordinarily subject to the control of such other local authority and the costs thereby incurred shall be divided between the cantonment fund and the fund subject to the control of such other local authority, in such proportion as may have been determined by the agreement.

1^{45-A}. Every Board shall, as soon as may be after the close of the year and not later than the date fixed in this behalf by the

Report on administration. 2[Central Government] submit to the 2[Central Government] through the Officer Commanding-in-Chief, the Command, a report on the administration of the cantonment during the preceding financial year, in such form and containing such details as the 2[Central Government] may direct. The comments, if any, of the Officer Commanding-in-Chief, the Command, on such report shall be communicated by him to the Board which shall be allowed a reasonable time to furnish a reply thereto, and the comments together with the reply, if any, shall be forwarded to the 2[Central Government] along with the report."

Control.

Power of Government to require production of documents.

46. The 2[Central Government] [* *]³ may at any time require a [Board]—

(a) to produce any record, correspondence, plan or other document in its possession or under its control;

(b) to furnish any return, plan, estimate, statement, account or statistics relating to its proceedings, duties or works;

(c) to furnish or obtain and furnish any report.

47. The 2[Central Government] or the 4[Officer Commanding-in-Chief, the Command,] may depute any person in the

Inspection.

service of the [Crown]² to inspect or examine any department of the office of, or any service or work undertaken by, or thing belonging to, a [Board], and to report thereon, and the [Board] and its officers and servants shall be bound to afford the person so deputed access at all reasonable times to the premises and property of the [Board] and to all records, accounts and other documents the inspection of which he may consider necessary to enable him to discharge his duties.

Power to call for documents.

48. 4-a[* *] [The Officer Commanding-in-Chief, the Command,]⁴ may, by order in writing,—

(a) call for any book or document in the possession or under the control of the [Board];

(b) require the [Board] to furnish such statements, accounts, reports and copies of documents relating to its proceedings, duties or works as he thinks fit.

49. If, on receipt of any information or report obtained 5[under section 46

Power to require execution of work, etc.

or section 47] or section 48, the 2[Central Government] or 4[the Officer Commanding-in-Chief, the Command,] is of opinion—

(a) that any duty imposed on a [Board] by or under this Act has not been performed or has been performed in an imperfect, inefficient or unsuitable manner, or

(b) that adequate financial provision has not been made for the performance of any such duty,

he may, 4-a[* *] direct the [Board] within such period as he thinks fit, to make arrangements to his satisfaction for the proper performance of the duty, or, as the case may be, to make financial provision to his satisfaction for the performance of the duty:

Leg. Ref.

¹ Section 45-A added by Act XXIV of 1936.

² Substituted by Order in Council, 1937.

³ Omitted by Order in Council, 1937.

⁴ These words were substituted by S. 4

of the Cantonments (Amendment) Act, 1926 (XXXV of 1926)

^{4a} Omitted by Act XXIV of 1936.

⁵ Substituted and omitted by Act XXIV of 1936.

Provided that, unless in the opinion of the 1[Central Government] or the Officer Commanding-in-Chief, the Command, as the case may be, the immediate execution of such order is necessary, he shall, before making any direction under this section, give the [Board] an opportunity of showing cause why such direction should not be made.

50. If, within the period fixed by a direction made under section 49, any action the taking of which has been directed under that section has not been duly taken, the 1[Central Government] or the Officer Commanding-in-Chief, the Command, as the case may be, may make arrangements for the taking of such action, and may direct that all expenses connected therewith shall be defrayed out of the cantonment fund.

51. (1) If the President dissents from any decision of the Board, which he considers prejudicial to the health, welfare or discipline of the troops in the cantonment, he may, for reasons to be recorded in the minutes, by order in writing, direct the suspension of action thereon for any period not exceeding one month and, if he does so, shall forthwith refer the matter to the Officer Commanding-in-Chief, the Command, 2[the reference being made, save in cases where the Officer Commanding the District is himself the Officer Commanding-in-Chief, the Command, for the purposes of this Act] through the Officer Commanding the District, who may make such recommendations thereon as he thinks fit.

(2) If the District Magistrate considers any decision of a [Board] to be prejudicial to the public health, safety or convenience, he may after giving notice in writing of his intention to the [Board] refer the matter to the 3[Central Government], and, pending the disposal of the reference to the 3[Central Government], no action shall be taken on the decision.

(3) If any Magistrate who is a member of a Board, being present at a meeting, dissents from any decision which he considers prejudicial to the public health, safety or convenience, he may, for reasons to be recorded in the minutes and after giving notice in writing of his intention to the President, report the matter to the District Magistrate; and the President shall, on receipt of such notice, direct the suspension of action on the decision for a period sufficient to allow of a communication being made to the District Magistrate and of his taking proceedings as provided by sub-section (2)

Power of Officer Commanding-in-Chief, the Command, on reference under section 51 or otherwise

52 (1) The Officer Commanding-in-Chief, the Command, may at any time 4[]

(a) direct that any matter or any specific proposal other than one which has been referred to the 3[Central Government] under sub-section (2) of section 51 be considered or re-considered by the [Board], or

(b) direct the suspension, for such period as may be stated in the order, of action on any decision of a [Board], other than a decision which has been referred to him under sub-section (1) of section 51 and thereafter cancel the

Leg Ref.

¹ Substituted by Order in Council, 1937.

² These words were inserted by S. 2 and Sch. I of the Repealing and Amending Act, 1927 (X of 1927)

³ Substituted by Order in Council, 1937.

⁴ In sub-S. (1) of S. 52, the words "on

a recommendation made to him in this behalf by the Officer Commanding the District or where the Officer Commanding the District is himself the Officer Commanding-in-Chief, the Command, for the purposes of this Act, of his own motion" have been omitted (Act VII of 1931)

suspension or 1[after giving the Board a reasonable opportunity of showing cause only such direction should not be made] direct that the decision shall not be carried into effect or that it shall be carried into effect with such modifications as he may specify.

(2) When any decision of a Board has been referred to him under sub-section (1) of section 51, the Officer Commanding-in-Chief the Command, may, by order in writing,—

(a) cancel the order given by the President directing the suspension of action; or

(b) extent the duration of the order for such period as he thinks fit; or

1[(c) after giving the Board a reasonable opportunity of showing cause why such direction should not be made, direct that the decision shall not be carried into effect or that it shall be carried into effect by the Board with such modifications as he may specify.]

53. When any decision of a [Board] has been referred to the 2[Central Government] under sub-section (2) of section 51, the 2[Central Government] may, after consulting the Officer Commanding-in-Chief, the Command, by order in writing,—

Powers of Local Government on a reference made under section 51

(a) direct that no action be taken on the decision; or

(b) direct that the decision be carried into effect either without modification or with such modifications as it may specify.

54. (1) If, in the opinion of the 2[Central Government], any Board is not competent to perform or persistently makes default in the performance of the duties imposed on it by or under this act or otherwise by law, or exceeds or abuses its powers, the 2[Central Government] may, by an order published, together with the statement of the reasons therefor, in the [Official Gazette], declare the Board to be incompetent or in default or to have exceeded or abused its powers, as the case may be, and supersede it for such period as may be specified in the order:

Provided that no Board shall be superseded unless a reasonable opportunity has been given to it to show cause against the supersession.

(2) When a Board is superseded by an order under sub-section (1)—

(a) all members of the Board shall, on such date as may be specified in the order, vacate their offices as such members but without prejudice to their eligibility for election or nomination under clause (c);

(b) during the supersession of the Board, all powers and duties conferred and imposed upon the Board by or under this Act or otherwise by law shall be exercised and performed by the 3[Officer Commanding the station] subject to such reservation, if any, as the 2[Central Government] may prescribe in this behalf and

(c) before the expiry of the period of supersession elections shall be held and nominations made for the purpose of reconstituting the Board.

Validity of proceedings

55. (1) No act or proceeding of a Board or of any committee of a Board shall be invalid by reason only of the existence of a vacancy in the Board or committee.

(2) No disqualification or defect in the election, nomination or appointment of a person acting as the President or a member of a Board or of any such committee shall vitiate any act or proceeding of the Board or committee if

Leg. Ref.

¹ Inserted and substituted by Act XXIV of 1936.

² Substituted by Order in Council, 1937.

³ These words were substituted by S. 14 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

the majority of the persons present at the time of the act being done or the proceeding being taken were duly qualified members thereof.

(3) Any document or minutes which purport to be the record of the proceedings of a Board or of any committee of a Board shall, if made and signed substantially in the manner prescribed for the making and signing of the record of such proceedings, be presumed to be a correct record of the proceedings of a duly convened meeting, held by a duly constituted Board or committee, as the case may be, whereof all the members were duly qualified.

CHAPTER IV.

SPIRITUOUS LIQUORS AND INTOXICATING DRUGS.

56. If within a cantonment, or within such limits adjoining a cantonment

Unauthorised sale of
spirituous liquor or intoxicating drug

as the 1[Central Government] may, by notification in the [Official Gazette], define, any person not subject to military or air-force law or any person subject to military or air-force law otherwise than as a military

officer or a soldier knowingly barter, sells or supplies, or offers or attempts to barter, sell or supply, any spirituous liquor or intoxicating drug to or for the use of any soldier or follower or soldier's wife or minor child without the written permission of the 2[Officer Commanding the station] or of some person authorised by the 2[Officer Commanding the station] to grant such permission, he shall be punishable with fine which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both.

Unauthorised possession
of spirituous liquor

57. If within a cantonment, or within any limits defined under section 56,—

(a) any person subject to military or air-force law otherwise than as a military officer or a soldier, or

(b) the wife or servant of any such person or of a soldier, has in his or her possession, except on behalf of the 1[Central Government] or for the private use of a military officer, more than one quart of any spirituous liquor, other than fermented malt-liquor, without the written permission of the 2[Officer Commanding the station] or of some person authorised by the 2[Officer Commanding the station] to grant such permission, he or she shall be punishable, in the case of a first offence, with fine which may extend to fifty rupees, and in the case of a subsequent offence, with imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees.

58. (1) Any police officer or excise officer may, without an order from a

Arrest of persons and
seizure and confiscation of
things for offences against
the two last foregoing sections

Magistrate and without a warrant, arrest any person whom he finds committing an offence under section 56 or section 57, and may seize and detain any spirituous liquor or intoxicating drug in respect of which such an offence has been committed and any vessels or coverings in which the liquor or drug is contained.

(2) Where a person accused of an offence under section 56 has been previously convicted of an offence under that section, an officer in charge of a police station may, with the written permission of a Magistrate, seize and detain any spirituous liquor or intoxicating drug within the cantonment or within any limits defined under that section which, at the time of the alleged commission of the subsequent offence, belonged to, or was in the possession of, such person.

Leg Ref.

¹ Substituted by Order in Council, 1937.

² These words were substituted by S. 14 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

Notes.

Sec 56 —Meaning of terms—"Barter"

or "Sells". 6 Cr.L.J. 67=9 Bom.L.R. 703 =31 B. 523; "Supplies"—*Servant* supplying liquor to *master* is no offence, *Ibid*; "Soldier", who is 3 A. 214=Oudh Sel. Cas 104; "Spirituous liquor," Beer not such, 7 M.H.C. (App.) 15; "Sentence", whipping not proper under the section, Rat. 682

(3) The Court convicting a person of an offence under section 56 or section 57 may order the confiscation of the whole or any part of anything seized under sub-section (1) or sub-section (2).

(4) Subject to the provisions of Chapter XLIII of the Code of Criminal Procedure, 1898, anything seized under sub-section (1) or sub-section (2) and not confiscated under sub-section (3) shall be restored to the person from whom it was taken.

59. The foregoing provisions of this Chapter shall not apply to the sale or supply of any article in good faith for medicinal purposes by a medical practitioner, chemist or druggist authorised in this behalf by a general or special order of the Officer Commanding the station].

Saving of articles sold or supplied for medicinal purposes.

CHAPTER V.

TAXATION

Imposition of Taxation.

2[60. (1) The Board may, with the previous sanction of the 2-a[Provincial Government], impose in any cantonment any tax which under any enactment for the time being in force, may be imposed in any municipality in the province wherein such cantonment is situated: [*Proviso omitted by order in Council, 1937*]

General power of taxation.

(2) Any tax imposed under this section shall take effect from the date of its notification in the 2-a[‘Official Gazette’]

3[61. When a resolution has been passed by the Board proposing to impose a tax under S. 60, the Board shall in the manner prescribed in S. 255 publish a notice specifying—

Framing of preliminary proposals

- (a) the tax which it is proposed to impose;
- (b) the persons or classes of persons to be made liable and the description of the property or other taxable thing or circumstances in respect of which they are to be made liable; and
- (c) the rate at which the tax is to be levied.

62. (1) Any inhabitant of the cantonment may, within thirty days from the publication of the notice under S. 61, submit to the Board an objection in writing to all or any of the proposals contained therein and the Board shall take any objection into consideration and pass orders thereon by special resolution.

Objections and disposal thereof.

(2) If the Board decides to modify its proposals or any of them, it shall re-publish the modified proposals in the manner provided by S. 61 indicating that the proposals are in modification of the proposals previously published, and the provisions of sub-section (1) of this section shall apply to such modified proposals.

(3) When the Board has finally settled the proposals, it shall submit them along with the objections, if any, made in connection therewith to the Provincial Government through the Officer Commanding-in-Chief, the Command.

Leg. Ref

¹ These words were substituted by S. 14 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

² New S. 60 substituted for old S. 60 by Act XXIV of 1936

^{2a} Substituted by Order in Council, 1937

³ New Ss. 61 to 63 substituted for old Ss. 61 to 63 by Act XXIV of 1936.

Notes

Sec 60.—Cantonment—Committee empowered to levy tax on water.—Tax cannot be increased or varied without sanction from the Government 20 S.L.R. 325=92 I.C. 361=1926 Sind 130.

63. The [Provincial Government] may authorise the Board to impose the tax either in the original form or, if any objection has been submitted, in that form or any such modified form as it thinks fit.”

Definition of “annual value.” 64. For the purposes of this Chapter “annual value” means—

(a) in the case of railway stations, hotels, colleges, schools, hospitals, factories and any other buildings which a [Board] decides to assess under this clause, one-twentieth of the sum obtained by adding the estimated present cost of erecting the building to the estimated value of the land appertaining thereto, and

(b) in the case of a building or land not assessed under clause (a), the gross annual rent for which such building (exclusive of furniture or machinery therein) or such land is actually let or, where the building or land is not let or in the opinion of the [Board] is let for a sum less than its fair letting value, might reasonably be expected to let from year to year:

Provided that, where the annual value of any building is, by reason of exceptional circumstances, in the opinion of the [Board] excessive if calculated in the aforesaid manner, the [Board] may fix the annual value at any less amount which appears to it to be just.

65 (1) Save as otherwise expressly provided in the notification imposing the tax, every tax ^{1a}[assessed] on the annual value of buildings or lands or of both shall be leviable primarily upon the actual occupier of the property upon which the said tax is assessed, if he is the owner of the buildings or lands of holds them on a building or other lease ²[granted by or on behalf of the Crown or] the [Board] or on a building lease from any person

(2) In any other case, the tax shall be primarily leviable as follows, namely—

(a) if the property is let, upon the lessor,

(b) if the property is sub-let, upon the superior lessor,

(c) if the property is unlet, upon the person in whom the right to let the same vests

(3) On failure to recover any sum due on account of such tax from the person primarily liable, there may be recovered from the occupier of any part of the buildings or lands in respect of which the tax is due such portion of the sum due as bears to the whole amount due the same ratio which the rent annually payable by such occupier bears to the aggregate amount of rent so payable in respect of the whole of the said buildings or lands, or to the aggregate amount of the letting value thereof, if any, stated in the authenticated assessment list.

(4) An occupier who makes any payment for which he is not primarily liable under this section shall, in the absence of any contract to the contrary, be entitled to be reimbursed by the person primarily liable for the payment, and, if so entitled, may deduct the amount so paid from the amount of any rent from time to time becoming due from him to such person.

Assessment List.

66. When a tax ³[assessed] on the annual value of buildings or lands or both is imposed, the [Board] shall cause an assessment list of all buildings or lands in the cantonment, or of

Leg Ref.

¹ Substituted by Order in Council, 1937

^{1a} This word was inserted by S. 7 of the Cantonments (Amendment) Act, 1927 (XXVI of 1927).

² Substituted by Act XXIV of 1936 and Order in Council, 1937.

³ This word was inserted by S. 8 of the Cantonments (Amendment) Act, 1927 (XXVI of 1927).

both, as the case may be, to be prepared in such form as the [Provincia Government] may by rule prescribe.

67. When the assessment list has been prepared, the [Board] shall give public notice thereof, and of the place where the list or a copy thereof may be inspected, and every person claiming to be the owner, lessee or occupier of any property included in the list, and any authorised agent of such person, shall be at liberty to inspect the list and to make extracts therefrom free of charge.

68. (1) The [Board] shall, at the same time, give public notice of a date, not less than one month thereafter, when it will proceed to consider the valuations and assessments entered in the assessment list, and, in all cases in which any property is for the first time assessed or the assessment is increased, it shall also give written notice thereof to the owner and to any lessee or occupier of the property.

(2) Any objection to a valuation or assessment shall be made in writing to the [Board] before the date fixed in the notice, and shall state in what respect the valuation or assessment is disputed, and all objections so made shall be recorded in a register to be kept for the purpose by the [Board].

(3) The objections shall be inquired into and investigated, and the persons making them shall be allowed an opportunity of being heard either in person or by authorised agent, by an Assessment Committee appointed by the [Board].

(4) The Assessment Committee shall consist of not less than three persons, and, §[* * *] it shall not be necessary to appoint to the Assessment Committee any member §[of the Board].

69. (1) When all objections made under section 68 have been disposed of, and the revision of the valuation and assessment has been completed, the assessment list shall be authenticated by the signature of the members of the Assessment Committee who shall, at the same time, certify that they have considered all objections duly made and have amended the list so far as is required by their decisions on such objections.

(2) The assessment list so authenticated shall be deposited in the office of the [Board] and shall there be open, free of charge, during office hours to all owners, lessees and occupiers of property comprised therein or the authorised agents of such persons, and a public notice that it is so open shall forthwith be published.

70. Subject to such alterations as may thereafter be made in the assessment list under the provisions of this Chapter and to the result of any appeal made thereunder, the entries in the assessment list authenticated and deposited as provided in section 69 shall be accepted as conclusive evidence—

(i) for the purpose of assessing any tax imposed under this Act, of the annual value or other valuation of all buildings and lands to which such entries respectively refer, and

(ii) for the purposes of any tax imposed on buildings or lands, of the amount of each such tax leviable thereon during the year to which such list relates.

71. §[(1) The Board may amend the assessment list at any time—

1 The
of the Can

(VII) of 19. Leg Ref.

2 New Form for Shullong Government,
by Act XXIst, 1925, Pt II, p. 904.

3 Substituted by Order in Council, 1937.

2 Omitted and substituted by Act XXIV
of 1936

3 Sub-Ss. (1) and (1-a) substituted by
by Act XXIV of 1936.

(a) by inserting or omitting the name of any person whose name ought to have been or ought to be inserted or omitted, or

(b) by inserting or omitting any property which ought to have been or ought to be inserted or omitted, or

(c) by altering the assessment on any property which has been erroneously valued or assessed through fraud, accident or mistake, whether on the part of the Board or of the Assessment Committee or of the assessee, or

(d) by revaluing or reassessing any property the value of which has been increased, or

(e) in the case of a tax payable by an occupier, by changing the name of the occupier:

Provided that no person shall by reason of any such amendment become liable to pay any tax or increase of tax in respect of any period prior to the commencement of the year in which the assessment is made¹; and

“(1-a) Before making any amendment under sub-section (1) the Board shall give to any person affected by the amendment notice of not less than one month that it proposes to make the amendment.]

(2) Any person interested in any such amendment may tender an objection to the [Board] in writing before the time fixed in the notice, and shall be allowed an opportunity of being heard in support of the same in person or by authorised agent.

72. The [Board] shall prepare a new assessment list at least once in every three years, and for this purpose the provisions of sections 66 to 71 shall apply in like manner as they apply for the purpose of the preparation of an assessment list for the first time.

73. (1) Whenever the title of any person primarily liable for the payment of a tax on the annual value of any building or land is transferred, the person whose title is transferred and the person to whom the same is transferred shall, within three months after the execution of the instrument of transfer or after its registration, if it is registered, or after the transfer is effected, if no instrument is executed, give notice of such transfer to the Executive Officer.

(2) In the event of the death of any person primarily liable as aforesaid, the person on whom the title of the deceased devolves shall give notice of such devolution to the Executive Officer within six months from the death of the deceased.

(3) The notice to be given under this section shall be in such form as the Executive Officer may direct, and the transferee or other person on whom the title devolves shall, if so required, be bound to produce before the Executive Officer any documents evidencing the transfer or devolution.

(4) Every person who makes a transfer as aforesaid without giving such notice to the Executive Officer shall continue liable for the payment of all taxes assessed on the property transferred until he gives notice or until the transfer has been revoided in the registers of the [Board], but nothing in this section shall be held to affect the liability of the transferee for the payment of the said tax.

1[“(5) the Executive Officer shall record every transfer on devolution or title notified to him under sub-section (1) or sub-section (2) in the assessment list and other tax registers of the Board.]

74. (1) If any building is erected or re-erected within the meaning of section 179, the owner shall give notice thereof to the Executive Officer within thirty days from the date of its completion or occupation, whichever is earlier.

(2) Any person failing to give the notice required by sub-section (1) shall be punishable with fine which may extend to fifty rupees or ten times the amount of the tax payable on the said building, as erected or re-erected, as the case may be, in respect of a period of three months, whichever is greater

Remission and Refund.

75. If any building is wholly or partly demolished or destroyed or otherwise deprived of value, the [Board] may, on the application¹ [in writing] of the owner² [or occupier] remit or refund such portion of³ [any tax assessed on the annual value thereof] as it thinks fit.

76. In a cantonment⁴ [* * *] when any building or land has remained vacant and unproductive of rent for⁵ [sixty] or more consecutive days⁴ [* *] the [Board] shall remit or refund, as the case may be, such portion of⁶ [any tax assessed on the annual value thereof] [* *] as may be proportionate to the number of days during which the said building or land has remained vacant and unproductive of rent.

77. For the purpose of obtaining a partial remission or refund of tax, the owner of a building composed of separate tenements may request the [Board], at the time of the assessment of the building, to enter in the assessment list, in addition to the annual value of the whole building, a note recording in detail the annual value of each separate tenement, when any tenement, the annual value of which has been thus separately recorded, has remained vacant and unproductive of rent for⁵ [sixty] or more consecutive days⁴ [* *] such portion of⁷ [any tax assessed on the annual value of the whole building] [* *] shall be remitted or refunded as would have been remitted or refunded if the tenement had been separately assessed

8[77-A.]⁷ [No remission or refund under⁹ [* *], section 76, or section 77] shall be made unless notice in writing of the 10[fact that the building, land or tenement has become vacant and unproductive of rent] has been given to the [Board] and no remission or refund shall take effect in respect of any period commencing more than fifteen days before the delivery of such notice.

78. (1) For the purposes of sections 76 and 77 no building, tenement or land shall be deemed vacant if maintained as a pleasure resort or town or country house, or be deemed unproductive of rent if let to a tenant who has a continuing right of occupation thereof, whether he is in actual occupation or not.

(2) The burden of proving all facts entitling any person to claim relief under section 75, or section 76, or section 77, shall be upon him.

79. (1) The owner of any building, tenement or land in respect of which a remission or refund of tax has been given under section 76 or section 77 shall give notice of the re-occupation of such building, 11[tenement] or land within fifteen days of such re-occupation.

Leg Ref.

¹ Inserted by Act VII of 1931.

² Inserted by Act XXIV of 1936.

³ These words were substituted by S 9 of the Cantonments (Amendment) Act, 1927 (XXVI of 1927).

⁴ Omitted by Act XXIV of 1936.

⁵ Substituted by Act XXIV of 1936.

⁶ These words were substituted by S 10, of the Cantonments (Amendment) Act, 1927 (XXVI of 1927).

⁷ These words were substituted by S. 11.

ibid

⁸ Numbered by S 11 of the Cantonments (Amendment) Act, 1927 (XXVI of 1927).

⁹ The word and figures "section 75" have been omitted by Act VII of 1931.

¹⁰ For the words "circumstances in which it is claimed" the following have been substituted, namely, "fact that the building, land or tenement has become vacant and unproductive of rent" by Act VII of 1931.

¹¹ Inserted by Act XXIV of 1934.

(2) Any owner failing to give the notice required by sub-section (1) shall be punishable with fine which shall not be less than twice the amount of the tax payable on such building, tenement or land in respect of the period during which it has been re-occupied and which may extend to fifty rupees, or to ten times the amount of the said tax, whichever sum is greater.

Charge on Immovable Property.

80. A tax assessed on the annual value of any building or land shall, subject to the prior payment of the land revenue, if any, due to the Government thereon, be a first charge upon the building or land.

Octroi, Terminal Tax and Toll.

81. Every person bringing or receiving any goods, vehicles or animals within the limits of any cantonment in which octroi or terminal tax or toll is leviable, shall, when so required by an officer duly authorised by the [Board] in this behalf, so far as may be necessary for ascertaining the amount of tax chargeable—

(a) permit that officer to inspect, examine or weigh such goods, vehicles or animals; and

(b) communicate to that officer any information, and exhibit to him any bill, invoice or document of a like nature, which such person may possess relating to such goods, vehicles or animals.

82. (1) Any person who takes or attempts to take past any octroi station or any other place appointed within a cantonment for the collection of octroi, terminal tax or toll any goods, vehicles or animals, on account of which octroi, terminal tax or toll is leviable and thereby evades, or attempts to evade, the payment of such octroi, terminal tax or toll, and any person who abets any such evasion or attempt at evasion, shall be punishable with fine which may extend either to ten times the value of such octroi, terminal tax or toll, or to fifty rupees, whichever is greater, and which shall not be less than twice the value of such octroi, terminal tax or toll, as the case may be.

(2) In case of non-payment of any octroi or terminal tax or toll on demand, the officer empowered to collect the same may seize any goods, vehicles or animals on which the octroi, terminal tax or toll is chargeable or any part or number thereof which is of sufficient value to satisfy the demand, [and shall give a receipt specifying the items seized.]

(3) The [Board] after the lapse of five days from the seizure, and after the issue of a notice in writing to the person in whose possession the goods, vehicles or animals were at the time of seizure, fixing the time and place of sale, may cause the property so seized, or so much thereof as may be necessary, to be sold by auction to satisfy the demand and any expenses occasioned by the seizure, custody and sale thereof, unless the demand and expenses are in the meantime paid.

Provided that the Executive Officer may, in any case, order that any article of a perishable nature which cannot be kept for five days without serious risk of damage, or which cannot be kept save at a cost which, together with the amount of octroi, terminal tax or toll, is likely to exceed its value, shall be sold after the lapse of such shorter time as he may, having regard to the nature of the article, think proper.

(4) If, at any time before the sale has begun, the person whose property has been seized tenders to the Executive Officer the amount of all expenses incurred and of the octroi, terminal tax or toll, the Executive Officer shall release the property seized.

Leg Ref

¹ Added by Act XXIV of 1936

Notes.

Sec 81 —Liability to octroi duty of goods passing through cantonment. 22 B 843.

(5) The surplus, if any, of the sale-proceeds shall be credited to the cantonment fund, and shall, on application made to the [Board] within one year after the sale, be paid to the person in whose possession the property was at the time of seizure, and, if no such application is made, shall be the property of the [Board].

83. It shall be lawful for the [Board] with the previous sanction of the 1[Officer Commanding-in-Chief, the Command,] to lease the collection of any octroi, terminal tax or toll for any period not exceeding one year; and the lessee and all persons employed by him in the management and collection of the octroi, terminal tax or toll shall, in respect thereof,—

- (a) be bound by any orders made by the [Board] for their guidance;
- (b) have such powers exercisable by officers or servants of the [Board] under this Act as the [Board] may confer upon them; and
- (c) be entitled to the same remedies and be subject to the same responsibilities as if they were employed by the [Board] for the management and collection of the octroi, terminal tax or toll, as the case may be:

Provided that no article distrained may be sold except under the orders of the [Board].

Appeals.

84. (1) An appeal against the assessment or levy of, or against the refusal to refund, any tax under this Act shall lie to the District Magistrate or to such other officer as may be empowered by the 2[Central Government] in this behalf:

Provided that, 3[* * *] the person to whom the appeal would ordinarily lie is, or was when the tax was imposed, a member of the Board, the appeal shall lie to the Commissioner of the Division, or, in a province where there are no Commissioners, to the District Judge.

(2) If, on the hearing of an appeal under this section, any question as to the liability to, or the principle of assessment of, a tax arises on which the officer hearing the appeal entertains reasonable doubt, he may, either of his own motion or on the application of the appellant, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer the statement with his own opinion on the point for the decision of the High Court.

(3) On a reference being made under sub-section (2), the subsequent proceedings in the case shall be, as nearly as may be, in conformity with the rules relating to references to the High Court contained in Order XLVI of the First Schedule to the Code of Civil Procedure, 1908.

85. In every appeal the costs shall be in the discretion of the officer hearing the appeal.

86. If the [Board] fails to pay any costs awarded to an appellant within ten days after the date of the order for payment thereof, the officer awarding the costs may order the person having the custody of the balance of the cantonment fund to pay the amount

Leg. Ref.

¹ These words were substituted by S. 2 of the Cantonments (Amendment) Act, 1926 (XXXV of 1926).

² Substituted by Order in Council, 1937.

³ Omitted by Act XXIV of 1936.

Notes.

Secs. 84 and 88.—The jurisdiction of

the Civil Court is excluded in all matters relating to any valuation, assessment, liability to assessment or taxation by a Cantonment Board. And if a decree is passed granting an injunction against the Board in respect of any such matter, it is wholly without jurisdiction and *ultra vires* and cannot be put into execution. 144 I.C. 1016=1933 A L.J. 162=1933 A. 163.

Conditions of right to appeal. 87. No appeal shall be heard or determined under this Chapter unless—

(a) the appeal is, in the case of a tax assessed on the annual value of buildings or lands or both, brought within thirty days next after the date of the authentication of the assessment list under section 69 (exclusive of the time requisite for obtaining a copy of the relevant entries therein), or, as the case may be, within thirty days of the date on which an amendment is finally made under section 71, and, in the case of any other tax, within thirty days next after the date of the receipt of the notice of assessment or of alteration of assessment or, if no notice has been given, within thirty days next after the date of the presentation of the first bill in respect thereof.

Provided that an appeal may be admitted after the expiration of the period prescribed therefor by this section if the appellant satisfies the Court before whom the appeal is preferred that he had sufficient cause for not preferring it within that period;

(b) the amount, if any, in dispute in the appeal has been deposited by the appellant in the office of the [Board].

Finality of appellate orders. 88. The order of an appellate authority confirming, setting aside or modifying an order in respect of any valuation or assessment or liability to assessment or taxation shall be final:

Provided that it shall be lawful for the appellate authority, upon application or on its own motion, to review any order passed by it in appeal if application in this behalf is made within three months from the date of the original order.

Payment and Recovery of Taxes.

89. Save as otherwise expressly provided under this Act, any tax imposed under the provisions of this Act shall be payable on such dates and in such instalments, if any, as the [Board] may, by public notice, direct.

90. (1) When any tax has become due, the Executive Officer shall cause to be presented to the person liable for the payment thereof a bill for the amount due.

(2) Every such bill shall specify the particulars of the tax and the period for which the charge is made.

91. (1) If the amount of the tax for which any bill has been presented is not paid to the [Board] within thirty days from the presentation thereof, the Executive Officer may cause to be served upon the person liable for the payment of the same a notice of demand in the form set forth in Schedule I.

(2) For every notice of demand which the Executive Officer causes to be served on any person under this section, a fee of such amount, not exceeding one rupee, as shall in each case be fixed by the Executive Officer, shall be payable by the said person and shall be included in the costs of recovery.

92. (1) If the person liable to the payment of any tax does not, within thirty days from the service of the notice of demand, pay the amount due, or show sufficient cause for non-payment of the same to the satisfaction of the Executive Officer, such sum, with all costs of recovery, may be recovered under a warrant, issued in the form set forth in Schedule II, by distress and sale of the moveable property of the defaulter:

Provided that the Executive Officer shall not recover any sum the liability for which has been remitted on appeal under this Chapter.

(2) Every warrant issued under this section shall be signed by the Executive Officer.

93. (1) It shall be lawful for any servant of the [Board] to whom a warrant issued under section 92 is addressed to distress, wherever it may be found 1[in the Cantonment] any moveable property of 1[or standing timber, growing crops or grass belonging to] the person therein named as defaulter, subject to the following conditions, exceptions and exemptions, namely:—

(a) the following property shall not be distrained:—

(i) the necessary wearing apparel and bedding of the defaulter, his wife and children,

(ii) tools of artisans,

(iii) books of account, or

(iv) when the defaulter is an agriculturist, his implements of husbandry, seed-grain and such cattle as may be necessary to enable the defaulter to earn his livelihood,

(b) the distress shall not be excessive, that is to say, the property distrained shall be as nearly as possible equal in value to the amount recoverable under the warrant, and if any property has been distrained which, in the opinion of the Executive Officer, should not have been distrained, it shall forthwith be returned.

(2) The person charged with the execution of a warrant of distress shall forthwith make an inventory of the property which he seizes under such warrant, and shall, at the same time, give a written notice in the form set forth in Schedule III to the person in possession thereof at the time of seizure that the said property will be sold as therein mentioned

94. (1) When the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is, when added to the amount to be recovered, likely to exceed its value, the Executive Officer shall give notice to the person in whose possession the property was at the time of seizure that it will be sold at once, and shall sell it accordingly by public auction unless the amount mentioned in the warrant is forthwith paid.

(2) If the warrant is not in the meantime suspended by the Executive Officer, or discharged, the property seized shall, after the expiry of the period named in the notice served under sub-section (2) of section 93, be sold by public auction by order of the Executive Officer.

(3) The surplus of the sale-proceeds, if any, shall forthwith be credited to the cantonment fund, and notice of such credit shall be given at the same time to the person from whose possession the property was taken, and, if the same is claimed by written application to the [Board] within one year from the date of the notice, a refund thereof shall be made to such person. Any surplus not claimed within one year as aforesaid shall be the property of [Board]

(4) For every distraint made under this Chapter a fee of such amount, not exceeding one rupee, as shall in each case be fixed by the Executive Officer shall be charged, and the said fee shall be included in the costs of recovery.

95 (1) If the Executive Officer has reason to believe that any person from whom any sum is due 2[or is about to become due] on account of any tax is about to remove from the cantonment, he may direct the immediate payment by such person of the sum so due or about to become due, and cause a bill for the same to be served on such person.

(2) If, on the service of such bill, such person does not forthwith pay the sum so due or about to become due, the amount shall be leviable by distress and sale in the manner hereinbefore provided in this Chapter, except that it shall not be necessary to serve upon the defaulter any notice of demand and the warrant for distress and sale may be issued and executed without any delay.

96 Instead of proceeding against a defaulter by distress and sale as hereinbefore provided in this Chapter, or after a defaulter has been so proceeded against unsuccessfully or with only partial success, any sum due or the balance of any sum due, as the case may be, from such defaulter on account of a tax may be recovered from him by a suit in any Court of competent jurisdiction.

Special Provisions relating to Taxation.

Power to institute suit for recovery. 97. Every [Board] shall be deemed to be a Municipal Committee for the purposes of the Municipal Taxation Act, 1881.

Power to make special provision for conservancy in certain cases 98. A [Board] may make special provision for the cleansing of any factory, hotel, club or group of buildings or lands used for any one purpose and under one management, and may fix a special rate and the dates and other conditions for periodical payment thereof, which shall be determined by a written agreement with the person liable for the payment of the conservancy or scavenging tax in respect of such factory, hotel, club or group of buildings or lands:

Provided that, in fixing the amount, proper regard shall be had to the probable cost to the [Board] of the services to be rendered.

Exemption in the case of buildings 99. (1) When, in pursuance of section 98, a [Board] has fixed a special rate for the cleansing of any factory, hotel, club or group of buildings or lands, such premises shall be exempted from the payment of any conservancy or scavenging tax imposed in the Cantonment

(2) The following buildings and lands shall be exempt from any tax on property, namely:—

(a) places set apart for public worship and either actually so used or used for no other purpose;

(b) buildings used for educational purposes and public libraries, playgrounds and dharmshalas which are open to the public and from which no income is derived;

(c) hospitals and dispensaries maintained wholly by charitable contributions;

(d) burning and burial grounds, not being the property of 1[the Crown] or a [Board] which are controlled under the provisions of this Act;

(e) buildings or lands vested in a [Board]; and

(f) any buildings or lands, used or acquired for the public service or for any public purpose, which are the property of, 2[the Crown] or in the occupation of, 1[the Central or any Provincial Government].

3[99-A. 1[The Central Government] may, by notification in the 1[Official Gazette], exempt, either wholly or in part from the payment of any tax imposed under this Act, any person or class of persons or any property or goods or class of property or goods 4[* * *].

Leg Ref.

¹ Substituted by Order in Council, 1937.

² Inserted by Order in Council, 1937.

³ This section was inserted by S. 7 of the Cantonments (Amendment) Act, 1926

(XXXV of 1926).

⁴ In S. 99-A the words "belonging to the Secretary of State for India in Council" have been omitted (Act VII of 1931)

100. A [Board] may exempt, for a period not exceeding one year at a time from the payment of any tax or any portion of a tax imposed under this Act, any person who is in its opinion by reason of poverty unable to pay the same.

Exemption of poor persons

101. (1) A [Board] may, with the previous sanction of the [Officer Commanding-in-Chief, the Command], allow any person to compound for any tax.

Composition

(2) Every sum due by reason of the composition of a tax under sub-section (1) shall be recoverable as if it were a tax.

102. A [Board] may write off any sum due on account of any tax [or rate] or of the costs of recovering any tax [or rate] if such sum is, in its opinion, irrecoverable;

Irrecoverable debts

[Provided that, where the sum written off in favour of any one person exceeds fifty rupees, the sanction of the Officer Commanding-in-Chief, the Command, shall be first obtained.]

103. (1) The Executive Officer may, by written notice, call upon any inhabitant of the cantonment to furnish such information as may be necessary for the purpose of ascertaining—

Obligation to disclose liability.

(a) whether such inhabitant is liable to pay any tax imposed under this Act;

(b) at what amount he should be assessed; or

(c) the annual value of the building or land which he occupies and the name and address of the owner or lessee thereof

(2) If any person, when called upon under sub-section (1) to furnish information, neglects to furnish it or furnishes information which is not true to the best of his knowledge or belief, he shall be punishable with fine which may extend to one hundred rupees.

104. No assessment and no charge or demand on account of any tax or fee shall be impeached or affected by reason only of any mistake in the name of any person liable to pay such tax or fee, or in the description of any property or thing, or any mistake in the amount of the assessment, charge or demand, if the directions contained in this Act and the rules and bye-laws made thereunder have in substance and effect been complied with; but any person who sustains any special damage by reason of any such mistake shall be entitled to recover compensation for the same by suit in a Court of competent jurisdiction.

Immaterial error not to affect liability.

105. No distress levied under this Chapter shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account only of any defect of form in the notice of demand, warrant of distress or other proceeding relating thereto, nor shall any such person be deemed a trespasser *ab initio* on account of any irregularity afterwards committed by him; but any person who sustains any special damage by reason of any such irregularity shall be entitled to recover compensation for the same by suit in a Court of competent jurisdiction.

Distrant not to be invalid by reason of immaterial defect.

CHAPTER VI.

CANTONMENT FUND AND PROPERTY.

Cantonment Fund.

106. There shall be formed for every cantonment a cantonment fund, and there shall be placed to the credit thereof the following sums, namely:—

Cantonment fund

Leg. Ref.

Act XXXV of 1926.

¹ These words were substituted by S. 2.

² Inserted by Act XXIV of 1936.

(a) the balance, if any, of the cantonment fund formed for the cantonment under the Cantonments Act, 1910,

(b) all sums received by or on behalf of the [Board].

¹[* * * *].

107. (1) Where in or near a cantonment there is a Government treasury or sub-treasury, or a branch of the Imperial Bank of India, the cantonment fund shall be kept in such treasury, sub-treasury or bank, as the case may be.

(2) Where there is no such treasury, sub-treasury or bank, the cantonment fund may be deposited with any bank to which the Government treasury business has been entrusted, and, in the absence of such a bank, with any banker or person acting as a banker who has given such security for the safe custody of the fund and the payment on demand of the funds so deposited as the ²[Central Government] may in each case direct.

³[(3) A Cantonment Authority may, from time to time, with the previous sanction of the ⁴[officer commanding in chief, the command] invest any portion of its cantonment fund in securities of the Government of India or in such other securities, including fixed deposits in banks, as the ²[Central Government] may approve in this behalf, and may dispose of such investments or vary them for others of a like nature]

(4) The income resulting from any fixed deposit or from any such security as is referred to in sub-section (3) or from the proceeds of the sale of any such security shall be credited to the cantonment fund

Property.

108. Subject to any special reservation made by the ²[Central Government] ⁵[* * *] all property of the nature herein-
Property after in this section specified which has been acquired or provided or is maintained by a [Board] shall vest in and belong to that [Board], and shall be under its direction, management and control, that is to say,—

(a) all markets, slaughter-houses, manure and nightsoil depots, and buildings of every description;

(b) all water-works for the supply, storage or distribution of water for public purposes and all bridges buildings, engines, materials, and things connected therewith or appertaining thereto,

(c) all sewers, drains, culverts and water-courses, and all works, materials and things appertaining thereto;

(d) all dust, dirt, dung, ashes, refuse, animal matter, filth and rubbish of every kind, and dead bodies of animals collected by the [Board] from the streets, houses, privies, sewers, cess-pools or elsewhere, or deposited in places appointed by the [Board] for such purpose;

(e) all lamps and lamp-posts and apparatus connected therewith or appertaining thereto;

(f) all land or other property transferred to the [Board] ²[by the Central or a Provincial Government] or by gift, purchase or otherwise for local public purposes; and

(g) all streets and the pavements, stones and other materials thereof, and also all trees, erections, materials, implements, and things existing on or appertaining to streets.

109. The cantonment fund and all property vested in a [Board] shall be applied for the purposes, whether express or implied, for which, by or under this Act or any other law for the time being in force, powers

Application of cantonment fund and property.

Leg Ref

¹ Cl (c) omitted by Order in Council, 1937

² Substituted by Order in Council, 1937.

³ This section was substituted by

S. 12 of the Cantonments (Amendment) Act, 1927 (XXVI of 1927).

⁴ Substituted by Act XXIV of 1936

⁵ Omitted by Order in Council, 1937.

are conferred or duties or obligations are imposed upon the [Board]:

Provided that the [Board] shall not incur any expenditure for acquiring or renting land beyond the limits of the cantonment or for constructing any work beyond such limits except—

(a) with the sanction of the 1[Central Government] and

(b) on such terms and conditions as the 1[Central Government] may impose.

Provided, further, that priority shall be given in the order hereinafter set forth to the following liabilities and obligations of a [Board], that is to say,—

(a) to the liabilities and obligations arising from a trust legally imposed upon or accepted by the [Board];

(b) to the repayment of, and the payment of interest on, any loan incurred under the provisions of the Local Authorities Loans Act, 1914,

(c) to the payment of establishment charges;

(d) to the payment of such expenses on account of pauper lunatics sent from the cantonment to public lunatic asylums and mental hospitals as the 1[Provincial Government] directs the [Board] to pay, and

(e) to the payment of any sum the payment of which is expressly required by the provisions of this Act or any rule or bye-law made thereunder.

110. When there is any hindrance to the permanent or temporary acquisition upon payment of any land required by a [Board] for the purposes of this Act, the 1[Central Government] may, at the request of the [Board] 1[procure the acquisition thereof] under the provisions of the Land Acquisition Act, 1894, and, on payment by the [Board] of the compensation awarded under that Act and of the charges incurred by the Government in connection with the proceedings, the land shall vest in the [Board].

Power to make rules regarding cantonment fund and property.

111. The 1[Central Government] may make rules² consistent with this Act to provide for all or any of the following matters, namely:—

(a) the conditions on which property may be acquired by [Boards] or on which property vested in a [Board] may be transferred by sale, mortgage, lease, exchange or otherwise; and

(b) any other matter relating to the cantonment fund or cantonment property in respect of which no provision or insufficient provision is made by or under this Act, and provision is, in the opinion of the 1[Central Government], necessary.

CHAPTER VII.

CONTRACTS.

Contracts by whom to be executed.

112. Subject to the provisions of this Chapter, every [Board] shall be competent to enter into and perform any contract necessary for the purposes of this Act.

Sanction

113. (1) Every contract—

(a) for which budget provision does not exist, or

(b) which involves a value or amount exceeding one hundred rupees, shall require the sanction of the [Board].

Leg Ref.

¹ Substituted by Order in Council, 1937

² For such rules, see *Gen. R. and O.*, Vol. V, p. 467.

(2) Every contract other than a contract such as is referred to in sub-section (1) shall be sanctioned by the [Board] or by the executive Officer on behalf of the [Board].

114. (1) Every contract made by or on behalf of a [Board], the value or amount of which exceeds fifty rupees, shall be in writing, and every such contract shall 1[* * *] be signed by two members, of whom the President or the Vice-President shall be one, and be countersigned by the Executive Officer and be sealed 'with the common seal of the Board, or 1[* * *]

Provided that, 1[* * *] the Executive Officer may in a case of urgency, with the previous sanction of the President of the Board, execute on behalf of the Board any contract the value or amount of which does not exceed two hundred rupees.

(2) Where an Executive Officer executes a contract on behalf of a Board under sub-section (1), he shall submit a report of his action and of the reasons therefor to the Board at its next meeting.

115. If any contract is executed by or on behalf of a [Board] otherwise than in conformity with the provisions of this Chapter, it shall not be binding on the [Board].

Contracts improperly executed not to be binding on a [Board]

CHAPTER VIII.

DUTIES AND DISCRETIONARY FUNCTIONS OF [BOARDS].

116. It shall be the duty of every [Board], so far as the funds at its disposal permit, to make reasonable provision within the cantonment for—

- Duties of [Board].
- (a) lighting streets and other public places,
 - (b) watering streets and other public places.
 - (c) cleansing streets, public places and drains, abating nuisances and removing noxious vegetation;
 - (d) regulating offensive, dangerous or obnoxious trades, callings and practices;
 - (e) removing, on the ground of public safety, health or convenience, undesirable obstructions and projections in streets and other public places,
 - (f) securing or removing dangerous buildings and places,
 - (g) acquiring, maintaining, changing and regulating places for the disposal of the dead;
 - (h) constructing, altering and maintaining streets, culverts, markets, slaughter-houses, latrines, privies, urinals, drains, drainage works and sewerage works;
 - (i) planting and maintaining trees on road sides and other public places;
 - (j) providing or arranging for a sufficient supply of pure and wholesome water, where such supply does not exist, guarding from pollution water used for human consumption, and preventing polluted water from being so used,
 - (k) registering births and deaths,
 - (l) establishing and maintaining a system of public vaccination;
 - (m) establishing and maintaining or supporting public hospitals and dispensaries, and providing public medical relief;
 - (n) establishing and maintaining ²[or assisting] primary schools;
 - (o) rendering assistance in extinguishing fires, and protecting life and property when fires occur;
 - (p) maintaining and developing the value of property vested in, or entrusted to the management of, the [Board]; and

(g) fulfilling any other obligation imposed upon it by or under this Act or any other law for the time being in force.

1 [116-A. A [Board] may, subject to any conditions imposed by the 1-a [Central Government] manage any property entrusted to its management by the 1-a [Central Government] on such terms as to the sharing of rents and profits accruing from such property as may be determined by the rule made under section 280.]

Discretionary functions of [Board]

117. A [Board] may, within the cantonment, make provision for—

(a) laying out in areas, whether previously built upon or not, new streets, and acquiring land for that purpose and for the construction of buildings, and compounds of buildings, to abut on such streets;

(b) constructing, establishing or maintaining public parks, gardens, offices, dairies, bathing or washing places, drinking fountains, tanks, wells and other works of public utility;

(c) reclaiming unhealthy localities;

(d) furthering educational objects by measures other than the establishment and maintenance of primary schools,

(e) taking a census and granting rewards for information which may tend to secure the correct registration of vital statistics;

(f) making a survey,

(g) giving relief on the occurrence of local epidemics by the establishment or maintenance of relief works or otherwise;

(h) securing or assisting to secure suitable places for the carrying on of any offensive, dangerous or obnoxious trade, calling or occupation,

(i) establishing and maintaining a farm or other place for the disposal of sewage;

(j) constructing, subsidising or guaranteeing tramways or other means of locomotion, and electric lighting or electric power works,

(k) adopting any measure, other than a measure specified in section 116 or in the foregoing provisions of this section, likely to promote the safety, health or convenience of the inhabitants of the cantonment; or

(l) the doing of anything on which expenditure is declared by the 1-a [Provincial Government], or by the [Board], with the sanction of the 1-a [Provincial Government] to be an appropriate charge on the cantonment fund.

Power of expenditure for educational purposes outside the cantonment.

2 [117-A. A [Board] may make provision for educational objects outside the cantonment if it is satisfied that the interests of the residents of the cantonment will be served thereby.]

CHAPTER IX.

PUBLIC SAFETY AND SUPPRESSION OF NUISANCES.

General Nuisances.

Penalty for causing nuisances.

118. (1) Whoever—

(a) in any street or other public place within a cantonment—

Leg Ref.

¹ This section was inserted by S. 6 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

^{1-a} Substituted by Order in Council, 1937

² This section was inserted by S. 8 of the Cantonments (Amendment) Act, 1926 (XXXV of 1926).

Notes.

Sec. 118 (1) (a) (iii): **INGREDIENTS.**—The giving of offence by the exposure of the person is not a necessary ingredient of the offence under S. 118 (1) (a) (iii). The offence is complete if the exposure is "wilful or indecent" and in a public place. 27 Cr.L.J. 107=1926 A. 263.

(i) is drunk and disorderly or drunk and incapable of taking care of himself: or

(ii) uses any threatening, abusive or insulting words, or behaves in a threatening or insulting manner with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be occasioned; or

(iii) exposes himself or wilfully or indecently exposes his person; or

(iv) loiters, or begs importunately, for alms; or

(v) exposes or exhibits, with the object of exciting charity, any deformity or disease or any offensive sore or wound, or

(vi) carries meat exposed to public view: or

(vii) is found gaming; or

(viii) pickets animals, or collects carts; or

(ix) being engaged in the removal of night-soil or other offensive matter or rubbish, wilfully or negligently permits any portion thereof to spill or fall, or neglects to sweep away or otherwise effectually to remove any portion thereof which may spill or fall in such street or place; or

(x) without proper authority affixes upon any building, monument, post, wall, fence, tree or other thing, any bill, notice or other document; or

(xi) without proper authority defaces or writes upon or otherwise marks any building, monument, post, wall, fence, tree or other thing, or

(xii) without proper authority removes, destroys, defaces or otherwiseobliterates any notice or other document put up or exhibited under this Act; or

(xiii) without proper authority displaces, damages, or makes any alteration in, or otherwise interferes with, the pavement, gutter, storm water-drain, flags or other materials of any such street, or any lamp, bracket, direction-post, hydrant or water-pipe maintained by the [Board] in any such street or public place, or extinguishes a public light; or

(xiv) carries any corpse not decently covered or without taking due precautions to prevent risk of infection or injury to the public health or annoyance to passers-by or to persons dwelling in the neighbourhood; or

(xv) carries night-soil or other offensive matter or rubbish at any hour prohibited by the [Board] by public notice, or in any pattern of cart or receptacle which has not been approved for the purpose by the [Board], or fails to close such cart or receptacle when in use, or

(b) carries night-soil or other offensive matter or rubbish along any route in contravention of any prohibition made in this behalf by the [Board] by public notice; or

(c) deposits, or causes or permits to be deposited, earth or materials of any description, or any offensive matter or rubbish, in any place not intended for the purpose in any street or other public place or waste or unoccupied land under the management of the [Board]; or

(d) having charge of a corpse fails to bury, burn or otherwise, lawfully dispose of the same within twenty-four hours after death; or

(e) makes any grave or buries or burns any corpse in any place not set apart for such purpose, or

(f) keeps or uses, or knowingly permits to be kept or used, any place as a common gaming house, or assists in conducting the business of any common gaming house, or

Notes

Sec. 118 (1) (c).—A takhtposh or moveable wooden platform cannot be held to be "earth, or material of any description, or any offensive matter, or rubbish" within the meaning of cl. (c), S 118 (1). 28 Cr.L. J. 683=103 I C 411=1927 L. 647.

A verandah of a private house accessible

to a public street is not a public place within the meaning of S 118 of the Cantonments Act and the mere fact that it is open to the road, and can be entered by the public is not sufficient for holding it to be anything but a private place. [11 P.R. 1890 (Cr.); 1881 A.W.N. 17; 1881 A.W.N. 8 and 1887 A.W.N. 75, Ref.] 1931 Lah. 576.

(g) at any time or place at which the same has been prohibited by the [Board] by public or special notice, beats a drum or tom-tom, or blows a horn or trumpet, or beats any utensil, or sounds any brass or other instrument, or plays any music; or

(h) disturbs the public peace or order by singing, screaming or shouting; or

(i) lets loose animal so as to cause, or negligently allows any animal to cause injury, danger, alarm or annoyance to any person; or

(j) being the occupier of any building or land in or upon which an animal dies, neglects within three hours of the death of the animal, or, if the death occurs at night, within three hours after sunrise, either—

(1) to report the occurrence to the Executive Officer or to an officer, if any, appointed by him in this behalf with a view to securing the removal and disposal of the carcase by the public conservancy establishment; or

(ii) to remove and dispose of the carcase in accordance with any general directions given by the [Board] by public notice or any special directions given by the Executive Officer on receipt of such report as aforesaid, or

(k) save with the written permission of the [Board] and in such manner as it may authorise, stores or uses night-soil, manure, rubbish or any other substance emitting an offensive smell; or

(l) uses or permits to be used as a latrine any place not intended for that purpose;

shall be punishable with fine which may extend to fifty rupees.

(2) Whoever does not take reasonable means to prevent any child under the age of twelve years being in his charge from easing himself in any street or other public place within the cantonment shall be punishable with fine which may extend to twenty-five rupees.

(3) The owner or keeper of any animal found picketed or straying without a keeper in a street or other public place in a cantonment shall be punishable with fine which may extend to twenty rupees.

(4) Any animal found picketed as aforesaid may be removed by any officer or servant of the [Board] or by any police officer to a pound as if the animal had been found straying.

Dogs.

Registration and control of dogs.

119. (1) A [Board] may make bye-laws to provide for the registration of all dogs kept within the cantonment.

(2) Such bye-laws shall—

(a) require the registration, by the Officer Commanding each military unit, of all dogs kept in the lines occupied by that unit;

(b) require that every registered dog shall wear a collar to which shall be attached a metal token to be issued by the registration authority, and fix the fee payable for the issue thereof;

(c) require that any dog which has not been registered or which is not wearing such token shall, if found in any public place, be detained at a place set apart for the purpose, and

(d) fix the fee which shall be charged for such detention and provide that any such dog shall be liable to be destroyed or otherwise disposed of unless it is claimed and the fee in respect thereof is paid within one week; and may provide for such other matters as the [Board] thinks fit.

(3) A [Board] may—

(a) cause to be destroyed, or to be confined for such period as that Authority may direct, any dog or other animal which is, or is reasonably suspected to be, suffering from rabies, or which has been bitten by any dog or other animal suffering or suspected to be suffering from rabies;

(b) by public notice direct that, after such date as may be specified in the notice, dogs which are without collars or without marks distinguishing them

as private property and are found straying on the streets or beyond the enclosures of the houses of their owners, if any, may be destroyed, and cause them to be destroyed accordingly.

(4) No damages shall be payable in respect of any dog or other animal destroyed or otherwise disposed of under this section.

(5) Whoever, being the owner or person in charge of any dog, neglects to restrain it so that it shall not be at large in any street without being muzzled and without being secured by a chain lead in any case in which—

(a) he knows that the dog is likely to annoy or intimidate any person, or

(b) the [Board] has, by public notice during the prevalence of rabies, directed that dogs shall not be at large without muzzles and chain leads, shall be punishable with fine which may extend to one hundred rupees.

(6) Whoever in a cantonment—

(a) allows any ferocious dog which belongs to him or is in his charge to be at large without being muzzled, or

(b) sets on or urges any dog or other animal to attack, worry or intimidate any person, or

(c) knowing or having reason to believe that any dog or animal belonging to him or in his charge has been bitten by an animal suffering or reasonably suspected to be suffering from rabies, neglects to give immediate information of the fact to the Executive Officer or gives information which is false, shall be punishable with fine which may extend to two hundred rupees.

Traffic.

Rule of the road.

120. Whoever in driving, leading or propelling a vehicle along a street fails, except in a case of actual

necessity,—

(a) to keep to the left when passing a vehicle coming from the opposite direction, or

(b) to keep to the right when passing a vehicle going in the same direction as himself,

shall be punishable with fine which may extend to fifty rupees.

Prevention of Fire, etc

121. (1) A [Board] may, by public notice, direct that within such limits in the cantonment as may be specified in the notice,

Use of inflammable materials for building purposes

the roofs and external walls of huts or other buildings shall not, without the permission in writing of the [Board], be made or renewed of grass, mats, leaves or other inflammable materials, and may, by notice in writing, require any person who has disobeyed any such direction as aforesaid to remove or alter the roofs or walls so made or renewed.

(2) A [Board] may, by notice in writing, require the owner of any building in the cantonment which has an external roof or wall made of any such material as aforesaid to remove such roof or wall within such time as may be specified in the notice, notwithstanding that a public notice under subsection (1) has not been issued or that such roof or wall was made with the consent of the [Board] or before the issue of such public notice:

Provided that, in the case of any such roof or wall in existence before the issue of such a public notice or made with the consent of the [Board], that authority shall make compensation, not exceeding the original cost of constructing the roof or wall, for any damage caused by the removal.

122. A [Board] may, by public notice, prohibit in any case where such prohibition appears to it to be necessary for the prevention of danger to life or property, the stacking or collecting of wood, dry grass, straw or

Stacking or collecting inflammable materials.

other inflammable materials, or the placing of mats or thatched huts or the lighting of fires in any place in the cantonment, or within any limits therein, which may be specified in the notice.

123. No person shall set a naked light on or near any building in any street or other public place in a cantonment in such manner as to cause danger of fire:

Care of naked lights

Provided that nothing in this section shall be deemed to prohibit the use, subject to the permission in writing of the [Board], of lights for purposes of illumination on the occasion of a festival or public or private entertainment.

124. (1) Notwithstanding anything contained in the Cinematograph Act, 1918, no exhibition of pictures or other optical effects by means of a cinematograph or other like apparatus for the purpose of which inflammable films are used, and no public dramatic performance or pantomime shall be given in any cantonment elsewhere than in premises for which a licence has been granted by the [Board] under this section.

Regulation of cinematographic and dramatic performances.

(2) If the owner of a cinematograph or other apparatus uses the apparatus or allows it to be used, or if any person takes any part in any public dramatic performance or pantomime, in contravention of the provisions of this section, or if the occupier of any premises allows them to be used in contravention of the provisions of this section or of any condition of any licence granted under this section, he shall be punishable with fine which may extend to two hundred rupees, and, in the case of a continuing offence, with an additional fine which may extend to fifty rupees for each day after the first during which the offence continues.

(3) Nothing in this section shall be deemed to prohibit the giving of any exhibition or any dramatic performance or pantomime in any theatre or institute which is the property of ¹[the Crown] where the exhibition, performance or pantomime is held with the permission and under the control of the military authorities.

125. Whoever in a cantonment discharges any fire-arm or lets off fireworks or fire-balloons, or engages in any game in such manner as to cause or to be likely to cause danger to persons passing by or dwelling or working in the neighbourhood or risk of injury to property shall be liable to fine which may extend to fifty rupees.

Discharging fire-works, fire-arms, etc.

126. Where in a cantonment any building, or wall, or any thing affixed thereto, or any well, tank, reservoir, pool, depression, or excavation, or any bank or tree, is, in the opinion of the [Board], ²[in a ruinous state or] for want of sufficient repairs, protection or enclosure, ²[a nuisance or] dangerous to persons passing by or dwelling or working in the neighbourhood, the [Board] may, by notice in writing, require the owner ³[or part owner or person claiming to be the owner or part owner thereof, or, failing any of them, the occupier] thereof ²[either to remove the same or] to repair ⁴[or to protect or to enclose] the same in such manner as it thinks necessary; and, if the danger is, in the opinion of the [Board], imminent, it shall forthwith take such steps as it thinks necessary to avert the same.

Power to require buildings, wells, etc., to be rendered safe.

Leg Ref.

¹ Substituted by Order in Council, 1937

² These words were inserted by S. 7 of the Cantonment (Amendment) Act, 1925 (VII

of 1925)

³ Inserted by Act XXIV of 1936.

⁴ Substituted by Act XXIV of 1936.

127. A [Board] may, by notice in writing, require the owner or part-owner, or person claiming to be the owner or part-owner, of any building or land in the cantonment, or the lessee or the person claiming to be the lessee of any such land, which, by reason of disuse or disputed ownership or other cause, has remained unoccupied and has become the resort of idle and disorderly persons or of persons who have no ostensible means of subsistence or cannot give a satisfactory account of themselves, or is used for gaming or immoral purposes, or otherwise occasions or is likely to occasion a nuisance, to secure and enclose the same within such time as may be specified in the notice.

CHAPTER X.

SANITATION AND THE PREVENTION AND TREATMENT OF DISEASE.

Sanitary Authorities.

128. The following officers shall, for the purposes of sanitation, have control over, and be responsible for maintaining in a sanitary condition, those parts of a cantonment, respectively, which are specified in the case of each, that is to say:—

(a) the [Officer Commanding the station]—all buildings and lands which are occupied or used for military purposes;

(b) the Officer Commanding the air forces in the cantonment—all buildings and lands which are occupied or used for air-force purposes;

(c) the head of any civil department or railway administration occupying as such any part of the cantonment—all buildings and lands in his charge as head of that department or administration.

129. (1) The Health Officer shall exercise a general sanitary supervision over the whole cantonment, and shall submit monthly to the [Board] a report as to the sanitary condition of the cantonment, together with such recommendations in connection therewith as he thinks fit.

(2) The Assistant Health Officer shall perform such duties in connection with the sanitation of the cantonment as are, subject to the control of the [Board], allotted to him by the Health Officer.

Conservancy and Sanitation.

130. All public latrines and urinals provided or maintained by a [Board] shall be so constructed as to provide separate compartments for each sex and not to be a nuisance, and shall be provided with all necessary conservancy establishments, and shall regularly be cleansed and kept in proper order.

131. (1) On the application or with the consent of the occupier of any building or land, or, where the occupier of any building or land fails to make arrangements to the satisfaction of the [Board] for the matters referred to in this section, without such consent, and after giving notice in writing to the occupier, a [Board] may undertake the house scavenging of any building or land in the cantonment for such period as it thinks fit on such terms as it may prescribe in this behalf.

(2) Where the [Board] has undertaken the duties referred to in this section, all matter removed in the performance of such duties shall be the property of that Authority.

(3) For the purposes of this section, "house scavenging" means the removal of filth or rubbish or other offensive matter from a privy, latrine, urinal, drain, cesspool, or other common receptacle for such matter.

132. (1) Every [Board] shall provide or appoint, in proper and convenient situations, public receptacles, depots or places for the temporary deposit or disposal of household rubbish, offensive matter, carcasses of dead animals and sewage.

(2) The [Board] may, by public notice, issue directions as to the time at which, the manner in which, and the conditions subject to which, any matter referred to in sub-section (1) may be removed along a street or may be deposited or otherwise disposed of.

(3) All matter deposited in receptacles, depots or places provided or appointed under this section shall be the property of the [Board]

Cesspools, receptacles for filth, etc. 133. The Executive Officer of any cantonment may, by notice in writing,—

(a) require any person having the control whether as owner, lessee or occupier of any land or building in the cantonment—

(i) to close any cesspool appertaining to the land or building which is, in the opinion of the Executive Officer, a nuisance, or

(ii) to keep in a clean condition, in such manner as may be prescribed by the notice, any receptacle for filth or sewage accumulating on the land or in the building, or

(iii) to prevent the water of any private latrine, urinal, sink or bath-room, or any other offensive matter, from soaking, draining or flowing, or being put, from the land or building upon any street or other public place, or into any watercourse or into any drain not intended for the purpose, or

(iv) to collect and deposit for removal by the conservancy establishment of the [Board], within such time and in such receptacle or place, situate at not more than one hundred feet from the nearest boundary of the premises, as may be specified in the notice, any offensive matter or rubbish which such person has allowed to accumulate or remain under, in or on such building or land, or

(b) require any person to desist from making or altering any drain leading into a public drain; or

(c) require any person having the control of a drain in the cantonment to cleanse, purify, repair or alter the same, or otherwise put it in good or let, within such time as may be specified in the notice

134. (1) Where any well, tank, cistern, reservoir, receptacle, or other place in the cantonment where water is stored or accumulates, whether within any private enclosure or not, is in such a condition as to create a nuisance, or, in the opinion of the Health Officer, or the Assistant Health Officer, is or is likely to be a breeding place for mosquitoes, the [Board], may, by notice in writing, require the owner, lessee or occupier thereof within such period as may be specified in the notice, to fill up or cover the well, cistern, reservoir or receptacle, or to fill up the tank, or to drain off or remove the water, as the case may be.

(2) The [Board] may, if it thinks fit, with the previous sanction of the [Officer Commanding-in-Chief, the Command], meet the whole or any portion of the expenses incurred in complying with a requisition under sub-section (1).

135. A [Board] may, by notice in writing, require the owner or lessee of any building or land in the cantonment to provide, in such manner as may be specified in the Provisions of latrines, etc

notice, any latrine, urinal, cesspool, dust-bin or other receptacle for filth, sewage, or rubbish, or any additional latrine, urinal, cesspool or other receptacle as aforesaid, which should, in its opinion, be provided for the building or land.

136. Every person employing, whether on behalf of the Government or otherwise, more than ten workmen or labourers, and Sanitation in factories, every person managing or having control of a market, school, theatre or other place of public resort, in etc., a cantonment shall give notice of the fact to the [Board] and shall provide such latrines and urinals, and shall employ such number of sweepers, as the [Board] thinks fit, and shall cause the latrines and urinals to be kept clean and in proper order:

Provided that nothing in this section shall apply in the case of a factory to which the Indian Factories Act, 1911, applies.

Private latrines.

137. A [Board] may, by notice in writing,—

(a) require the owner or other person having the control of any private latrine or urinal in the cantonment not to put the same to public use: or

(b) where any plan for the construction of private latrines or urinals has been approved by the [Board], and copies thereof may be obtained free of charge on application,—

(1) require any person repairing or constructing any private latrine or urinal not to allow the same to be used until it has been inspected by or under the direction of the Health Officer and approved by him as conforming with such plan; or

(ii) require any person having control of any private latrine or urinal to re-build or alter the same in accordance with such plan, or

(c) require the owner or other person having the control of any such private latrine or urinal which, in the opinion of the [Board] constitutes a nuisance, to remove the latrine or urinal; or

(d) require any person having the control whether as owner, lessee or occupier of any land or building in the cantonment—

(i) to have any latrines provided for the same shut out by a sufficient roof and wall or fence from the view of persons passing by or dwelling in the neighbourhood, or

(ii) to cleanse in such manner as the [Board] may specify in the notice any latrine or urinal belonging to the land or building,

(e) require any person being the owner and having the control of any drain in the cantonment to provide, within ten days from the service of the notice, such covering as may be specified in the notice.

138. (1) Where it appears to a [Board] that any block of buildings in the cantonment is in an unhealthy condition by reason of the manner in which the buildings are crowded together, or of the narrowness or closeness of the street, or of the want of proper drainage or ventilation, or of the impracticability of cleansing the buildings or other similar cause, it may cause the block to be inspected by a committee consisting of—

(a) the Health Officer,

(b) the Civil Surgeon of the district or, if his services are not available, some other medical officer [in the service of the Crown.]

(c) the Executive Engineer or a person deputed by the Executive Engineer in this behalf, and

²[(d) Where the cantonment is a Class I or Class II cantonment, two non-official members of the Board, or where the cantonment is a Class III cantonment, one non-official member of the Board]

Leg. Ref.

¹ Substituted by Order in Council, 1937.

² Sec. 138, new cl. (d) substituted for old cl. (d) by Act XXIV of 1936.

(2) The committee shall make a report in writing to the [Board] regarding the sanitary condition of the block, and, if it considers that the condition thereof is likely to cause risk of disease to the inhabitants of the building or of the neighbourhood or otherwise to endanger the public health, it shall clearly indicate on a plan verified by the executive Engineer or the person deputed by him to serve on the committee, the buildings which should in its opinion wholly or in part be removed in order to abate the unhealthy condition of the block.

(3) If, upon receipt of such report, the [Board] is of opinion that all or any buildings indicated should be removed, it may, by notice in writing, require the owners thereof to remove them:

Provided that the [Board] shall make compensation to the owners for any buildings so removed which may have been erected under proper authority;

Provided, further, that the [Board] may, if it considers it equitable in the circumstances so to do, pay to the owners such sum as it thinks fit as compensation for any buildings so removed which have not been erected under proper authority.

(4) For the purposes of this section "buildings" includes enclosure walls and fences appertaining to buildings.

139. (1) Where it appears to a [Board] that any building or part of a building in the cantonment which is used as a dwelling house is so overcrowded as to endanger the health of the inmates thereof, it may, after such inquiry as it thinks fit, by notice in writing require the owner or occupier of the building or part thereof, as the case may be, within such time not being less than one month as may be specified in the notice, to abate the overcrowding of the same by reducing the number of lodgers, tenants, or other inmates to such number as may be specified in the notice.

(2) Any person who fails, without reasonable cause, to comply with a requisition made upon him under sub-section (1) shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, to an additional fine which may extend to five rupees for every day after the first during which the failure has continued.

140. (1) Where any building in a cantonment is so ill-constructed or dilapidated as to be, in the opinion of the [Board] in an insanitary state, the [Board] may, by notice in writing, require the owner, within such time as may be specified in the notice, to execute such repairs or to make such alterations as it thinks necessary for the purpose of removing such defects.

(2) A copy of every notice issued under sub-section (1) shall be conspicuously posted on the building to which it relates.

(3) A notice issued under sub-section (1) shall be deemed to have been complied with if the owner of the building to which it relates has, instead of executing the repairs or making the alterations directed by the notice, removed the building.

141. (1) The Executive Officer may, by notice in writing, require the owner, lessee or occupier of any building or land in the cantonment, which appears to him to be in a filthy or insanitary state, within twenty-four hours to

Notes

Sec. 141.—Where a person fails to comply with the notice served under S. 141 (1) of the Cantonments Act, he can be fined under S. 141 (1) read with S. 268 of the Act. He cannot be prosecuted for the same

failure under S. 141 (2) and his conviction under this sub-section is clearly illegal. The word "again" used in sub-S. (2) suggests that the offence contemplated in that sub-section is a recurring and not a continuing offence. In other words, the legislature

cleanse the same or otherwise put it in a proper state, in such manner as may be specified in the notice.

(2) If, within three months from the date of the service of a notice under sub-section (1), any building or land in respect of which the notice was issued is again in a filthy or insanitary state, the owner, lessee or occupier, as the case may be, shall be punishable with fine which may extend to two hundred rupees.

142. If a [Board] is satisfied that any building or part of a building in the cantonment which is intended for or used as a dwelling place is unfit for human habitation, it may cause a notice to be posted on some conspicuous part of the building prohibiting the owner or occupier thereof from using the building or room for human habitation, or allowing it to be so used, until it has been rendered fit for such use to the satisfaction of the [Board].

143. A [Board] may, by notice in writing, require the owner, lessee, or occupier of any land in the cantonment to clear away and remove any thick or noxious vegetation or undergrowth which appears to it to be injurious to health or offensive to persons residing in the neighbourhood.

144. Where, in the opinion of a [Board] the cultivation in the cantonment of any description of crop or the use therein of any kind of manure or the irrigation of any land therein in any specified manner is likely to be injurious to the health of persons dwelling in the neighbourhood, the [Board] may, by public notice, prohibit such cultivation, use or irrigation after such date as may be specified in the notice, or may, by a like notice, direct that it shall be carried out subject to such conditions as the [Board] thinks fit:

Provided that if, when a notice is issued under this section, any land to which it relates has been lawfully prepared for cultivation or any crop is sown therein or is standing thereon, the [Board] shall, if it directs that the notice is to take effect on a date earlier than that by which the crop would ordinarily be sown or reaped, as the case may be, make compensation to all persons interested in the land or crop for the loss, if any, incurred by them respectively by reason of compliance with the notice.

Burial and Burning Grounds.

145. A [Board] may, by notice in writing, require the owner or person in charge of any burial or burning ground in the cantonment to supply such information as may be specified in the notice concerning the condition, management or position of such ground.

146. (1) No place in a cantonment which has not been used as a burial or burning ground before the commencement of this Act shall be so used without the permission in writing of the [Board].

(2) Such permission may be granted subject to any conditions which the [Board] thinks fit to impose for the purpose of preventing annoyance to, or danger to the health of, persons residing in the neighbourhood.

Notes.

contemplated the service of a notice upon a person and eventually a cleaning up of the premises with or without an offence committed under S. 141 (1) read with S. 268. The legislature then provided that if

within three months of the service of the original notice the premises were again found to be filthy, proceedings could be commenced at once under sub-S. (2) without a fresh notice. 158 I.C. 1010=36 Cr.L. J. 1493=1935 A. 905.

147. (1) Where a [Board] after making or causing to be made local inquiry, is of opinion that any burial or burning ground in the cantonment has become offensive to, or dangerous to the health of, persons living in the neighbourhood, it may, with the previous sanction of the ¹[Central Government] by notice in writing, require the owner or person in charge of such ground to close the same from such date as may be specified in the notice.

(2) Where the ¹[Central Government] sanctions the issue of any notice under sub-section (1), it shall declare the conditions on which the burial or burning ground may be re-opened, and a copy of such declaration shall be annexed to the notice.

(3) Where the ¹[Central Government] sanctions the issue of any such notice, it shall require a new burial or burning ground to be provided at the expense of the cantonment fund, or, if the community concerned is willing to provide a new burial or burning ground, the ¹[Central Government] shall require a grant to be made from the cantonment fund towards the cost of the same.

(4) No corpse shall be buried or burnt in any burial or burning ground in respect of which a notice issued under this section is for the time being in force.

148 The provisions of sections 145, 146 and 147 shall not apply in the case of any burial ground which is for the time being managed by or on behalf of the Government

149. A [Board] may, by public notice, prescribe routes in the cantonment by which alone corpses may be removed to burial or burning grounds.

Prevention of Infectious or Contagious Diseases.

150. ²[Any person], being in charge of, or in attendance, whether as a medical practitioner or otherwise, upon any person in a cantonment whom he knows or has reason to believe to be suffering from a contagious or infectious disease, or being the owner, lessee or occupier of any building in a cantonment in which he knows that any such person is so suffering, shall, if he fails to give information, or if he gives false information, to the [Board] respecting the existence of such disease, be punishable with fine which may extend to one hundred rupees:

Provided that no person shall be punishable under this section for failure to give information if he had reasonable cause to believe that the information had already been duly given:

Provided, further, that this section shall not apply in the case of venereal disease where the person suffering therefrom is under specific and adequate medical treatment and is, by reason of his habits and conditions of life and residence, unlikely to spread the disease.

151. (1) In the event of a cantonment being visited or threatened by an outbreak of any infectious or contagious disease among the inhabitants thereof or of any epidemic disease among any animals therein, the ³[Officer Commanding-in-Chief, the Command], if he thinks that the provisions of this Act or of any law for the time being in force in the cantonment are insufficient for the purpose, may, with the previous sanction of the ¹[Central Government],—

Leg. Ref

¹ Substituted by Order in Council, 1937.
² Substituted for the word "whoever" by Act VIII of 1930

³ These words were substituted by S. 2 of the Cantonments (Amendment) Act, 1926 (XXXV of 1926).

(a) take such special measures, and

(b) by public notice, make such temporary regulations to be observed by the public or by any class or section of the public, as he thinks necessary to prevent the outbreak or the spread of the disease:

Provided that, where in the opinion of the 1[Officer Commanding-in-Chief, the Command,] immediate measures are necessary, he may take action without such sanction as aforesaid and, if he does so, shall forthwith report such action to the 2[Central Government].

(2) Whoever commits a breach of any temporary regulation made under sub-section (1) shall be deemed to have committed an offence under section 188 of the Indian Penal Code.

152. Where it is certified to the Executive Officer by a medical practitioner

Power to require names of dairyman's customers

that the outbreak or spread of any infectious or contagious disease in the cantonment is, in the opinion of such medical practitioner, attributable to the milk supplied by any dairyman, the Executive Officer may, by notice in writing, require the dairyman, within such time as may be specified in the notice, to furnish him with a full and complete list of the names and addresses of all his customers within the cantonment, or to give him such information as will enable him to trace the persons to whom the dairyman has sold milk.

153. Where it is certified to the Executive Officer by the Health Officer

Power to require names of a washerman's customers.

that it is desirable, with a view to prevent the spread of any infectious or contagious disease in the cantonment, that the Health Officer should be furnished with a list of the customers of any washerman, the Executive Officer may, by notice in writing, require the washerman, within a time to be specified in the notice, to furnish the Health Officer with a full and complete list of the names and addresses of all owners within the cantonment of clothes and other articles which the washerman washes or has washed during the six weeks immediately preceding the date of the notice.

154. Where, after inspection, the Health Officer is of opinion that any

Report after inspection of dairy or washerman's place of business.

infectious or contagious disease is caused or is likely to arise in the cantonment from the consumption of the milk supplied from a dairy or from the washing of clothes or other articles in any place, or from any process employed by a washerman, he shall report the matter to the Executive Officer.

155. Upon receipt of a report submitted by the

Action on report submitted by Health Officer

Health Officer under section 154, the Executive Officer may, by notice in writing,—

(a) prohibit the supply of milk from the dairy until the notice has been withdrawn, or

(b) prohibit the washerman from washing clothes or other articles in any such place or by any such process as aforesaid until the notice has been withdrawn or unless he uses such place in such manner, or washes by such process, as the Executive officer may direct in the notice.

156. The Health Officer may take possession of any milk, clothes or other

Examination of milk or washed clothes

articles which are or have recently been in the possession of any dairyman on whom a notice has been served under section 152, or of any clothes or other articles which are or have recently been in the possession of any washerman, on whom a notice has been served under section 153, and may subject the same or cause the same to be subjected to such chemical or other process as he may

think necessary; and the [Board] shall pay from the cantonment fund all the costs of the process and shall also pay to the owner of the milk, clothes or other articles such sum as compensation for any loss occasioned by such process as may appear to it to be reasonable.

Contamination of public conveyance.

158. Whoever in a cantonment—

(a) uses a public conveyance while suffering from an infectious or contagious disease, or

(b) uses a public conveyance for the carriage of a person who is suffering from any such disease, or

(c) uses a public conveyance for the carriage of the corpse of a person who has died from any such disease,

shall be bound to take proper precautions against the communication of the disease to other persons using or who may thereafter use the conveyance and to notify such use to the owner, driver or person in charge of the conveyance, and further to report without delay to the Executive Officer the number of the conveyance and the name of the person so notified.

158. (1) Where any person suffering from, or the corpse of any person who has died from, an infectious or contagious disease has been carried in a public conveyance which ordinarily plies in a cantonment, the driver thereof shall forthwith report the fact to the Executive Officer who shall forthwith cause the conveyance to be disinfected if that has not already been done.

(2) No such conveyance shall be brought again into use until the Executive Officer has granted a certificate stating that it can be used without causing risk of infection.

159. Whoever fails to make to the Executive Officer any report which he is required to make by section 157 or section 158, shall be punishable with fine which may extend to one hundred rupees.

160. Notwithstanding anything contained in any law for the time being in force, no owner, driver or person in charge of a public conveyance shall be bound to convey or to allow to be conveyed in such conveyance in or in the vicinity of a cantonment any person suffering from an infectious or contagious disease or the corpse of any person who has died from such disease unless and until such person pays or tenders a sum sufficient to cover any loss and expense which would ordinarily be incurred in disinfecting the conveyance.

161. Where a [Board] is, upon the advice of the Health Officer, of opinion that the cleansing and disinfection of any building or part of a building in the cantonment or of any articles in any such building or part which are likely to retain infection, or the renewal of the flooring of any such building or part of such building, would tend to prevent or check the spread of any infectious or contagious disease, he may, by notice in writing, require the owner or occupier to cleanse and disinfect the said building, part or articles, as the case may be, or to renew the said flooring within such time as may be specified in the notice:

Disinfection of building or articles therein.

Provided that where, in the opinion of the [Board] the owner or occupier is from poverty or any other cause unable effectually to carry out any such requisition, the [Board] may, at the expense of the cantonment fund, cleanse and disinfect the building, part or articles, or, as the case may be, renew the flooring.

162. (1) Where the destruction of any hut or shed in a cantonment is, in the opinion of the [Board] necessary to prevent the spread of any infectious or contagious disease, the [Board] may, by notice in writing, require the owner to destroy the hut or shed and the materials thereof within such time as may be specified in the notice.

(2) Where the President of a [Board], ¹[* *], is satisfied that the destruction of any hut or shed in the cantonment is immediately necessary for the purpose of preventing the spread of any infectious or contagious disease, he may order the owner or occupier of the hut or shed to destroy the same forthwith, or may himself cause it to be destroyed after giving not less than two hours' notice to the owner or occupier thereof.

(3) The [Board] shall pay compensation to the owner of any hut or shed destroyed under this section.

163. The [Board] shall provide free of charge temporary shelter or house accommodation for the members of any family in which an infectious or contagious disease has appeared who have been compelled to leave their dwelling by reason of any proceedings taken under section 161 or section 162, and who desire such shelter or accommodation as aforesaid to be provided for them.

164. (1) Where in a cantonment any building or part of a building is intended to be let in which any person has, within the six weeks immediately preceding, been suffering from an infectious or contagious disease, the person letting the building or part shall before doing so disinfect the same in such manner as the [Board] may, by public or special notice, direct, together with all articles therein liable to retain infection.

(2) For the purposes of this section, the keeper of an hotel, lodging house or sarai shall be deemed to let to any person who is admitted as a guest therein that part of the building in which such person is permitted to reside.

165. No person shall, without previous disinfection of the same, give, lend, sell, transmit or otherwise dispose of to another person any article or thing which he knows or has reason to believe has been exposed to contamination by any infectious or contagious disease and is likely to be used in, or taken into a cantonment.

Means of disinfection

166. (1) Every [Board] shall—

(a) provide proper places with necessary attendants and apparatus for the disinfection of conveyances, clothing, bedding or other articles which have been exposed to infection;

(b) cause conveyances, clothing or other articles brought for disinfection to be disinfected either free of charge or on payment of such charges as it may fix.

(2) A [Board] may notify places at which articles of clothing, bedding, conveyances or other articles which have been exposed to infection shall be washed, and, if it does so, no person shall wash any such thing at any place not so notified without having previously disinfected such thing.

(3) The President of a Board ¹[* *], may direct the destruction of any clothing, bedding or other article in the cantonment likely to retain infection, and may give such compensation as he thinks fit for any article so destroyed.

Making or selling of food, etc., or washing clothes by infected person.

167. Whoever, while suffering from, or in circumstances in which he is likely to spread, any infectious or contagious disease,—

(a) makes, carries or offers for sale in a cantonment or takes any part in the business of making, carrying or offering for sale therein any article of food or drink or any medicine or drug for human consumption, or any article of clothing or bedding for personal use or wear, or

(b) takes any part in the business of the washing or carrying of clothes shall be punishable with fine which may extend to one hundred rupees.

168. When a cantonment is visited or threatened by an outbreak of any infectious or contagious disease, the [Board] may, by public notice, restrict in such manner or prohibit sale of food or drink, prohibit for such period, as may be specified in the notice, the sale or preparation of any article of food or drink for human consumption specified in the notice or the sale of any flesh of any description of animals so specified.

169. (1) If a [Board] is of opinion that the water in any well, tank or other place is likely, if used for drinking, to engender, or cause the spread of, any disease, it may,—

(a) by public notice, prohibit the removal or use of such water for drinking,

(b) by notice in writing require the owner or person having control of such well, tank or place to take such steps as may be directed by the notice to prevent the public from having access to or using such water; or

(c) take such other steps as it may consider expedient to prevent the outbreak or spread of any such disease.

(2) In the event of a cantonment or any part of a cantonment being visited or threatened by an outbreak of any infectious or contagious disease, the Health Officer or any person authorised by him in this behalf may, without notice and at any time, inspect and disinfect any well, tank or other place from which water is, or is likely to be, taken for the purposes of drinking, and may further take such steps as he thinks fit to ensure the purity of the water or to prevent the use of the same for drinking purposes.

170. Where any person has died in a cantonment from any infectious or contagious disease, the Executive Officer may, by notice in writing,—

(a) require any person having charge of the corpse to convey the same to a mortuary, thereafter to be disposed of in accordance with law; or

(b) prohibit the removal of the corpse from the place where death occurred except for the purpose of being buried or burned or of being conveyed to a mortuary.

Hospitals and Dispensaries.

Maintenance or aiding of hospitals or dispensaries

171. (1) A [Board] may—

(a) provide and maintain either within or without the cantonment as many hospitals and dispensaries as it thinks fit, or

(b) make, upon such terms as it thinks fit to impose, a grant-in-aid to any hospital or dispensary¹ [or veterinary hospital] whether within or without the cantonment not maintained by it.

(2) Every hospital or dispensary maintained or aided under sub-section (1) shall have attached to it a ward or wards for the treatment of persons suffering from infectious or contagious diseases.

(3) A medical officer, appointed in such manner as the Local Government may direct, shall be in charge of every hospital or dispensary maintained or aided under this section.

172. (1) Every hospital or dispensary maintained or aided under section 171 shall be maintained in accordance with any general or special orders of the ¹[Central Government] ²for the conduct of hospitals and dispensaries or in accordance with the said orders modified in such manner as the ¹[Central Government] ²thinks fit.

(2) The [Board] shall cause every such hospital or dispensary to be provided with all requisite drugs, instruments, apparatus, furniture and appliances and with sufficient costs, bedding and clothing for inpatients.

173 At every hospital or dispensary maintained or aided under section 171, the sick poor of the cantonment, and other inhabitants of the cantonment suffering from infectious or contagious diseases, and, with the sanction of the [Board], any other sick persons, may receive medical ³[or surgical] treatment free of cost, and, if treated as in-patients, shall be either dieted gratuitously or, if the medical officer in charge so directs, shall be granted subsistence allowance on such scale as the [Board] may fix:

Provided that the subsistence allowance shall not be less than the lowest allowance for the time being fixed for the subsistence of judgment-debtors by ¹[Provincial Government] under section 57 of the Code of Civil Procedure, 1908.

174. Any sick person who is ineligible to receive medical ³[or surgical] treatment free of cost in any hospital or dispensary under section 173 may be admitted to treatment therein upon such terms as the [Board] thinks fit.

175. (1) If the Health Officer or the medical officer in charge of a hospital or dispensary maintained or aided under section 171 has reason to believe that any person living in the cantonment is suffering from an infectious or contagious disease, he may, by notice in writing, call upon such person to attend for examination at any such hospital or dispensary at such time as may be specified in the notice and not to quit it without the permission of the medical officer in charge; and, on the arrival of such person at the hospital or dispensary, the medical officer in charge thereof may examine him for the purpose of satisfying himself whether or not such person is suffering from an infectious or contagious disease:

Provided that, if, having regard to the nature of the disease or the condition of the person suffering therefrom, or the general environment and circumstances of such person, the Health Officer or medical officer, as the case may be, considers that the attendance of such person at a hospital or dispensary is likely to prove unnecessary or inexpedient, he shall examine such person at such person's own residence.

(2) If any person, on examination under sub-section (1), is found to be suffering from an infectious or contagious disease, the Health Officer or medical officer, as the case may be, may cause him to be detained in hospital until he is free from the infection or contagion:

Provided that, if having regard to the nature of the disease or the condition of the person suffering therefrom, or the general environment and circumstances of such person, he considers that the detention of such person at a hospital or dispensary is unnecessary or inexpedient, he shall discharge such person and take such measures or give such directions in the matter as he thinks necessary.

176. (1) If the Health Officer or the medical officer in charge of a hospital or dispensary maintained or aided under section 171 reports in writing to the 1[Officer Commanding the station] that any person having received a notice under section 175 has refused or omitted to attend at the hospital or dispensary, specified in the notice, or

Power to exclude from cantonment persons refusing to attend hospital or dispensary.

that such person, having attended the hospital or dispensary, has quitted it without the permission of such medical officer, or that any person has failed to comply with any direction given to him under section 175, the 1[Officer Commanding the station] may, by order in writing, direct such person to remove from the cantonment within twenty-four hours and not to re-enter it without his permission in writing.

(2) No person who has under sub-section (1) been ordered to remove from and not to re-enter a cantonment shall enter any other cantonment in British India without the written permission of the 2[Officer Commanding the station].

Control of Traffic for Hygienic Purposes.

177. (1) A [Board] may provide or prescribe suitable routes for the use of persons passing through the cantonment—

Routes for pilgrims and others.

(a) on their way to or from fairs or places of pilgrimage or other places of public resort; or

(b) during times when an infectious or contagious disease is prevalent, and may, by public notice, require such persons as aforesaid to use such routes and no others.

(2) All routes provided or prescribed under sub-section (1) shall be clearly and sufficiently indicated by the [Board].

Special Conditions regarding Essential Services.

178. (1) Whoever, being a sweeper employed by a [Board] in the absence of a written contract authorising him so to do and

Conditions of service of sweepers.

without reasonable cause, resigns his employment or absents himself from his duty without having given one month's notice to the [Board], or neglects or refuses to perform his duties, or any of them, shall be punishable with imprisonment which may extend to one month.

(2) The [Central Government]³ may, by notification, in the 3[Official Gazette], direct that on and from such date as may be specified in the notification, the provisions of this section shall apply in the case of any specified class of servants employed by a [Board] whose functions intimately concern the public health or safety.

(3) For the purpose of this section, "sweeper" includes any menial servant employed by a [Board] in the removal or disposal of filth or rubbish.

CHAPTER XI.

CONTROL OVER BUILDINGS, STREETS, BOUNDARIES, TREES, ETC.

Buildings.

4[178-A. No person shall erect or re-erect a building on any land in a cantonment, except with the previous sanction of the [Board], nor otherwise than in accordance with the

Sanction for building.

Leg. Ref.

¹ These words were substituted by S. 14 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

² These words were substituted by S. 8

of the Cantonments (Amendment) Act, 1925 (V of 1925).

³ Substituted by Order in Council, 1937.

⁴ Sec. 178-A was inserted by Act XXIV of 1936.

provisions of this Chapter and of the rules and bye-laws made under this Act relating to the erection and re-erection of buildings.]

179. (1) Whoever intends to erect or re-erect any building in a cantonment shall ¹[apply for sanction by giving notice] in writing of his intention to the [Board].

Notice of new buildings

(2) For the purposes of this Act, a person shall be deemed to erect or re-erect a building who—

(a) makes any material alteration or enlargement of any building, or
(b) converts into a place for human habitation any building not originally constructed for that purpose, or

(c) converts into more than one place for human habitation a building originally constructed as one such place, or

(d) converts two or more places of human habitation into greater number of such places, or

(e) converts into a stable, cattle-shed or cowhouse any building originally constructed for human habitation, or

(f) makes any alteration which there is reason to believe is likely to affect prejudicially the stability or safety of any building or the condition of any building in respect of drainage, sanitation or hygiene, or

(g) makes any alteration to any building which increases or diminishes the height of, or area covered by, or the cubic capacity of, the building, or which reduces the cubic capacity of any room in the building below the minimum prescribed by any bye-law made under this Act.

180. (1) A person given the notice required by section 179 shall specify the purpose for which it is intended to use the building to which such notice relates.

(2) No notice shall be valid until the information required under subsection (1) and any further information and plans which may be required under bye-laws made under this Act have been furnished to the satisfaction of the [Board] along with the notice.

181. (1) The [Board] may either refuse to sanction the erection or re-erection, as the case may be, of the building, or

Power of [Board] to may sanction it either absolutely or subject to such sanction or refuse direction as it thinks fit to make in writing in respect of all or any of the following matters namely.—

(a) the free passage or way to be left in front of the building;

(b) the space to be left about the building to secure free circulation of air and facilitate scavenging and the prevention of fire;

(c) the ventilation of the building, the minimum cubic area of the rooms and the number and height of the storeys of which the building may consist;

(d) the provision and position of drains, latrines, urinals, cesspools or other receptacles for filth;

(e) the level and width of the foundation, the level of the lowest floor and the stability of the structure;

(f) the line of frontage with neighbouring buildings if the building abuts on a street;

(g) the means to be provided for egress from the building in case of fire;

(h) the materials and method of construction to be used for external and party walls for rooms, floors, fireplaces, and chimneys;

Leg. Ref.

¹ Substituted by Act XXIV of 1936.

Notes.

Sec. 181.—Where Cantonment Authority grants permission without any reservation

so far as the use of the building for shops was concerned, its subsequent resolution modifying the previous one by adding the words "shops rejected" is *ultra vires*. (52 P.R. 1900, Rel on.) 126 I.C. 525=1930 Lah. 822.

(i) the height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on; and

(j) any other matter affecting the ventilation and sanitation of the buildings;

and the person erecting or re-erecting the building shall obey all such written directions in every particular.

1[(2) The Board may refuse to sanction the erection or re-erection of any building, either on grounds sufficient in the opinion of the Board affecting the particular building, or in pursuance of a general scheme sanctioned by the Officer Commanding-in-Chief, the Command, restricting the erection or re-erection of buildings within specified limits for the prevention of overcrowding or in the interests of persons residing within such limits or for any other public purpose.

(3) The Board, before sanctioning the erection or re-erection of a building on land which is under the management of the Military Estates Officer, shall refer the application to the Military Estates Officer for ascertaining whether there is any objection on the part of Government to such erection or re-erection; and the Military Estates Officer shall return the application together with his report thereon to the Board within thirty days after it has been received by him.

(4) The Board may refuse to sanction the erection or re-erection of any building—

(a) when the land on which it is proposed to erect or re-erect the building is held on a lease ²[from the Crown] if the erection or re-erection constitutes a breach of the terms of the lease, or

(b) when the land on which it is proposed to erect or re-erect the building is not held on a lease from Government, if the right to build on such land is in dispute between the person applying for sanction and the Government.

(5) If the Board decides to refuse to sanction the erection or re-erection of the building, it shall communicate in writing the reasons for such refusal to the person by whom notice was given.

(6) Where the Board neglects or omits, for one month after the receipt of a valid notice, to make and to deliver to the person who has given the notice any order of any nature specified in this section, and such person thereafter by a written communication sent by registered post to the Board calls the attention of the Board to the neglect or omission, then, if such neglect or omission continues for a further period of fifteen days from the date of such communication the Board shall be deemed to have given sanction to the erection or re-erection, as the case may be, unconditionally.

Provided that, in any case to which the provisions of sub-section (3) apply, the period of one month herein specified shall be reckoned from the date on which the Board has received the report referred to in that sub-section.]

182. (1) No compensation shall be claimable by any person for any damage or loss which he may sustain in consequence of the refusal of the [Board] of sanction to the erection of any building or in respect of any direction issued by it under sub-section (1) of section 181.

(2) The [Board] shall make compensation to the owner of any building for any actual damage or loss sustained by him in consequence of the prohibition of the re-erection of any building or of its requiring any land belonging to him to be added to the street:

Provided that the [Board] shall not be liable to make any compensation in respect of the prohibition of the re-erection of any building which for a period of three years or more immediately preceding such refusal has not been in existence or has been unfit for human habitation

183. Every sanction for the erection or re-erection of a building given or deemed to have been given by the [Board] as here-

Lapse of sanction. inbefore provided shall be available for one year from the date on which it is given, and, if the building so sanctioned is not begun by the person who has obtained the sanction or some one lawfully claiming under him within that period, it shall not thereafter be begun ¹[unless the Board on application made therefor has allowed an extension of that period.]

²[183-A. A Board, when sanctioning the erection or re-erection of a building as herebefore provided, shall specify a **Period for completion of building.** reasonable period after the work has commenced within which the erection or re-erection is to be completed, and, if the erection or re-erection is not completed within the period so fixed, it shall not be continued thereafter without fresh sanction obtained in the manner hereinbefore provided, unless the Board on application made therefor has allowed an extension of that period:]

Provided that not more than two such extensions shall be allowed by the Board in any case.]

Illegal erection and re-erection 184 Whoever begins, continues or completes the erection or re-erection of a building—

(a) without having given a valid notice as required by sections 179 and 180, or before the building has been sanctioned or is deemed to have been sanctioned, or

(b) without complying with any direction made under sub-section (1) of section 181, or

(c) when sanction has been refused, or has ceased to be available, shall be punishable with fine which may extend to five hundred rupees, ³[or has been suspended by the Officer Commanding-in-Chief, the Command, under clause (b) of sub-section (1) of S. 52.]

4185. (1) A [Board] may, at any time, by notice in writing, direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the [Board] considers that such erection or re-erection is an offence under section 184, and may in any such case ⁴[or in any other case in which the Board considers that the erection or re-erection of a building is an offence under S. 184, within six months of the completion of such erection or re-erection] in like manner

Leg. Ref.

¹ Substituted by Act XXIV of 1936.

² Sec 183-A added by Act XXIV of 1936.

³ Added by Act XXIV of 1936.

⁴ Sec. 185 has been re-numbered as sub-S (1) of that section and the proviso and sub-S. (2) added by Act XXIV of 1936. The words "or in any other case . . . or re-erection" in S 185 added by Act XXIV of 1936

Notes.

Sec 184 (b): Scope of.—Section 184 (b) does not provide a punishment for mere non-compliance with a direction made under sub-S. (1) of S. 181, but for the beginning, continuation, or completion of the erection of a building without complying with such a direction 148 I.C. 420=35 Ir.L.J. 666=1934 Oudh 29.

Secs 184 and 185—There is a clear distinction between the offences under Ss.

184 and 185 of the Act One relates to the erection or re-erection of a building without the permission of the cantonment authority, the other offence is the failure to comply with a notice issued by authority Where a building was erected before 1924 but the prosecution was for the offence of disobeying a notice after the Act came into force, *held*, that the prosecution was sustainable and that the time-limit for the same was 6 months from the date of the disobedience. 136 I C 713=33 Cr L.J 336=1932 Lah. 370.

Secs 184 and 268.—Section 184 provides no penalty for a continuing failure or contravention, although such a penalty is provided in S 268. 148 I.C. 420=35 Cr. L.J. 666=11 O.W.N. 156=1934 Oudh 29 It is not proper to substitute a conviction under S. 268 for the one under S. 184 (b) (*ibid*) 35 Cr.L.J 666=1934 Oudh 29=148 I.C. 420.

direct the alteration or demolition, as it thinks necessary, of the building, or any part thereof, so erected or re-erected:

Provided that the [Board] may, instead of requiring the alteration or demolition of any such building or part thereof, accept by way of composition such sum as it thinks reasonable.

[Provided further that the Board shall not, without the previous concurrence of the Officer Commanding-in-Chief, the Command, accept any sum by way of composition under the foregoing proviso in respect of any building on land which is not under the management of the Board"]

"(2) A Board shall by notice in writing direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the order under S. 181 sanctioning the erection or re-erection has been suspended by the Officer Commanding-in-Chief, the Command, under clause (b) of sub-section (1) of S. 52, and shall in any such case in like manner direct the demolition or alteration, as the case may be, of the building or any part thereof so erected or re-erected where the Officer Commanding-in-Chief, the Command, thereafter directs that the order of the Board sanctioning the erection or re-erection of the building shall not be carried into effect or shall be carried into effect with modifications specified by him."

Provided that the Board shall pay to the owner of the building compensation for any loss actually incurred by him in consequence of the demolition or alteration of any building which has been erected or re-erected prior to the date on which the order of the Officer Commanding-in-Chief, the Command, has been communicated to him."]

186. A [Board] may make bye-laws prescribing—

(a) the manner in which notice of the intention to erect or re-erect a building in the cantonment shall be given to the [Board] and the information and plans to be furnished with the notice;

(b) the type or description of buildings which may or may not, and the purpose for which a building may or may not, be erected or re-erected in any specified area or areas;

(c) the minimum cubic capacity of any room or rooms in a building which is to be erected or re-erected; ¹[* *],

(d) the fees payable on provision by the [Board] of plans or specifications of the type of buildings which may be erected in the cantonment or any part thereof;

²[(e) the circumstances in which a mosque, temple or church or other sacred building may be erected or re-erected; and

(f) with reference to the erection or re-erection of buildings, of any class of building, all or any of the following matters, namely:—

(i) the line of frontage where the building abuts on a street;

(ii) the space to be left about the building to secure free circulation of air and facilities for scavenging and for the prevention of fire;

(iii) the materials and method of construction to be used for external and party-walls, roofs and floors;

(iv) the position, the material and the method of construction of fire-places, chimneys, drains, latrines, privies, urinals and cess-pools;

(v) height and slope of the roof above the uppermost floor upon which human beings are to live or cooking operations are to be carried on;

(vi) the level and width of the foundation, the level of the lowest floor and the stability of the structure;

(vii) the number and height of the storeys of which the building may consist;

Leg Ref.

¹ The word "and" omitted by Act XXIV of 1936.

² Sec 186 clauses (e) and (f) added by Act XXIV of 1936.

(viii) the means to be provided for egress from the building in case of fire;

(ix) the safeguarding of wells from pollution; or

(x) the materials and method of construction to be used for godowns intended for the storage of foodgrains in excess of fifty maunds in order to render them rat proof.]

187. (1) No owner or occupier of any building in a cantonment shall, without the permission in writing of the [Board], add to or place against or in front of the building any projection or structure overhanging, projecting into, or encroaching on, any street or any drain, sewer or aqueduct therein.

(2) The [Board] may, by notice in writing, require the owner or occupier of any such building to alter or remove any such projection or encroachment as aforesaid:

Provided that, in the case of any projection or encroachment lawfully in existence at the commencement of this Act, the [Board] shall make compensation for any damage caused by the removal or alteration.

(3) The [Board] may, by order in writing, give permission to the owners or occupiers of buildings in any particular street to put up open verandahs, balconies or rooms projecting from any upper storey thereof to an extent beyond the line of the plinth or basement wall at such height from the level ground or street as may be specified in the order.

188. A [Board] may, by notice in writing, require any person who has, without its permission in writing, newly erected or re-erected any building over any public sewer, drain, culvert, water-course or water-pipe in the cantonment to pull down or otherwise deal with the same as it thinks fit.

189. (1) A [Board] may, by notice in writing, require the owner or lessee of any building or land in any street, at his own expense and in such manner as the [Board] thinks fit, to put up and keep in good condition proper troughs and pipes for receiving and carrying rain water from the building or land and for discharging the same or to establish and maintain any other connection or communication between such building or land and any drain or sewer

(2) For the purpose of efficiently draining any building or land in the cantonment, the [Board] may, by notice in writing, require the owner or lessee of the building or land—

Notes

Sec. 187.—Where on an application to the cantonment authority, for sanction to construct a platform, the applicant receives such sanction by means of a letter from the executive officer of the cantonment, under whose signature all orders of the cantonment authority are normally communicated, it is not his business to enquire from the executive officer whether the sanction conveyed by him had been granted by the cantonment authority. He is entitled to assume that the executive officer was acting in accordance with the authority conferred on him by the Cantonment Board and to act on such sanction. 35 P.L.R. 414=1934 Cr.C. 803=1934 Lah. 510

A person is not bound to comply with any notice whatever, however illegal or peremp-

tory, merely because it is issued to him by a Municipal Board or a Cantonment Authority, and if he fails to comply with it he does not render himself liable to a fine under the Act. (1932 All 673, Dist.) 146 I. C 2=34 Cr L J 1191=1933 All 486

Secs. 187 and 268.—Notice for removal of encroachment issued by executive officer:—Validity of—Disobedience to—Conviction for—Propriety of. See 1933 Lah 545. Qualified sanction to construct—Construction—Notice to demolish “unauthorized construction”—Validity of—Non-compliance with—Offence. See 146 I.C. 2=34 Cr.L.J. 1191. Open space between two houses owned by petitioner—Construction of pavement by him thereon no Offence See 37 P L.R. 236=1935 Lah. 588.

(a) to pave, with such materials and in such manner as it thinks fit, any courtyard, alley or passage between two or more buildings, or

(b) to keep any such paving in proper repair.

190. A [Board] may attach to the outside of any building, or to any tree in the Cantonment, brackets for lamps in such manner as not to occasion injury thereto or inconvenience.

Power to attach brackets for lamps.

Streets.

191. A [Board] may, by order in writing, permit the temporary occupation of any street, or of any land vested in the [Board] for the purpose of depositing any building materials or making any temporary excavation therein or erection thereon, subject to such conditions as it may prescribe for the safety or convenience of the public, and may charge a fee for such permission and may in its discretion withdraw such permission.

Temporary occupation of street, land, etc.

192. (1) A [Board] shall not permanently close any street, or open any new street without the previous sanction of the [Officer Commanding-in-Chief, the Command].

Closing and opening of streets.

(2) A [Board] may, by public notice, temporarily close any street or any part of a street for repair or for the purpose of carrying out any work connected with drainage, water-supply or lighting or any other work which it is by or under this Act required or permitted to carry out:

Provided that where, owing to any works or repairs or from any other cause, the condition of any street or of any water-works, drain, culvert or premises vested in the [Board] is such as to be likely to cause danger to the public, the [Board] shall—

(a) take all reasonable means for the protection of the adjacent buildings and land and provide reasonable means of access thereto,

(b) cause sufficient barriers or fences to be erected for the security of life and property, and cause such barriers or fences to be sufficiently lighted from sunset to sunrise.

2193. (1) A [Board] may cause a name to be given to any street and to be affixed on any building in the cantonment in such place as it thinks fit, and may also cause a number to be affixed to any such building

Names of streets and numbers of buildings.

(2) Whoever destroys, pulls down, defaces or alters any such name or number or puts up any name or number differing from that put up by the order of the [Board] shall be punishable with fine which may extend to twenty rupees.

²[(3) When a number has been affixed to any building under sub-section (1), the owner of the building shall maintain the number in order, and shall replace it if removed or defaced, and if he fails to do so the Board may by notice in writing require him to replace it.]

Boundaries and Trees.

194. (1) No boundary wall, hedge or fence of any material or description shall be erected in a cantonment without the permission in writing of the [Board].

Boundary walls, hedges and fences.

(2) A [Board] may, by notice in writing, require the owner or lessee of any land in the cantonment—

Leg. Ref.

¹ These words were substituted by S. 2 of the Cantonments (Amendment) Act, 1926

(XXXV of 1926)

² Sec. 193, sub-S³ (3) added by Act XXIV of 1936

(a) to remove from the land any boundary wall, hedge or fence which is, in its opinion, unsuitable, unsightly or otherwise objectionable; or

(b) to construct on the land sufficient boundary walls, hedges or fences of such material, description or dimensions as may be specified in the notice; or

(c) to maintain the boundary walls, hedges or fences of such lands in good order:

Provided that, in the case of any such boundary wall, hedge or fence which was erected with the consent or under the orders of the [Board], or which was in existence at the commencement of this Act, the [Board] shall make compensation for any damage caused by the removal thereof.

(3) The [Board] may, by notice in writing, require the owner, lessee or occupier of any such land to cut or trim any hedge on the land in such manner and within such time as may be specified in the notice.

195. (1) Where, in the opinion of a [Board], the felling of any tree of mature growth standing in a private enclosure in the cantonment is necessary for any reason, the [Board] may, by notice in writing, require the owner, lessee or occupier of the land to fell the tree within such time as may be specified in the notice.

(2) A [Board] may—

(a) cause to be lopped or trimmed any tree standing on land in the cantonment which belongs to ¹[the Crown]; or

(b) by public notice require all owners, lessees or occupiers of land in the cantonment, or by notice in writing require the owner, lessee or occupier of any such land, to lop or trim, in such manner as may be specified in the notice, all or any trees standing on such land or to remove any dead trees from such land.

196. Whoever, without the permission in writing of the [Board], digs up the surface of any open space in the cantonment, which is not private property, shall be punishable with fine which may extend to twenty rupees, and, in the case of a continuing offence ²[with an additional fine] which may extend to five rupees for every day after the first during which the offence continues.

197. (1) If, in the opinion of a [Board], the working of a quarry in the cantonment, or the removal of stone, earth or other material from the soil in any place in the cantonment, is dangerous to persons residing in or frequenting the neighbourhood of such quarry or place, or creates, or is likely to create, a nuisance, the [Board] may, by notice in writing, prohibit the owner, lessee or occupier of such quarry or place or the person responsible for such working or removal, from continuing or permitting the working of such quarry or the moving of such material, or require him to take such steps in the matter as the [Board] may direct for the purpose of preventing danger or abating the nuisance arising or likely to arise therefrom

(2) If, in any case referred to in sub-section (1), the [Board] is of opinion that such a course is necessary in order to prevent imminent danger, it may, by order in writing, require a proper boarding or fence to be put up for the protection of passers-by.

CHAPTER XII.

MARKETS, SLAUGHTER-HOUSES, TRADES AND OCCUPATIONS.

198. (1) A [Board] may provide and maintain, either within or without the cantonment, public markets and public slaughter-houses, to such number as it thinks fit, together with stalls, shops, sheds, pens and other buildings or conveniences for the use of persons carrying on trade or business in or frequenting such markets or slaughter-houses, and may provide and maintain in any such market buildings, places, machines, weights, scales and measures for the weightment or measurement of goods sold therein.

(2) When such market or slaughter-house is situated beyond cantonment limits, the [Board] shall have the same power for the inspection and proper regulation of the same as if it were situated within those limits.

(3) The [Board] may at any time, by public notice, close any public market or public slaughter-house or any part thereof.

(4) Nothing in this section shall be deemed to authorise the establishment of a public market or public slaughter-house within the limits of any area administered by any local authority other than the [Board] without the permission of such local authority or otherwise than on such conditions as such local authority may approve.

199. (1) No person shall, without the general or special permission in writing of the [Board], sell or expose for sale any animal or article in any public market.

(2) Any person contravening the provisions of this section, and any animal or article exposed for sale by such person, may be summarily removed from the market by or under the orders of the Executive Officer or any officer or servant of the [Board] authorised by it in this behalf.

Levy of stallages, rents and fees.

200. A [Board] may—

(a) charge for the occupation or use of any stall, shop, standing, shed or pen in a public market, or public slaughter-house, or for the right to expose goods for sale in a public market, or for weighing or measuring goods sold therein, or for the right to slaughter animals in any public slaughter-house, such stallages, rents and fees as it thinks fit; or

(b) with the sanction of the [Officer Commanding-in-Chief, the Command] farm the stallages, rents and fees leviable as aforesaid or any portion thereof for any period not exceeding one year at a time; or

(c) put up to public auction, or with the sanction of the [Officer Commanding-in-Chief, the Command], dispose of by private sale, the privilege of occupying or using any stall, shop, standing, shed or pen in a public market or public slaughter-house for such term and on such conditions as it thinks fit.

201. A copy of the table of stallages, rents and fees, if any, leviable in any public market or public slaughter-house, and of the bye-laws made under this Act for the purpose of regulating the use of such market or slaughter-house, printed in the English language and in such other language or languages as the [Board] may direct, shall be affixed in some conspicuous place in the market or slaughter-house.

Leg. Ref.

¹ These words were substituted by S. 2 of the Cantonments (Amendment) Act, 1926 (XXXV of 1926).

Notes.

Secs. 200 and 210.—Lease of shed—Destruction of shed—Liability of lessee for rent. See 1933 Lah. 517.

202. (1) No place in a cantonment other than a public market shall be used as a market, and no place in a cantonment other than a public slaughter-house, shall be used as a slaughter-house, unless such place has been licensed as a market or slaughter-house, as the case may be, by the [Board] :

Provided that nothing in this sub-section shall apply in the case of a slaughter-house established and maintained by the Government.

(2) Nothing in sub-section (1) shall be deemed—

(a) to restrict the slaughter of any animal in any place on the occasion of any festival or ceremony, subject to such conditions as to prior or subsequent notice as the Executive Officer with the previous sanction of the District Magistrate may, by public or special notice, impose in this behalf, or

(b) to prevent the Executive Officer, with the sanction of the [Board], from setting apart places for the slaughter of animals in accordance with religious custom, when such animals are slaughtered for consumption by the troops or for the purpose of the sale of the flesh thereof to the troops.

(3) Whoever omits to comply with any condition imposed by the Executive Officer under clause (a) of sub-section (2) shall be punishable with fine which may extend to fifty rupees and, in the case of a continuing offence, with an additional fine which may extend to ten rupees for every day after the first during which the offence is continued.

203. (1) A [Board] may charge such fees as it thinks fit to impose for the grant of a licence to any person, to open a private market or private slaughter-house in the cantonment, and may grant such licence subject to such conditions, consistent with this Act and any bye-laws made thereunder, as it thinks fit to impose.

(2) The [Board] may refuse to grant any such licence without giving reasons for such refusal.

204. (1) Any person who keeps open for public use any market or slaughter-house in respect of which a licence is required by or under this Act, without obtaining licence therefor, or while the licence therefor is suspended, or after the same has been cancelled, shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, with an additional fine which may extend to five rupees for every day after the first during which the offence is continued.

(2) When a licence to open a private market or private slaughter-house is granted or refused or if suspended or cancelled, the [Board] shall cause a notice of the grant, refusal, suspension or cancellation to be posted in English, and in such other language or languages as it thinks necessary, in some conspicuous place by or near the entrance to the place to which the notice relates.

205. Whoever, knowing that any market or slaughter-house has been opened to the public without a licence having been obtained therefor when such licence is required by or under this Act, or that the licence granted therefor is for the time being suspended or that it has been cancelled, sells or exposes for sale any article in such market, or slaughters any animal in such slaughter-house, shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, with an additional fine which may extend to five rupees for every day after the first during which the offence is continued.

206. (1) Where, in the opinion of the [Board], it is necessary on sanitary grounds so to do, it may, by public notice, prohibit for such period, not exceeding one month, as may be specified in the notice, or for such further period, not exceeding one month, as it may specify by a like

notice, the use of any private slaughter-house specified in the notice, or the slaughter therein of any animal of any description so specified.

(2) A copy of every notice issued under sub-section (1) shall be conspicuously posted in the slaughter-house to which it relates.

207. (1) Any servant of a [Board], authorised by order in writing in this behalf by the President of the Board,¹ or the Health Officer, may, if he has reason to believe that any animal has been, is being, or is about to be slaughtered in any place in contravention of the provisions of this Chapter, enter into and inspect any such place at any time, whether by day or by night.

(2) Every such order shall specify the place to be entered and the locality in which the same is situated and the period, which shall not exceed seven days, for which the order is to remain in force.

208 A [Board] may, with the approval of the [Provincial Government], make bye-laws consistent with this Act to provide for all or any of the following matters, namely:—

(a) the days on, and the hours during, which any private market or private slaughter-house may be kept open for use;

(b) the regulation of the design, ventilation and drainage of such markets and slaughter-houses, and the material to be used in the construction thereof,

(c) the keeping of such markets and slaughter-houses and lands and buildings appertaining thereto in a clean and sanitary condition, the removal of filth and refuse therefrom, and the supply therein of pure water and of a sufficient number of latrines and urinals for the use of persons using or frequenting the same;

(d) the manner in which animals shall be stalled at a slaughter-house;

(e) the manner in which animals may be slaughtered;

(f) the disposal or destruction of animals offered for slaughter which are, from disease or any other cause, unfit for human consumption; and

(g) the destruction of carcases which from disease or any other cause are found after slaughter to be unfit for human consumption.

Trades and Occupations.

209 (1) A [Board] may provide suitable places for the exercise by washermen of their calling, and may require payment of such fees for the use thereof as it thinks fit

(2) Where the [Board] has provided such places as aforesaid it may, by public notice, prohibit the washing of clothes by washermen at any other place in the cantonment:

Provided that such prohibition shall not be deemed to apply to the washing by a washerman of his own clothes or of the clothes of any other person who is an occupier of the place at which they are washed.

(3) Whoever contravenes any prohibition contained in a notice issued under sub-section (2) shall be punishable with fine which may extend to twenty rupees.

Licences required for carrying on of certain occupations.

210. (1) No person of any of the following classes, namely.—

Leg. Ref

¹ In S. 207 the word "if any" omitted by Act XXIV of 1936

Notes.

Sec 210 —A merchant who is selling hamboos, rafters, wooden boards and beams

- (a) butchers and vendors of poultry, game or fish;
- (b) persons keeping pigs for profit, and dealers in the flesh of pigs which have been slaughtered in India,
- (c) persons keeping milch cattle or milch goats for profit;
- (d) persons keeping for profit any animals other than pigs, milch cattle or milch goats;
- (e) dairymen, buttermen and makers and vendors of ghee,
- (f) makers of bread, biscuits or cake, and vendors of bread, biscuits or cake made in India;
- (g) vendors of fruit or vegetables;
- (h) manufacturers of aerated or other potable waters or of ice or ice-cream, and vendors of the same;
- 1[(i) vendors of any medicines, drugs or articles of food or drink for human consumption (other than the flesh of pigs, milk, butter, bread, biscuits, cake, fruit, vegetables, aerated or other potable waters or ice or ice cream) which are of a perishable nature;
- (j) vendors of water to be used for drinking purposes;
- (k) washermen,
- (l) dealers in hay, straw, wood, charcoal or other inflammable material;
- (m) dealers in fire-works, kerosene oil, petroleum or any other inflammable oil or spirit;
- (n) tanners and dyers,
- (o) persons carrying on any trade or occupation from which offensive or unwholesome smells arise;
- (p) vendors of wheat, rice and other grain or of flour, 2[*]
- (q) makers and vendors of sugar or sweetmeats; and

3[(r) barbers and keepers of shaving saloons,]
shall carry on his trade, calling or occupation in any part of a cantonment unless he has applied for and obtained a licence in this behalf from the [Board].

(2) A licence granted under sub section (1) shall be valid 4[until the end of the year in which it is issued] and the grant of such licence shall not be withheld by the [Board] unless it has reason to believe that the business which it is intended to establish or maintain would be offensive or dangerous to the public.

(3) Notwithstanding anything contained in sub-section (1).—

(a) no person who was, at the commencement of this Act, carrying on his trade, calling or occupation in any part of a cantonment shall be bound to apply for a licence for carrying on such trade or occupation in that part until he has received from the [Board] not less than three months' notice in writing of his obligation to do so, and if the [Board] refuses to grant him a licence, it shall pay compensation for any loss incurred by reason of such refusal;

(b) no person shall be required to take out a licence for the sale or storage of petroleum or for the sale or possession for sale of poisons or white arsenic in any case in which he is required to take out a licence for such sale, storage or possession for sale by or under the Indian Petroleum Act, 1899, or the Poisons Act, 1919.

Leg. Ref.

¹ In sub-S (1) of S 210, Clauses (r) to (r) have been re-numbered as (s) to (q) by Act XXIV of 1934

² Omitted by Act XXIV of 1936.

³ Inserted by Act XXIV of 1936.

⁴ Substituted by Act XXIV of 1936.

Notes.

within the limits of the cantonment without any licence is liable to prosecution under S. 268 of the Cantonments Act for being a dealer in wood within the meaning of S. 210 (M) 1934 All 987 (1). On this section, see also 1933 Lah. 517.

(4) The [Board] may charge for the grant of licences under this section such fees [not exceeding the cost of granting the licences] as it may fix with the previous sanction of the [Provincial Government].

211. A licence granted to any person under section 210 shall specify the part of the cantonment in which the licensee may carry on his trade, calling or occupation, and may regulate the hours and manner of transport within the cantonment of any specified articles intended for human consumption, and may contain any other conditions which the [Board] thinks fit to impose in accordance with bye-laws made under this Act.

General Provisions.

212. If a [Board] is satisfied that any place used under a licence granted under this Chapter is a nuisance or is likely to be dangerous to life, health or property, the [Board] may, by notice in writing, require the owner, lessee or occupier thereof to discontinue the use of such place or to effect such alterations, additions, or improvements as will, in the opinion of the [Board], render it no longer a nuisance or dangerous.

213. Whoever carries on any trade, calling or occupation for which a licence is required without obtaining a licence therefor or while the licence therefor is suspended or after the same has been cancelled, and whoever, after receiving a notice under section 212, uses or allows to be used any building or place in contravention thereof, shall be punishable with fine which may extend to two hundred rupees and, in the case of a continuing offence, with an additional fine which may extend to forty rupees for every day after the first during which the offence is continued.

214. Whoever feeds or allows to be fed on filthy or deleterious substances any animal, which is kept for the purpose of supplying milk to, or which is intended to be used as food for, the inhabitants of a cantonment or allows it to graze in any place in which grazing has, for sanitary reasons, been prohibited by public notice by the [Board], shall be punishable with fine which may extend to fifty rupees.

Entry, Inspection and Seizure.

215. (1) The President or the Vice-President² [+ 4] the Executive Officer, the Health Officer, the Assistant Health Officer, or any other officer or servant of a [Board] authorised by it in writing in this behalf,—

(a) may at any time enter into any market, building, shop, stall or other place in the cantonment for the purpose of inspecting, and may inspect, any animals, article or thing intended for human food or drink or for medicine, whether exposed or hawked about for sale or deposited in or brought to any place for the purpose of sale, or of preparation for sale, or any utensil or vessel for preparing, manufacturing or containing any such article, or thing, and may

Leg Ref.

¹ Inserted by Act XXIV of 1936

² Omitted by *ibid*

Notes

Sec 213.—Where a person, who was a butcher by trade and had no licence, actually imported meat in large quantities far more than could be required for his personal use and had distributed it but where there was no evidence that he actually received any money the presumption that he actually imported meat and sold it can be legitimately

drawn. 118 I.C. 223=30 Cr.L.J. 906=1929 Sind 150

Secs 213 and 216.—Where a butcher, having no licence as required by Ss 213 and 216 of the Act, imports meat in far larger quantities than would be required for his personal use and distributes it, but there is no evidence to show that he actually received any money, it could be presumed that he actually imported and sold meat. 118 I.C. 223=30 Cr.L.J. 906=1929 Sind 150

enter into and inspect any place used as a slaughter-house and may examine any animal or article therein;

(b) may seize any such animal, article or thing which appears to him to be diseased, or unwholesome or unfit for human food or drink or medicine, as the case may be, or to be adulterated or to be not what it is represented to be, or any such utensil or vessel which is of such a kind or in such a state as to render any article prepared, manufactured or contained therein unwholesome or unfit for human food or for medicine, as the case may be.

(2) Any article seized under sub-section (1) which is of a perishable nature may, under the orders of the Health Officer or the Assistant Health Officer, forthwith be destroyed if, in his opinion, it is diseased, unwholesome or unfit for human food, drink or medicine, as the case may be.

(3) Every animal, article, utensil, vessel or other thing seized under sub-section (1) shall, if it is not destroyed under sub-section (2), be taken before a Magistrate.

(4) The owner or person in possession, at the time of seizure under sub-section (1), of any animal or carcass which is diseased or of any article or thing which is unwholesome or unfit for human food, drink or medicine as the case may be, or is adulterated or is not what it is represented to be, or of any utensil or vessel which is of such kind or in such state as is described in clause (b) of sub-section (1), shall be punishable with fine which may extend to one hundred rupees, and the animal, article, utensil, vessel or other thing shall be liable to be forfeited to the [Board] or to be destroyed or to be so disposed of as to prevent its being exposed for sale or used for the preparation of food, drink or medicine, as the case may be.

Explanation I.—If any such article, having been exposed or stored in, or brought to, any place mentioned in sub-section (1) for sale as ghee, contains any substance not exclusively derived from milk, it shall be deemed, for the purposes of this section, to be an article which is not what it is represented to be.

Explanation II.—Meat subjected to the process of blowing shall be deemed to be unfit for human food.

Explanation III.—The article of food or drink shall not be deemed to be other than what it is represented to be merely by reason of the fact that there has been added to it some substance not injurious to health.

Provided that—

(a) such substance has been added to the article because the same is required for the preparation or production thereof as an article of commerce in a state fit for carriage or consumption and not fraudulently to increase the bulk, weight or measure of the food or drink or conceal the inferior quality thereof, or

(b) in the process of production, preparation or conveyance of such article of food or drink, the extraneous substance has unavoidably become intermixed therewith, or

(c) the owner or person in possession of the article has given sufficient notice by means of a label distinctly and legibly written or printed thereon or therewith, or by other means of a public description, that such substance has been added, or

(d) such owner or person has purchased the article with a written warranty that it was of a certain nature, substance and quality and had no reason to believe that it was not of such nature, substance and quality, and has exposed it or hawked it about or brought it for sale in the same state and by the same description as that in and by which he purchased it.

Import of Catile and Flesh.

216. (1) No person shall, without the permission in writing of the

Notes.

Sec 216 —See Notes under S 213, *supra*

Import of cattle and flesh [Board], bring into a cantonment any animal intended for human consumption, or the flesh of any animal slaughtered outside the cantonment otherwise than in a slaughter-house maintained by the Government or the [Board].

(2) Any animal or flesh brought into a cantonment in contravention of sub-section (1) may be seized by the Executive Officer or by any servant of the [Board] and sold or otherwise disposed of as the [Board] may direct, and if it is sold, the sale-proceeds may be credited to the cantonment fund.

(3) Whoever contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to fifty rupees

(4) Nothing in this section shall be deemed to apply to cured or preserved meat or to animals driven or meat carried through a cantonment for consumption outside thereof, or to meat brought into a cantonment by any person for his immediate domestic consumption:

Provided that the [Board] may, by public notice, direct that the provisions of this section shall apply to cured or preserved meat of any specified description or brought from any specified place

CHAPTER XIII.

WATER-SUPPLY, DRAINAGE AND LIGHTING.

Water-supply.

217. (1) In every cantonment where a sufficient supply of pure water for domestic use does not already exist, the [Board] shall provide or arrange for the provision of such a supply.

(2) The [Board] shall, as far as possible, make adequate provision that such supply shall be continuous throughout the year, and that the water shall be at all times pure and fit for human consumption

218. (1) The [Board] may with the previous sanction of the 1[Central Government] by public notice, declare any lake, stream, spring, well, tank, reservoir or other source, whether within or without the limits of the cantonment (other than a source of water-supply under the control of the 2[Military Engineer] Services or the Public Works Department) from which water is or may be made available for the use of the public in the cantonment to be a source of public water-supply.

(2) Every such source shall be under the control of the [Board].

219. The [Board] may, by notice in writing, require the owner or any person having the control of any source of public water-supply which is used for drinking purposes—

(a) to keep the same in good order and to clear it from time to time of silt, refuse and decaying vegetation, or

(b) to protect the same from contamination in such manner as the [Board] may direct, or

(c) if the water therein is proved to the satisfaction of the [Board] to be unfit for drinking purposes, to take such measures as may be specified in the notice to prevent the public from having access to or using such water:

Provided that, in the case of a well, such person as aforesaid may, instead of complying with the notice, signify in writing his desire to be relieved of all

Leg. Ref.

¹ Substituted by Order in Council, 1937

² These words were substituted by S. 9 of

the Cantonments (Amendment) Act, 1925 (VII of 1925).

responsibility for the proper maintenance of the well and his readiness to place it under the control and supervision of the [Board] for the use of the public, and if he does so, he shall not be bound to carry out the requisition, and the [Board] shall undertake the control and supervision of the well.

220. (1) The [Board] may permit the owner, lessee or occupier of any building or land to connect the building or land with a source of public water-supply by means of communication pipes of such size and description as it may prescribe for the purpose of obtaining water for domestic use.

(2) The occupier of every building so connected with the water-supply shall be entitled to have for domestic use, in return for the water-tax, if any, such quantity of water as the [Board] may determine.

(3) All water supplied in excess of the quantity to which such supply is limited under sub-section (2) and, in a cantonment in which a water-tax is not imposed, all water supplied under this section, shall be paid for at such rate as the [Board] may fix.

(4) The supply of water for domestic use shall not be deemed to include any supply—

(a) for animals or for washing vehicles where such animals or vehicles are kept for sale or hire;

(b) for any trade, manufacture or business;

(c) for fountains, swimming baths of any ornamental or mechanical purpose;

(d) for gardens or for purposes of irrigation;

(e) for making or watering roads or paths; or

(f) for building purposes.

221. If it appears to the [Board] that any building or land in the cantonment is without a proper supply of pure water, the [Board] may, by notice in writing, require the owner, lessee or occupier of the building or land to obtain from a source of public water-supply such quantity of water as is adequate to the requirements of the persons usually occupying or employed upon the building or land, and to provide communication pipes of the prescribed size and description, and to take all necessary steps for the above purposes.

222. (1) The [Board] may, by agreement, supply, from any source of public water-supply, the owner, lessee or occupier of any building or land in the cantonment with any water for any purpose other than a domestic purpose, on such terms and conditions, consistent with this Act and the rules and bye-laws made thereunder, as may be agreed upon between the [Board] and such owner, lessee or occupier.

(2) The [Board] may withdraw such supply or curtail the quantity thereof at any time if it should appear necessary to do so for the purpose of maintaining sufficient supply of water for domestic use by inhabitants of the cantonment.

223. Notwithstanding any obligation imposed on [Boards] under this Act, a [Board] shall not be liable to any forfeiture, penalty, or damages for failure to supply water or for curtailing the quantity thereof if the failure or curtailment, as the case may be, arises from accident or from drought or other unavoidable cause unless, in the case of an agreement for the supply of [Board] not liable for failure of supply.

water under section 222, the [Board] has made express provision for forfeiture, penalty, or damages in the event of such failure or curtailment.

224. Notwithstanding anything hereinbefore contained or contained in any agreement under section 222, the supply of water

Conditions of universal application.

by a [Board] to any building or land shall be, and shall be deemed to have been, granted subject to the

following conditions, namely:—

(a) the owner, lessee or occupier of any building or land in or on which water supplied by the [Board] is wasted by reason of the pipes, drains or other works being out of repair shall, if he has knowledge thereof, give notice of the same to such officer as the [Board] may appoint in this behalf;

(b) the Executive Officer or any other officer or servant of the [Board] authorised by it in writing in this behalf may enter into or on any premises supplied with water by the [Board] for the purpose of examining all pipes, taps, works and fittings connected with the supply of water and of ascertaining whether there is any waste or misuse of such water;

(c) the [Board] may, after giving notice in writing, cut off the connection between any source of public water-supply and any building or land to which water is supplied for any purpose therefrom, or turn off such supply if—

(i) the owner or occupier of the building or land neglects to pay the water-tax or other charges connected with the water-supply within one month from the date on which such tax or charge falls due for payment;

(ii) the occupier refuses to admit the Executive Officer or other authorised officer or servant of the [Board] into the building or land for the purpose of making any examination or inquiry authorised by clause (b) or prevents the making of such examination or inquiry;

(iii) the occupier wilfully or negligently misuses or causes waste of water;

(iv) the occupier wilfully or negligently injures or damages his meter or any pipe or tap conveying water from the water-works,

(v) any pipes, taps, works or fittings connected with the supply of water to the building or land are found, on examination by the Executive Officer, to be out of repair to such an extent as to cause a waste of water;

(d) the expense of cutting off the connection or of turning off the water in any case referred to in clause (c) shall be paid by the owner or occupier of the building or land;

(e) no action taken under or in pursuance of clause (c) shall relieve any person from any penalty or liability which he may otherwise have incurred

225. A [Board] may allow any person not residing within the limits of

Supply to persons outside cantonment

the cantonment to take or be supplied with water for any purpose from any source of public water-supply on such terms as it may prescribe, and may at any time withdraw or curtail such supply.

Penalty.

226. Whoever—

(a) uses for other than domestic purposes any water supplied by a [Board] for domestic use, or

(b) where water is supplied by agreement with a [Board] for a specified purpose, uses that water for any other purpose, shall be punishable with fine which may extend to fifty rupees, and the [Board] shall be entitled to recover from him the price of the water misused.

Water, Drainage and other Connections.

Power of [Board] to lay wires, connections, etc.

227. A [Board] may carry any cable, wire, pipe, drain, sewer or channel of any kind,—

(a) for the purpose of carrying out, establishing or maintaining any system of water-supply, lighting, drainage, or sewerage, through, across, under

or over any road or street, or any place laid out or intended as a road or street, or, after giving reasonable notice in writing to the owner or occupier, into, through, across, under or over any land or building, or up the side of any building, situated within the cantonment, or

(b) for the purpose of supplying water or of the introduction or distribution of outfall of water or for the removal or outfall of sewage, after giving reasonable notice in writing to the owner or occupier, into, through, across, under or over any land or building, or up the side of any building, situated outside the cantonment;

and may at all times do all acts and things which may be necessary or expedient for repairing or maintaining any such cable, wire, pipe, drain, sewer or channel in an effective state for the purpose for which the same may be used or is intended to be used:

Provided that no nuisance shall be caused in excess of what is reasonably necessary for the proper execution of the work:

Provided, further, that compensation shall be payable to the owner or occupier for any damage sustained by him which is directly occasioned by the carrying out of any such operation

228 In the event of any cable, wire, pipe, drain, sewer or channel being laid or carried above the surface of any land or through, over or up the side of any building, such cable, wire, pipe, drain, sewer or channel shall be so laid or carried as to interfere as little as possible with the rights of the owner or occupier to the due enjoyment of such land or building, and compensation shall be payable by the [Board] in respect of any substantial interference with the right to any such enjoyment.

Wires, etc., laid above surface of ground.

229. No person shall, for any purpose whatsoever, without the permission of the [Board], at any time make or cause to be made any connection or communication with any cable, wire, pipe, drain, sewer or channel constructed or maintained by, or vested in, a [Board].

Connection with main not to be made without permission.

230. A [Board] may prescribe the size of the ferrules to be used for the supply of gas, if any, and may establish meters or other appliances for the purpose of testing the quantity of any water, or the quantity or quality of any gas, supplied to any premises by the [Board].

Power to prescribe ferrules and to establish meters, etc

231. The ferrules, communication pipes, connections, meters, stand-pipes and all fittings thereon or connected therewith leading from water mains or from pipes, drains, sewers or channels into any house or land, to which water or gas is supplied by a [Board], and the pipes, fittings and works inside any such house or within the limits of any such land, shall in all cases be ¹[installed or] executed subject to the inspection and to the satisfaction of the [Board].

Power of inspection.

232. A [Board] may fix the charges to be made for the establishment by them or through their agency of communications from, and connections with, mains or pipes for the supply of water, or gas, or for meters or other appliances for testing the quantity or quality thereof supplied, and may levy such charges accordingly.

Power to fix rates and charges.

Application of this Chapter to Government Water-supplies.

233. (1) Where in any cantonment there is a water-supply under the control of the 1[Military Engineer] Services or the Government water-supply. Public Works Department, the officer of the 1[Military Engineer] Services or of the Public Works Department, as the case may be, in charge of such water-supply (hereinafter in 2[this Chapter] referred to as the Officer) may publish in the cantonment in such manner as he thinks fit a notice declaring that any lake, stream, spring, well, tank, reservoir or other source, whether within or without the limits of the cantonment (other than a source of public water-supply under the control of the [Board]) is a source of public water-supply and may, for the purpose of keeping any such source in good order or of protecting it from contamination or from use, require the [Board] to exercise any power conferred upon that Authority by section 219.

(2) In the case of any water-supply such as is referred to in sub-section (1), the following provisions of this Chapter, namely, the provisions of sections 220, 222, 223, 224, 226, 227, 228, 229, 230, 231 and 232 shall, as far as may be, be applicable in respect of the supply of water to the cantonment, and for the purpose of such application references to the [Board] shall be construed as references to the Officer, and references to the Executive Officer or other officer or servant of the [Board] shall be construed as references to such person as may be authorised in this behalf by the Officer.

234. In any case in which the provisions of section 233 apply 3[and in which the Board is not receiving a bulk supply of water under S. 234-A] the water-tax, if any, imposed in the cantonment and all other charges arising out of the supply of water which may be imposed under the provisions of this Chapter as applied by section 233 shall be recovered by the [Board], and all monies so recovered, or such proportion thereof as the 4[Central Government] may in each case determine, shall be paid by the [Board] to the Officer.

5[234-A. (1) Where in any cantonment there is a water-supply such as is referred to in sub-section (1) of S. 233, the Board may receive from the Military Engineer Services or the Public Works Department, as the case may be, at such point or points as may be agreed upon between the Board and the Officer, a supply of water adequate to the requirements for domestic use of all persons in the cantonment other than entitled consumers.

(2) Any supply of water received under sub-section (1) shall be a bulk supply, and the Board shall make such payments to the Officer for all water so received as may be agreed upon between the Board and the Officer, or, in default of such agreement, as may be determined by the Governor-General in Council to be reasonable having regard to the actual cost of supplying the water in the cantonment and the rate charged for water in any adjacent municipality:

Provided that, notwithstanding anything contained in this Act, the Board shall not charge for the supply to persons in the cantonment of water received by the Board under this section a rate calculated to produce more than the sum of the payments made to the Officer for water received and the actual cost of the supply thereof by the Board to consumers.

(3) If any dispute arises between the Board and the Officer regarding the amount of water adequate to the requirements of persons in the cantonment

Leg Ref.

¹ These words were substituted by S. 9 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

² Substituted by Act XXIV of 1936.

³ Inserted by Act XXIV of 1936.

⁴ Substituted by Order in Council, 1937.

⁵ Secs 234-A and 234-B inserted by Act XXIV of 1936.

other than entitled consumers, the dispute shall be referred to the Governor-General in Council whose decision shall be final.

234-B. Where under the provisions of sub-section (1) of S. 234-A a bulk supply of water is received by the Board, the Board shall be solely responsible for the supply of water to all persons in the cantonment other than entitled consumers; and the provisions of this Act shall apply as if such bulk supply were a source of public water-supply under the control of the Board and as if the communications from and connections with such bulk supply for the purpose of supplying water to such persons were a system of water-supply established and maintained by the Board.

CHAPTER XIV.

REMOVAL AND EXCLUSION FROM CANTONMENTS AND SUPPRESSION OF SEXUAL IMMORALITY.

235. The ¹[Officer Commanding the station] may, on receiving information that any building in the cantonment is used as a brothel or for purposes of prostitution, by order in writing setting forth the substance of the information received, summon the owner, lessee, tenant or occupier of the building to appear before him either in person or by an authorised agent, and, if the ²[Officer Commanding the station] is then satisfied as to the truth of the information, he may, by order in writing direct the owner, lessee, tenant or occupier, as the case may be, to discontinue such use of the building within such period as may be specified in the order.

236. (1) Whoever in a cantonment loiters for the purpose of prostitution or importunes any person to the commission of sexual immorality, shall be punishable with imprisonment which may extend to one month, or with fine which may extend to two hundred rupees.

(2) No prosecution for an offence under this section shall be instituted except on the complaint of the person importuned, or of a military officer in whose presence the offence was committed, or of a member of the Military or

Leg Ref.

¹ These words were substituted by S. 10 of the Cantonments (Amendment) Act, 1925 (VII of 1925)

² These words were substituted by S. 14, *ibid*

Notes.

Sec 236 (1).—A Magistrate can convict a male of the offence of loitering for the purpose of prostitution under S. 236 (1). 28 Bom. L. R. 298=27 Cr.L.J. 555=93 I C 1051=1926 Bom. 227.

There is nothing in the wording of S. 236 (1) which requires that the person importuning must importune to the commission of sexual immorality with himself or herself. (1926 Bom 227, Rel. on.) 160 I.C 884=37 Cr.L J 372=1936 A.L.J. 193=1936 All. 129.

Sec. 236 (2): PROPER COMPLAINT—REQUIREMENTS —A complaint under S. 236 was sent in writing by a Regimental Provost Sergeant to a Sub-Inspector of Police who forwarded it in original to the Magistrate. The Magistrate acted upon the complaint. The Regimental Provost Sergeant was a

member of the military police and was authorised to make complaints under S. 236. A part of the offence was committed in presence of this officer. *Held*, that a proper complaint was made to the Magistrate in accordance with the provisions of S. 236 (2). 160 I C 884=37 Cr.L.J. 372=1936 A.L.J. 193=1936 All 129

PROSECUTION BY EXECUTIVE OFFICER—LEGALITY OF.—In order that a person can be legally convicted under S. 236 it is necessary that the prosecution should be instituted strictly in accordance with the provisions laid down in sub-S. (2), S. 236. An Executive Officer of a Cantonment launched a prosecution under S. 236 against the accused and the accused was convicted under that section. The Executive Officer was not the person importuned, nor did the prosecution allege that the offence was committed in his presence or that he had been authorized in this behalf by the Officer Commanding the station. *Held*, that the prosecution being illegally instituted, the conviction of the accused must be set aside. 1933 Lah. 590=147 I.C. 1200=35 P.L.R. 284.

Air Force Police, being employed in the cantonment and authorised in this behalf by the 1[Officer Commanding the station], in whose presence the offence was committed, or of a police officer not below the rank of a sub-inspector 2[or a sergeant] who is employed in the cantonment and authorised in this behalf by the 1[Officer Commanding the station] 2[with the concurrence of the District Magistrate].

237. If the 3[Officer Commanding the station] is, after such inquiry as he thinks necessary, satisfied that any person residing in or frequenting the cantonment is a prostitute or has been convicted of an offence under section 236, or of the abetment of such an offence, he may cause to be served on such person an order in writing requiring such person to remove from the cantonment within such time as may be specified in the order, and prohibiting such person from re-entering it without the permission in writing of the 1[Officer Commanding the station].

Removal and exclusion from cantonments of disorderly persons. 238. (1) A Magistrate of the first class, having jurisdiction in a cantonment, on receiving information that any person residing in or frequenting the cantonment—

(a) is a disorderly person who has been convicted more than once of gaming or who keeps or frequents a common gaming house, a disorderly drinking shop or a disorderly house of any other description, or

(b) has been convicted more than once, either within the cantonment or elsewhere, of an offence punishable under Chapter XVII of the Indian Penal Code, or

(c) has been convicted, either within the cantonment or elsewhere, of any offence punishable under section 156 of the Army Act, or

(d) has been ordered under Chapter VIII of the Code of Criminal Procedure, 1898, either within the cantonment or elsewhere, to execute a bond for his good behaviour, may record in writing the substance of the information received, and may issue a summons to such person requiring such person to appear and show cause why he should not be required to remove from the cantonment and be prohibited from re-entering it.

(2) Every summons issued under sub-section (1) shall be accompanied by a copy of the record aforesaid, and the copy shall be served along with the summons on the person against whom the summons is issued.

(3) The Magistrate shall, when the person so summoned appears before him, proceed to inquire into the truth of the information received and take such further evidence as he thinks fit, and if, upon such inquiry, it appears to him that such person is a person of any kind described in sub-section (1) and that it is necessary for the maintenance of good order in the cantonment that such person should be required to remove therefrom and be prohibited from re-entering the cantonment, the Magistrate shall report the matter to the 1[Officer Commanding the station], and if the 1[Officer Commanding the station] so directs, shall cause to be served on such person an order in writing requiring him to remove from the cantonment within such time as may be specified in the order and prohibiting him from re-entering it without the permission in writing of the 1[Officer Commanding the station].

Leg Ref

¹ These words were substituted by S. 14 of the Cantonments (Amendment) Act, 1925 (VII of 1925)

² In sub-S. (2) of S. 236, after the word "sub-inspector" the words "or a sergeant" have been inserted and after the words

"Officer Commanding the Station" where they occur the second time, the words "with the concurrence of the District Magistrate" have been added by Act VII of 1931

³ These words were substituted by S. 10 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

239. (1) If any person in a cantonment causes or attempts to cause or does any act which he knows is likely to cause disloyalty, disaffection or breaches of discipline amongst any portion of His Majesty's forces or is a person who, the 1[Officer Commanding the station] has reason to believe, is likely to do any such act, the 1[Officer Commanding the station] may make an order in writing setting forth the reasons for the making of the same and requiring such person to remove from the cantonment within such time as may be specified in the order and prohibiting him from re-entering it without the permission in writing of the 1[Officer Commanding the station]:

Removal and exclusion from cantonment of seditious persons.

Provided that no order shall be made under this section against any person unless he has had a reasonable opportunity of being informed of the grounds on which it is proposed to make the order and of showing cause why the order should not be made.

(2) Every order made under sub-section (1) shall be sent to the Superintendent of Police of the district, who shall cause a copy thereof to be served on the person concerned.

(3) Upon the making of any order under sub-section (1), the 1[Officer Commanding the station] shall forthwith send a copy of the same to the 2[Central Government].

(4) The 2[Central Government] may, of its own motion, and shall, on application made to it in this behalf within one month of the date of the order by the person against whom the order has been made, call upon the District Magistrate to make, after such inquiry as the 2[Central Government] may prescribe, a report regarding the justice of the order and the necessity therefor. At every such inquiry the person against whom the order has been made shall be given an opportunity of being heard in his own defence.

(5) The 2[Central Government] may at any time after the receipt of a copy of an order sent under sub-section (3) or, where a report has been called for under sub-section (4), on receipt of that report, if it is of opinion that the order should be varied or rescinded, 2[make such orders thereon as it thinks fit.]

(6) Any person who has been excluded from a cantonment by an order made under this section may, at any time after the expiry of one month from the date thereof, apply to the officer Commanding-in-Chief, the Command, for the rescission of the same and, on such application being made, the said Officer may, after making such inquiry, if any, as he thinks necessary, either reject the application or rescind the order.

Penalty.

240. Whoever—

(a) fails to comply with an order issued under this Chapter within the period specified therein, or, whilst an order prohibiting him from re-entering a cantonment without permission is in force, re-enters the cantonment without such permission, or

(b) knowing that any person has, under this Chapter, been required to remove from the cantonment and has not obtained the requisite permission to re-enter it, harbours or conceals such person in the cantonment, shall be punishable with fine which may extend to two hundred rupees, and, in the case of a continuing offence with an additional fine which may extend to twenty rupees for every day after the first during which he has persisted in the offence

Leg. Ref.

¹ These words were substituted by S. 14 of the Cantonments (Amendment) Act, 1925

(VII of 1925).

² Substituted by Order in Council, 1937.

CHAPTER XV.

POWERS, PROCEDURE, PENALTIES AND APPEALS.

Entry and Inspection.

241. It shall be lawful for the President or the Vice-President of a Board or the Executive Officer, or the Health Officer or Assistant Health Officer, or any person specially authorised by the Health Officer or the Assistant Health Officer or for any other person authorised by general or special order of a [Board] in this behalf, to enter into or upon any building or land with or without assistants or workmen in order to make any inquiry, inspection, measurement, valuation or survey, or to execute any work, which is authorised by or under this Act or which it is necessary to make or execute for any of the purposes or in pursuance of any of the provisions of this Act or of any rule, bye-law or order made thereunder:

Provided that nothing in this section shall be deemed to confer upon any person any power such as is referred to in section 207 or section 215 or to authorise the conferment upon any person of any such power.

242. With the previous sanction of the President, any member of a Board may inspect any work or institution constructed or maintained, in whole or part, at the expense of the Board, and any register, book, accounts or other document belonging to, or in the possession of, the Board.

243. (1) A [Board] may, by general or special order, authorise any person—

(a) to inspect any drain, privy, latrine, urinal, cesspool, pipe, sewer or channel in or on any building or land in the cantonment, and, in his discretion, to cause the ground to be opened for the purpose of preventing or removing any nuisance arising from the drain, privy, latrine, urinal, cesspool, pipe, sewer or channel, as the case may be:

(b) to examine works under construction in the cantonment, to take levels or to remove, test, examine, replace or read any meter.

(2) If, on such inspection, the opening of the ground is found to be necessary for the prevention or removal of a nuisance, the expenses thereby incurred shall be paid by the owner or occupier of the land or building, but if it is found that no nuisance exists or but for such opening would have arisen, the ground or portion of any building, drain or other work opened, injured or removed for the purpose of such inspection shall be filled in, reinstated, or made good, as the case may be, by the [Board].

244. (1) The Executive Officer of a Cantonment may, with or without assistants or workmen, enter on any land within fifty yards of any work authorised by or under this Act for the purpose of depositing thereon any soil, gravel, stone or other materials, or of obtaining access to such work, or for any other purpose connected with the carrying on of the same.

(2) The Executive Officer shall, before entering on any land under subsection (1), give the occupier, or, if there is no occupier, the owner not less than three days' previous notice in writing of his intention to make such entry, and shall state the purpose thereof, and shall, if so required by the occupier or owner, fence off so much of the land as may be required for such purpose.

(3) The Executive Officer shall, in exercising any power conferred by this section, do as little damage as may be, and compensation shall be payable by the [Board] to the owner or occupier of such land, or to both, for any such damage whether permanent or temporary.

245. It shall be lawful for any person, authorised by or under this Act to make any entry into any place, to open or cause to be opened any door, gate or other barrier—

Breaking into premises.

(a) if he consider the opening thereof necessary for the purpose of such entry; and

(b) if the owner or occupier is absent, or being present refuses to open such door, gate or barrier.

Entry to be made in the day time.

and sunset.

246. Save as otherwise expressly provided in this Act, no entry authorised by or under this Act shall be made except between the hours of sunrise

247. Save as otherwise expressly provided in this Act, no building or land shall be entered without the consent of the occupier, or if there is no occupier, of the owner thereof, and no such entry shall be made without giving the said occupier or owner, as the case may be, not less than four hours' written notice of the intention to make such entry:

Provided that no such notice shall be necessary if the place to be inspected is a stable for horses or a shed for cattle, or a latrine, privy or urinal, or a work under construction.

248. When any place used as a human dwelling is entered under this Act, due regard shall be paid to the social and religious customs and usages of the occupants of the place entered, and no apartment in the actual occupancy of a female shall be entered or broken open until she has been informed that she is at liberty to withdraw and every reasonable facility has been afforded to her for withdrawing.

249. Whoever obstructs or molests any person employed by a [Board] who is not a public servant within the meaning of section 21 of the Indian Penal Code or any person with whom the [Board] has lawfully contracted, in the execution of his duty or of anything which he is empowered or required to do by virtue or in consequence of any of the provisions of this Act or of any rule, bye-law or order made thereunder, or in fulfilment of his contract, as the case may be, shall be punishable with fine which may extend to one hundred rupees.

Powers and Duties of Police Officers

250. Any member of the police force employed in a cantonment may, without a warrant, arrest any person committing in his view a breach of any of the provisions of this Act which are specified in Schedule IV:

Provided that—

(a) in the case of the breach of any such provision as is specified in Part B of Schedule IV, no person shall be so arrested who consents to give his name and address, unless there is reasonable ground for doubting the accuracy of the name or address so given, the burden of proof of which shall lie on the arresting officer, and no person so arrested shall be detained after his name and address have been ascertained; and

Notes.

Sec. 247: ENTRY WITH HOUSE-OWNER'S IMPLIED CONSENT.—NOTICE, IF REQUIRED.—The entry which is contemplated in S. 247 of the Cantonments Act which requires 4 hours' written notice is an entry without the consent of the occupier or the owner. Where the entry is with the implied consent of such occupier or owner, no question of written notice arises. 153 I.C. 469=36 Cr L.J. 356=1935 A.W.R. 71=1935 A.L.J. 175=1935 All. 160.

Sec. 249: OBSTRUCTION—REFUSAL TO PAY

RENT.—Where a tenant, who is liable to pay rent to a contractor of the Cantonment Committee who has been duly authorized to collect rent from him, refuses to pay rent either to him or to his servant, the mere refusal to pay rent does not amount to an obstruction within the purview of S. 249. Therefore a complaint founded on S. 249 is, to say the least of it, clearly misconceived and an action for malicious prosecution lies against the complainant. 188 I.C. 282=1932 All. 386.

(b) no person shall be so arrested for an offence under section 236 except—

(i) at the request of the person importuned or of a military officer in whose presence the offence was committed; or

(ii) by or at the request of a member of the Military or Air Force Police, who is employed in the cantonment and authorised in this behalf by the 1[Officer Commanding the station], and in whose presence the offence was committed or by or at the request of any police officer not below the rank of a sub-Inspector who is employed in the cantonment and authorised in this behalf by the 1[Officer Commanding the station].

251. It shall be the duty of all police officers to give immediate information to the [Board] of the commission of any offence against the provisions of this Act or of any rule or bye-law made thereunder, and to assist all cantonment officers and servants in the exercise of their lawful authority.

Notices.

252. Where any notice, order or requisition made under this Act or any rule or bye-law made thereunder requires anything to be done for the doing of which no time is fixed in this Act or in the rule or bye-law, the notice, order or requisition shall specify a reasonable time for doing the same.

253. Every notice, order or requisition issued by a [Board] under this Act or any rule or bye-law made thereunder shall be signed—

(a) 2[* * *] either by the President of the Board or by the Executive Officer, or 2[* * *].

(b) by the members of any committee especially authorised by the [Board] in this behalf.

254. (1) Every notice, order or requisition issued under this Act or any rule or bye-law made thereunder shall, save as otherwise expressly provided, be served or presented—

Service of notice, etc.

(a) by giving or tendering the notice, order or requisition, or sending it by post, to the person for whom it is intended; or

(b) if such person cannot be found, by affixing the notice, order or requisition on some conspicuous part of his last known place of abode or business, if within the cantonment, or by giving or tendering the notice, order or requisition to some adult male member or servant of his family, or by causing it to be affixed on some conspicuous part of the building or land, if any, to which it relates.

(2) When any such notice, order or requisition is required or permitted to be served upon an owner, lessee or occupier of any building or land, it shall not be necessary to name the owner, lessee or occupier therein, and the service thereof shall, save as otherwise expressly provided, be effected either—

(a) by giving or tendering the notice, order or requisition, or sending it by post, to the owner, lessee or occupier, or, if there are more owners, lessees or occupiers than one, on any one of them; or

(b) if no such owner, lessee or occupier can be found, by giving or tendering the notice, order or requisition to the authorised agent, if any, of any such owner, lessee or occupier, or to an adult male member or servant of the family of any such owner, lessee or occupier, or by causing it to be affixed on some conspicuous part of the building or land to which it relates.

(3) When the person on whom a notice, order or requisition is to be served is a minor, service upon his guardian or upon an adult male member or servant of his family shall be deemed to be service upon the minor.

Leg Ref.

¹ These words were substituted by S 14 of the Cantonments (Amendment) Act, 1925

(VII) of 1925).

² Omitted by Act XXIV of 1930.

255. Every notice which, by or under this Act, is to be given or served as a public notice or as a notice which is not required to be given to any individual therein specified shall, save as otherwise expressly provided, be deemed to have been sufficiently given or served if a copy thereof is affixed in such conspicuous part of the office of the [Board] or in such other public place, during such period or is published in such local newspaper or in such other manner, as the [Board] may direct.

256. In the event of non-compliance with the terms of any notice, order or requisition issued to any person under this Act, or any rule or bye-law made thereunder, requiring such person to execute any work or to do any act, it shall be lawful for the [Board] whether or not the person in default is liable to punishment for such default or has been prosecuted or sentenced to any punishment therefor, after giving notice in writing to such person, to take such action or such steps as may be necessary for the completion of the act or work required to be done or executed by him, and all the expenses incurred on such account shall be recoverable by the [Board].

Recovery of Money.

257. (1) If any such notice as is referred to in section 256 has been given to any person in respect of property of which he is the owner, the [Board] may require any occupier of such property or of any part thereof to pay to it, instead of to the owner, any rent payable by him in respect of such property, as it falls due, up to the amount recoverable from the owner under section 256:

Provided that, if the occupier, on application made to him by the [Board] refuses truly to disclose the amount of his rent or the name or address of the person to whom it is payable, the [Board] may recover from the occupier the whole amount recoverable under section 256.

(2) Any amount recovered from an occupier instead of from an owner under sub-section (1) shall, in the absence of any contract between the owner and the occupier to the contrary, be deemed to have been paid to the owner.

258. (1) Where any person, by reason of his receiving the rent of immoveable property as an agent or trustee, or of his being as an agent or trustee the person who would receive the rent if the property were let to a tenant, would under this Act be bound to discharge any obligation imposed on the owner of the property for the discharge of which money is required, he shall not be bound to discharge the obligation unless he has, or but for his own improper act or default might have had, funds in his hands belonging to the owner sufficient for the purpose.

(2) The burden of proving any fact entitling an agent or trustee to relief under sub-section (1) shall lie upon him.

(3) Where any agent or trustee has claimed and established his right to relief under this section, the [Board] may, by notice in writing, require him to apply to the discharge of such obligation as aforesaid the first monies which may come to his hands on behalf, or for the use, of the owner, and, on failure to comply with the notice, he shall be deemed to be personally liable to discharge the obligation.

1[259. (1) Notwithstanding anything elsewhere contained in this Act,

Leg. Ref.

¹ Section 259 substituted for old section 259 by Act XXIV of 1936

Notes

Sec 259 —The expression "recoverable

by the Cantonment Authority under the Act" does not include the case of money due under ordinary contract between that authority and others. It merely applies to such dues as are recoverable by the Cantonment

Method of recovery. arrears of any tax and any other money recoverable by a Board under this Act may be recovered together with the cost of recovery either by suit or, on application to a Magistrate having jurisdiction in the cantonment or in any place where the person from whom such tax or money is recoverable may for the time being be residing, by the distress and sale of any moveable property of, or standing timber, growing crops or grass belonging to, such person which is within the limits of such Magistrate's jurisdiction, and shall, if payable by the owner of any property as such, be a charge on the property until paid:

Provided that the tools of artisans shall be exempt from such distress or sale.

(2) An application to a Magistrate under sub-section (1) shall be in writing and shall be signed by the President or Vice-President of the Board or by the Executive officer, but shall not require to be personally presented].

Committees of Arbitration.

260. In the event of any disagreement as to the liability of a [Board] to pay any compensation under this Act, or as to the amount of any compensation so payable, the person claiming such compensation may apply to the [Board] for the reference of the matter to a Committee of Arbitration, and the [Board] shall forthwith proceed to convene a Committee of Arbitration to determine the matter in dispute.

261. When a Committee of Arbitration is to be convened, the [Board] shall cause a public notice to be published stating the matter to be determined, and shall forthwith send copies of the order to the District Magistrate, and to the other party concerned, and shall, as soon as may be, nominate such members of the Committee as it is entitled to nominate under section 262, and, by notice in writing, call upon the other persons who are entitled to nominate a member or members of the Committee to nominate such member or members in accordance with the provisions of that section.

Constitution of Committee of Arbitration. 262. (1) Every Committee of Arbitration shall consist of five members, namely:—

(a) a Chairman who shall be a person not in the service of the 1[Crown] or the [Board] and who shall be nominated by the 2[Officer Commanding the station];

(b) two persons nominated by the [Board], and

(c) two persons nominated by the other party concerned 3[* * * *].

(2) If the [Board] or the other party concerned or the 2[Officer Commanding the station] fails within seven days of the date of issue of the notice referred to in section 261 to make any nomination which it or he is entitled to make or, if any member who has been so nominated neglects or refuses to act and the [Board] or other person by whom such member was nominated fails to nominate another member in his place within seven days from the date on which it or he may be called upon to do so by the District Magistrate, the District Magistrate shall forthwith appoint a member or members, as the case may be, to fill the vacancy or vacancies.

Leg Ref.

¹ Substituted by Order in Council, 1937.

² These words were substituted by S. 14 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

³ Omitted by Act XXIV of 1936.

Notes.

Authority under the express provisions of certain sections of the Cantonment Act

which entitle it to levy fees for permitting certain acts to be done. Where therefore the Cantonment Authority proceeds to recover arrears of rent due from a tenant by distress and sale of his immoveable property its action is illegal and makes the Authority liable to pay damages to the tenant for its illegal action. 150 I.C. 682=1933 Lah. 517.

No person to be nominated who has direct interest or whose services are not immediately available.

263. (1) No person who has a direct interest in the matter under reference, or whose services are not immediately available for the purposes of the Committee, shall be nominated a member of a Committee of Arbitration.

(2) If, in the opinion of the District Magistrate, any person who has been nominated has a direct interest in the matter under reference, or is otherwise disqualified for nomination, or if the services of any such person are not immediately available as aforesaid, and if the [Board] or other person by whom any such person was nominated fails to nominate another member within seven days from the date on which it or he may be called upon to do so by the District Magistrate, such failure shall be deemed to constitute a failure to make a nomination within the meaning of section 262.

264. (1) When a Committee of Arbitration has been duly constituted, the [Board] shall, by notice in writing, inform each of the members of the fact, and the Committee shall meet as soon as may be thereafter.

(2) The Chairman of the Committee shall fix the time and place of meetings, and shall have power to adjourn any meeting from time to time as may be necessary.

(3) The Committee shall receive and record evidence, and shall have power to administer oaths to witnesses, and, on requisition in writing signed by the Chairman of the Committee, the District Magistrate shall issue the necessary processes for the attendance of witnesses and the production of documents required by the Committee, and may enforce the said processes as if they were processes for attendance or production before himself.

265 (1) The decision of every Committee of Arbitration shall be in accordance with the majority of votes taken at a meeting at which the Chairman and at least three of the other members are present.

(2) If there is not a majority of votes in favour of the proposed decision, the opinion of the Chairman shall prevail.

(3) The decision of a Committee of Arbitration shall be final and shall not be questioned in any Court.

Prosecutions.

266. 1[(1)] Save as otherwise expressly provided in this Act, no Court shall proceed to the trial of any offence made punishable by or under this Act other than an offence specified in Schedule IV, except on the complaint of, or upon information received from,

Leg Ref.

¹ Original S 266 has been re-numbered as sub-section (1) of S 266 by Act XXIV of 1936.

Notes.

Sec 266: INTERPRETATION.—Section 266 only lays down that no Court shall proceed to the trial of any offence under the Act unless moved by the persons mentioned therein and if the persons mentioned therein initiate the proceedings as provided in the section, the Court must follow the procedure laid down in Cr P. Code. 109 I.C. 607=29 Cr.L.J. 591 (Nag.). A complaint was lodged by the Cantonment Board through a Sub-Overseer, signed by the Executive Officer of the Board. The Executive Officer never appeared before the Magistrate. Sub-Overseer did not hold any power of attorney on behalf of the Board. No power of authority was filed to show that the Executive Officer had any authority to lodge such a complaint. On conviction the accused filed a revision. The Executive Officer filed an affidavit that he had an authority to file the complaint. *Held*, that failure to file the authority was an omission curable under S. 537. (116 P.L.R. 1907, Foll.) 111 I.C. 326=29 Cr.L.J. 822=1928 Lah. 946

Where the prosecution of a person for an offence not specified in Sch. IV of the Cantonments Act is instituted on a letter which is a personal application by the Executive Officer of the cantonment authority for his prosecution, and it is not shown that the Executive Officer is authorised by the cantonment authority by a general or special order to act on its behalf in such a proceeding, the complaint is not made in the manner required by S. 266 of the Act and a conviction thereon is liable to be set aside 1935 A.W.R. 985=158 I.C. 1010=1935 A. 905.

the [Board] concerned or a person authorised by the [Board] by a general or special order in this behalf.

1[(2) No offence made punishable under this Act shall be tried by any Magistrate or by any Bench, if such Magistrate or any of the Magistrates composing the Bench is a member of the Board.]

267. (1) A [Board] or any person authorised by it, by general or special order in this behalf, may, either before or after the institution of the proceedings, compound any offence made punishable by or under this Act other than an offence under Chapter XIV:

Composition of offences. Provided that no offence shall be compoundable which is committed by failure to comply with a notice, order or requisition issued by or on behalf of the [Board], unless and until the same has been complied with in so far as compliance is possible.

(2) Where an offence has been compounded, the offender, if in custody, shall be discharged and no further proceedings shall be taken against him in respect of the offence so compounded.

General Penalty Provisions.

268. Whoever, in any case in which a penalty is not expressly provided by this Act, fails to comply with any notice, order or requisition issued under any provision thereof, or otherwise contravenes any of the provisions of this Act, shall be punishable with fine which may extend to two hundred rupees, and, in the case of a continuing failure or contravention, with an additional fine which may extend to twenty rupees for every day after the first during which he has persisted in the failure or contravention

269. Where any person to whom a licence has been granted under this Act or any agent or servant of such person commits a breach of any of the conditions thereof, or of any bye-law made under this Act for the purpose of regulating the manner or circumstances in, or the conditions subject to, which anything permitted by such licence is to be or may be done, the [Board] may, without prejudice to any other penalty which may have been

Leg. Ref.

¹ Section 206 has been re-numbered as sub-section (1) of that section, and to the said section as so re-numbered, sub-S (2) has been added by Act XXIV of 1936

Notes

Sec. 268 —The Executive Officer of the Cantonment is not a member of the "Cantonment Authority" as defined in S. 2 (7) of the Act and a notice issued by him for the removal of an encroachment is invalid. Consequently a person cannot be convicted for disobeying a notice issued by the Executive Officer for removal of encroachment on Government land. Subsequent confirmation of the action of the Executive Officer by the Cantonment Board is of no avail as the notice disobeyed is the notice from the Executive Officer. 1933 C. C. 816 (1)=1933 Lah. 545 (1). The Cantonment Authority gave a qualified sanction to A to proceed with the construction of his building at his own risk in that the site on which the construction was being built was claimed by the Government, but there was no "Municipal objection". As soon as A

proceeded to build, the Cantonment Authority served him with a notice "to demolish the unauthorized construction." A having failed to comply with this notice, he was prosecuted under S. 187 read with S. 268. *Held*, that there was no unauthorized construction because A had sanction from the Board to build the room, that it was preposterous to suggest that when A had had the sanction of the Board in writing under S. 181, he did not have the permission in writing of the Cantonment Authority, and that the question between the parties was a purely civil one and as a matter of fact A had not exceeded the authority given him by the Board in sanctioning his application for building. 146 I.C. 2=34 Cr.L.J. 1191 =1933 All. 486. A merchant who is selling bamboos, rafters, wooden boards and beams within the limits of the Cantonment without any licence is liable to prosecution under S. 268 of the Cantonments Act for being a dealer in wood within the meaning of S. 210 (M.) 1934 All. 987 (1). On this section *see also* 1934 Oudh 29=148 I.C. 420 cited under S. 181, *supra*.

incurred under this Act, by order in writing, cancel the licence or suspend it for such period as it thinks fit:

Provided that no such order shall be made until an opportunity has been given to the holder of the licence to show cause why it should not be made.

270. Where any person has incurred a penalty by reason of having caused any damage to the property of a [Board] he shall be liable to make good such damage, and the amount payable in respect of the damage shall, in case of dispute, be determined by the Magistrate by whom the person incurring such penalty is convicted, and, on non-payment of such amount on demand, the same shall be recovered by distress and sale of the moveable property of such person, and the Magistrate shall issue a warrant for its recovery accordingly.

Limitation.

271. No Court shall try any person for an offence made punishable by or under this Act, after the expiry of six months from the date of the commission of the offence, unless complaint in respect of the offence has been made to a Magistrate within the six months aforesaid.

272. No suit or prosecution shall be entertained in any Court against any [Board] ¹[**] or against any ²[Officer Commanding a station], or against any member of a Board, or against any officer or servant of a [Board] for anything in good faith done, or intended to be done, under this Act or any rule or bye-law made thereunder.

273. (1) No suit shall be instituted against any [Board] or against any member of a Board, or against any officer or servant of a [Board] in respect of any act done, or purporting to have been done, in pursuance of this Act or of any rule or bye-law made thereunder, until the expiration of two months after notice in writing has been left at the office of the [Board] and in the case of such member, officer or servant, unless notice in writing has also been delivered to him or left at his office or place of abode, and unless such notice states explicitly the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and unless the plaint contains a statement that such notice has been so delivered or left.

(2) If the [Board], member, officer or servant has, before the suit is instituted, tendered sufficient amends to the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered, and shall also pay all costs incurred by the defendant after such tender.

(3) No suit, such as is described in sub-section (1), shall, unless it is an action for the recovery of immoveable property or for a declaration of title thereto, be instituted after the expiry of six months from the date on which the cause of action arises.

Leg. Ref.

¹ Omitted by Act XXIV of 1936

² These words were substituted by S. 11 of the Cantonments (Amendment) Act, 1925 (VII of 1925)

Notes

Sec 271. LIMITATION.—When there is nothing to show that any new building was done by the accused within limitation but what was done in that connexion had been completed more than six months before the date of the complaint, the accused cannot be tried for the offence 148 I.C. 420=35

Cr. L. J. 606=11 O.W.N. 156=1934 O. 29.

Sec 273—Section 273 (1) of the Act does not contemplate the class of suits of private contracts for which specific rules of evidence are prescribed by the Limitation Act. It contemplates actions brought against the Board in respect of acts done in pursuance of any rule or bye-law that has the force of law. Hence a suit against the Board for the price of goods supplied is not governed by S. 273 but by Art. 52, Limitation Act. 149 I.C. 49=1934 A.L.J. 805-1934 All. 436.

(4) Nothing in sub-section (1) shall be deemed to apply to a suit in which the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the institution of the suit or proceeding.

Appeals and Revision.

274. (1) Any person aggrieved by any order described in the Second column of Schedule V may appeal to the authority specified in that behalf in the third column thereof.

(2) No such appeal shall be admitted if it is made after the expiry of the period specified in that behalf in the fourth column of the said Schedule.

(3) The period specified as aforesaid shall be computed in accordance with the provisions of the Indian Limitation Act, 1908, with respect to the computation of periods of limitation thereunder.

275. (1) Every appeal under section 274 shall be made by petition in writing accompanied by a copy of the order appealed against.

(2) Any such petition may be presented to the authority which made the order against which the appeal is made, and that authority shall be bound to forward it to the appellate authority, and may attach thereto any report which it may desire to make by way of explanation.

276. On the admission of an appeal from an order, other than an order contained in a notice issued under clause (a) of section 137, section 140, section 17b, or section 238, all proceedings to enforce the order and all prosecutions for any contravention thereof shall be held in abeyance pending the decision of the appeal, and, if the order is set aside on appeal, disobedience thereto shall not be deemed to be an offence.

Revision. 277. 1[* + + + + +]

2[(1)] Where an appeal from an order made by the [Board] has been disposed of by the District Magistrate 3[either party to the proceeding] may, within thirty days from the date thereof, apply, through the 4[Officer Commanding-in-Chief, the Command], to the 4*[Central Government] or to such authority as the [Central Government] may appoint in this behalf, for a revision of the decision.

5[(2)] The provisions of this Chapter with respect to appeals shall apply, as far as may be, to applications for revision made under this section.

Finality of appellate orders. 278. Save as otherwise provided in section 277, every order of an appellate authority shall be final.

279. No appeal shall be decided under this Chapter unless the appellant has been heard, or has had a reasonable opportunity of being heard in person or through a legal practitioner.

CHAPTER XVI.

RULES AND BYE-LAWS.

280. (1) The Governor-General in Council may, after previous publication, make rules⁶ to carry out the purposes and objects of this Act.

Leg. Ref.

¹ The original sub-S. (1) was omitted by S. 9 of the Cantonments (Amendment) Act, 1926 (XXXV of 1926).

² Sub-section (2) was re-numbered (1), *ibid.*

⁴ Substituted by Act XXIV of 1936.

⁵ These words were substituted by S. 9

of Act XXXV of 1926

⁶ Substituted by Order in Council.

⁷ Sub-section (3) was re-numbered (2),

ibid.

⁶ For rules made under this section and called the Cantonment Account Code, 1924, the Cantonment Land Administration Rules, 1925, and the Cantonment Fund Servants Rules, 1925, see *Gen. R. and O.*, Vol. V, pp 470-611.

Notes.

Sec. 280 —Extension of Rules outside cantonment limits, see 2 P.R. 1885 (Cr.);

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the manner in which, and the authority to which application for permission to occupy land belonging to 1[the Crown] in a cantonment is to be made;

(b) the authority by which such permission may be granted and the conditions to be annexed to the grant of any such permission;

2[(bb) the allotment to a [Board] of a share of the rents and profits accruing from property entrusted to its management under the provisions of section 116-A];

(c) the appointment, control, supervision, suspension, removal, dismissal and punishment of servants of [Boards];

3[(cc) the constitution of a Service of Executive Officers and the appointment, control, supervision, conditions of service, pay and allowances, suspension, removal, dismissal and punishment of the members thereof.];

(d) the circumstances in which security shall be demanded from servants of [Boards] and the amount and nature of such security;

(e) the grant of leave, absentee or acting allowance to servants of [Boards];

(f) the creation and management of Provident Funds, and the circumstances in which, and the conditions subject to which, contributions thereto shall be made from cantonment funds and by servants of [Boards];

(g) The keeping of accounts by [Boards] and the manner in which such accounts shall be audited and published;

(h) the definition of the persons by whom, and the manner in which, money may be paid out of a cantonment fund;

4[(hh) Omitted by Act XXIV of 1936.];

(i) the preparation of estimates of income and expenditure by [Boards] and the definition of the persons by whom, and the conditions subject to which, such estimates may be sanctioned;

(j) the regulation of the procedure of Committees of Arbitration; and

(k) the prescribing of registers, statements and forms to be used and maintained by any authority for the purposes of this Act.

281. (1) A rule under section 280 may be made Supplemental provisions either generally for all cantonments or for the whole respecting rules. or any part of any one or more cantonments.

(2) All rules so made shall be published in the 1[Official Gazette] and in such other manner, if any, as the 1[Central Government] may direct and, on such publication, shall have effect as if enacted in this Act.

Leg. Ref.

¹ Substituted by Order in Council, 1937

² This clause was inserted by S. 12 of the Cantonments (Amendment) Act, 1925 (VII of 1925).

³ Cl. (cc) inserted by Act XXIV of 1936.

Notes

12 P. R. 1870 (Cr.). Omission to report case of cholera, 9 P. R. 1895 (Cl.). As to appeals against conviction for offence under Cantonment Rules, see 1 P. R. 1897 (Cl.). Rule under the section when *ultra vires*, 40 P. R. 1884 (Cl.), 48 P. R. 1887 (Cr.).

Sec. 280 (a)—See Rat. 505. Sections 64 to 67, Penal Code, do not apply to sentences passed under this Act. Duty of Cantonment Magistrate to inform accused of his right to have the case tried by another Ma-

gistrate, see 55 I. C. 1002=21 Cr. L. J. 394. (See also Notes under S. 282, *infra*.)

When persons encroach on cantonment land, mere condonation by the Cantonment Board cannot confer on those persons title to the land encroached upon. A letter by the Government of India to the Cantonment Board reciting that the encroachments have been condoned by lapse of time does not confer any title to the land on the person encroaching; the letter is not law but only an executive instruction to the Board; nor does a resolution by the Cantonment Board passed in pursuance of such a letter reciting that the encroachment is "old and condonable", confer any legal title on the person encroaching. Title to land cannot be conferred by condonation. 1936 A.M.L.J. 44.

282. Subject to the provisions of this Act and of the rules made thereunder, a [Board] may, in addition to any bye-laws which it is empowered to make by any other provision of this Act, make bye-laws to provide for all or any of the following matters in the cantonment, namely:—

- (1) the registration of births, deaths and marriages, and the taking of a census;
- (2) the enforcement of compulsory vaccination,
- (3) the regulation of the collection and recovery of taxes, tolls and fees under this Act and the refund of taxes.
- (4) the regulation or prohibition of any description of traffic in the streets,
- (5) the manner in which vehicles standing, driven, led or propelled in the streets between sunset and sunrise shall be lighted;
- (6) the seizure and confiscation of ownerless animals straying within the limits of the cantonment;
- (7) the prevention and extinction of fire;
- (8) the construction of scaffolding for building operations to secure the safety of the general public and of persons working thereon;
- (9) the regulation in any manner not specifically provided for in this Act of the construction, alteration, maintenance, preservation, cleaning and repairs of drains, ventilation-shafts, pipes, water-closets, privies, latrines, urinals, cesspools and other drainage works,
- (10) the regulation or prohibition of the discharge into, or deposit in, drains of sewage, polluted water and other offensive or obstructive matter,
- (11) the regulation or prohibition of the stabling or herding of animals, or of any class of animals, so as to prevent danger to public health;
- (12) the proper disposal of corpses, the regulation and management of burial and burning places and other places for the disposal of corpses, and the fees chargeable for the use of such places where the same are provided or maintained by Government or at the expense of the cantonment fund;

Notes.

Sec 282, cls. (8), (9) and (10) —*See* 3 Cr.L.J. 301=23 P.R. 1905 (Cr.) (Repair of wall and removal of building); Rat. 706, 3 Cr.L.J. 78 (keeping common gaming house), Rat. 541 (order for construction of privy); Rat. 636 (neglect to repair house); 19 P. R. 1904 (order for repair of building). *See also* Rat. 875; 7 O.C. 68; 1 P.R. 1906 (Cr.), 56 P.L.R. 1912; 1 S.L.R. 92 (washing clothes in tank), Rat. 54 (plying offensive trade); 8 M. 428, 9 P.R. 1895 (Cr.) (omission to report cholera case), 17 N.L.J. 214 (grazing cattle within cantonment area and preventing them from being impounded).

"*Public places*" what are and what are not, *see* A.W.N. (1887) 19, Rat. 361=15 P.R. 1906 (Cr.)=45 P.L.R. 1907; Rat. 471; Rat. 476 (public road); 22 P.L.R. 1907.

Conviction under a wrong section of the Code—Ignorance of law—Effect. *See* 12 Cr.L.J. 371, 11 Ind. Cas. 139=160 P.W.R. (Cr.) 1911. As to registration of prostitutes, *see* 2 P.R. 1895 (Cr.); A.W.N. (1887), 219, Rat. 572, 25 P.R. 1870 (Cr.). As to liability of master for offence committed by servant, *see* 10 Bom.L.R. 1052. Conviction for non-removal of remains of ruined buildings. 23 P.R. 1905 (Cr.) *See also* as to liability for keeping buildings in

a ruinous condition. *See* 43 B. 836=21 Bom.L.R. 759=52 Ind.Cas. 288=20 Cr.L.J. 624, 43 B. 838=21 Bom.L.R. 761=52 Ind. Cas. 665=20 Cr.L.J. 697. As to use of stables without licence, *see* Rat. 413. As to giving owner notice of repairs required, *see* 56 P.L.R. 1912. As to when and how and by whom notice is to be given, *see* 3 P.R. 1907 (Cr.)=47 P.L.R. 1907=5 Cr.L.J. 493. As to ordering imprisonment in default of payment of fine, *see* 40 P.R. 1884 (Cr.) As to effect of breach of rules, *see* A.W.N. (1886) 289, 48 P.R. 1887 (Cr.). Order as to payment of daily fine not proper. 12 Cr.L.J. 371=11 Ind. Cas. 139=206 P.L.R. 1911. *See also* 7 B.H.C. (Cr.) 87; 19 P.R. 1904 (Cr.), Additional fine when proper. 22 B. 841. Trial of offences beyond cantonment limits—Procedure for trial. 12 P.R. 1870 (Cr.). Liability of cantonment officer for not proceeding according to the Code and the Rules. *See* 9 C. 341=9 I.A. 152 (P.C.).

Secs 282 and 283.—A conviction for the offence of grazing cattle on land within the cantonment area and preventing them from being impounded cannot stand when no connection has been proved between the persons convicted and the cattle in respect of which the conviction is based. 17 N.L.J. 214.

(13) the permission, regulation or prohibition of the use or occupation of any street or place by itinerant vendors or by any person for the sale of articles or the exercise of any calling or the setting up of any booth or stall, and the fees chargeable for such use or occupation;

(14) the regulation and control of encamping grounds, pounds, washing places, serais, hotels, dak-bungalows, lodging-houses, boarding-houses, buildings let in tenements, residential clubs, restaurants, eating-houses, cafes, refreshment-rooms and places of public recreation, entertainment or resort;

(15) the regulation of the ventilation, lighting, cleansing, drainage and water-supply of the buildings used for the manufacture or sale of aerated or other potable waters and of butter, milk, sweet-meats and other articles of food or drink for human consumption;

(16) the matters regarding which conditions may be imposed by licences granted under section 210;

(17) the control and supervision of places where dangerous or offensive trades are carried on so as to secure cleanliness therein or to minimise any injurious, offensive or dangerous effects arising or likely to arise therefrom;

(18) the regulation of the erection of any enclosure, fence, tent, awning or other temporary structure of whatsoever material or nature on any land situated within the cantonment,

(19) the laying out of streets, and the regulation and prohibition of the erection of buildings without adequate provision being made for the laying out and location of streets;

(20) the regulation of the use of public parks and gardens and other public places, and the protection of avenues, trees, grass and other appurtenances of streets and other public places,

(21) the regulation of the grazing of animals;

(22) the fixing and regulation of the use of public bathing and washing places;

(23) the regulation of the posting of bills and advertisements, and of the position, size, shape or style of name-boards, sign-boards and sign-posts;

(24) the fixation of a method for the sale of articles whether by measure, weight, piece or any other method;

(25) the rendering necessary of licences within the cantonment—

(a) for persons working as job porters for the conveyance of goods;

(b) for animals or vehicles let out on hire,

(c) for the proprietors or drivers of vehicles, boats or other conveyances, or of animals kept or plying for hire; or

(d) for persons impelling or carrying such vehicles or other conveyances,

(26) the prescribing of the fee payable for any licence required under clause (25), and of the conditions subject to which such licences may be granted, revised, suspended or withdrawn;

(27) the regulation of the charges to be made for the services of such job porters and of the hire of such animals, vehicles or other conveyances, and for the remuneration of persons impelling or carrying such vehicles or conveyances as are referred to in clause (25):

(28) the regulation or prohibition, for purposes of sanitation or the prevention of disease or the promotion of public safety or convenience, of any act which occasions or is likely to occasion a nuisance, and for the regulation or prohibition of which no provision is made elsewhere by or under this Act;

(29) the circumstances and the manner in which owners of buildings or land in the cantonment, who are temporarily absent from, or are not resident in, the cantonment, may be required to appoint as their agents, for all or any of the purposes of this Act or of any rule or bye-law made thereunder, persons residing within or near the cantonment;

(30) the prevention of the spread of infectious or contagious diseases within the cantonment;

(31) the segregation in, or the removal and exclusion from, the cantonment, or the destruction, of animals, suffering or reasonably suspected to be suffering from any infectious or contagious disease;

(32) the supervision, regulation, conservation and protection from injury, contamination or trespass of sources and means of public water-supply and of appliances for the distribution of water whether within or without the limits of the cantonment,

(33) the manner in which connections with water-works may be constructed or maintained, and the agency which shall or may be employed for such construction and maintenance;

(34) the regulation of all matters and things relating to the supply and use of water including the collection and recovery of charges therefor and the prevention of evasion of the same;

(35) the maintenance of schools, and the furtherance of education generally;

(36) the regulation or prohibition of the cutting or destruction of trees or shrubs, or of the making of excavations, or of the removal of soil or quarrying, where such regulation or prohibition appears to the [Board] to be necessary for the maintenance of a water-supply, the preservation of the soil, the prevention of landslips or of the formation of ravines or torrents, of the protection of land against erosion, or against the deposit thereon of sand, gravel or stones;

(37) the rendering necessary of licences for the use of premises within the cantonment as stables or cowhouses or as accommodation for sheep, goats or fowls;

(38) the control of the use in the cantonment of mechanical whistles, syrens or trumpets; and

(39) generally for the regulation of the administration of the cantonment under this Act.

283. Any bye-law made by a [Board] under this Act may provide that a contravention thereof shall be punishable—

(a) with fine which may extend to one hundred rupees, or

(b) with fine which may extend to one hundred rupees and, in the case of a continuing contravention, with an additional fine which may extend to twenty rupees for every day during which such contravention continues after conviction for the first such contravention; or

(c) with fine which may extend to ten rupees for every day during which the contravention continues after the receipt of a notice from the [Board] by the person contravening the bye-law requiring such person to discontinue such contravention.

284. (1) Any power to make bye-laws conferred by this Act is conferred subject to the condition of the bye-laws being made after previous publication and of their not taking effect until they have been approved and confirmed by the 1[Central Government] and published in the 1[Official Gazette].

(2) The 1[Central Government] in confirming a bye-law may make any change therein which appears to it to be necessary.

(3) The 1[Central Government] may, after previous publication of its intention, cancel any bye-law which it has confirmed, and thereupon the bye-law shall cease to have effect.

285. (1) A copy of all rules and bye-laws made under this Act shall be kept at the office of the [Board] and shall, during office hours, be open free of charge to inspection by any inhabitant of the cantonment.

(2) Copies of all such rules and bye-laws shall be kept at the office of the [Board] and shall be sold to the public at cost price singly, or in collections at the option of the purchaser.]

CHAPTER XVII.

SUPPLEMENTAL PROVISIONS.

286 The 2[Central Government] may, by notification in the 2[Official Gazette], and subject to any conditions as to compensation or otherwise which it thinks fit to impose, extend to any area beyond a cantonment and in the vicinity thereof, with or without restriction or modification, any of the provisions of Chapters IX, X, XI, XII, XIII, XIV and XV or of any rule or bye-law made under this Act for the cantonment which relates to the subject matter of any of those Chapters, and every enactment, rule or bye-law so extended shall thereupon apply to that area as if the area were included in the cantonment

Extension of certain provisions of the Act and rules to places beyond cantonments

3[286-A. The [Board] may empower any of its members or officers to exercise or perform in the absence of the Executive Officer from the Cantonment all or any of such powers or duties of an Executive Officer under this Act as the 2[Central Government] may, by notification in the 2[Official Gazette] specify in this behalf.]

287. (1) Paragraphs 2 and 3 of section 54, and sections 59, 107 and 123 of the Transfer of Property Act, 1882, with respect to the transfer of property by registered instrument, shall, on and from the commencement of this Act, extend to every cantonment.

4[(2) The Registrar or Sub-Registrar of the district or sub-district formed for the purposes of the Indian Registration Act, 1908, in which any cantonment is situated, shall 5[when any document relating to immovable property within the cantonment is registered, send information of the registration] forthwith to the [Board] or such other authority as the 2[Central Government] may prescribe in this behalf.]

288. No notice, order, requisition, licence, permission in writing or other such document issued under this Act shall be invalid merely by reason of any defect of form.

Registration.

Leg Ref.

¹ Substituted by Act XXIV of 1936

² Substituted by Order in Council, 1937

³ This new S 286-A has been added by Act VII of 1931

⁴ This sub-section was substituted by S 11 of the Cantonments (Amendment) Act, 1926 (XXXV of 1926)

⁵ These words were substituted by S 2 and Sch. I of the Repealing and Amending Act, 1927 (X of 1927).

Notes.

Sec 287 —By virtue of S 287 of the Cantonments Act, S 107 of the T. P. Act is made applicable to cantonments. 134 I. C. 289=32 P.L.R. 361=1931 Lah. 501. A mortgage by deposit of title-deeds cannot be effected within the limits of a cantonment to which S. 59 has been extended (1933 Lah 972, Ref.) 1933 Lah 1001=149 I. C. 1060. A mortgage by deposit of title-deeds

Notes.

is invalid, if effected within a Cantonment area where such transactions are prohibited even though the property is situated in a place where such mortgages are valid. The determining factor in the matter of validity of the mortgage in such cases is not the place where the property alleged to have been mortgaged is situated but the formalities required by the law for the creation of a valid mortgage at the place where the title-deeds are alleged to have been delivered to the creditor (1927 Cal. 823, Foll. Case-law discussed) 1933 Lah 972=147 I. C. 942 =35 P. L. R. 249

Sec 288 —Proceedings without notice to accused illegal 17 A.L.J. 503=50 I. C. 992=20 Cr. L.J. 384; contents of notice as to extent of repairs necessary. 3 P. R. (Cr.) 1912=9 P. W. R. (Cr.) 1912=56 P. L. R. 1912=13 Cr. L. J. 17=13 I. C. 209

289. A copy of any receipt, application, plan, notice, order or other document or of any entry in a register, in the possession of a [Board] shall, if duly certified by the legal keeper thereof or other persons authorised by the [Board] in this behalf, be admissible in evidence of the existence of the document or entry, and shall be admitted as evidence of the matters and transactions therein recorded in every case where, and to the same extent to which, the original document or entry would, if produced, have been admissible to prove such matters.

290. No officer or servant of a [Board] shall, in any legal proceeding to which the [Board] is not a party, be required to produce any register or document the contents of which can be proved under section 289 by a certified copy, or to appear as a witness to prove any matter or transaction recorded therein save by order of the Court made for special cause.

291. For the purposes of the Government Buildings Act, 1899, Cantonments and [Boards] shall be deemed to be municipalities and municipal authorities respectively.

292. [*Repeals.*] *Repealed by the Repealing Act, 1927 (XII of 1927).*

SCHEDULE I.

NOTICE OF DEMAND.

(See Section 91.)

To
residing at

Take notice that the [Board] demands from the sum of _____ due from _____ on account of _____ (here describe the property, occupation, circumstance or thing in respect of which the sum is payable) leviable under _____ for the period of _____ day of _____ 19____, and ending on the _____ day of _____ 19____, and that if, within thirty days from the service of this notice, the said sum is not paid to the [Board] at _____, or sufficient cause for non-payment is not shown to the satisfaction of the Executive Officer, a warrant of distress will be issued for the recovery of the same with costs.

Dated this _____

day of _____
(Signed)

Executive Officer,
Cantonment

SCHEDULE II

FORM OF WARRANT.

(See section 92.)

(Here insert the name of the officer charged with the execution of the warrant.)

Whereas A B. of _____ has not paid, and has not shown satisfactory

* (Here describe the liability.) cause for the non-payment of, the sum of _____ due on account of _____ for the period of _____ day of _____ 19____, and ending with the _____ day of _____ 19____, which sum is leviable under _____

And whereas thirty days have elapsed since the service on him of notice of demand for the same;

This is to command you to distrain, subject to the provisions of the Cantonments Act, 1924, the movable property of the said A B. to the amount of the said sum of Rs. _____

; and forthwith to certify to me, together with this warrant, all particulars of the property seized by you thereunder

Dated this _____

day of _____

19____

(Signed)

Executive Officer,
Cantonment.

SCHEDULE III.

FORM OF INVENTORY OF PROPERTY DISTRAINED AND NOTICE OF SALE.

(See section 93.)

To
residing at

Take notice that I have this day seized the property specified in the inventory annexed hereto, for the value of _____ due for the liability¹ (Here describe the liability mentioned in the margin for the period commencing with the day of _____ 19, and ending with the day of _____ 19, together with Rs _____ due for service of notice of demand, and that, unless within seven days from the date of the service of this notice you pay to the [Board] the said amount, together with the costs of recovery, the said property will be sold by public auction.

Dated this _____ day of _____ 19 .

(Signature of officer executing the warrant).

INVENTORY

(Here state particulars of property seized)

SCHEDULE IV

CASES IN WHICH POLICE MAY ARREST WITHOUT WARRANT.

(See section 250).

| 1 Section. | 2 Subject. |
|--------------------|---|
| | PART A. |
| 118 (1) (a) (i) | Drunkenness, etc |
| 167 | Making or selling of food, etc., or washing of clothes, by infected person. |
| | PART B |
| 118 (1) (a) (ii) | Using threatening or abusive words, etc |
| 118 (1) (a) (iii) | Indecent exposure of person, etc. |
| 118 (1) (a) (iv) | Begging |
| 118 (1) (a) (v) | Exposing deformity, etc. |
| 118 (1) (a) (vi) | Gaming |
| 118 (1) (a) (vii) | Destroying notice, etc |
| 118 (1) (a) (viii) | Breaking direction-post, etc. |
| 118 (1) (f) | Keeping common gaming-house, etc |
| 118 (1) (g) | Beating drum, etc. |
| 118 (1) (h) | Singing, etc., so as to disturb public peace or order |
| 119 (d) | Letting loose, or setting on, ferocious dog |
| 125 | Discharging fire-arms, etc., so as to cause danger |
| 176 (1) | Remaining in, or re-entering cantonment after notice of expulsion for failure to attend hospital or dispensary- |
| 193 (2) | Destroying, etc., name of street or number affixed to building |
| 214 | Feeding animal on filth, etc |
| 23, | Loitering or importuning for sexual immorality |
| 240 (a) | Remaining in, or returning to, a cantonment after notice of expulsion |

SCHEDULE V.

APPEALS FROM ORDERS

(See section 274.)

| 1 Section. | 2 Executive order. | 3 Appellate Authority | 4 Time allowed for appeal. |
|---------------|--|--|-------------------------------------|
| 126 | [Board's] notice to repair, protect or enclose a building, wall or anything affixed thereto or well, tank, | ¹ [Officer Commanding-in-Chief, the command] ² [or other authority authorized] | Thirty days from service of notice. |

Leg Ref.

(XXXV of 1926).

¹ These words were substituted by S 2 of the Cantonments (Amendment) Act, 1926² Added by Act XXIV of 1936.

| 1 Section. | 2 Executive order. | 3 Appellate Authority | 4 Time allowed for appeal. |
|---------------|---|--|--|
| 134 | reservoir, pool, depression or excavation [Board's] notice to fill up well, tank, etc, or to drain off or remove water. | in this behalf by the [Central Govern- ment]. ² a[Officer Command- ing-in-Chief, the Command] ³ [or other authority authorized in this behalf by the [Central Govern- ment]]. | Thirty days from service of notice. |
| 137 | [Board's] notice to provide sufficient drainage, etc. | ² a[Officer Command- ing-in-Chief, the Command] ³ [or other authority authorized in this behalf by the [Central Govern- ment]]. | Fifteen days from service of notice |
| 140 | [Board's] notice requiring a building to be repaired or altered so as to remove san- itary defects. | ² a[Officer Command- ing-in-Chief, the Command] ³ [or other authority authorized in this behalf by the [Central Govern- ment]]. | Thirty days from service of notice |
| 176 | Order of ³ [Officer command- ing the station] on report of Medical Officer, directing a person to remove from the cantonment and prohibiting him from re-entering it with- out permission. | ² a[Officer Command- ing-in-Chief, the Command] ³ [or other authority authorized in this behalf by the [Central Govern- ment]]. | Thirty days from service of notice. |
| 181 | [Board's] refusal to sanction the erection or re-erection of a building. | ² a[Officer Command- ing-in-Chief, the Command] ³ [or other authority authorized in this behalf by the [Central Govern- ment]]. | ⁴ [Thirty days from the date on which the re- fusal shall have been communicated to the person applying for sanction.] |
| 185 | [Board's] notice to alter or demolish a building. | ² a[Officer Command- ing-in-Chief, the Command] ³ [or other authority authorized in this behalf by the [Central Govern- ment]]. | Thirty days from service of notice. |
| 188 | [Board's] notice to pull down or otherwise deal with a building newly erected or re-built without permission over a sewer, drain, culvert, water-course or waterpipe. | ² a[Officer Command- ing-in-Chief, the Command] ³ [or other authority authorized in this behalf by the [Central Govern- ment]]. | Thirty days from service of notice. |
| 206 | [Board's] notice prohibiting or restricting the use of a slaughter-house. | ² a[Officer Command- ing-in-Chief, the Command] ³ [or other authority authorized in this behalf by the [Central Govern- ment]]. | Twenty-one days from service of notice. |
| 238 | Magistrate's notice directing disorderly person to remove from cantonment and prob- hibiting him from re-entering it without permission. | District Magistrate .. | Thirty days from service of notice. |

Leg. Ref.

¹ Substituted by Order in Council, 1937² These words were substituted by S 13
of the Cantonments (Amendment) Act, 1925

(VII of 1925)

² a. See footnote (1), on p. 215, *supra*.³ Added by Act XXIV of 1936.⁴ Substituted by Act XXIV of 1936.

SCHEDULE VI.

[Enactments repealed.] Repealed by the Repealing Act, 1927 (XII of 1927)

**THE CANTONMENTS (HOUSE ACCOMMODATION) ACT
(VI OF 1923).**

PREFATORY NOTE.—*Necessity for a special law relating to house accommodation in cantonments.*—In introducing the first Bill of 1898 in the council, the law member said —“For many years past we have had under consideration

Necessity for the Act the question of house-accommodation in cantonments. In the early days of the British dominion in India, the camps, stations and posts of the field army developed into cantonments where troops were stationed in garrison. These cantonments were localities set apart for the troops, and were intended for their use only, but, as time went on, non-military persons were permitted to reside in cantonments under the regulations of the day; land was occupied, and houses were built for the accommodation of officers and for other purposes, under the rules and conditions prevailing at that time.

In later years, owing to various circumstances, great difficulties have been experienced in working the regulations applicable to cantonments, and the difficulties of finding suitable accommodation for officers—especially for those obliged to live in a particular part of cantonments—have much increased.

The whole question has been exhaustively considered by officers specially appointed by committees and by other authorities; it has been discussed in every possible aspect and the investigation has spread over a great many years. The present Bill is the outcome of that discussion, the objections raised have been carefully considered, and we have recognised that conditions of ownership and tenancy must be governed by the regulations in force when any particular house was built. But as cantonments are and were intended for occupation of troops, and as the whole of the land belongs, as a general rule, to the State, and houses were built in many cases by persons who had no status in cantonments, not for their own use, but as a source of profit, we consider that it is not inequitable to lay upon house-holders the burden of proving that they hold their grants under special conditions, and ought not to be subjected to the provisions which convenience and military requirements dictate in a locality which has been set apart for military purposes. The necessity for securing house-accommodation for the military and civil officers of the Government is essential, but we have endeavoured to safeguard the interests of the house-owners, and to remove any reasons for complaint on the part of the latter.

It will be observed that in the Bill the cantonment Rules have been indefinitely referred to, inasmuch as, though prepared and published for criticism sometime ago, they have not yet come into force. It is intended, however, to bring them into operation before the Bill becomes law. These results will provide fully for the matters dealt with in the Bill so far as grants made under them will be concerned. Consequently, I may point out that the operation of the Bill will be practically restricted to past grants only.” (See also Statement of Objects and Reasons and also proceedings in Council, *Fort St George Gazette*, Suppl. 22nd Nov, 1898).

As stated in the preamble to this Bill, various conditions, rules, and regulations and orders in regard to the grant of land and the occupation of land and houses in cantonments have been from time to time made with the object of making accommodation available for officers whose duties require their residence within cantonment limits. These provisions have been collected and published for general information but, notwithstanding their issue in the past, great difficulties have been, and are still being, experienced in the matter.

The necessity for removing these difficulties and of making suitable provision for the housing of officers has long been recognised by the Government and a special chapter was in 1888 with that object included in the Bill “to amend the law relating to cantonments” The chapter was, however, subjected to criticisms at that time, and as the matter seemed to call for further consideration, while it was thought undesirable to delay the whole measure on that account, it was decided to exclude the provisions in question and to proceed with the rest of the Bill, which was eventually passed into law as the Cantonments Act 1889, (XIII of 1889). The difficulties referred to have, as was expected, steadily increased and the Government of India consider it inexpedient any longer to defer remedial legislation on the subject.

The Bill which it is proposed now to introduce has been framed, after careful consideration of the objections previously raised, and, while aiming at securing house accommodation for the military and civil officers of the Government whose presence in cantonments is obviously necessary, it endeavours also to safeguard as far as possible the interests of the house owners concerned.

This Bill was passed as the Cantonments House Accommodation Act of 1899, which is the first enactment in British India specifically dealing with the accommodation of Houses.

within cantonment limits. There were certain defects in this Act, and consequently a necessity was felt for amendment and codification. Hence, this Act again came for the consideration of the Government of India in 1901.

The Hon'ble Sir Edmund Ellis in introducing the Cantonments Bill (1901) into the Council made the following statements as to the necessity for amendment and the enactment of a new measure.

Cantonments Bill of 1901
—Necessity for amendment.

"My lord, I propose to make a statement regarding the course which we intend to pursue in dealing with the Cantonments (House Accommodation) Bill. "This Bill, the object of which is to grapple with the great and ever increasing difficulty experienced by officers in securing suitable accommodation in houses built within the limits of cantonment was, after the most prolonged consideration dating back to the year 1887 if not earlier, introduced in the Legislative Council by my predecessor Sir Edwin Collier on the 4th November, 1898. The Statement of Objects and Reasons and the Bill were duly published in the Gazette of India and circulated for criticism, and the result was the receipt, during the year 1899, of a large number of representations official and non-official, regarding the measure. To all of these the most anxious consideration has been given by the Governor General in Council.

"As was only to be expected, the bill has not been favourably received by the majority of the house-owners in cantonments, the objections put forward being most pronounced in the case of the very cantonments in which the want of accommodation for officers has been most acutely felt. On the other hand the measure has met with approval in many quarters, and in some cases even the house-owners themselves have admitted the necessity for such a Bill and the equity of its provisions.

"Now, I desire to make it very plain at the outset that the Government of India are unable to admit that cantonment areas can be regarded in the same light as the other parts of the country. On the contrary, the circumstances in them are altogether special and totally different from the circumstances anywhere else and I have no hesitation in asserting that this fact is well known and thoroughly felt and appreciated by every resident of any of the permanent military stations, which here in India we call cantonments. The term has for over a century been applied in this country to well defined areas, always primarily and in some instances almost exclusively set apart for the occupation of troops and their followers. The necessity for maintaining special laws in such places surely goes without saying and this has indeed been recognised in actual practice and throughout all our legislation affecting cantonments. When therefore I find the common law of England cited and vague denunciations directed against the measure on the ground that it encroaches upon private rights which ought to be held sacred and inviolable, my answer is that the subject is approached from the wrong standpoint and that I fail to perceive the force of arguments which beg the question and have in fact no application to the case.

"And this brings me at once to the most important part of the bill and of the opposition which it has excited, I allude to clause (3) sub-clause (5) in which it is laid down that all land in a cantonment to which the provisions of the proposed Act are, after due enquiry, applied shall be presumed to be held under a grant from His Majesty, unless and until the person in possession proves to the satisfaction of the Local Government, that he held the land by a lawful title acquired prior to the formation of the cantonment. This provision, of course, shifts the burden of proof from the Government on to the shoulders of the cantonment house owner and it has, perhaps not unnaturally, been objected to as involving a serious interference with the rights of property. It has been urged that the presumption laid down by it is directly opposed to the ordinary legal principle which recognises possession as good *prima facie* evidence of title and that it is unfair to remove the *onus probandi* from the Government on whom it ought to be to the house owner. From what I have already said it will be anticipated that I cannot admit that this objection should be allowed to prevail. Cantonments are military stations in which military considerations always have been and always must be regarded as paramount and can never have been intentionally put on one side. The position of the Government with regard to them has been clear, for throughout all the various orders which have been issued, the principle has constantly been affirmed that land in cantonments is held subject to the requirements of the military authorities. Proceeding on the presumption which I have alluded to above and which I maintain is a fair presumption of which on persons permitted to build house in cantonments has been consistently aimed at ever since cantonments were formed in India and has, as I shall endeavour to show, been insisted upon by a series of executive orders issued in Army Regulations for the guidance of cantonment authorities. As the orders in the three presidencies were distinct, it will be necessary to notice each separately. "In Bengal the first order was issued in April 1801, and by it, the Governor-General in Council directed that if individuals not officers shall purchase they must remove the materials as the ground within the cantonment is to be kept appropriated exclusively to the use of troops, this order was republished on the 28th September 1807. Again in 1836 regulations were laid down for the occupation of land and the disposal of buildings in cantonments. Four conditions were attached—*First*, that the Government should retain the power of resumption on one month's notice; *second*, that the ground being in every case the property of the Government could not be sold by the grantee; *third*,

that the buildings erected on the land should not be sold to any civilian without the consent of the officer commanding stations, and *fourth*, that the transfer of any house of over 5,000 Rupees in value to a native of India should be subject to the sanction of the Government. The attention of all officers commanding stations was drawn to these orders by the Commander-in-Chief on the 20th April, 1853 and the General Regulations of the Bengal Army of 1885 practically reproduced them. In 1858 they were incorporated in Code of Regulations for the Public Works Department and they were again and again reproduced in the Regulations issued in 1873, 1880 and 1897. In the Punjab it may be added the Bengal Regulations were followed. In Bombay a general order of January 1807 pointed out that any permission which officers might receive to erect houses on ground within Military cantonments conferred on them no rights of property in the land as that continued to be the property of the State. Another general order, dated the 30th October, 1832 asserted that no private landed property was to be included within the limits of a cantonment in which the whole of the ground belongs to Government. It at the same time provided for the removal from cantonments of any person not being an officer or a soldier, and in such cases permitted the taking away of the materials of any building belonging to any such person. In 1835 another Government order laid down rules for the occupation of land in cantonment and pointed out that "permission" to occupy ground within the limits of a cantonment conferred no proprietary rights on the occupant. This was affirmed by an order which was issued in May, 1838 and included a clause for resumption on one month's notice. In 1851 these orders were affirmed and in 1862 a Government Resolution was issued restating the principles already laid down. The regulation for the Bombay Presidency of 1875 and the Army Regulations (India), of 1887 followed on the same lines.

In Madras the earliest order on the subject appears to have been issued on the 8th May, 1812, and in it the Governor in Council laid down that no officer or person should be permitted to erect any building on ground, belonging to the company within the walls of a Fort or within the limits of any cantonment, but on condition of immediate surrender to the Government, and that no grant in perpetuity of any piece of ground within the precincts of a Fort or cantonment should be accorded to any individual. Leases renewable at the pleasure of the Government were to be given. These orders were republished as a Code of Regulations under the authority of the Governor in Council on the 1st October, 1813. Revised Codes embodying the same conditions were republished on the 12th September, 1820 and again on the 19th December, 1826. Similar orders were issued on the 4th December, 1829, and on the 17th April, 1849, revised rules framed on the same principles were published. These appear again in the Madras Army Regulations of 1869 and 1876 and in the Army Regulations (India) of 1887. From the above it is evident that the Government have consistently and continuously affirmed their rights as regards building sites in cantonments. Moreover in regard to the right of Government to regulate the purchase and letting of houses for the accommodation of Military officers, I would point out that the right was recognised by the Cantonments Acts of 1864 and 1880. By section 19 of Act XXII of 1864 it was provided that rules might be made—

first, for regulating any cases in which the land within the limits of a cantonment was the property of the Government but the occupation and use of which by private persons was permissive and for imposing terms on which such occupation and use should be allowed and conditions under which the Government might resume possession on giving compensations,

secondly, for maintaining proper Registers of immovable property within cantonment limits and for providing for the registration of transfer of such property, and

thirdly, for regulating the manner in which houses within the limits of cantonments should be claimable for purchase or hire for the accommodation, when necessary of Military officers. These three headings were reproduced in Section 27 of Act III of 1880 and it appears to me that if house owners urge that they purchased property in ignorance of the conditions imposed by the Government they have only themselves to blame, for not having made ordinary inquiries as to the circumstances in which land in cantonments has in fact always been and must of necessity always be held. I now come to deal with the present position which appears to be this. In some cases the Government would undoubtedly be able to prove that conditions such as those which I just described were expressly imposed and as expressly accepted. In most cases it could prove that the existence of the orders on the subject above referred to was so much a matter of common knowledge that the imposition and the acceptance of the conditions laid down in them must be implied. But in others it might be able to prove nothing except that the particular cantonment concerned had existed as such for so many years and that some sort of control over the building of houses in it had always been exercised. It may be that the orders laid down by the higher military authorities and the Government have not always been observed and that express and unconditional grants of building sites or express agreements permitting the building of houses and imposing no conditions whatsoever have been made. In such cases there is recourse to clause 4 of the Bill, which I shall be prepared to amend in order to make the point perfectly clear that there is no intention to interfere except in a certain number of exceptional cases, and it is to meet these that this measure is proposed. Neither the Government nor the house owner, if put to proof, could show either how the land was originally included in the cantonment or under what circumstances the building on it came to be erected. I maintain that in such cases it is but right to give to the Government the benefit of whatever doubt and uncertainty

there may be and to presume in the absence of title-deeds on either side that the land is the Government land and must be treated upon as paramount. The very existence of houses in most cantonments depends primarily on the presence of His Majesty's troops; the value of house property would as a rule be much diminished if the troops were withdrawn; and under these circumstances, it is surely not too much to assume that houses in cantonments were in fact built for the accommodation of Military men, and that appropriation for their use in suitable repair and at reasonable rents is perfectly reasonable, just and proper.

By the earlier part of clause (3) of the Bill the application of the measure is to be left to the Local Governments and is to depend on the result of a careful inquiry regarding the precise circumstances of each cantonment. If the occupant of any building site can show to the satisfaction of the Local Government—judicial proof, he it noticed is not required—that he holds the land by a lawful title acquired prior to the formation of the cantonment then the land will be excluded from the operation of the proposed Act. And subject to the burden of proof referred to above instead of there being anything to prevent a resort to the Civil Courts by any one aggrieved in the matter, the obnoxious clause under consideration expressly directs that, if pending the inquiry or at any time thereafter any land is proved by the decree of a court of competent jurisdiction to be held, under such a lawful title, it shall be excluded from the area of the notification bringing the measure into operation. (*See Fort St. Geo. Gaz.*, Part III, 5th Nov., 1901, pp 28—29)

The present Act is Act of 1923. The Bill which subsequently became Act of 1923 was introduced in the Legislative Council in 1922. The following extracts from the Statement of Objects and Reasons attached to the Bill may most usefully be noticed.

The following is the Statement of Objects and Reasons to the Cantonments House Accommodation Act, 1922.

"A Committee which was appointed in the winter 1920-1921 to enquire into and make recommendations in regard to the administration of cantonments recommended *inter alia* that the Cantonments House Accommodation Act should be revised, so as to remove certain defects which have been brought to light and to carry out more fully the intention of the Act, namely the better provision of house accommodation for military officers in cantonments. These recommendations have now been examined by the Government of India whose conclusions are embodied in the draft Bill.

A number of the amendments are designed merely to bring the Act up to date by specifying, in place of the authorities by whom the Act is at present administered, other authorities recently constituted, e.g., District Commanders in lieu of Divisional Commanders.

The principal changes of substance which the Bill seeks to introduce are—*firstly*, to substitute for the procedure under which houses are liable to be appropriated for use, on a monthly tenancy, by military officers, holding direct from the house owner, a procedure, under which Government will take such houses as may be required on a repairing lease for a term of at least 5 years and will allot the houses so leased to officers requiring accommodation. Under this procedure officers will become the tenants of Government, who alone will deal with the house owners. Where a military officer prefers to take a house by private agreement with a house owner and not from Government, it is considered that there is no justification for interference between the two parties in cases of dispute, which will in future be settled, as they would outside a cantonment, either by agreement between the parties or by recourse to the law Courts. *Thirdly*, the Bill alters the constitution of committees of Arbitration and provides for an appeal to the Court against the decisions of such committees.

THE CANTONMENTS (HOUSE-ACCOMMODATION) ACT (VI OF 1923).¹

EFFECT OF LEGISLATION.

| Year. | No. | Short title | How repealed or affected by legislation. |
|-------|-----|---|---|
| 1923 | VI | The Cantonments (House Accommodation) Act, 1923 | Amendment Act X of 1925 " Act IX of 1930. " Act XXII of 1933 Rep. in pt., Act XII of 1927. |

[5th March, 1923.]

An Act further to amend and to consolidate the law relating to the provision of house-accommodation for military officers in cantonments.

Leg. Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1922, Pt. V, p. 233;

and for Report of Joint Committee, see *ibid.*, 1923, Pt. V, p. 5.

WHEREAS it is expedient further to amend and to consolidate the law relating to the provision of house-accommodation for military officers in cantonments, It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement. 1. (1) This Act may be called The CANTONMENTS (HOUSE-ACCOMMODATION) Act, 1923.

(2) It extends to the whole of British India (inclusive of British Baluchistan.)¹ [*¹]

(3) It shall come into force on the first day of April, 1923, but it shall not become operative in any cantonment or part of a cantonment until the issue, or otherwise than in pursuance, of a notification as hereinafter provided by section 3:

Provided that any notification made under section 3 of the ²Cantonments (House-Accommodation) Act, 1902, which is in force at the commencement of this Act, shall be deemed to be a notification made under section 3 of this Act.

Definitions.

2. (1) In this Act, unless there is anything repugnant in the subject or context,—

(a) "Brigade area" means one of the Brigade areas, whether occupied by a brigade or not, into which India is for military purposes for the time being divided, and includes any area which the ^{2a}[Central Government] may, by notification in the ^{2a}[Official Gazette] declare to be a Brigade area for all or any of the purposes of this Act;

[* * * * *]³

⁴[(b) "Cantonment Board" means a Cantonment Board constituted under the Cantonments Act, 1924;]

(c) "Command" means one of the Commands into which India is for military purposes for the time being divided, and includes any area which the ^{2a}[Central Government] may, by notification in the ^{2a}[Official Gazette] declare to be a Command for all or any of the purposes of this Act,

(d) ⁵["Officer commanding the station"] means the officer for the time being in command of the forces in a cantonment ⁶["or if that officer is the Officer Commanding the District, the military officer who would be in command of those forces in the absence of the Officer Commanding the District"];

(e) "District" means one of the Districts into which India is for military purposes for the time being divided; it includes a Brigade area which does not form part of any such District and any area which the ^{2a}[Central Government] may, by notification in the ^{2a}[Official Gazette] declare to be a District for all or any of the purposes of this Act;

(f) "house" means a house suitable for occupation by a military officer or a military mess, and includes the land and buildings appurtenant to a house,

(g) "military officer" means a commissioned or warrant officer of His Majesty's military or air-forces on military or air-force duty in a cantonment, and includes a Chaplain on duty with troops in a cantonment, ⁷[an officer of the Cantonments Department] and any person in Army departmental employment whom the Officer Commanding the District may at any time, by an

Leg Ref

¹ Omitted by Order in Council, 1937.

² Repealed by S. 39 and Schedule of this Act.

^{2a} Substituted by Order in Council, 1937.

³ Original clause (b) was omitted and clause (bb) re-lettered as clause (b) by Act IX of 1930. The original clause (b) stood as follows.—

"Cantonment Authority" means a Cantonment Board, or, in the case of a cantonment for which such a Board has not been con-

stituted or has ceased to exist or cannot be convened, the Officer Commanding the station.

⁴ This clause was inserted by Act X of 1925, S. 2.

⁵ These words were substituted for the words "Commanding Officer of the Cantonment" by S. 6 of Act X of 1925.

⁶ Added by Act IX of 1930.

⁷ These words were substituted for the words "a Cantonment Magistrate" by Act X of 1925, S. 2.

order in writing, place on the same footing as a military officer for the purposes of this Act,

(h) "owner" includes the person who is receiving, or is entitled to receive, the rent of a house, whether on his own account or on behalf of himself and others or as an agent or trustee, or who would so receive the rent, or be entitled to receive it, if the house were let to a tenant; and

(i) a house is said to be in a state of reasonable repair when—

(i) all floors, walls, pillars and arches are sound and all roofs sound and watertight,

(ii) all doors and windows are intact, properly painted or oiled, and provided with proper locks or bolts or other secure fastenings, and

(iii) all rooms, out-houses and other appurtenant buildings are properly colour-washed or white-washed.

(2) If any question arises whether any land or building is appurtenant to a house, it shall be decided by the 1[Officer Commanding the station] whose decision thereon shall, subject to revision by the 2[Collector], be final

CHAPTER II.

APPLICATION OF ACT.

3 (1) The 3[Central Government] may, by notification in the 3[Official Gazette] declare this Act to be operative in any cantonment or part of a cantonment 4[¹ * ²] other than a cantonment situate within the limits of a presidency-town.

(2) Before issuing a notification under sub-section (1) in respect of any cantonment or part of cantonment, the 3[Central Government] shall cause local inquiry to be made with a view to determining whether it is expedient to issue such notification, and what portion (if any) of the area proposed to be included therein should be excluded therefrom.

4. 5[Nothing in this Act shall affect the provisions of any written Crown contract unless all the parties of that contract consent in writing to be bound by the terms of this Act].

CHAPTER III.

APPROPRIATION OF HOUSES.

5. Every house situate in a cantonment or part of a cantonment in respect of which a notification under sub-section (1) of section 3 is for the time being in force shall be liable to appropriation by the 3[Central Government] on a lease in the manner and subject to the conditions hereinafter provided.

Conditions on which houses may be appropriated [6. (1) Where—

(a) a military officer who is stationed in or has been posted to the cantonment, or a President of a military mess in the cantonment, applies in writing to the officer Commanding the Station stating that he is unable to secure suitable accommodation in the cantonment for himself or the mess on reasonable terms by private agreement, and that no suitable house or quarter belonging to the 3[Crown] is available for his occupation or for the occupation of the mess,

Leg Ref.

¹ These words were substituted for the words "Commanding Officer of the Cantonment" by S. 6 of the Cantonments (House-Accommodation Amendment) Act, 1925 (X of 1925)

² Substituted for the words "District Magistrate" by Act IX of 1930

³ Substituted by Order in Council, 1937.

⁴ Omitted by Order in Council, 1937.

⁵ Section substituted by Order in Council, 1937

Notes

Sec 4 —Section 4, clearly does not apply to a license under General Order No. 179 unless the Secretary of State and the other party entitled consent to be bound by the terms of the Act and consent in writing. 164 I.C. 1046=1936 Lab. 582.

and the Officer Commanding the Station is satisfied on inquiry of the truth of the facts so stated; or

(b) the Officer Commanding the Station is satisfied on inquiry that there is not in the cantonment a sufficient and assured supply of houses available at reasonable rates of rent by private agreement to meet the requirements of the military officers and military messes whose accommodation in the cantonment is in his opinion necessary or expedient, the Officer Commanding the Station may, with a view to enforcing the liability under section 5, serve a notice on the owner of any house which appears to him to be suitable for occupation by a military officer or a military mess, as the case may be, within the cantonment, or if this Act is in force in part only of the cantonment, within that part, requiring the owner to permit the house to be inspected, measured and surveyed by such person and on such date, not being less than three clear days from the service of the notice, and at such time between sunrise and sunset, as may be specified in the notice.

(2) On the date and at the time so specified the owner shall be bound to afford all reasonable facilities to the person specified in the notice for the purpose of the inspection, measurement and survey of the house and, if he refuses or neglects to do so, such person may, subject to any rules made under this Act, enter on the premises and do all such things as may be reasonably necessary for the said purpose.¹

7. (1) If, on the report of such person as aforesaid, the ²[Officer Commanding the station] is satisfied that the house is suitable for occupation by a military officer or a military mess, he may, ³[⁴ * * *] by notice—

(a) require the owner to execute a lease of the house to the ⁴[Central Government] for a specified period which shall not be less than five years,

(b) require the existing occupier, if any, to vacate the house; and

(c) require the owner to execute within such time as may be specified in the notice such repairs as may, in the opinion of the ²[Officer Commanding the station], be necessary for the purpose of putting the house into a state of reasonable repair.

(2) Every notice issued under sub-section (1) shall state the amount of the annual rent proposed as reasonable for the house, calculated on the assump-

Leg Ref

¹ Section 6 is newly substituted for old S. 6 by Act IX of 1930. The old S. 6 stood as follows:—

(1) Where the Officer Commanding the station considers that the liability imposed by section 5 should be enforced in respect of any house, he shall serve a notice on the owner of the house requiring him to permit the house to be inspected, measured and surveyed by such person and on such day, not being less than three days from the service of the notice, and at such time as may be specified in the notice.

(2) On the day and at the time so specified, the owner shall be bound to afford all reasonable facilities to the person specified in the notice for the purpose of the inspection, measurement and survey of the house, and, if he refuses or neglects to do so, the said person may, subject to rules made under this Act, enter on the premises and do all such things as may be reasonably necessary for the said purpose.

² These words were substituted for the words "Commanding Officer of the Canton-

ment" by S. 6 of the Cantonments (House-Accommodation Amendment) Act, 1925 (X of 1925).

³ In sub-S. (1) to S. 7, the words "with the previous sanction of the Officer Commanding the District" has been omitted.

⁴ Substituted by Order in Council, 1937.

Notes.

Secs 6 and 11—The Cantonments Act does not contain any prohibition against a transfer by an owner of his right to continue in occupation of the house. All that the Act says is that no notice shall be issued under S. 6 if the house is occupied by the owner. The owner, therefore, may agree that if the house is required by the military authorities, he would deliver possession thereof to them. The Cantonment Magistrate is not prohibited from entering into any such agreement with an intending purchaser or even an owner in possession. Such an agreement would not defeat the provisions of the Cantonments Act. 25 Bom. L.R. 938=85 I.C. 442=1924 Bom. 238.

tion that the owner will carry out the required repairs, if any. It shall also contain an estimate of the cost of such repairs.

(3) The following shall be deemed to be conditions of every lease executed under sub-section (1), namely:—

(a) that the house shall, on the expiration of the lease, be redelivered to the owner in a state of reasonable repair, and

(b) that the grounds and the garden, if any, appertaining to the house shall be maintained in the condition in which they are at the time at which the lease is executed; ¹ Provided that nothing in this sub-section shall be deemed to affect the right of the Government to avoid the lease in any such event as is specified in clause (e) of section 108 of the Transfer of Property Act, 1882].

28. [Repealed by Act IX of 1930].

9. No house in any cantonment or part of a cantonment in which this Act

is operative shall, unless it was so occupied at the date of the issue of the notification declaring this Act, or the 3Cantonments (House Accommodation) Act, 1902, as the case may be, to be operative, be occupied

for the purposes of a hospital, school, school hostel, bank, hotel, or shop, or by a railway administration, a company or firm engaged in trade or business or a club, without the previous sanction of the Officer Commanding the District given with the concurrence of the Commissioner or, in a province where there are no Commissioners, of the Collector.

Houses not to be appropriated in certain cases.

10. No notice shall be issued under section 7 if the house—

(a) was, at the date of the issue of the notification declaring this Act or the 3Cantonments (House Accommodation) Act, 1902, as the case may be, to be operative in the cantonment or part of the cantonment, or is, with such sanction as is required by section 9, occupied as a hospital, school, school hostel, bank, hotel or shop, and has been so occupied continuously during the three years immediately preceding the time when the occasion for issuing the notice arises, or

(b) was, at the date of such notification as is referred to in clause (a) or is, with such sanction as aforesaid, occupied by a railway administration or by a company or firm engaged in trade or business or by a club, or

(c) is occupied by the owner, or

(d) has been appropriated by the 3^a [Provincial Government] with the concurrence of the Officer Commanding the District, or by the 3^a [Central Government] for use as a public office or for any other purpose.

11. (1) If a house is unoccupied, a notice issued under section 7 may

Time to be allowed for giving possession of house.

require the owner to give possession of the same to the 4[Officer Commanding the station] within twenty one days from the service of the notice.

Leg. Ref.

¹ Proviso to sub-Section (3) has been added by Act IX of 1930.

² Section 8 was repealed by Act IX of 1930. The repealed S. 8 stood as follows—

8 The Officer Commanding the District shall not sanction the issue of any notice under S. 7 unless he is satisfied—

(i) that the house in respect of which it is proposed to issue the notice is suitable for occupation by a military officer or a military mess, and

(ii) that there is not in the cantonment or, if this Act is in force in a part only of the cantonment, then in that part thereof, a sufficient number of houses already available and suitable for occupation by military

officers or military messes whose accommodation in the cantonment, or a part thereof, as the case may be, is in his opinion necessary or expedient

³ Repealed by S. 39 and Schedule of this Act

⁴ Substituted by Order in Council, 1937

¹ These words were substituted for the words "Commanding Officer of the Cantonment" by S. 6 of the Cantonments (House-Accommodation Amendment) Act, 1925 (X of 1925)

Notes.

Sec 11—See 1934 Bom. 258 cited under S. 6, *supra*.

(2) If a house is occupied, a notice issued under section 7 shall not require its vacation in less than thirty days from the service of the notice.

(3) Where a notice has been issued under section 7 and the house has been vacated in pursuance thereof, the lease shall be deemed to have commenced on the date on which the house was so vacated.

12. If the owner fails to give possession of a house to the ¹[Officer Commanding the station] in pursuance of a notice issued under section 7, or if the existing occupier fails to vacate a house in pursuance of such a notice, the District Magistrate, by himself or by another person generally or specially authorised by him in this behalf, shall enter on the premises and enforce the surrender of the house

Surrender of house when to be enforced.

Option in certain cases for owner on whom notice is issued under section 7 to call upon the Government to purchase.

13. (1) If a house, in respect of which a notice is issued under section 7, is shown to the satisfaction of the ^{1a}[Central Government] or is proved by a decree or order of a Court of competent jurisdiction to have been erected—

(a) under any conditions, rules, regulations or orders which were in force in Bengal prior to the eighth day of December, 1864, and conferred on the owner the option of offering the house for sale to the military officer applying for its appropriation for his occupation or to the East India Company or the Government, or

(b) under any conditions, rules, regulations or orders which were in force in Bombay prior to the first day of June, 1875, and conferred such an option as is described in clause (a), then the owner shall have the option of either complying with the notice or offering the house for sale to the ^{1a}[Central Government].

(2) If the owner elects to sell the house, and the ^{1a}[Central Government] is willing to purchase it the question of the amount of the purchase-money to be paid shall, in the event of disagreement, be referred to ²[a Civil Court, in accordance with the provisions of Chapter IV]

14. (1) If a house, in respect of which a notice is issued under section 7, is occupied by a tenant holding in good faith and for valuable consideration under a registered lease for any term exceeding one year, the ^{1a}[Central Government] shall, for the term of one year from the date on which the house is vacated in pursuance of the notice, or for the unexpired term of the lease whichever is the shorter, be liable to the owner for the rent fixed by the registered lease instead of for the rent payable under this Act if the rent so fixed exceeds the rent so payable.

Provision where house is held on long lease by a tenant

(2) If a house, in respect of which a notice is issued under section 7, is occupied by a tenant holding in good faith and for valuable consideration under a registered lease from year to year, the ^{1a}[Central Government] shall be liable as aforesaid for the term of six months from the date on which the house is vacated in pursuance of the notice.

(3) Nothing in this section shall be deemed—

(a) to render the ^{1a}[Central Government] so liable unless an application in writing in this behalf is made by the owner to the ¹[Officer Commanding the station] within fifteen days from the service of the notice; or

(b) to limit or otherwise affect any agreement between ³[the Crown] and the owner.

Leg Ref.

¹ These words were substituted for the words "Commanding Officer of the Cantonment" by S. 6 of the Cantonments (House-Accommodation Amendment) Act, 1925 (X

of 1925)

^{1a} Substituted by Order in Council, 1937.

² Substituted by Act IX of 1930.

³ Substituted by Order in Council, 1937

15. (1) If the owner considers that the rent stated in a notice issued under section 7 is not reasonable, he may, within a period of 1[thirty] days from the service of such notice, 1[refer the matter to a Civil Court in accordance with the provisions of Chapter IV].

Power for owner to require reference to arbitration on question of rent.

2[Provided that where an appeal has been made to the Officer Commanding the District under section 30, the period of thirty days shall be reckoned from the date on which the owner received notice of the result of the appeal under sub-section (2) of section 32.]

(2) If the owner does not make such a requisition within the said period, he shall be deemed to have accepted the rent so offered

16. (1) If the owner fails to execute any repairs to a house as required by a notice issued to him under section 7, the 3[Officer Commanding the station] may by notice require the owner to execute the repairs within such period, not being less than 1[thirty] days, as may be specified in the notice.

Power for owner to require reference to arbitration on question of repairs

(2) If the owner objects to any requisition contained in a notice issued under sub-section (1), he may, within 1[thirty] days from the service of the notice, 4[refer the matter to a Civil Court, in accordance with the provisions of Chapter IV].

2[Provided that where an appeal has been made to the Officer Commanding the District under section 30, the period of thirty days shall be reckoned from the date on which the owner received notice of the result of the appeal under sub-section (2) of section 32.]

5[(3) Every reference under sub-section (2) shall be accompanied by an estimate of the repairs, if any, which the owner considers necessary in order to put the house into a state of reasonable repair.

- 6[17. If the owner fails to comply with a notice issued under sub-section

Leg Ref

¹ Substituted by Act IX of 1930.

² Proviso added by Act XXII of 1933.

³ These words were substituted for the words "Commanding Officer of the Cantonment" by S. 6 of the Cantonments (House-Accommodation Amendment) Act, 1925 (X of 1925).

⁴ Substituted by Act IX of 1930.

⁵ Sub-section (3) of S. 16 added by Act IX of 1930

⁶ Section 17 has been substituted by Act IX of 1930 for old S. 17 which stood as follows:—

17. Where—

(a) the owner fails to comply with a notice issued under sub-section (1) of section 16 and has not, within fifteen days from the service of such notice, required that the matter be referred to a Committee of Arbitration, or

(b) a Committee of Arbitration decides that repairs are necessary and the extent to which they are necessary, and specifies the period within which they are to be executed, and the owner fails to execute them within such period, and has not within one month from the date of the decision appealed therefrom to the Civil Court as hereinafter provided, or

(c) the owner fails to execute within such period as may be specified by the Civil Court hearing such appeal such repairs as the

Court may decide to be necessary, the Military Engineer Services or the Public Works Department shall, on the application of the Officer Commanding the station, cause the repairs specified in the notice or, if the matter has been referred to a Committee of Arbitration, in the decision of the Committee or the Civil Court, as the case may be, to be executed at the expense of the Government, and the cost thereof may be deducted from the rent payable to the owner.

Notes.

Sec 15.—The Act only refers to an owner. A notice is issued to an owner and if there is any person in occupation, to the occupier, and it is the owner alone who can make a reference to the Civil Court. Hence in a reference under S. 15 the owners are not bound to make a mortgagee who is not in possession of the leased property a party and his non-joinder will not defeat the suit, although it is advisable that the mortgagee should be added under O. 1, R. 10, C. P. Code, not as a necessary party but as a person whose presence before the Court is necessary "in order to enable the Court effectually and completely to adjudicate and settle all the questions involved in the suit" 1937 Pesh. 17

Secs. 17 and 18.—See 25 A.L.J. 91=97 I C 71=1926 A. 746.

Power to have repairs executed and recover cost. (1) of section 16, the Military Engineer services or the Public works Department may, with the previous sanction of the Officer Commanding the Station and notwithstanding any right of reference conferred by that section, cause the repairs specified in the notice to be executed at the expense of the 1[Central Government] and the cost thereof, or, where a reference has been made, the amount finally determined by the Civil Court, may be deducted from the rent payable to the owner.]

18. Every person on whom devolves, by transfer, by succession or by operation of law, the interest of an owner in any house, or in any part of any house, situate in a cantonment or part of cantonment in respect of which a notification under sub-section (1) of section 3 is for the time being in force, shall be bound to give notice of the fact to the 2[Officer Commanding the Station] within one month from the date of such devolution, and, if he, without reasonable cause, fails to do so, shall be punishable with fine which may extend to fifty rupees.

CHAPTER IV.

PROCEDURE IN REFERENCES.

Jurisdiction in references 19. All references under this Act shall be made by application to, and tried by, the Court of the District Judge.

20. References under this Act shall be deemed to be proceedings within the meaning of section 141 of the Code of Civil Procedure, 1908, and in the trial thereof the Court may exercise any of its powers under that Code.

21. The scope of the inquiry in a reference under this Act shall be restricted to a consideration of the matters referred to the Court in accordance with the provisions of this Act

CHAPTER V.

APPEALS.

429. (1) An appeal shall lie to the High Court against the decision of the Appeal to High Court. Court of the District Judge upon a reference tried by it.

(2) No appeal under this section shall be admitted unless it is made within thirty days from the date of the decision against which it is preferred.

(3) An appeal preferred under this section shall be deemed to be an appeal from an order within the meaning of section 108 of the Code of Civil Procedure, 1908.

430. The owner or any tenant of a house in respect of which a notice has

Leg. Ref.

¹ Substituted by Order in Council, 1937.

² These words were substituted for the words "Commanding Officer of the Cantonment" by S. 6 of the Cantonments (House Accommodation Amendment) Act 1925 (X of 1925).

³ Chapter IV has been newly substituted by Act IX of 1930, S. 10 for the old Chapter IV.

⁴ Sections 29 and 30 have been substituted

by Act IX of 1930

Notes

Sec 30 —A person aggrieved by the issue of a notice against him under S. 7 for vacating a house in the Cantonment, has only one remedy open to him, namely, to appeal under S. 30, whether the notice is legal or not. Civil Courts have no jurisdiction to entertain a suit in respect of such notice. 49 B. 152=27 Bom L R 56= 86 I.C. 81=1925 Bom. 162.

Appeal to Officer Commanding the District. been issued under section 7 may, within a period of [ten days]¹ from the date of the service thereof appeal to the Officer Commanding the District against the decision of the Officer Commanding the Station to appropriate the house.

Petition of appeal. 31. (1) Every petition of appeal under section 30 shall be in writing and accompanied by a copy of the notice appealed against.

(2) Any such petition may be presented to the ²[Officer Commanding the station], and that officer shall be bound to forward it to the authority empowered by section 30 to hear the appeal and may attach thereto any report which he may desire to make in explanation of the notice appealed against.

(3) If any such petition is presented direct to the ³[Officer Commanding the District] and an immediate order on the petition is not necessary, the Officer Commanding the District may refer the petition to the ²[Officer Commanding the station] for report.

32. (1) The decision on any such appeal of the Officer Commanding the District ³[¹ ² ³ ⁴] shall be final, and shall not be questioned in any Court otherwise than on the ground that the house is situate in a cantonment, or part of a cantonment in which this Act is not operative:

Order in appeal final. Provided that no appeal shall be decided until the appellant has been heard or has had a reasonable opportunity of being heard in person or through a legal practitioner, ⁴[and in giving a decision the Officer Commanding the District shall record briefly the grounds thereof].

⁵[(2) Notice of the result of the appeal shall be given to the appellant as soon as may be, and where the appellant is a tenant of the house, to the owner of the house also.]

33. Where an appeal has been presented under section 30 within the period prescribed ⁶[therein] all action on the notice shall, on the application of the appellant, be held in abeyance pending the decision of the appeal.

CHAPTER VI.

SUPPLEMENTAL PROVISIONS.

34. Every notice or requisition prescribed by this Act shall be in writing signed by the person by whom it is given or made or by his duly appointed agent, and may be served by post on the person to whom it is addressed, or, in the case of an owner who does not reside in or near the cantonment, on his agent appointed ⁷[in accordance with a bye-law made under clause (29) of section 282 of the Cantonments Act, 1924].

⁸[34-A. The period prescribed for making any reference or preferring any appeal under this Act shall be computed in accordance with the provisions of the Indian Limitation Act, 1908].

Leg Ref.

¹ Substituted for the words "twenty days" by Act XXII of 1933.

² These words were substituted for the words "Commanding Officer of the Cantonment" by S. 6 of the Cantonments (House-Accommodation (Amendment) Act, 1925 (X of 1925).

³ Omitted by Act IX of 1930.

⁴ Added by Act IX of 1930.

⁵ Section 32, cl. 2 added by Act XXII of 1933.

⁶ Substituted for "by sub-section (2) of that section" by Act IX of 1930.

⁷ These words were substituted for the words "under the Cantonments Act, 1910, or any rule made thereunder" by S. 4 of the Cantonments (House-Accommodation Amendment) Act, 1925 (X of 1925).

⁸ Section 34-A inserted by Act IX of 1930.

Power for Central Government to make rules. 35. (1) The 1[Central Government] may make rules² to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) [* * *]³

(b) define the powers of entry, inspection, measurement or survey which may be exercised in carrying out the purposes and objects of this Act or of any rule made hereunder.

Further provisions respecting rules 36. (1) The power to make rules under section 35 shall be subject to the condition of the rules being made after previous publication and of their not taking effect until they have been published in the 1[Official Gazette] and in such other manner (if any) as the 1[Central Government] may direct.

(2) Any rule under section 35 may be general for all cantonments or parts of cantonments in British India in which this Act is for the time being operative, or may be special for any of such cantonments or parts as the 1[Central Government] may direct.

(3) A copy of the rules under section 35 for the time being in force in a cantonment shall be kept open to inspection free of charge at all reasonable times in the office of the cantonment authority.

(4) In making any rule under clause (b) of sub-section (2) of section 35, the 1[Central Government] may direct that whoever obstructs any person, not being a public servant within the meaning of section 21 of the Indian Penal Code, in making any entry, inspection, measurement or survey, shall be punishable with fine which may extend to fifty rupees, and, in the case of a continuing offence, with fine which, in addition to such fine as aforesaid, may extend to five rupees for every day after the first during which such offence continues.

Inapplicability of section 556 of the Code of Criminal Procedure, 1898, to trials of offences. 37. No Judge or Magistrate shall be deemed, within the meaning of section 556 of the Code of Criminal Procedure, 1898, to be a party to, or personally interested in any prosecution for an offence constituted by or under this Act merely because he is a member of the Cantonment 4[Board] or has ordered or approved the prosecution.

Protection to persons acting under Act 38. No suit or other legal proceeding shall lie against any person for anything in good faith done, or intended to be done, under this Act or in pursuance of any lawful notice or order issued under this Act.

39. [Repeals.] Repealed by S. 2 and Sch. of the Repealing Act, 1927 (XII of 1927).

[THE SCHEDULE.]

[Enactments repealed.] Repealed by S. 2 and Sch. of the Repealing Act 1927 (XII of 1927).

THE CARRIAGE BY AIR ACT (XX OF 1934).

[19th August, 1934.]
An Act to give effect in British India to a Convention for the unification of certain rules relating to international carriage by air.

WHEREAS a Convention for the unification of certain rules relating to international carriage by air (hereinafter referred to as the Convention) was, on the 12th day of October, 1929, signed at Warsaw;

Leg. Ref.

¹ Substituted by Order in Council, 1937.

² For such rules, see *Gen. R. and O.*, Vol. V, p. 251.

³ Clause (a) of sub-S. (2) of S. 35 has

been omitted by Act IX of 1930.

⁴ This word was substituted for the word "Committee" by S. 5 of the Cantonments (House-Accommodation Amendment) Act 1925 (X of 1925).

AND WHEREAS it is expedient that British India should accede to the Convention and should make provision for giving effect to the said Convention in British India:

AND WHEREAS it is also expedient to make provision for applying the rules contained in the Convention (subject to exceptions, adaptations and modifications) to carriage by air in British India which is not international carriage within the meaning of the Convention;

It is hereby enacted as follows:—

Short title, extent and commencement. 1. (1) This Act may be called THE CARRIAGE BY AIR ACT, 1934.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on such date as the 1[Central Government] may, by notification in the 1[Official Gazette] appoint.

2. (1) The rules contained in the First Schedule, being the provisions of the convention relating to the rights and liabilities of carriage, passengers, consignors, consignees and other persons shall, subject to the provisions of this Act, have the force of law in British India in relation to any carriage by air to which those rules apply, irrespective of the nationality of the aircraft performing the carriage.

(2) The 1[Central Government] may, by notification in the 1[Official Gazette] certify who are the High Contracting Parties to the Convention, in respect of what territories they are parties, and to what extent they have availed themselves of the Additional Protocol to the Convention, and any such notification shall be conclusive evidence of the matters certified therein.

(3) Any reference in the First Schedule to the territory of any High Contracting Party to the Convention shall be construed as a reference to all the territories in respect of which he is a party.

(4) Notwithstanding anything contained in the Indian Fatal Accidents Act, 1855, or any other enactment or rule of law in force in any part of British India, the rules contained in the First Schedule shall, in all cases to which those rules apply, determine the liability of a carrier in respect of the death of a passenger, and the rules contained in the Second Schedule shall determine the persons by whom and for whose benefit and the manner in which such liability may be enforced.

(5) Any sum in francs mentioned in rule 22 of the First Schedule shall, for the purpose of any action against a carrier, be converted into rupees at the rate of exchange prevailing on the date on which the amount of damages to be paid by the carrier is ascertained by the Court.

3. (1) Every High Contracting Party to the Convention who has not availed himself of the provisions of the Additional Protocol thereto shall, for the purposes of any suit brought in a Court in British India in accordance with the provisions of rule 28 of the First Schedule to enforce a claim in respect of carriage undertaken by him, be deemed to have submitted to the jurisdiction of that Court and to be a person for the purposes of the Code of Civil Procedure, 1908.

(2) The High Court may make rules of procedure providing for all matters which may be expedient to enable such suits to be instituted and carried on.

(3) Nothing in this section shall authorise any Court to attach or sell any property of a High Contracting Party to the Convention.

4. The 1[Central Government] may, by notification in the 1[Official Gazette] apply the rules contained in the first Schedule and any provision of section 2 to such carriage by air, not being international carriage by air as defined in the First Schedule, as may be specified in the notification, subject however to such exceptions, adaptations and modifications, if any, as may be so specified.

FIRST SCHEDULE.

(See section 2.)

RULES

CHAPTER I.

SCOPE—DEFINITIONS

1. (1) These rules apply to all international carriage of persons, luggage or goods performed by aircraft for reward. They apply also to such carriage when performed gratuitously by an air transport undertaking.

(2) In these rules "High Contracting Party" means a High Contracting Party to the Convention.

(3) For the purposes of these rules the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to the Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of these rules.

(4) A carriage to be performed by several successive air carriers is deemed, for the purposes of these rules, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

2. (1) These rules apply to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in R. 1.

(2) These rules do not apply to carriage performed under the terms of any international postal Convention.

CHAPTER II

DOCUMENTS OF CARRIAGE.

Part I.—Passenger ticket.

3 (1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars —

(a) the place and date of issue.

(b) the place of departure, and of destination,

(c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character,

(d) the name and address of the carrier or carriers;

(e) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

(2) The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to these rules. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the Schedule which exclude or limit his liability.

Part II.—Luggage ticket

4. (1) For the carriage of luggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.

(2) The luggage ticket shall be made out in duplicate one part for the passenger and the other part for the carrier.

(3) The luggage ticket shall contain the following particulars —

(a) the place and date of issue;

(b) the place of departure and of destination,

Leg Ref.

¹ Substituted by Order in Council, 1937.

- (c) the name and address of the carrier or carriers,
- (d) the number of the passenger ticket,
- (e) a statement that delivery of the luggage will be made to the bearer of the luggage ticket,
- (f) the number and weight of the packages,
- (g) the amount of the value declared in accordance with R. 22 (2),
- (h) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

(4) The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to these rules. Nevertheless, if the carrier accepts luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain the particulars set out at (d), (f) and (h) of sub-rule (3), the carrier shall not be entitled to avail himself of those provisions of this Schedule which exclude or limit his liability.

Part III.—Air consignment note.

5 (1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment note", and every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of R. 9, be none the less governed by these rules.

6 (1) The air consignment note shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign an acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air consignment note, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

7. The carrier of goods has the right to require the consignor to make out separate consignment notes when there is more than one package.

8. The air consignment note shall contain the following particulars:—

- (a) the place and date of its execution;
- (b) the place of departure and of destination,
- (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character,
- (d) the name and address of the consignor,
- (e) the name and address of the first carrier,
- (f) the name and address of the consignee, if the case so requires,
- (g) the nature of the goods,
- (h) the number of the packages, the method of packing and the particular marks or numbers upon them,
- (i) the weight, the quantity and the volume or dimensions of the goods,
- (j) the apparent condition of the goods and of the packing,
- (k) the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it,
- (l) if the goods are sent for payment on delivery, the price of the goods, and if the case so requires, the amount of the expenses incurred,
- (m) the amount of the value declared in accordance with R. 22 (2),
- (n) the number of parts of the air consignment note;
- (o) the documents handed to the carrier to accompany the air consignment note;
- (p) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon;
- (q) a statement that the carriage is subject to the rules relating to liability contained in this Schedule.

9. If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in R. 8 (a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability.

10. (1) The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note.

(2) The consignor will be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

11 (1) The air consignment note is *prima facie* evidence of the conclusion of contract, of the receipt of the goods and of the conditions of carriages.

(2) Statements in the air consignment note relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the goods do not constitute evidence against the carrier except so far as they both have been, and are stated in the air consignment note to have been, checked by him in the presence of the consignor or relate to the apparent condition of the goods.

12. (1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note.

(4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with R. 13. Nevertheless, if the consignee declines to accept the consignment note or the goods, or if he cannot be communicated with, the consignor resumes his right of disposition.

13. (1) Except in the circumstances set out in R. 12, the consignee is entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

14. The consignor and the consignee can respectively enforce all the rights given them by Rr. 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

15. (1) Rules 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

(2) The provisions of Rr. 12, 13 and 14 can only be varied by express provision in the air consignment note.

16. (1) The consignor must furnish such information and attach to the air consignment note such documents as are necessary to meet the formalities of customs, octroi or police before the goods can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III.

LIABILITY OF THE CARRIER.

17. The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

18. (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

19. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

20. (1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

21. If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may exonerate the carrier wholly or partly from his liability.

22. (1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 1,25,000 francs. Where damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 1,25,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value of the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned in this rule shall be deemed to refer to the French franc consisting of 65 $\frac{1}{2}$ milligrams gold of millesimal fineness 900.

23. Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in these rules shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Schedule.

24. (1) In the cases covered by Rr. 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Schedule.

(2) In the cases covered by R. 17 the provisions of sub-R. (1) also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

25. (1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability if the damage is caused by his wilful misconduct or by such default on his part as is in the opinion of the Court equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

26. (1) Receipt by the person entitled to delivery of luggage or goods without complaint is *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of carriage.

(2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of luggage and seven days from the date of receipt in the case of goods. In the case of delay the complaint must be made at the latest within fourteen days from the date on which the luggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

27. In the case of the death of the person liable, an action for damages lies in accordance with these rules against those legally representing his estate.

28. An action for damages must be brought at the option of the plaintiff, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

29. The right of damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

30. (1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in sub-R. (4) of R. 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Schedule, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

CHAPTER IV.

PROVISIONS RELATING TO COMBINED CARRIAGE.

31. (1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Schedule apply only to the carriage by air, provided that the carriage by air falls within the terms of R. 1.

(2) Nothing in this Schedule shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Schedule are observed as regards the carriage by air.

CHAPTER V.

GENERAL AND FINAL PROVISIONS.

32. Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Schedule, whether by deciding the law to be applied, or by altering the rules as to jurisdiction shall be null and void. Nevertheless for the carriage of goods arbitration clauses are allowed, subject to these rules, if the arbitration is to take place in the territory of one of the High Contracting Parties within one of the jurisdictions referred to in R. 28.

33. Nothing contained in this Schedule shall prevent the carrier from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of this Schedule.

34. This Schedule does not apply to international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, nor does it apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

35. The expression "days" when used in these rules means current days, not working days.

36. When a High Contracting Party has declared at the time of ratification of or of accession to the Convention that the first paragraph of Art 2 of the Convention shall not apply to international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority, these rules shall not apply to international carriage by air so performed.

SECOND SCHEDULE

(See section 2)

PROVISIONS AS TO LIABILITY OF CARRIERS IN THE EVENT OF THE DEATH OF A PASSENGER

1. The liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death.

In this rule the expression "member of a family" means wife or husband, parent, step-parent, grand-parent, brother, sister, half-brother, half-sister, child, step-child, grand-child:

Provided that, in deducing any such relationship as aforesaid any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adopters.

2. An action to enforce the liability may be brought by the personal representative of the passenger or by any person for whose benefit the liability is under the last preceding rule enforceable, but only one action shall be brought in British India in respect of the death of any one passenger, and every such action by whomsoever brought shall be for the benefit of all such persons so entitled as aforesaid as either are domiciled in British India, or, not being domiciled there express a desire to take the benefit of the action.

3. Subject to the provisions of the next succeeding rule the amount recovered in any such action, after deducting any costs not recovered from the defendant, shall be divided between the persons entitled in such proportions as the Court may direct.

4. The Court before which any such action is brought may at any stage of the proceedings make any such order as appears to the Court to be just and equitable in view of the provisions of the First Schedule to this Act limiting the liability of a carrier and of any proceedings which have been, or are likely to be, commenced outside British India in respect of the death of the passenger in question.

THE CARRIAGE OF GOODS BY SEA ACT (XXVI OF 1925).¹

[21st September, 1925.]

An Act to amend the law with respect to the carriage of goods by sea.

WHEREAS at the International Conference on Maritime Law held at Brussels in October, 1922, the delegates at the Conference, including the delegates representing His Majesty, agreed unanimously to recommend their respective Governments to adopt as the basis of a convention a draft convention for the unification of certain rules relating to bills of lading,

AND WHEREAS at a meeting held at Brussels in October, 1923, the rules contained in the said draft convention were amended by the Committee appointed by the said Conference;

And whereas provision has been made by the Carriage of Goods by Sea Act, 1924, that the said rules as so amended and as set out with notifications in the schedule shall, subject to the provisions of that Act, have the force of law with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers under bills of lading;

And whereas it is expedient that like provision should be made in British India; It is hereby enacted as follows:—

1. (1) This Act may be called THE CARRIAGE OF GOODS BY SEA ACT, 1925.

Short title and extent.

(2) It extends to the whole of British India.

2. Subject to the provisions of this Act, the rules set out in the schedule (hereinafter referred to as "the rules") shall have

Application of rules

effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India.

3. There shall not be implied in any contract for the carriage of goods by sea to which the rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship.

4. Every bill of lading, or similar document of title, issued in British India which contains or is evidence of any contract to which the rules apply, shall contain an express statement that it is to have effect subject to the provisions of the said rules as applied by this Act.

Statement as to application of Rules to be included in bills of lading.

Modification of Article VI of Rules in relation to goods carried in sailing ships and by prescribed routes.

5. Article VI of the Rules shall, in relation to—

(a) the carriage of goods by sea in sailing ships carrying goods from any port in British India to any other port whether in or outside British India, and

(b) the carriage of goods by sea in ships carrying goods from a port in British India notified² in this behalf in the 3[*Official Gazette*] by the 3[Central Government] to a port in Ceylon specified in the said notification, have effect as though the said Article referred to goods of any class instead of to particular goods and as though the proviso to the second paragraph of the said Article were omitted.

6. Where under the custom of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then,

Modification of Rules 4 and 5 of Article III in relation to bulk cargoes.

Leg. Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1925, Pt. V, p. 37 and for report of the joint committee, see

ibid., p. 205

² For such notification, see *Gazette of India*, 1925, Pt. I, p. 950.

³ Substituted by Order in Council, 1937.

notwithstanding anything in the rules, the bill of lading shall not be deemed to be *prima facie* evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

7 (1) Nothing in this Act shall affect the operation of sections four hundred and forty-six to four hundred and fifty. Saving and operation both inclusive, five hundred and two, and five hundred and three of the Merchant Shipping Act, 1894, as amended by any subsequent enactments, or the operation of any other enactment for the time being in force limiting the liability of the owners of seagoing vessels.

(2) The rules shall not by virtue of this Act apply to any contract for the carriage of goods by sea before such day¹, not being earlier than the first day of January, 1926, as the ²[Central Government] may, by notification in the ²[*Official Gazette*], appoint, nor to any bill of lading or similar document of title issued, whether before or after such day as aforesaid, in pursuance of any such contract as aforesaid.

SCHEDULE.

RULES RELATING TO THE BILLS OF LADING.¹

ARTICLE I.

DEFINITIONS.

In these rules the following expressions have the meanings hereby assigned to them respectively that is to say—

(a) "Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper;

(b) "Contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or of any similar document as aforesaid, issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between carrier and a holder of the same;

(c) "Goods" includes goods, wares, merchandises, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried,

(d) "Ship" means any vessel used for the carriage of goods by sea,

(e) "Carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship

ARTICLE II

RISKS

Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the loading, handling, stowage, carriage custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth

ARTICLE III

RESPONSIBILITIES AND LIABILITIES.

1 The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy,

(b) Properly man, equip, and supply the ship,

(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation

2 Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried

3 After receiving the goods into his charge, the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage,

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

Leg Ref.

¹ For notification appointing such day as the 1st of January, 1926, see *Gazette of*

India, 1925, Pt. I, p. 950

² Substituted by Order in Council, 1937.

(c) The apparent state and condition of the goods:

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable grounds for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.¹

4 Such a bill of lading shall be *prima facie* evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c).

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be *prima facie* evidence of the delivery by the carrier of the goods as described in the bill of lading.²

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

7. After the goods or loaded the bill of lading to be issued by the carrier, master or agent of the carrier, to the shipper shall, if the shipper so demands, be a "shipped" bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier, such document of title may be noted at the port of shipment by the carrier, master or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this Article be deemed to constitute a "shipped" bill of lading.

8 Any clause, covenant or agreement in a contract of a carriage relieving the carrier or the ship from liability for loss or damage to or in connexion with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these rules, shall be null and void and of no effect.

A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability

ARTICLE IV.

RIGHTS AND IMMUNITIES.

1. Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III.

Leg. Ref.

¹ Clause, "weight, contents and value unknown" in bill of lading—Effect of 62 M.L.J. 736

² Failure to bring the suit within time extinguishes the right 1931 Sind 124, 1932 Bom. 330.

Notes.

Sch. I, Art. III, Para 6: CONSTRUCTION—PERIOD OF ONE YEAR—IF CAN BE EXTENDED—The period of one year fixed in para. 6, Art. 3, Sch. I is to be construed strictly and is not to be allowed to be extended by vague and indefinite arguments and pleas. Where a ship leaves the port on a particular date, she must be deemed to have delivered the cargo to the consignees within the meaning of para. 6, Art. 3, and it is not open to the consignees to take ad-

vantage of a survey, which has been unduly delayed in order to extend the period of time 1937 Sind 11.

PORT TRUST—IF AGENTS OF SHIP OWNERS.—The Port Trust are not the agents of the ship-owners to hold identified and ascertained consignments indefinitely at the will of the consignees, so as to make the ship-owners liable for the loss caused to the consignments, although in particular cases it may well be that they are agents of the ship-owners for the limited purpose of identifying and delivering the consignments mixed together 1937 Sind 11.

'REMOVAL'—MEANING.—The word 'removal' in Para 6, Art 3, Sch. I, Carriage of Goods by Sea Act, means physical removal 1937 Sind 11

Whenever loss or damage had resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section

2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

- (a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
- (b) fire, unless caused by the actual fault or privity of the carrier;
- (c) perils, dangers and accidents of the sea or other navigable waters,
- (d) act of God,
- (e) act of war,
- (f) act of public enemies,
- (g) arrest or restraint of princes, rulers or people, or seizure under legal process;
- (h) quarantine restriction,
- (i) act or omission of the shipper or owner of the goods, his agent, or representative,
- (j) strikes or lock-outs or stoppage, or restraint of labour from whatever cause, whether partial or general,
- (k) riots and civil commotions;
- (l) saving or attempting to save life or property at sea,
- (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods,
- (n) insufficiency of packing,
- (o) insufficiency or inadequacy of marks;
- (p) latent defects not discoverable by due diligence,
- (q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

3. The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants

4. Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these rules or of the contract of carriage and the carrier shall not be liable for any loss or damage resulting therefrom

5. Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connexion with goods in an amount exceeding 100*l* per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading

This declaration if embodied in the bill of lading shall be *prima facie* evidence, but shall not be binding or conclusive on the carrier.

By agreement between the carrier, master or agent of the carrier and the shipper another maximum amount than that mentioned in this paragraph may be fixed, provided that such maximum shall not be less than the figure above named

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connexion with goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading.

6. Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any

ARTICLE V

SURRENDER OF RIGHTS AND IMMUNITIES, AND INCREASE OF RESPONSIBILITIES AND LIABILITIES.

A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under the rules contained in any of these Articles, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of these rules shall not be applicable to charterparties, but if bills of lading are issued in the case of a ship under a charterparty they shall comply with the terms of these rules. Nothing in these rules shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average

ARTICLE VI.

SPECIAL CONDITIONS.

Notwithstanding the provisions of the preceding Articles, a carrier, master or agent of the carrier, and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect.

Provided that this Article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed, are such as reasonably to justify a special agreement.

ARTICLE VII.

LIMITATIONS ON THE APPLICATION OF THE RULES

Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connexion with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

ARTICLE VIII.

LIMITATION OF LIABILITY

The provisions of these Rules shall not affect the rights and obligations of the carrier under any statute for the time being in force relating to the limitation of the liability of owners of sea-going vessels.

ARTICLE IX.

The monetary units mentioned in these Rules are to be taken to be gold value.

THE CARRIERS ACT (III OF 1865).

| Year. | No. | Short title. | Effect of subsequent legislation |
|-------|-----|---------------------------|---|
| 1865 | III | The Carriers Act, 1865 .. | <p>Repealed in part by Act IX of 1890 Section 2 repealed in part by Act X of 1914.</p> <p>Repealed (as to carriers by rail), by Act IV of 1879</p> <p>Amended by Act X of 1899, S. 2 Amended by Act XIII of 1921</p> <p>Declared in force— throughout British India except as regards the Scheduled Districts Act XV of 1874, S. 3, in the Sonthal Parganas, Reg. III of 1872, S. 3 as amended by Reg. III of 1899, S. 3; in the Upper Burma (except the Shan States), Act XIII of 1898, S. 4</p> |

Prefatory Note: DEFINITION AND KINDS OF CARRIERS—A carrier is one who undertakes the transportation of persons or moveable property, and the authorities, both elementary and judicial, recognize two kinds of classes of carriers, viz., 'private carriers' and 'common carriers'. While a common carrier has been defined as one who holds himself out to the public to carry persons or freight for hire, the term did not, at the common law, embrace a carrier of passengers, and is commonly confined to carriers of goods, as distinguished from common carriers of passengers. (See the definition in S. 2.) A private carrier is one who, without being engaged in such business as a public employment, undertakes to deliver goods in a particular case for hire or reward. A common carrier differs from a private carrier in two important respects: (1) In respect of duty, he being obliged by law to undertake the charge of transportation, which no other person, without a special agreement is. (2) In respect of risk, the former being regarded by the law as an insurer, the latter, being liable like ordinary bailees.

APPLICABILITY OF LAW OF BAILEES—(1) **TO CARRIAGE OF GOODS**.—The rules of liability applicable to private carriers of goods are those which are in general applicable to ordinary bailees, and the law as to common carriers of goods is a branch of the law

covering the subject of bailments. That is, the carrier of goods is a bailee, and, aside from any considerations of public policy which affect the liability of a carrier conducting a public employment his duties and liabilities are in general those of an ordinary bailee; but these considerations of public policy have led to the recognition by the Courts, from an early period in the history of the common law, of rules respecting the duty of the common carrier as to serving the public, and as to liability for goods entrusted to his care which do not apply to private carriers of goods.

(2) TO CARRIAGE OF PASSENGERS.—A carrier of passengers is not, as to the person of the passenger, a bailee, and in this respect the law of carriers of passengers is not a part of the subject of bailments; but inasmuch as those who hold themselves out as prosecuting the business of carrying passengers for hire are regarded as undertaking a public duty, they are properly classed in this respect with public carriers of goods, and it is proper to treat them under the general heading of "Carriers". Moreover public carriers of passengers are deemed common carriers as to the baggage accepted by them for transportation as a part of the business of transporting passengers.

WHO ARE COMMON CARRIERS OF GOODS.—A common carrier has been defined as "one who undertakes for hire or reward, to transport the goods of such as choose to employ him from place to place".

RIGHTS AND LIABILITIES OF COMMON CARRIERS.—"A common carrier must carry all goods that are tendered to him for carrying without insisting upon an unreasonable condition, provided they are of the description which he professes to carry, [*Garton v. Bristol and Exeter Railway*, (1861) 1 B. and S. 162, *Great Western Railway v. Sutton*, 1868 L.R. 4 H.L. 226], he has accommodation for the goods [*Jackson v. Rogers*, (1863) 2 Show 327], and reasonable payment of their carriage is offered [*Wyld v. Pickford*, (1841) 8 Mec. and W. 443; 58 R. R. 775], and the sender is ready and willing to pay it (Bullen and Leake, 3rd Ed., p. 277); and also provided that the goods are brought neither too late for the journey by which they are to go [see *Pickford v. Grand Junction Railway*, (1844) 12 Mec. and W. 766]; nor too long a time before the journey is to begin [*Lane v. Cotton*, (1701) 1 Raym. (Ld.); at p. 652; see *Great Western Railway v. Bunch*, (1888) 13 App. Cas. 31]. But the carrier may apparently refuse to take goods which will subject him to exceptional danger [*Edwards v. Sherratt*, (1801) 1 East 604, per Hale, C. J.; *Morse v. Slue*; (1672) 1 Vent 238]. Unless otherwise agreed, he must deliver within a reasonable time, having regard to the circumstances of the case [*Taylor v. Great Northern Railway*, (1866) L.R. 1 C.P. 385; *Hales v. London and North-Western Railway*, (1863) 4 B. and S. 661] and by the route which he professes to be his route [*Foster v. G. W. Ry.*, (1904) 2 K. B. 306, distinguishing *Mallet v. G. E. Ry.*, (1899) 1 Q.B. 309, see *Ency. of Laws of England*, Vol. II, p. 580]. A carrier is liable for injury arising from negligence in the execution of his contract to carry, unless he has effectively stipulated that he shall be free from such liability. If the contract is one which deprives the passenger of the benefit of a duty or care which he is *prima facie* entitled to expect that the Railway Company has accepted, the latter must discharge the burden of proving that the passenger assented to the special terms imposed. This he may show to have been done either in person or through the agency of another. Such agency will be held to have been established when he is shown to have authorised antecedently or by way of ratification the making of the contract under circumstances in which he must be taken to have left everything to his agent. In such a case, it is sufficient to prove that he has been content to accept the risk of allowing terms to be made without taking the trouble to learn what was being agreed to. In such cases the Railway Company may infer his intention from his conduct. Where, therefore a passenger who is to be carried upon special conditions at a reduced fare has allowed terms to be made for him by an agent the presumption is that the passenger was content to accept the risk without enquiring what the terms agreed upon by his agent were. 19 C.W.N. 905 (P.C.); see also 54 Cal. 430.

THE CARRIERS ACT (III OF 1865)¹

[14th February, 1865.]

An Act relating to the rights and liabilities of Common Carriers.

WHEREAS it is expedient not only to enable common carriers to limit their

Preamble liability for loss of or damage to property delivered to them to be carried but also to declare their liability for loss of or damage to such property occasioned by the negligence or criminal acts of themselves, their servants or agents; It is enacted as follows:—

Leg. Ref.

¹ For Statement of Objects and Reasons of the Bill which was passed into law as Act III of 1865, see *Gazette of India Extraordinary*, dated 1st August, 1864, and for

Proceedings relating to the Bill, see *ibid*, Supplement, p. 497, and *ibid*, 1865, pp. 51, 64 and 65.

The Act has been declared to be in force in the whole of British India, except as

Leg. Ref.

regards the Scheduled Districts, by the Laws Local Extent Act (XV of 1874), S. 3.

It has been applied to Upper Burma generally (except the Shan States) by the Burma Laws Act (XIII of 1898), Bur. Code, Vol. I, but its application to hill-tribes in a hill tract is barred by the Kachin Hill Tribes Regulation (I of 1895), Bur. Code, Vol. I; and to Chins in the Chin Hills by the Chin Hills Regulation (V of 1896), Bur. Code, Vol. I. It has been applied to the Santhal Parganas, by the Santhal Parganas Settlement Regulation (III of 1872), S. 31, as amended by the Santhal Parganas Justice and Laws Regulation (III of 1899), B. and O. Code, Vol. I.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act (XIV of 1874), to be in force in the following Scheduled Districts, namely.—

Sindh

West Jalpaiguri, the Western Hills of Darjiling, the Darjiling Tarai and the Damson Sub-division of the Darjiling District

The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see *Calcutta Gazette*, 1899, Pt. I, p. 44); and Manbhum, and Pargana Dhalbhum and the Kolhan in the District of Singhbhum

The Porahat Estate in the District of Singhbhum

Kumaon and Garhwal

The Scheduled portion of the Mizapuri District

Jaunsar Bawar

The Districts of Hazara, Peshawar, Kohat, Bannu, Dera Ismail Khan and Dera Ghazi Khan (*Portions of the Districts of Hazara, Bannu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat now form the North-West Frontier Province*, see *Gazette of India*, 1901, Pt. I, p. 857, and *ibid.*, 1902, Pt. I, p. 575; but its application to that part of the Hazara District known as Upper Tanawal is barred by the Hazara (Upper Tanawal) Regulation (II of 1900), *Punjab and N.-W. Code*)

The Scheduled Districts of the Central Provinces

The Scheduled Districts in Ganjam and Vizagapatam

The District of Sylhet

The rest of Assam (except the North Lushai Hills)

It has been declared, by notification under S. 3 (b) of the last-mentioned Act, not to be in force in the Schedule District of Lahaul—see *Gazette of India*, 1886, Pt. I, p. 301.

It has been extended, by notification under S. 5 of the same Act, to the following Scheduled Districts, namely.—

The Tarai of the Provinces of Agra

Ajmer and Merwara

It has been repealed as to carriers by rail by the Indian Railways Act (IV of 1879). For the Indian Railways Act now in force, see the Indian Railways Act (IX of 1890).

See *Gazette of India*, 1880, Pt. I, p. 672.

Ditto 1881, Pt. I, p. 74.

Ditto 1881, Pt. I, p. 504.

Ditto 1897, Pt. I, p. 1059.

Ditto 1876, Pt. I, p. 605.

Ditto 1878, Pt. I, p. 383.

Ditto 1878, Pt. I, p. 382.

Ditto 1886, Pt. I, p. 48.

Ditto 1879, Pt. I, p. 771.

Ditto 1898, Pt. I, p. 870.

Ditto 1879, Pt. I, p. 631.

Ditto 1897, Pt. I, p. 299.

See *Gazette of India*, 1876, Pt. I, p. 505.

Ditto 1877, Pt. I, p. 605.

Short title

1. This Act may be cited as THE CARRIERS ACT, 1865.

Interpretation clause.

2. In this Act, unless there be something repugnant in the subject or context—

“common carrier” denotes a person, other than the Government, engaged in the business of transporting for hire property

“Common carrier”.

from place to place, by land or inland navigation, for

all persons indiscriminately:

1 “person” includes any association or body of persons, whether incorporated or not.

2 [* * * * *]

3 No common carrier shall be liable for the loss of or damage to property

Leg. Ref

1 Cf definition in S. 3 (39) of the General Clauses Act (X of 1897)

2 Repealed by Act X of 1914

Notes

Sec 1: ACT IS NOT EXHAUSTIVE THE LIABILITY OF THE COMMON CARRIERS IS GOVERNED BY THE ENGLISH COMMON LAW AS MODIFIED BY THE CARRIERS ACT.—A common carrier is subject to two distinct classes of liability, the one as insurer, in which the element of default is absent, the other for losses, as he is under an obligation to carry safely, in which that element is present. The Carriers Act modifies this by providing that the liability as insurer for goods not mentioned in the schedule may be limited by special contract where the loss is due to negligence. 38 C. 28, 15 C.W.N. 226.

ACT NOT AFFECTED BY CONTRACT ACT.—3 B. 109, 18 C. 620 (P.C.), 20 I.C. 546=38 M. 941=25 M.L.J. 162

WHO ARE COMMON CARRIERS.—Owners of sea-going merchant ships (26 C. 562); owners of steamships plying periodically (3 M. 107); carrier by water generally (38 M. 941) See also 28 M. 400

As to duties of common carriers under the Act, see 51 I.A. 28=51 C. 304 (P.C.)

LIABILITY OF COMMON CARRIER.—A common carrier does not cease to fill that character if he enters into a special contract limiting his liability both under the Carriers Act and under the Indian Railways Act. 31 I.C. 474=11 N.L.R. 174. Carrier is ordinarily the agent of the buyer not only to take delivery but also to assent to appropriation. 12 I.C. 662 A common carrier in India is liable as an insurer. He is responsible for safety of goods entrusted to him except when loss or injury arises from act of God or King's enemies. But this liability may be varied by contract 29 I.C. 260=21 C.L.J. 565 In India carriers by sea do not get the benefit of the Act. 40 B. 529=33 I.C. 536. Carriers by sea for hire are common carriers though the Carriers Act of 1865 does not apply to them. 38 M. 941 The duties and liabilities of a common carrier are governed in India by the principles of the *English Common Law* on the subject except where they have been departed from the Carriers Act, or by the

Railways Act. (*Ibid*) Where the bill of lading contained the clause “At shipper's risk with option of carrying on deck,” and the goods (betel leaves) went bad for want of ventilation, *held*, that the carrier was not liable in damages, being exempted by the special clause. 30 I.C. 939 (1). Stipulations exempting the carrier from liability will be held to limit his liability as insurer and not his liability for negligence unless negligence is expressly included. 17 I.C. 37=6 S.L.R. 103 (32 M. 9, Foll.). The burden of proving absence of negligence is on the common carrier, loss or damage being deemed *prima facie* proof of negligence. 29 I.C. 260=21 C.L.J. 565 In a contract to carry a load from one place to another where no fixed route is settled upon, the more convenient route may be followed though it is a longer one and carriage cost should be calculated on the same. 11 I.C. 43 (Cal.). The definition of a “Common Carrier” in S. 2 is framed without reference to the extent of his liability 31 I.C. 474=11 N.L.R. 174. A carrier in its general sense means a person or company which undertakes to transport the goods of another person from one place to another for hire 34 M.L.J. 553 Where goods have to be carried with the aid of different agencies to arrive at the destination, the carrier with whom the contract is made at one end is, in the absence of a contract limiting his liability to his own transport system, liable for loss or destruction of the goods beyond his own system or in consequence of act done by or default of persons other than his own servant. (*Ibid*.) See also 54 Cal. 430=1927 Cal. 394.

Sec. 2 —A licensee of a ferry is a common carrier. 50 I.C. 562. “Indiscriminately,” meaning of See 51 C. 304=51 I.A. 28 (P.C.).

Secs 3 and 4 —The liability for loss or damage is not defeated by the fact that the goods delivered as luggage are in fact merchandise. 41 Cal. 80 Liability for loss of goods in case of through booking by steamer and rail. See 11 C.W.N. 1076; on this section, see also 44 C. 419; 13 P.R. 1866. Early Anglo-Indian Legislation extended to India the principle embodied in the Carriers Act (1830) (11 Geo. IV and I Wm. IV c. 68). See Statement of Objects and Reasons. See also 38 C. 28; 10 C. 166 (F.B.); 13

Carriers not to be liable for loss of certain goods above one hundred rupees in value, unless delivered as such.

thereof.¹

For carrying such property, payment may be required at rates fixed by carrier.

Provided that, to entitle such carrier to payment at a rate higher than his ordinary rate of charge, he shall have caused to be exhibited in the place where he carries on the business of receiving property to be carried, notice of the higher rate of charge required, printed or written in English and in the vernacular language of the country wherein he carries on such business.

Proviso.

business of receiving property to be carried, notice of the higher rate of charge required, printed or written in English and in the vernacular language of the country wherein he carries on such business.

5. In case of the loss or damage to property exceeding in value one hundred rupees and of the description aforesaid

The person entitled to recover in respect of property lost or damaged may also recover money paid for its carriage.

also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid.

6. The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act shall not be deemed to be limited or affected by any public notice; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863² (*to provide for taking land for works of public utility to be constructed*

delivered to him to be carried exceeding in value one hundred rupees and of the description contained in the schedule to this Act, unless the person delivering such property to be carried or some person duly authorized in that behalf, shall have expressly declared to such carrier or his agent the value and description

4. Every such carrier may require payment for the risk undertaken in carrying property exceeding in value one hundred rupees and of the description aforesaid, at such rate of charge as he may fix.

ordinary rate of charge, he shall have caused to be exhibited in the place where he carries on the business of receiving property to be carried, notice of the higher rate of charge required, printed or written in English and in the vernacular language of the country wherein he carries on such business.

5. In case of the loss or damage to property exceeding in value one hundred rupees and of the description aforesaid

delivered to such carrier to be carried, when the value and description thereof shall have been declared and payment shall have been required in manner provided for by this Act, the person entitled to recover in respect of such loss or damage shall

also be entitled to recover any money actually paid to such carrier in consideration of such risk as aforesaid.

6. The liability of any common carrier for the loss of or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act shall not be deemed to be limited or affected by any public notice; but any such carrier, not being the owner of a railroad or tramroad constructed under the provisions of Act XXII of 1863² (*to provide for taking land for works of public utility to be constructed*

Leg. Ref.

¹ The earlier sections extended to India the principle embodied in the Carriers Act, 1830 (11 Geo. IV and 1 Wm. IV, c. 68). See Statement of Objects and Reasons quoted *supra*.

² See now the Land Acquisition Act (1 of 1894), S. 2

Notes.

C L.R. 342; 40 C. 716; 17 B. 417; 17 C. 39; 19 C. 538; 18 C. 620 (P.C.)

Secs 6 to 8.—A carrier is liable for injury arising from *negligence* in the execution of his contract to carry unless he has effectively stipulated that he shall be free from such liability. 19 C.W.N. 905=31 I. C. 684 (P.C.). Nature of negligence for which owner of railroad or tram-road liable. See 11 M.L.J. 156. Unless there is a contract to the contrary, the consignor cannot hold the company with whom he did not contract, liable for the loss, when all that is complained of, is *non-feasance*. 34 M.L.J. 553=45 I.C. 485. Where there is an agreement between two companies constituting one as the agent of the other and both are work-

ing for joint benefit, either Company may be sued. (*Ibid.*) Goods consigned to a Railway Company for carriage were, during transmission, destroyed by a severe cyclone (*Ibid.*, in a suit for value of the goods that the company was not liable. 38 I.C. 702=25 C L J 37. When an extraordinary cause co-operating with the negligence of a person produces injury to some other person, the negligent person is not liable. (*Ibid.*) Liability of railway in case of loss of goods by fire caused by erroneous description of goods. See 3 B. 120; 3 B. 109; 5 B. 371; 13 P.R. 1866, 28 M. 400; 17 M. 445; 11 C.W.N. 1076. Burden of proof as to negligence. 24 C 786, 1 C.W.N. 200; 26 C. 398; 24 C. 786. A contract of carriage by a shipping company is at an end when it delivers the goods to the Port Commissioners. 41 Cal. 703=25 I.C. 885. Whether the goods are to be delivered to the consignee at his house or at the termination of the journey depends on agreement and on the usual course of business. 44 I.C. 401=20 Bom.L.R. 591. It is the duty of the consignee to ascertain when the goods will arrive and to be ready to take delivery. 41 Cal 703. At the time of deli-

ted by private persons or Companies, and for regulating the construction and use of works on land so taken) may, by special contract, signed by the owner of such property so delivered as last aforesaid or by some person duly authorized in that behalf by such owner, limit his liability in respect of the same.

7. ¹The liability of the owner of any railroad or tramroad constructed under the provisions of the said Act XXII of 1863, for the loss or damage to any property delivered to him to be carried, not being of the description contained in the Schedule to this Act, shall not be deemed to be limited or affected by any special contract, but the owner of such railroad or tramroad shall be liable for the loss of or damage to property delivered to him to be carried only when such loss or damage shall have been caused by negligence or a criminal act on his part or on that of his agents or servants.

8. Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried where such loss or damage shall have arisen from the ²[* ⁴] criminal act of the carrier or any of his agents or servants ²]and shall also be liable

Leg Ref.

¹ Section 7, (so far as it relates to railways), has been repealed by the Indian Railways Act (IX of 1890), Ch VII, S 72

² The words "negligence or" were omitted and the words within brackets at the end of the section were added by Act XIII of 1921, S 2 (1)

Notes.

very, a Railway Company is not bound to give after reweighing a certificate of shortage. Refusal on the part of the consignee to take delivery in consequence of the refusal to give a certificate is sufficient to throw the loss arising from deterioration of the goods on the consignee. 45 I.C. 933=22 C.W.N. 902. The act of the Company in sending out notice of arrival and issuing a delivery order to a person, whom they *bona fide* believed to be the person entitled to the goods was not an act for which they could be made liable. 41 Cal. 703. Notice of suit and liability for loss, before suit. see 8 C.L.J. 192; 41 Ind. Cas. 919. Waiver of notice, 38 C. 50. Where freight is paid in advance for the carriage of goods by sea to a shipowner, he gets it absolutely and the shipper of goods cannot recover it. 44 Mad. 145=40 M.L.J. 57. A clause in a contract of carriage agreeing to hold the carriers indemnified from and against all claims which may be insured against them nevertheless is governed by S. 8 and does not relieve the carriers of liability arising from the negligence of their servants. It is not a separate contract of indemnity but part of the contract of carriage. 38 Cal. 28. Where by a special contract, a Steamer Company, common carriers, were exempted from liability for any loss or damage, unless it arose from their negligence or criminal act of their servants or agents, the loss of goods is *prima facie* evidence of negligence and burden is on them to prove that loss must

have been occasioned otherwise than by the negligence or criminal act of themselves, their servants or agents. 40 Cal. 716=19 I.C. 245=17 C.W.N. 633. Where, by an arrangement with Railway Company, goods delivered to it were to be transported by a Steamship Company and the goods were destroyed on board a steamer, held that, although there was no contract between it and the plaintiff, the Steamship Company was nevertheless liable as a common carrier for the loss. 47 Cal. 6=23 C.W.N. 998.

BILL OF LADING—Special clause against liability—Shipper cannot sue. 62 I.C. 709=30 M.L.T. 18 (H.C.)

Secs 8 and 9—The Act makes a common carrier liable to the owner of the goods as such, though not as insurer. 47 Cal. 6. But see 60 Cal. 879. The loss or damage to the goods is *prima facie* proof of negligence and under S. 9 the burden of proof as to the absence of negligence is thrown upon the common carrier. 41 Cal. 80. The onus of proving negligence of the carrier is not upon the plaintiff. *Ibid*. Contract exonerating carrier from liability for negligence of servants invalid. 59 C. 472=1932 C. 344.

CARRIER'S LIABILITY—The licence granted to a lighterman required him to give the benefit of his services to all persons who may require them, subject to his having reasonable ground for refusal. He entered into contracts for the carriage of goods with a steamship and gave an indemnity for safe carriage, but he was not prevented from entering into other contracts; *Held*, that the licensee was a common carrier and, where he does not carry safely, he is liable for the loss on the footing that he is an insurer of the goods. The owner of the goods can sue him and it is no answer to say that there is no privity of contract between him and the

to the owner for loss or damage to any such property, other than property to which the provisions of section 3 apply and in respect of which the declaration required by that section has not been made, where such loss or damage has arisen from the negligence of the carrier or any of his agents or servants]

9. In any suit brought against a common carrier for the loss, damage or non-delivery of goods entrusted to him for carriage, it shall not be necessary for the plaintiff to prove that such loss, damage or non-delivery was owing to the negligence or criminal act of the carrier, his servants or agents

Plaintiffs, in suits for loss, damage, or non-delivery, not required to prove negligence or criminal act.

10. No suit shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless notice in writing of the loss or injury has been given to him before the institution of the suit and within six months of the time when the loss or injury first came to the knowledge of the plaintiff.

Notice of loss or injury to be given within six months.

11. The [Provincial Government] may, by notification in the [Official Gazette,] add to the list of articles contained in the Schedule to this Act, and the Schedule shall, on the issue of any such notification, be deemed to have been amended accordingly.

Power to Provincial Government to add to the Schedule.

SCHEDULE

Gold and silver coin.
Gold and silver in a manufactured or unmanufactured state
Precious stones and pearls.
Jewellery
Time-pieces of any description.
Trinkets.
Bills and hundies.
Currency notes of the Government of India, or notes of any Banks, or securities for payment of money, English or Foreign.
Stamps and stamped paper
Maps, prints, and works of art.
Writings.
Title-deeds.
Gold or silver plate or plated articles
Glass.
China
Silk in a manufactured or unmanufactured state and whether wrought up or not wrought up with other materials.
Shawls and lace.

Cloths and tissues embroidered with the precious metals or of which such metals form part
Articles of ivory, ebony or sandalwood.
[Art pottery and all article made of marble
Furs
Government securities
Opium
Coral
Musk, Orr, Sandal wood oil, and other essential oils used in the preparation of it or other perfumes.
Musical and scientific instruments
Feathers
Narcotic preparations of hemp.
Gude India-rubber.
Jade, jade stone and amber
Goroochand or Goroochandian
Cinematograph films and apparatus
Zahir Mohra Khatai]

Leg. Ref

Sec 10 —S. 10 was added by the Indian Carriers Act (X of 1899) S. 2. The original section was repealed by the Indian Railways Act (IX of 1890). That section ran as follows —

"Nothing in this Act shall affect the provision contained in the ninth, tenth, and eleventh sections of Act XVIII of 1854 (relating to Railways in India)".

¹ Section 11 was added by Act XIII of 1921, S. 3.

² Substituted by Order in Council, 1937.

³ Added by Notification No. 5299 dated 14th October, 1922. See *Gazette of India*, 1922, Pt. I, p. 1235.

Notes

carrier. 60 Cal. 879=37 C.W.N. 559=1933

Cal. 735. Injuries to goods. Through booking of goods. Nephene. Oms. of proof. Non-treasure and misfeasance. 17 Cal. 6. Goods delivered to Steamship Co. Carriage by Railway Companies. Loss during transit in railway. Liability of Steamship Co. Burden of proof. 54 Cal. 430 31 C.W.N. 358

Sec 10 —In order to maintain a suit for damages for short delivery against a common carrier, a notice of claim under S. 10 must be given, even though the carrier came to know of the claim *aliunde* within six months' time and had no difficulty in tracing the goods. 41 L.C. 919=27 C.L.J. 294, 38 C. 50. The essential of a good notice under S. 10 is that it should reach the person who is liable to make good the loss: 54 Cal. 430=31 C.W.N. 358 1927 C. 304.

THE CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).

Effect of subsequent legislation Short title given by Act XIV of 1827.

Declared in force—throughout British India except as regards the Scheduled Districts, Act XV of 1874, S. 3, in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3

Prefatory Note.—"When Warren Hastings became the Governor of Bengal, one of his first acts was to lay down a plan for the administration of civil justice in the interior of Bengal. With respect to civil rights, Warren Hastings' plan of 1772 directed by his twenty-third rule, that "in all suits regarding marriage, inheritance and caste and other religious usage and institutions, the laws of the Koran with respect to Mahomedans, and those of Shaster with respect to Gentus (Hindus) shall be invariably adhered to". Moulvies or Brahmins were directed to attend the Courts for the purpose of expounding the law and giving assistance in framing the decrees. The principle laid down by the above rule of Warren Hastings was recognised and confirmed by the code of regulations issued by the Government of Bengal in 1780, as also by the British Parliament in 1881 by the provision contained in S. 18 of 21 Geo. III, c. 70. Enactments to the same effect have been introduced into numerous subsequent English and Indian enactments. A Bengal regulation of 1832 (VII of 1832), whilst re-enacting the rules of Warren Hastings which had been embodied in previous regulations qualified their application by a provision which attracted little attention at that time, but afterwards became the subject of considerable discussion. It declared that these rules are intended and shall be held to apply to such person as *bona fide* professes those religions at the time of the application of the law to the case, and were designed for the protection of the rights of such persons, not for the deprivation of the rights of others. Where, therefore, in any civil suit the parties to such suits may be of different persuasion, where one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or more of the parties to such suit shall not be either of the Mahomedan or Hindu persuasion the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws they would have been entitled. In all such cases the decision shall be governed by the principles of justice and equity, and this provision shall not be considered as justifying the introduction of the English or any foreign law or the application to such cases of any rules not sanctioned by those principles. In the year 1850 the Government of India passed the law (XXI of 1850) of which the object was to extend the principle of this regulation throughout the territories subject to the Government of the East India Company. This Act, which was at the time of its passing, known as the Lex Loci Act, excited considerable opposition among orthodox Hindus as unduly favouring converts and has been criticised from the Hindu point of view with respect to its operation on the guardianship of children in a case where one of two parents had been converted from Hinduism to Mahomedanism. It will have been observed that Warren Hastings' rule and the enactment based upon it apply to Hindus and Mahomedans. There are, of course, many natives of India who are neither Hindus nor Mahomedans, such as the Portuguese and Armenian Christians, the parsis, the Sikhs, the Jains, the Buddhists of Burma and elsewhere and the Jews. The tendency of the Courts or the legislature has been to apply to these classes the spirit of Warren Hastings' rule and to leave them in the enjoyment of family law, except so far as they have shown a disposition to place themselves under English Law" (See Ilbert's *Government of India*, 2nd Ed., 1907, pp. 323, 329). This Act was originally known as the Lex Loci Act, and is even now generally cited under the same designation. The title is, however, a misnomer. It was properly applied to the other provisions which were subsequently dropped. (See the evidence of Mr. Cameron before the Select Committee of the House of Lords in 1852; Ilbert's *Government of India*, 2nd Ed., 1907, p. 328 Note.)

THE CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).¹

[11th April, 1850]

An Act for extending the principle of section 9, Regulation VII, 1832, of the Bengal Code throughout the Territories subject to the Government of the East India Company.

Leg. Ref.

¹ Short title, "The Caste Disabilities Removal Act, 1850." See the Indian Short Titles Act, 1897 (XIV of 1897).

This Act has been declared to be in force in the whole of British India, except as regards the Scheduled Districts, by the Laws Local Extent Act, 1874 (XV of 1874), S. 3.

It has been declared in force in the Santhal

Parganas by the Santhal Parganas Settlement Regulation (III of 1872), S. 3, as amended by the Santhal Parganas Laws and Justice Regulation, 1899 (III of 1899), B & O. Code, Vol. I.

It has been declared, by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (XIV of 1874), to be in force in the following Scheduled Districts, namely:—

WHEREAS it is enacted by section 9, Regulation VII, 1832, of the Bengal Code¹ that "whether in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhamadan persuasion, or

Leg. Ref.

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|---|--|
| Sindh | See <i>Gazette of India</i> : 1880, Pt. I, p. 672. |
| West Jalpaiguri | <i>Ibid.</i> 1881, Pt. I, p. 74 |
| The Districts of Hazaribagh, Lohardaga (now the Ranchi District, see <i>Calcutta Gazette</i> , 1899, Pt. I, p. 44); and Manbhum: and Pargana Dhalbhum and the Kolhan in District of Singbhum | <i>Ibid.</i> 1881, Pt. I, p. 504. |
| The Scheduled portion of the Mizapur District | <i>Ibid.</i> 1879, Pt. I, p. 383. |
| Jaunsar Bawar | See <i>Gazette of India</i> , 1897 Pt. I, p. 382. |
| The Districts of Peshawar, Hazara, Kohat, Banu, Dera Ismail Khan and Dera Ghazi Khan (<i>Portions of the Districts of Hazara, Banu, Dera Ismail Khan and Dera Ghazi Khan and the Districts of Peshawar and Kohat, now form the North-West Frontier Province, see Gazette of India</i> , 1901, Pt. I, p. 857, and <i>ibid.</i> , 1902, Pt. I, p. 575; but its application has been barred in that part of the Harara District known as Upper Tanawal, by the Hazara (Upper Tanawal) Regulation (II of 1900) S. 3, Punjab and N.W. Code) | <i>Ibid.</i> 1886, Pt. I, p. 48. |
| The District of Lahaul | <i>Ibid.</i> 1886, Pt. I, p. 301 |
| The Scheduled Districts of the Central Provinces | <i>Ibid.</i> 1879, Pt. I, p. 771. |
| The Scheduled Districts in Ganjam and Vizagapatam | <i>Ibid.</i> 1898, Pt. I, p. 870. |
| Coorg | <i>Ibid.</i> 1879, Pt. I, p. 747. |
| The District of Sylhet | <i>Ibid.</i> 1879, Pt. I, p. 631. |
| The rest of Assam (except the North Lushai Hills) | <i>Ibid.</i> 1897, Pt. I, p. 299. |
| The Porahat Estate in the Singbhum District | <i>Ibid.</i> 1897, Pt. I, p. 1059. |
| It has been extended, by notification under S. 5 of the last-mentioned Act, to the following Scheduled Districts, namely— | |
| Upper Burma generally (except the Shan States) | See <i>Gazette of India</i> , 1898, Pt. I, p. 89 and <i>Ibid.</i> 1899, Pt. I, p. 98 |
| Kumaon and Garhwal | See <i>Gazette of India</i> , 1876, Pt. I, p. 606. |
| The Tarai and the Province of Agia | <i>Ibid.</i> 1876, Pt. I, p. 505 |
| ¹ Bengal Regulation Act VII of 1832 was repealed by the Bengal Civil Courts Act (VI of 1871) which was repealed by Act XII of 1887 | |

Notes

This Act is not retrospective. 4 A.L.J. 365 As to effect of conversion before this Act on rights of inheritance, see 21 M.L.J. 645=15 C.W.N. 545=35 A. 356 (P.C.)

SCOPE OF ACT.—See 23 M. 171; 1 Bom. 559; 32 Cal. 871 Regulation VII of 1832 or Act XXI of 1850 held to be applicable to the Province of Oudh from the date of annexation at the earliest, that is the year 1856 4 O. W. N. 1243; 1928 Oudh 138

OBJECT OF THE ACT.—19 W.R. 367 (406); construction of this Act (*ibid.*); conflict to be avoided in construing Act 77 P.R. 1907; 11 A. 100.

APPLICATION OF ACT.—Act applies to all cases of ex-communication from caste—Cause

of ex-communication being immaterial. 2 N.-W.P. 446; ex-communication of Hindu widow for unchastity causes no forfeiture of rights 1 B. 559, 32 C. 871; 19 W.R. 367 (379) Application of Act to heirs of convert. See 21 P.L.R. 1903; 32 C. 871; 11 A. 100; 57 I.A. 313=60 M.L.J. 275 (P.C.); 1935 Oudh 301.

Act applies only for the benefit of the person who changes his religion. In other words, when once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children 160 I.C. 48=1936 A.L.J. 488=1936 A.W.R. 198=1936 All. 202.

EFFECT OF THE ACT.—Act XXI of 1850

where one or more of the parties to the suit shall not be either of the Muhamadan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled; and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company; It is enacted as follows:—

1. So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories

Notes.

secures after apostasy the same rights to individuals in property as they enjoyed before apostasy 31 I C 476—98 P R 1915 Section 1 merely removes the personal disability of the person who has changed his religion from enforcing his rights which he possessed prior to the change. It does not lay down that if any ancestor of the *propositus* in any degree of ascent has changed his religion the Act would apply in determining the status of an heir to such a *propositus*. The removal of the penalty which the preamble bears out is clearly intended for the benefit of the party who has incurred the penalty and not for others. The Act has no application to a case where the claimant of rights either of one class or of the other has neither renounced nor has been excluded from the communion of any religion or been deprived of caste 4 O W N 1243—1928 O. 138 Degradation by apostasy does not dissolve marriage among Hindus 9 M. 466 (470); 18 C. 264; 17 M. 235; 23 M. 171; 25 B. 644; 49 P R. 1907, 4 B 330; 4 M. 243; 8 M. 169; 2 N-W P 300, as to restitution of conjugal rights, see 8 A 78 Hindu widow re-marrying after conversion—Effect on her rights of inheritance 23 M L J. 81; 19 C 289; 35 A. 466 Act does not affect usage of Hindu temple or other religious institution. 13 M 293; 13 I A. 105; 11 M I A 405 Loss of caste does not involve loss of right of guardianship 167 P.L.R. 1901; 1 A 549, 14 M.I.A. 309; 28 A. 233; or right to give Hindu son in adoption 25 B. 551

Sec. 1—A convert or outcaste from Hindu religion retains his right of inheritance whether the right accrues before or after the conversion to another religion or exclusion from caste 3 Pat 152. Courts in India should refuse to interfere with the autonomy of caste, *see*, with the decisions of caste panchayats provided they are not opposed to natural justice 23 I C. 301=12 A L J 552 Caste panchayats deal with

families as units. 23 I.C 301=12 A.L.J. 552 The effect of S 9 of the Bengal Regulation (VII of 1832) and of Act XXI of 1850 which extended the principles of the Regulation to the whole of British India is virtually to set aside the provisions of Hindu Law which penalise the renunciation of religion or exclusion from caste by enforcing forfeiture of the property of the converts 33 A 356=38 I.A. 87=15 C W N 545=21 M L J 845 (P.C.) A Hindu who was joint in estate with his son became a convert to Mahomedanism in 1845 and died in 1851, his son having predeceased him. *Held*, that the convert's son who remained Hindu did not acquire any enforceable right to his father's share in the joint family property which he could either assert in himself or transmit to his heirs for enforcement in a British Court of Justice. (*Ibid*) Conversion by a Hindu wife to Mahomedanism—Right of succession See 21 L W 415 at 431 A Hindu son is entitled to inherit the property of his father who was converted to Mahomedanism. See 27 I.C. 357=8 S L R 155 (11 A. 100, *Foll.*); 38 I A. 87, 23 M 171; 21 C 697, *Ref.*; 1927 M. 72 Conversion of one member of Hindu family—Coparcenary right of—Survivorship put an end to 26 L.W 361=1927 M. 883=105 I C. 206 As to burden of proof, see 27 I.C. 357.

The Caste Disabilities Removal Act has abrogated the rule of Mahomedan Law by which a non-Muslim is excluded from succession to a Muslim. 1 Lah. 376 When a convert to Christianity leaves descendants behind him, they cannot, as reversioners claim the estate of a deceased Hindu, as the provision for removal of disabilities under the above Act applies only to the apostate and does not extend to his descendants. 40 M 1118 (11 A. 100, *diss. from*). See also 98 I C 867=24 L.W. 675=1926 M.W.N. 952 A convert's son must be put in the position in which he would have been, if his father had not changed his religion. 27 I.C 357=8 S L R 155 The fact of the vendees

THE INDIAN CENSUS ACT (X OF 1929).

Prefatory Note.—"The object of this Act is to provide for the taking of a census in 1931. It reproduces 'with the necessary verbal alterations, the provision of the Indian Census Act, 1920 (IV of 1920)'—(*Statement of Objects and Reasons.*)

[1st October, 1929.

In Act to provide for certain matters in connection with the taking of the Census.

WHEREAS it has been determined to take a census of British India during the year 1931, and it is expedient to provide for certain matters in connection with the taking of such census; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE INDIAN CENSUS ACT, 1929.

(2) It extends to the whole of British India including British Baluchistan and the Sonthal Parganas

Appointment of census-officers

2. (1) The [Provincial Government] may appoint any person to take, or aid in, or supervise the taking of, the census within any specified local area.

(2) Persons so appointed shall be called census-officers

(3) The [Provincial Government] may delegate to such authority, as it thinks fit, the power of appointing census-officers which is conferred by this section.

3. (1) A declaration in writing, signed by any officer authorised by the [Provincial Government] in this behalf, that any person has been duly appointed as census-officer for any local area shall be conclusive proof of such appointment.

(2) All census-officers shall be deemed to be public servants within the meaning of the Indian Penal Code.

Discharge of duties of census-officers in certain cases.

4. (1) (a) Every officer in command of any body of men belonging to His Majesty's naval, military or air forces or to His Majesty's Indian Marine Service or of any vessel of war,

(b) every person (except a pilot or harbour-master) having charge or control of a vessel;

(c) every person in charge of a lunatic asylum, hospital, workhouse, prison, reformatory or lock-up or any public, charitable, religious or educational institution;

(d) every keeper, secretary or manager of any *sarai*, hotel, boarding-house, lodging-house, emigration depot or club; and

(e) every occupant of immovable property who has at the time of the taking of the census not less than twenty persons living on or in such property, and every manager or officer of a railway or other commercial or industrial establishment who has at such time not less than ten persons employed under him, shall, if so required by the District Magistrate or by such officer as the [Provincial Government] may appoint in this behalf, perform such of the duties of a census-officer in relation to the persons who at the time of the taking of the census are under his command or charge, or are inmates of his house or present on or in such immovable property or are employed under him, as such Magistrate or officer may, by written order, direct.

(2) All the provisions of this Act relating to census-officers shall apply, so far as they can be made applicable, to all persons while performing such duties under this section, and any person refusing or neglecting to perform any

Notes.

being Christians did not deprive them of their rights of succession to the vendors who being Christians were converted to Islam. 1 Lah. 376. Apostasy from Hinduism does not entitle a member of a Malabar tarwad to claim partition of the property and deli-

very to him of his share, under the Removal of Caste Disabilities Act. The effect is not to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject. 44 M. 891=41 M.L.J. 243 (F.B.).

duty which he is directed under this section to perform shall be deemed to have committed an offence under section 187 of the Indian Penal Code.

5. (1) The District Magistrate, or such officer as the [Provincial Government] may appoint in this behalf for any local area, may, by written order, which shall have effect throughout the limits of his district or of such local area, as the case may be, call upon—

Power of District Magistrate to call upon certain persons to give assistance

(a) all owners and occupiers of land, tenure-holders, farmers, assignees of land-revenue and lessees of fisheries under the Burma Fisheries Act, 1905, or the Upper Burma Land and Revenue Regulation, 1889, or their agents,

(b) all village-officers and servants in estates as defined in the Madras Proprietary Estates' Village Service Act, 1894, and

(c) all members of panchayats appointed under the Village Chaukidari Act, 1870, or the Sylhet and Cachar Rural Police Regulation, 1883, or members of union boards established under the Bengal Village Self-Government Act, 1919, all ghatwals, Unit-tahsildars and members of a panchayat appointed under the Bihar and Orissa Village Administration Act, 1922, all members of village-authorities constituted under the Assam Local Self-Government Act, 1915, or the Assam Rural Self-Government Act, 1926, and all village-headmen in the Kumaun Division of the United Provinces, to give such assistance as he needs towards the taking of a census of the persons who are at the time of the taking of the census on the lands of such owners, occupiers, holders, farmers and assignees, or within the limits of such fisheries or in the villages or other areas for which such village-officers and servants, panchayats, union boards, village-authorities, ghatwals, Unit-tahsildars or village-headmen are appointed, as the case may be.

(2) Such order shall specify the nature of the assistance required, and such owners, occupiers, holders, farmers, assignees and lessees, or their agents, and such village-officers and servants, the members of such panchayats, union boards and village-authorities, and such ghatwals, Unit-tahsildars and village-headmen shall be bound to obey it.

6. Every census-officer may ask all such questions of all persons within the limits of the local area for which he is appointed as, by instructions issued in this behalf by the [Provincial Government] and published in the Official Gazette, he may be directed to ask.

Asking of questions by census officer.

7. Every person of whom any question is asked under the last foregoing section shall be legally bound to answer such question to the best of his knowledge, or belief:

Obligation to answer questions

Provided that no person shall be bound to state the name of any female member of his household, and no woman shall be bound to state the name of her husband or deceased husband or of any other person whose name she is forbidden by custom to mention.

8. Every person occupying any house, enclosure, vessel or other place shall allow census-officers such access thereto as they may require for the purposes of the census, and as, having regard to the customs of the country, may be reasonable, and shall allow them to paint on or affix to the place such letters, marks or numbers as may be necessary for the purpose of the census.

Occupier to allow access, and permit affixing of numbers.

9. (1) Subject to such orders as the [Provincial Government] may issue in this behalf, any census-officer may leave, or cause to be left—

Occupier or manager to fill up schedule.

(a) at any dwelling-house within the local area for which he is appointed or

(b) with any manager or officer of any commercial or industrial establishment who has at the time of the taking of the census not less than ten persons employed under him,

a schedule for the purpose of its being filled up by the occupier of such house or of any specified part thereof, or by such manager or officer with such particulars as the [Provincial Government] may direct regarding the inmates of such house or part, or the person employed under such manager or officer at the time of the taking of census, as the case may be.

(2) When any such schedule has been so left, the occupier of the house or part to which it relates, or the manager or officer with whom it is left, shall fill it up, or cause it to be filled up to the best of his knowledge or belief, so far as regards the inmates of such house or part, or the persons employed under him at the time aforesaid, as the case may be, and shall sign his name thereto, and, when so required, shall deliver the schedule so filled up and signed to the census-officer or to such person as the census-officer may direct.

Penalties.

10 In any of the following cases, namely:

(a) if a census-officer or a person lawfully required to give assistance towards the taking of a census refuses or neglects to use reasonable diligence in performing any duty imposed upon him or in obeying any order issued to him in accordance with this Act or with any rule duly made thereunder,

(b) if a census-officer intentionally puts any offensive or improper question or knowingly makes any false return, or, without the previous sanction of the [Central Government] or the [Provincial Government], discloses any information which he has received by means of or for the purposes of a census return,

(c) if any person refuses to answer to the best of his knowledge or belief any question asked of him by a census-officer which he is legally bound by section 7 so to answer,

(d) if any person occupying any house, enclosure, vessel or other place refuses to allow a census-officer such reasonable access thereto as he is required by section 8 to allow,

(e) if any person removes, obliterates, alters or injures before the 31st day of March, 1931, any letters, marks or numbers which have been painted or affixed for the purposes of the census,

(f) if any occupier of a dwelling-house or part thereof or any person with whom a schedule is left under section 9 knowingly and without sufficient cause fails to comply with the provisions of section 9, or makes any false return under that section, he shall be punishable with fine which may extend to fifty rupees.

11. (1) The Government may, by notification in the Official Gazette, declare before what classes of Magistrates prosecutions under this Act may be instituted.

(2) Unless and until a notification is published under sub-section (1) all prosecutions under this Act shall, in the towns of Calcutta, Madras and Bombay, be instituted before a Presidency Magistrate, and elsewhere, before the District Magistrate.

(3) No prosecution under this Act shall be instituted except with the previous sanction of the [Provincial Government], or of some officer authorised by the [Provincial Government] in this behalf.

12. No person shall have a right to inspect any book, register or record

Records of census not open to inspection or admissible in evidence in certain proceedings.

made by a census-officer in the discharge of his duty as such officer or any schedule delivered under section 9, and notwithstanding anything to the contrary in the Indian Evidence Act, 1872, no entry in any such book, register, record or schedule shall be admissible

as evidence in any civil proceeding or any proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898.

13. Notwithstanding anything in any enactment or rule with respect to the mode in which a census is to be taken in any municipality, the municipal authority may, at the time appointed for the taking of the census of British India during the year 1931, cause the census or the municipality to be taken wholly or in part by any method authorised by this Act.

14. Notwithstanding anything in any enactment or rule, in regard to municipal, local, union or village funds, the 1[Provincial Government] may direct that the whole or any part of any expenses incurred for anything done in accordance with this Act may be charged to any municipal, local, union or village fund constituted for, and on behalf of, the area within which such expenses were incurred.

Power to make rules 15. (1) The 1[Central Government] may make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, the 1[Central Government] may make rules providing—

(a) for the appointment of census-officers and of persons to perform any of the duties of census-officers or to give assistance towards the taking of a census, and for the general instructions to be issued to such officers or persons;

(b) for the enumerating of persons employed on railways and their families and of other classes of the population for whom it may be necessary or expedient to make special provision; and

(c) for the enumeration of persons travelling on the night when a census is taken.

(3) The 1[Central Government] may, by general or special order, direct that all or any of the powers conferred upon him by this section may also be exercised by any 1[Provincial Government] with respect to the territories administered by it.

THE CENTRAL BOARD OF REVENUE ACT (IV OF 1924).²

| Year. | No | Short title. | How repealed or otherwise affected by legislation. |
|-------|----|--|--|
| 1924 | IV | The Central Board of Revenue Act, 1924 | Rep. in part by Act XII of 1927. |

An Act to provide for the constitution of a Central Board of Revenue and to amend certain enactments for the purpose of conferring powers and imposing duties on the said Board.

WHEREAS it is expedient to provide for the constitution of a Central Board of Revenue and to amend certain enactments for the purpose of conferring powers and imposing duties on the said Board; it is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE CENTRAL BOARD OF REVENUE ACT, 1924.

(2) It shall come into force on the first day of April, 1924.

Leg. Ref.

¹ Substituted by Order in Council, 1937

² For Statement of Objects and Reasons,

see *Gazette of India*, 1924, Pt. V, p. 30; and for Report of the Select Committee, see *ibid*, p. 37.

2. As soon as may be after the commencement of this Act, the 1[Central Government] shall constitute a Central Board of Revenue², consisting of one or more persons appointed by it, which shall be subject to the control of the 1[Central Government] in the exercise of such powers and the performance of such duties as may be entrusted to it by the 1[Central Government] or by or under any law.

3. The 1[Central Government] may make rules³ for the purpose of regulating the transaction of business by the Central Board of Revenue, and every order made or act done in accordance with such rules shall be deemed to be the order or act, as the case may be, of the Central Board of Revenue.

4. The enactments specified in the Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof:

Provided that, where the power to make any appointment, or issue any notification, order, scheme or rule, or prescribe any form, is transferred by the operation of this Act from any authority to the Central Board of Revenue or any other authority, any such appointment, notification, order, scheme, rule, or form made, issued or prescribed by the first-mentioned authority before the commencement of this Act shall continue in force and be deemed to have been made, issued or prescribed by the Central Board of Revenue or such other authority, as the case may be, unless and until it is superseded by an appointment, notification, order, scheme, rule, or form made, issued or prescribed by the said Board or authority.

THE SCHEDULE. ENACTMENTS AMENDED. (See Section 4.)

| Year. | No | Short title | Amendments. |
|-------|------|---------------------------|--|
| 1878 | VIII | The Sea Customs Act, 1878 | <p>1. In section 63—</p> <p>(1) for clause (a) the following clause shall be substituted, namely—</p> <p>(a) 'Chief Customs-authority' means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924, and includes, in relation to any power or duty which the Governor-General in Council may, by notification in the <i>Gazette of India</i> transfer from the Central Board of Revenue to a Local Government, the Local Government or such officer as the Local Government may appoint in that behalf", and</p> <p>(2) after clause (j) the following clause shall be inserted, namely:—</p> <p>"(k) 'Official Gazette' means in relation to a notification issued by a Local Government, the Local <i>Official Gazette</i>, and in relation to a notification issued by the Central Board of Revenue, the <i>Gazette of India</i>."</p> <p>2. For section 6 the following section shall be substituted, namely.—</p> |

Leg Ref.

¹ Substituted by Order in Council, 1937.

² For Notification constituting the Central

Board of Revenue, see General Rules and Orders, Vol. V, p. 612.

³ For such Rules, see *ibid*.

| Year. | No. | Short title. | Amendments. |
|-------|------|---|---|
| 1878 | VIII | The Sea Customs Act, 1878—(<i>Contd.</i>) | <p>"6. The Governor-General in Council may appoint such persons as he thinks fit to be officers of Customs, and to exercise the powers conferred, and perform the duties imposed by this Act on such officers"</p> <p>3 For section 7 the following section shall be substituted, namely.—</p> <p>"7. The Governor General in Council may delegate to any [Local Government or to the Chief Customs-authority any power conferred upon him by section 6, and the Local Government or the Chief Customs-authority may delegate to any officer of Custom any power so delegated to it"</p> <p>4. In sections 11, 12 and 14, for the words "The Local Government or, if so authorised by the Local Government, the Chief Customs-authority" the words "The Chief Customs-authority" shall be substituted. and, in section 11, the words "within the territories administered by it" shall be omitted.</p> <p>5. In section 23 for the words "The Local Government" the words "The Chief Customs-authority" shall be substituted.</p> <p>6 In sections 53, 74, 76, 79, 85, 96, 116, 128, 133 and 147, the word "local", wherever it occurs in the expression "local official Gazette" shall be omitted.</p> <p>7. In section 88, for the words "the Local Government may from time to time direct" the words "the Chief Customs-authority may with the concurrence of the Local Government, direct" shall be substituted</p> <p>8. In section 128, for the words "the Local Government" the words "the Chief Customs-authority" shall be substituted.</p> <p>9 In section 133, for the words "the Local Government, subject to the control of the Governor-General in Council", the words "the Chief Customs-authority" shall be substituted</p> <p>10. In section 155, after the words "the Local Government may", the words "with the previous sanction of the Governor-General in Council" shall be inserted and for the words "by its own officers" the words "by officers of Government" shall be substituted</p> <p>11. In section 157, for the words "The Local Government" the words "The Governor-General in Council" shall be substituted.</p> <p>12. In section 188, for the words "the Local Government" in both places where they occur, the words "the Governor-General in Council" shall be substituted.</p> <p>13. In section 191, for the words "The Local Government" the words "The Governor-General in Council" shall be substituted.</p> <p>14. After section 204 the following section shall be inserted, namely.—</p> <p>"205 Any notification published in the <i>Gazette of India</i> by the Chief Customs Publication of authority under section 53, section 74, section 76, section 79, section 85, section 96, section 116, section 128, section 133 or section 147 shall forthwith be re-published in the local official Gazette of each province to which it relates"</p> |

| Year. | No | Short title. | Amendments |
|-------|-----|----------------------------------|--|
| 1896 | II | The Cotton Duties Act, 1896. | [<i>Repealed by Act XII of 1927.</i>] In section 2, for the words "the Local Government" the words and figures "if so empowered by the Governor General in Council the Local Government or the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924," shall be substituted. |
| 1908 | X | The Indian Salt Duties Act, 1908 | |
| 1914 | III | The Indian Copyright Act, 1914. | In sub-section (2) of section 6, for the words "the Local Government" the words "the Chief Customs-authority" shall be substituted. |
| 1922 | XI | The Indian Income-tax Act, 1922 | 1. After clause (4) of section 2, the following clause shall be inserted, namely— "(4-A) 'the Central Board of Revenue' means the Central Board of Revenue constituted under the Central Board of Revenue Act, 1924" 2. In section 5— (i) in clause (a) of sub-section (1), for the words "a Board of Inland Revenue" the words "the Central Board of Revenue" shall be substituted, and (ii) sub-section (2) shall be omitted. 3. In clauses (6) and (11) of section 2, in sub-section (5) of section 5, in sub-section (6) of section 18, in sub-section (5) of section 19, in sub-section (1) of section 59, and in sub-section (3) of section 64 for the words "the Board of Inland Revenue" the words "the Central Board of Revenue" shall be substituted. |

THE CHARITABLE ENDOWMENTS ACT (VI OF 1890).¹

| Year. | No. | Short title. | How repealed or otherwise affected by legislation |
|-------|-----|--------------------------------------|--|
| 1890 | VI | The Charitable Endowments Act, 1890. | Repealed in part (as to Burma) by Act XIII of 1898 Ss. 3 (1), 4 (3) (i), 11, 13 amended by Act XXXVIII of 1920. Declared in force— in the Sonthal Parganas Reg III of 1872, S. 3, as amended by Reg. III of 1899. S. 3 in Upper Burma (except the Shan States) Act XIII of 1898, S. 4. |

[7th March, 1890.]

An Act to provide for the Vesting and Administration of Property held in trust for charitable purposes.

WHEREAS it is expedient to provide for the vesting and administration of property held in trust for charitable purposes; it is hereby enacted as follows:—

Leg Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1889, Pt. V, p. 137; for Report of the Select Committee, see *ibid.*, 1890, p. 65; and for Proceedings in Council, see *ibid.*, 1889, Pt. VI, pp. 117 and 190, and *ibid.*, 1890, Pt. VI, p. 37.

The Act has been declared in force in Upper Burma (except the Shan States) by

the Burma Laws Act (XIII of 1892), Burma Code.

The Act has been declared in force in the Sonthal Parganas under S. 3 of the Sonthal Parganas Settlement Regulation (III of 1872) as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Bengal Code, Vol. I.

Title, extent and commencement.

1. (1) This Act may be called THE CHARITABLE ENDOWMENTS ACT, 1890.

(2) It extends to the whole of British India, inclusive of 1[* * *] British Baluchistan; and

(3) It shall come into force on the first day of October, 1890.

2. In this Act "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching or worship.

Definition.

3. 2[(1) The Central Government may appoint an officer of the Government by the name of his office to be treasurer of charitable endowments for India, and the Government of any Province may appoint an officer of the Government by the name of his office to be treasurer of charitable endowments for the Province.]

Appointment and incorporation of Treasurer of charitable endowments

(2) Such Treasurer shall, for the purposes of taking, holding and transferring movable or immovable property under the authority of this Act, be a corporation sole by the name of the Treasurer of Charitable Endowments for 2[India or, as the case may be, the Province] and, as such Treasurer, shall have perpetual succession and a corporate seal, and may sue and be sued in his corporate name.

3[3-A. In the subsequent provisions of this Act "the appropriate Government" means, as respects a charitable endowment, the objects of which do not extend beyond a single Province and are not objects to which the executive authority of the Central Government extends, the Government of the Province, and as respects any other charitable endowment the Central Government.]

Definition of "appropriate Government," etc.

4. (1) Where any property is held or is to be applied in trust for a charitable purpose, the 2[appropriate Government] if it thinks fit, may, on application made as hereinafter mentioned, and subject to the other provisions of this section, order, by notification⁴ in the official Gazette, that the property be vested in the Treasurer of Charitable Endowments on such terms as to the application of the property or the income thereof as may be agreed on between the 2[appropriate Government] and the person or persons making the application, and the property shall thereupon so vest accordingly.

Orders vesting property in Treasurer.

(2) When any property has vested under this section in a Treasurer of Charitable Endowments, he is entitled to all documents of title relating thereto.

(3) 5[* * *]

(4) An order under this section vesting property in a Treasurer of Charitable Endowments shall not require or be deemed to require him to administer the property, or impose or be deemed to impose upon him the duty of a trustee with respect to the administration thereof.

Leg Ref.

¹ The words "Upper Burma, and" were repealed by the Fifth Schedule of the Burma Laws Act (XIII of 1898), Burma Code

² Substituted by Order in Council, 1937

³ Section 3-A inserted by Order in Council, 1937

⁴ For notifications issued under this section in conjunction with S. 5 for—

(1) Bengal, *see* Beng. Stat. R. & O., Vol. II. (2) Bombay, *see* Bom. R. & O., Vol. I (3) Madras, *see* Mad. R. & O., Vol. I (4) Punjab, *see* Punj. List of Local R. & O. (5) The United Provinces of Agra and Oudh, *see* U P List of Local R. & O., Vol. I, Pt. I *See also* note under S. 7 (1).

⁵ Omitted by Order in Council, 1937.

5. (1) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the 1[appropriate Government,] if it thinks fit, may settle a scheme for the administration of any property which has been or is to be vested in the

Schemes for administration of property vested in the Treasurer.

Treasurer of Charitable Endowments, and may in such scheme appoint, by name or office, a person or persons, not being or including such Treasurer, to administer the property.

(2) On application made as hereinafter mentioned, and with the concurrence of the person or persons making the application, the 1[appropriate Government] may, if it thinks fit, modify any scheme settled under this section or substitute another scheme in its stead.

(3) A scheme settled, modified or substituted under this section shall, subject to the other provisions of this section, come into operation on a day to be appointed by the 1[appropriate Government] in this behalf, and shall remain in force so long as the property to which it relates continues to be vested in the Treasurer of Charitable Endowments or until it has been modified or another such scheme has been substituted in its stead.

(4) Such a scheme, when it comes into operation, shall supersede any decree or direction relating to the subject-matter thereof in so far as such decree or direction is in any way repugnant thereto, and its validity shall not be questioned in any Court, nor shall any Court give, in contravention of the provisions of the scheme or in any way contrary or in addition thereto, a decree or direction regarding the administration of the property to which the scheme relates:

2[Provided that nothing in this sub-section shall be construed as precluding a court from inquiring whether the Government by which a scheme was made was the appropriate Government.]

(5) In the settlement of such a scheme effect shall be given to the wishes of the author of the trust so far as they can be ascertained, and, in the opinion of the 1[Provincial Government], effect can reasonably be given to them.

(6) Where a scheme has been settled under this section for the administration of property not already vested in the Treasurer of Charitable Endowments, it shall not come into operation until the property has become so vested.

Mode of applying for vesting orders and schemes 6. (1) The application referred to in the two last foregoing sections must be made,—

(a) if the property is already held in trust for a charitable purpose, then by the person acting in the administration of the trust, or, where there are more persons than one so acting, then by those persons or a majority of them; and

(b) if the property is to be applied in trust for such a purpose, then by the person or persons proposing so to apply it.

(2) For the purposes of this section the executor or administrator of a deceased trustee or property held in trust for a charitable purpose shall be deemed to be a person acting in the administration of the trust.

7. 3[* * *]

¹ Substituted by Order in Council, 1937.

² Proviso inserted by Order in Council,

³ Omitted by Order in Council, 1937.

8. (1) Subject to the provisions of this Act, a Treasurer of Charitable Endowments shall not, as such Treasurer, act in the administration of any trust whereof any of the property is for the time being vested in him under this Act.

Bare trusteeship of Treasurer.

(2) Such Treasurer shall keep a separate account of each property for the time being so vested in so far as the property consists of securities for money, and shall apply the property or the income thereof in accordance with the provision made in that behalf in the vesting order under section 4 or in the scheme, if any, under section 5, or in both those documents.

(3) In the case of any property so vested other than securities for money, such treasurer shall, subject to any special order which he may receive from the authority by whose order the property became vested in him, permit the persons acting in the administration of the trust to have the possession, management and control of the property, and the application of the income thereof, as if the property had been vested in them.

9. A Treasurer of Charitable Endowments shall cause to be published annually in the 1[Official Gazette,] at such time as the 1[appropriate Government] may direct, a list of all properties for the time being vested in him under this Act and an abstract of all accounts kept by him under sub-section (2) of the last foregoing section.

Annual publication of list to properties vested in Treasurer

10. (1) A Treasurer of Charitable Endowments shall always be a sole trustee and shall not, as such Treasurer, take or hold any property otherwise than under the provisions of this Act, or subject to those provisions, transfer any property vested in him except in obedience to a decree divesting him of the property, or in compliance with a direction in that behalf issuing from the authority by whose order the property became vested in him.

Limitation of functions and powers of Treasurer.

(2) Such a direction may require the Treasurer to sell or otherwise dispose of any property vested in him, and, with the sanction of the authority issuing the direction, to invest the proceeds of the sale or other disposal of the property in any such security for money as is 1[specified in the direction] or in the purchase of immovable property

(3) When a Treasurer of Charitable Endowments is divested, by a direction of the 1[appropriate Government] under this section, of any property, it shall vest in the person or persons acting in the administration thereof and be held by him or them on the same trusts as those on which it was held by such Treasurer.

11. If the office held by an officer of the Government who has been appointed to be a Treasurer of Charitable Endowments is abolished or its name is changed, the 1[appropriate Government] may appoint the same or another officer of the Government by the name of his office to be such Treasurer, and thereupon the holder of the latter office shall be deemed for the purposes of this Act to be the successor in office of the holder of the former office.

Provision for continuance of office of Treasurer in certain contingencies.

Leg. Ref.

¹ Substituted by Order in Council, 1937.

Notes.

Secs. 10 and 11—Under S 10 the defendant has the option either to deposit money or to furnish security. The Court can order him to do one of these two things but cannot specify which he is to do. 69 I.C. 658 The security furnished under

S. 10 however relates to the expenditure actually incurred or likely to be incurred by the plaintiff which is quite a different matter from the costs of the suit. The Court cannot direct payment of this expenditure otherwise than in accordance with that section, and when security has been furnished the Court is incompetent to order execution against the surety. (*Ibid.*)

1[12. If by reason of any alteration of areas or by reason of the appointment of a treasurer of charitable endowments for India or for any Province for which such a treasurer has not previously been appointed or for any other reason it appears to the Central Government that any property vested in a treasurer of charitable endowments should be vested in another such treasurer, that Government may direct that the property shall be so vested and thereupon it shall vest in that other treasurer and his successors as fully and effectually for the purposes of this Act as if it had been originally vested in him under this Act.]

13. (1) 2[* * *]

(2) The 1[appropriate Government] may make rules consistent with this Act for—

(a) prescribing the fees to be paid to the Government in respect of any property vested under this Act in a Treasurer of Charitable Endowments;

(b) regulating the cases and mode in which schemes or any modification thereof are to be published before they are settled or made under section 5;

(c) prescribing the forms in which accounts are to be kept by Treasurers of Charitable Endowments, and the mode in which such accounts are to be audited; and

(d) generally, carrying into effect the purposes of this Act.

14. No suit shall be instituted against the 1[Crown] in respect of anything done or purporting to be done under this Act, or in respect of any alleged neglect or omission to perform any duty devolving on the Government under this Act, or in respect of the exercise of, or the failure to exercise, any power conferred by this Act on the Government, nor shall any suit be instituted against a Treasurer of Charitable Endowments except for divesting him of property on the ground of its not being subject to a trust for a charitable purpose, or for making him chargeable with or accountable for the loss or misapplication of any property vested in him, or the income thereof, where the loss or misapplication has been occasioned by or through his wilful neglect or default.

15. Nothing in this Act shall be construed to impair the operation of section 111 of the 3 Statute 53, George III, Chapter 155, or of any other enactment for the time being in force, respecting the authority of an Advocate-General at a presidency to act with respect to any charity, or of sections 8, 9, 10 and 11 of Act 4 No. XVII of 1864 (*an Act to constitute an Office of Official Trustee*) respecting the vesting of property in trust for a charitable purpose in an Official Trustee.

16. 5[* * * * *]

Leg. Ref.

¹ Substituted by Order in Council, 1937

² Omitted by *ibid*

³ The East India Company Act, 1813 (*Coll. Stats. Ind.*, Vol. I)

⁴ The Official Trustees Act, 1864 (*Genl Acts*, Vol. I).

⁵ Section 16 was omitted by Act XXXVIII of 1920, Sch. I

perty of a hospital was vested in the Treasurer of Charitable Endowments under S. 3 of the Charitable Endowments Act. Hence a suit could not be filed against the Secretary alone as representing the Committee. See 26 O.C. 333=1924 Oudh 128. Suit for property vested in the Treasurer of Charitable Endowments—Settlor alleged to have only life interest.—Suit based on a title paramount to the settlers—Maintainability. See 1926 Oudh 431.

Notes.

Sec. 14.—The administration of the pro-

THE CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920).

| Year | No. | Short title. | How repealed or otherwise affected by legislation. |
|------|-----|--|--|
| 1920 | XIV | The Charitable and Religious Trusts Act, 1920. | Section 2 amended by Act XLI of 1923, Sec 2 |

[20th March, 1920.]

An Act to provide more effectual control over the administration of Charitable and Religious Trusts.

WHEREAS it is expedient to provide facilities for the obtaining of information regarding trusts created for public purposes of a charitable or religious nature, and to enable the trustees of such trusts to obtain the directions of a Court on certain matters, and to make special provision for the payment of the expenditure incurred in certain suits against the trustees of such trusts; it is hereby enacted as follows:—

1 (1) This Act may be called **THE CHARITABLE AND RELIGIOUS TRUSTS ACT, 1920.**

(2) It extends to the whole of British India:

Provided that the ¹[Government of any Province] may, by notification in the *Gazette of India*, direct that this Act, or any specified part thereof, shall not extend to ¹[that Province or any specified area therein] or to any specified trust or class of trusts.

2. In this Act, unless there is anything repugnant in the subject or context, “the Court” means the Court of the District Judge ²[or any other Court empowered in that behalf by the Local Government] and includes the High Court in the exercise of its ordinary original civil jurisdiction.

3. Save as hereinafter provided in this Act, any person having an interest in any express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate to obtain an order embodying all or any of the following directions, namely:—

Leg Ref.

¹ Substituted by Order in Council, 1937.

² These words were added after the words “District Judge” by Act XLI of 1923, S. 2

Notes.

Secs. 1 and 3—The Act does not cease to apply to a case where the trustee has parted with the entire trust property. 78 I C 174 Persons who claim adversely to the trust and who are not liable under S. 3 are not proper parties to an application for directing the trustee to produce the accounts (*Ibid*) As to applicability of the Act to property on condition of holding so long as temple lasted—No direction as to appropriation of income—Public trust, if constituted See 5 O W N 50 The Madras Hindu Religious Endowments Act (II of 1927) has not taken away the jurisdiction of the District Judge under S. 5 of the Charitable

and Religious Trusts Act. To a certain extent both the Acts cover the same ground. When the District Judge passes an order under S. 5 of Act XIV of 1920, because the Madras Hindu Religious Endowment Board showed no inclination to exercise its powers under the Madras Act, it is a good reason for exercising his discretion; and the order cannot be revised by the High Court under S. 115, C P. Code. 152 I C. 1052=1935 Mad 56 (1)=68 M L J 55.

Sec 2.—Under this Act the District Court is a Court subordinate to the High Court 27 A.L.J 911=1929 All. 581=121 I.C. 267.

Sec. 3—The Charitable and Religious Trusts Act of 1920 applies only to those cases where the entire benefit under the wakf or trust is allotted for public purposes. Also where a trust is of public nature any person having an interest in the said trust is entitled to make the application contem-

(1) directing the trustee to furnish the petitioner through the Court with particulars as to the nature and objects of the trust, and of the value, condition, management and application of the subject-matter of the trust, and of the income belonging thereto, or as to any of these matters, and

(2) directing that the accounts of the trust shall be examined and audited.

Provided that no person shall apply for any such direction in respect of accounts relating to a period more than three years prior to the date of the petition.

4. (1) The petition shall show in what way the petitioner claims to be interested in the trust, and shall specify, as far as may be, the particulars and the audit which he seeks to obtain.

(2) The petition shall be in writing and shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying plaints.

5. (1) If the Court on receipt of a petition under section 3, after taking such evidence and making such inquiry, if any, as it may consider necessary, is of opinion that the trust to which the petition relates is a trust to which this Act applies, and that the petitioner has an interest therein, it shall fix a date for the hearing of the petition, and shall cause a copy thereof, together with notice of the date so fixed, to be

Notes.

plated by S. 3 of the Act of 1920 but he is not so entitled if the purpose of the trust is partly public and partly private. In the latter case his remedy is to make an application under S. 4 of the Wakf Act of 1923. 1929 Oudh 225 (F.B.). Section 3 applies to a mixed trust partly for a public and charitable purpose and partly for private purpose. 163 I.C. 234=8 R.A. 948=1936 A.L.J. 546=1936 A.W.R. 420=1936 A. 411. See also 11 O.W.N. 1435=1935 Oudh 96. The words "having an interest in a trust" must in each case depend on the nature of the trust. 50 A. 880=26 A.L.J. 1379=111 I.C. 129. See also 119 I.C. 365. A person who is a worshipper at Gurdwara is a person interested in a public trust for this Act. 36 P.L.R. 162=1934 Lah. 949. As to what is a public trust, see 11 O.W.N. 1435=152 I.C. 861. Where the rules of an alleged trust provide for the carrying on a sort of banking business whereby loans are to be made at interest either on security or guarantee, the object of the trust is hardly consistent with its being of a religious or charitable nature. 62 I.A. 146=57 A. 330=39 C.W.N. 865=1935 P.C. 97=69 M.L.J. 1 (P.C.).

"PUBLIC TRUST"—**MOSQUE BUILT BY PUBLIC SUBSCRIPTION**—Where a mosque was built with public subscriptions and used by the Mahomedan public for offering prayers and further was admitted by the respondent to be a religious trust in a prior suit, *held*, that such a mosque was a public trust and that an application under S. 3 calling upon the respondent to furnish certain information should be decided on merits. 17 Lah. 768=165 I.C. 664 (1)=1936 Lah. 695.

REVISION.—The provisions of S. 115, C. P. Code, and S. 44, Punjab Courts Act, are

very wide and an order of the District Judge under S. 3, Charitable and Religious Trusts Act, is reversible. 17 Lah. 768 165 I.C. 664=1936 Lah. 695.

SECS. 3 AND 5: *SHORT OP.*—The Act is intended to provide more effectual control over the administration of charitable and religious trust and provision is made therein for obtaining an order calling on the trustee to give particulars of the object of the trust and if the trust is denied to file a suit. No such provision is made in the Mussalman Wakf Act of 1923. 1927 Pat. 189. See also 1936 Lah. 695. Application under—No notice to all the trustees. Notice served on three trustees only. Locality of order. 1924 M.W.N. 515 82 I.C. 733 35 M.L.T. (H.C.) 51. An application under S. 3 of the Charitable and Religious Trusts Act does not cease to be maintainable simply because the opponents raise a question of title. Though under S. 5 (6) of the Act, the Court has no jurisdiction to decide any question of title between the petitioner and any one claiming title adversely to the trust, it does not mean that the moment a claim adverse to the trust is advanced, the jurisdiction of the Court is ousted. When such a claim is put forward, it in effect amounts to a denial of the existence of the trust. It is open to the claimant to take advantage of S. 5 (3) and to get the question determined in a regular suit. If he does not avail himself of this course, the Court must decide whether a trust exists. The opposing party has still his remedy by way of suit. 58 Bom. 623=152 I.C. 781=36 Bom.L.R. 687=1934 Bom. 343.

Sec. 5.—In proceedings for examination of accounts of trust property under the Charitable and Religious Trusts Act (1920), the District Judge did not refer to the ori-

served on the trustee and upon any other person to whom in its opinion notice of the petition should be given.

(2) On the date fixed for the hearing of the petition, or on any subsequent date to which the hearing may be adjourned, the Court shall proceed to hear the petitioner and the trustee, if he appears, and any other person who has appeared in consequence of the notice, or who it considers ought to be heard, and shall make such further inquiries, if any, as it thinks fit. The trustee may, and, if so required by the Court, shall at the time of the first hearing or within such time as the Court may permit present a written statement of his case. If he does present a written statement, the statement shall be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying pleadings.

(3) If any person appears at the hearing of the petition and either denies the existence of the trust or denies that it is a trust to which this Act applies, and undertakes to institute within three months a suit for a declaration to that effect and for any other appropriate relief, the Court shall order a stay of the proceedings and, if such suit is so instituted, shall continue the stay until the suit is finally decided.

(4) If no such undertaking is given, or if after the expiry of the three months no such suit has been instituted, the Court shall itself decide the question.

(5) On completion of the inquiry provided for in sub section (2), the Court shall either dismiss the petition or pass thereon such other order as it thinks fit:

Provided that, where a suit has been instituted in accordance with the provisions of sub-section (3), no order shall be passed by the Court which conflicts with the final decision therein.

(6) Save as provided in this section, the Court shall not try or determine any question of title between the petitioner and any person claiming title adversely to the trust.

Notes.

ginal grant at all, but based his order on certain statements which were wholly irrelevant and inadmissible for the purpose of construing the terms of the original grant. *Held*, the order was illegal and was vitiated by material irregularity and could be set aside in revision. The fact that the petitioner had the remedy of suit open to him is no bar to the order being set aside in revision. 58 Bom 623=152 I.C. 781=36 Bom L.R. 687=1934 Bom 343. On this section, *see also* 152 I.C. 1052=1935 Mad. 56=68 M.L.J. 55, cited under S. 1. The District Judge has no jurisdiction under the Charitable and Religious Trusts Act to decide questions of title. The Act does not bar the questions of title being agitated and decided in a regular suit by a Court exercising ordinary original civil jurisdiction. The mere fact that the Act provides a summary remedy does not create a bar to the filing of a regular suit by the unsuccessful party. The party who seeks to oust the jurisdiction of the Civil Court must establish his contention. 152 I.C. 861=7 R.O. 250=11 O.W.N. 1435=1935 Oudh 96.

Secs. 5 and 6.—On an application under the Charitable and Religious Trusts Act praying that the respondents be directed to file accounts of their management of the property alleging that it is a religious endowment, the District Judge is no doubt

authorised to decide the question whether the property is or is not devoted to public, religious or charitable purposes. But the proceedings of the District Judge are of a summary nature and do not fall within the definition of a suit and his decision cannot operate as *res judicata*. 36 P.L.R. 13=1934 Lah. 771. Per *Niamatullah*.—The order of the District Judge under S. 5 of Act XIV of 1920 is only an order passed in summary proceedings and it has not the force of a decree and has the effect merely of withdrawing certain restrictions imposed on the persons desirous of instituting suits under S. 92, Cr. P. Code. The decision under S. 5 on an application for examination of accounts of the alleged trust property does not bar a suit for declaration that the property does not belong to the trust but is in the absolute ownership of the alleged trustee. (*Ibid.*) The maintenance of a suit so as to nullify the effect of S. 6 of the Act is not permissible. 27 A.L.J. 653=118 I.C. 513=1929 A. 506.

Section 5 of the Charitable and Religious Trusts Act does not by itself contemplate the intervention of other persons for compelling the mutawalli to file his accounts except possibly as a mere reminder to the Judge that the accounts have not been filed with a view to induce the Judge to take proceedings under S. 10. 118 I.C. 717.

6. If a trustee without reasonable excuse fails to comply with an order made under sub-section (5) of section 5, such trustee shall, without prejudice to any other penalty or liability which he may incur under any law for the time being in force, be deemed to have committed a breach of trust affording ground for a suit under the provisions of section 92 of the Code of Civil Procedure, 1908; and any such suit may, so far as it is based on such failure, be instituted without the previous consent of the Advocate-General.

7. (1) Save as hereinafter provided in this Act, any trustee of an express or constructive trust created or existing for a public purpose of a charitable or religious nature may apply by petition to the Court, within the local limits of whose jurisdiction any substantial part of the subject-matter of the trust is situate, for the opinion, advice or direction of the Court on any question affecting the management or administration of the trust property, and the Court shall give its opinion, advice or direction, as the case may be, thereon:

Provided that the Court shall not be bound to give such opinion, advice or direction on any question which it considers to be a question not proper for summary disposal.

(2) The Court, on a petition under sub-section (1), may either give its opinion, advice or direction thereon forthwith, or fix a date for the hearing of the petition, and may direct a copy thereof, together with notice of the date so fixed, to be served on such of the persons interested in the trust, or to be published for information in such manner, as it thinks fit.

(3) On any date fixed under sub-section (2) or on any subsequent date to which the hearing may be adjourned, the Court, before giving any opinion, advice or direction shall afford a reasonable opportunity of being heard to all persons appearing in connection with the petition.

(4) A trustee stating in good faith the facts of any matter relating to the trust in a petition under sub-section (1), and acting upon the opinion, advice or direction of the Court given thereon, shall be deemed, as far as his own responsibility is concerned, to have discharged his duty as such trustee in the matter in respect of which the petition was made.

8. The costs, charges and expenses of and incidental to any petition, and all proceedings in connection therewith, under the foregoing provisions of this Act shall be in the discretion of the Court, which may direct the whole or any part of any such costs, charges and expenses to be met from the property or income of the trust in respect of which the petition is made, or to be borne and paid in such manner and by such persons as it thinks fit:

Notes.

Sec 6.—Section 6 says that once a breach of trust has been committed, by the trustee by his refusal to produce the accounts, a suit so far as it is based on such failure may be instituted without the previous sanction of the Advocate-General. It nowhere says by whom such a suit should be instituted. Once an order has been passed under S. 6 of the Act, a suit under S. 92 of the C. P. Code may be continued by other persons, even though the original plaintiff who applied under Ss. 3 and 4 and secured the order from the District Court under S. 6 of the Act has dropped out of the suit. 146 I.C. 628 (2)=1933 Mad. 854 =65 M.L.J. 690. A suit contemplated by S. 6 of the Act does not become incompetent on the ground that one of the reliefs

claimed therein cannot be said to be "based on such failure", i.e., the failure of the trustee to render accounts. The Court can entertain the suit so far as the other reliefs are concerned. (*Ibid*) See also 28 A.L.J. 1291.

Sec 7.—When a trustee makes an application to the District Judge to obtain his opinion or advice a case is presented before the District Judge for decision. 48 I.A. 280=44 M. 656 (Appl.) 1929 All. 581=27 A.L.J. 911.

Powers of District Judge under S. 7—Extent of—Wakf property—Dispute between mutwallis—District Judge appointing defendant to collect rents—Suit against him by mutwalli—Notice under S. 80, C. P. Code, not necessary. 165 I.C. 681=1936 A.L.J. 1112=1936 A. 801.

Provided that no such order shall be made against any person (other than the petitioner) who has not received notice of the petition and had a reasonable opportunity of being heard thereon.

9. No petition under the foregoing provision of this Act in relation to any trust shall be entertained in any of the following circumstances, namely :—

(a) if a suit instituted in accordance with the provisions of section 92 of the Code of Civil procedure, 1908, is pending in respect of the trust in question;

(b) if the trust property is vested in the Treasurer of Charitable Endowments, the Administrator-General, the Official Trustee or any society registered under the Societies Registration Act, 1860; or

(c) if a scheme for the administration of the trust property has been settled or approved by any Court of competent jurisdiction or by any other authority acting under the provisions of any enactment.

10. (1) In any suit instituted under section 14 of the Religious Endowments Act, 1863, or under Section 92 of the Code of

Power of Courts as to costs in certain suits against trustees of charitable and religious trust

Civil Procedure, 1908, the Court trying such suit may if, on application of the plaintiff and after hearing the defendant and making such inquiry as it thinks fit, it is satisfied that such an order is necessary in the

public interest, direct the defendant either to furnish security for any expenditure incurred or likely to be incurred by the plaintiff in instituting and maintaining such suit, or to deposit from any money in his hands as trustee of the trust to which the suit relates such sum as such Court considers sufficient to meet such expenditure in whole or in part.

(2) When any money has been deposited in accordance with an order made under sub-section (1), the Court may make over to the plaintiff the whole or any part of such sum for the conduct of the suit. Before making over any sum to the plaintiff, the Court shall take security from the plaintiff for the refund of the same in the event of such refund being subsequently ordered by the Court.

Provisions of the Code of Civil Procedure to apply 11. (1) The provisions of the Code of Civil Procedure, 1908, relating to—

(a) the proof of facts by affidavit,

(b) the enforcing of the attendance of any person and his examination on oath,

(c) the enforcing of the production of documents, and

(d) the issuing of commissions,

shall apply to all proceedings under this Act and the provisions relating to the service of summonses shall apply to the service of notices thereunder.

(2) The provisions of the said Code relating to the execution of decrees shall, so far as they are applicable, apply to the execution of order under this Act

12. No appeal shall lie from any order passed or against any opinion, advice or direction given under this Act.

Barring of appeals.

Notes

Sec 10 —Under S. 10 of the Charitable and Religious Trusts Act, the District Judge has the power to punish a mutawali if, without any reasonable cause, the burden of proving which shall lie upon him, he fails to furnish statement of particulars of documents, of statement of accounts This

is purely a penal proceeding in the course of which the Judge may enquire as to whether a wakf is one to which the Act is applicable. But, till that stage arises, the Judge cannot hold any such enquiry and compel a mutawalli, who is not admitting the applicability of the Act, to file accounts. 118 I.C 717 =1930 A 81=52 A. 167.

THE CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929).

Prefatory Note—The necessity for the passing of this Act was explained as follows in the original Statement of Object and Reasons—

"1 The object of the Bill is twofold. The main object, by declaring invalid the marriages of girls below 12 years of age, is to put a stop to such girls becoming widows. The second object, by laying down the minimum marriageable ages of boys and girls, is to prevent, so far as may be, their physical and moral deterioration by removing a principal obstacle to their physical and mental development.

2 According to the Census Report of 1921 A.D., there were in that year 612 Hindu widows who were less than one year old, 2,024 who were under 5 years, 97,857 who were under 10 years, and 3,32,024 who were under 15 years of age. The deplorable feature of the situation, however, is that the majority of these child widows are prevented by Hindu custom and usage from remarrying. Such a lamentable state of affairs exists in no country, civilized or uncivilized, in the world. And it is high time, that the law came in to the assistance of these helpless victims of social customs, which, whatever their origin or justification in old days, are admittedly out of date and are the source of untold misery and harm at the present time.

3. According to the Brahmins, the most ancient and the most authoritative book containing the laws of the Hindus, the minimum marriageable age of a man is 24 and a woman 16. And if the welfare of the girl were the only consideration in fixing the age, the law should fix 16 as the minimum age for the valid marriage of a girl. But amongst the Hindus, there are people who hold the belief that a girl should not remain unmarried after she attains puberty. And as in this country, some girls attain puberty at an age as early as 12, the Bill fixes 12 as the minimum age for the valid marriage of a Hindu girl.

4 In order, however, to make the Bill acceptable to the most conservative Hindu opinion, provision is made in the Bill that for conscientious reasons, the marriage of a Hindu girl would be permissible even when she is 11 years old. No Hindu *Sastra* enjoins marriage of a girl before she attains puberty, and the time has arrived and public opinion sufficiently developed, when the first step towards the accomplishment of the social reform so necessary for the removal of a great injustice to its helpless victims and so essential to the vital interests of a large part of humanity, should be taken, by enacting a law declaring invalid the marriages of girls below 11 years of age.

5 With regard to boys, the *Sastras* do not enjoin marriage at a particular age. Thoughtful public opinion amongst the Hindus would fix 18 as the minimum marriageable age for a boy. But as some classes of Hindus would regard such legislation as too drastic, the Bill takes the line of least resistance by providing 15 years as the age below which the marriage of a Hindu boy shall be invalid. Even in England, where child marriages are unknown and early marriages are exceptions, it has been found necessary to fix the ages below which boys and girls may not marry."

The following is the Report of the Select Committee on the Bill

"We have considered the Bill and the opinions in considerable detail, and a number of matters were discussed to which we do not think it necessary to refer in this report, as no serious difference among the members of our Committee was disclosed in regard to them. We shall, therefore, refer only to the decisions which either have resulted in an amendment of the Bill or have been arrived at by a vote of the majority of the Committee.

Clause 2.—We considered a suggestion that the minimum age to determine whether a female is a child for the purposes of sub-clause (a) should be reduced to 11 and another suggestion that it should be reduced to 12 years. The Committee, however, were emphatically of opinion that any such reduction would nullify the whole object of the Bill.

Clause 5—We considered that this clause as originally drafted by Select Committee, would include within its scope a betrothal ceremony which though it might be a necessary preliminary to a marriage, would not constitute a marriage without a further ceremony.

We are further of opinion that the clause would spread the net too wide by including too large a number of persons, and that it is only necessary to penalise the person who actually officiates in that part of the ceremony which finally renders the marriage tie indissoluble.

We consider it necessary to exempt any person who has officiated at a child marriage but who can prove to the Court that he had taken reasonable precautions to satisfy himself that the contracting parties were over the minimum age.

Finally, we negatived a proposal to re-insert a provision on the lines of clause 6 of the Bill as introduced, whereby a guardian could obtain a certificate enabling him to celebrate a child marriage on the ground that he conscientiously believes the marriage to be enjoined by his religion.

Clause 6.—We have provided that the punishment of imprisonment shall not be inflicted in the case of a female parent or guardian; and we rejected a proposal for the

omission of the presumption contained in the second part of this clause, as we consider the presumption reasonable in itself and necessary to enable the provisions of the clause to have their proper effect.

Clause 11.—We rejected two proposals in regard to this clause; one that the bond should be a personal bond without sureties, and the other that security should not be required in the case of a complaint made with the sanction of a Magistrate competent to try the offence. The latter provision might, we consider, lead to two separate inquiries and unnecessary recapitulation of evidence.

We have made a few drafting changes to which it is necessary for us to refer in detail, and we have rejected a proposal which is to be found amongst the opinions upon the Bill that the Act should be applicable locally by notification of the Local Government. We think that a provision of this kind would greatly facilitate evasion of the law by enabling a child marriage to be conducted in a province in which the law was not in force, although the contracting parties belonged to a province to which it had been applied.”—(*Report of Select Committee.*)

The following Minutes of Dissent were also appended to the Select Committee's Report—

“The principle of the Bill affects the personal law of the Mussalmans and therefore it should not be applicable to the Mussalmans at all. I am therefore of opinion that the Mussalmans should be exempted from the operation of the Bill.”—(*Muhammad Rafique.*)

“I think that the provision relating to the throwing of the burden of proving want of knowledge on the person who operates at a marriage is not justifiable. This burden should always be on the prosecution. I am also not in agreement with the provision that the parent or guardian should prove that he did not fail negligently to prevent a child marriage of his son or daughter or ward.

The provision relating to the furnishing of sureties is another matter where I feel myself unable to agree. I would further favour a provision for registration of marriages.”—(*Thakurdas Bhargava.*)

“I agree to the report of the Committee with the following observations:—After the report of the last Select Committee the Bill was re-circulated for eliciting opinion thereon. I have carefully gone through the opinions collected from representative quarters, and the Committee have ascertained the orthodox South Indian view in the matter in other ways. There is no denying the probability that there are influential sections among our people who may be out to arrest the progress of the operation of the Act, and this will mean extreme hardship to many. People may be in danger of being compelled to lose occupation and means of their livelihood. I may here, for instance, indicate the cases of many temple priests. This seems more probable when in many cases leaders of our community have nothing to do with marriage or family life. I should like to put in a clause making it illegal for people, especially people having no family life, to associate themselves in any attempt at excommunication of the man performing marriage under the provisions of this Act. But under the circumstances such a provision may not be possible.

There may be other instances also where a poor man may require to marry two girls together, or a dying parent may like to see the child married before death for various reasons, and other cases of like nature.

I, therefore, feel that some room should be given to such hard cases. It is not however easy to give an exhaustive list of these cases as a schedule to this Act. Then the question arises as to the authority competent to deal with such hard cases and give relief in the best exercise of its discretion. It seems to me that such power should not be entrusted to a Criminal Court which is not quite in touch with cases of hardship of various kinds. I will therefore entrust the power to the principal Court of civil jurisdiction in the districts and the City Civil Court in the metropolis or a Court corresponding to it in the provinces. I wish that a general provision be made to the following effect—

Nothing in this Act shall apply to a case of child marriage where the girl married is not below 12 years of age and where the contracting parties of the parents or guardians have obtained the sanction of the principal Court of civil jurisdiction upon an application made prior to the solemnization of the marriage stating the circumstances under which they are compelled to solemnize the marriage the non-performance of which would mean hardship to the girl or her family.

In section 9, I think the period should be less than one year, at most 3 months.”—(*Nalakantha Das.*)

“I sign the report subject to the observation that an overwhelming majority of the Mussalmans, including eminent and distinguished Olanas, is strongly against the application of this bill to the Muslim community on the ground that it interferes with their religion.”—(*Muhammad Yakub.*)

Subject to note of dissent that the Bill as now drafted is shorn of all utility and amounts to a pious resolution at social reform.”—(*H. A. J. Gidney.*)

"I do not agree with the majority of my colleagues on two important points. The proposal to make marriages of girls below the age of 14 years punishable by law has rightly roused much opposition among the large body of orthodox Hindus. I regard that the age should be fixed at 12 so that a law to restrain child marriages might be passed with the unanimous support of all sections of the community. Kinnar Chandra Sinha proposed that 12 should be substituted for 14. But that also was rejected by the majority. If even 12 is fixed as the age marriages below which shall be punishable, it is possible that a section of orthodox opinion will be reconciled to it. But in view of the fact that marriage is a religious sacrament among Hindus and in view of the belief which has prevailed on the question of the age of marriage among them for a very long time, to make a marriage above the age of 12 and below the age of 14 punishable by law will be a violent interference with the Hindu religion which I consider it my duty, frankly to oppose. We must not forget that even in England the legal marriageable age for girls is 12 years. I think we should leave the raising of the age of the marriage of girls beyond 12 to the greater spread of education and of ideas of social and physical well being among the people. Their effects are already visible and should not be ignored."

I am also opposed to imprisonment being awarded as a punishment to any person who offends against the provisions of the proposed law. I expect that if the Government and the public will co-operate to have a knowledge of the provisions of the Act made universally known among the people, the fear of the infliction of a fine which may extend up to a thousand rupees and the opprobrium of being exposed to a prosecution will act as effective deterrents to prevent people from celebrating child marriages in contravention of the provisions of the proposed law. In any event, I would not provide imprisonment as an alternative punishment for the first few years of the new legislation." (Mr. M. Malaviya)

"I think 14 years will be considered too high to be the minimum marriageable age for girls by a large section of the Hindu community. I am aware of the fact that communities like the Mahomedan, the Christian, the Parsi and even a considerable section of the Hindu community to all of whom this Bill has now been made applicable, will regard the declaration of the legal age for marriage of girls below 14 years as a retrograde measure and a possible incentive to reduce the age of marriage in their respective societies. But I am also not oblivious of the very strong opinion in favour of pre-puberty marriage held by a very large section of the Hindu community. They look upon marriage as a sacrament, and, generally speaking, to them, the celebration of marriage does not necessarily mean the consummation of marriage."

We see that the Hindu Mahasabha having within its fold various sections of the Hindu community fixes 12 years as the minimum age for the marriage of girls and so does the All-India Sanatana Dharma Mahasabha representing the most orthodox section of the Hindu community. Its resolution No. 7 passed at its sitting held at Allahabad in January, 1928, under the presidency of Pandit Madan Mohan Malaviya, when translated into English will read thus.

"7. (a) In the opinion of this Sanatana Dharma Mahasabha no marriage of a Hindu boy should take place till he is 18 years of age

(b) This Mahasabha exhorts the Hindu community that the marriage of girls should never be celebrated before they have entered upon their 12th year."

But in the subsequent resolution No. 8, it clearly indicates that the consummation of marriage should not take place before the girl attains her 16th year.

The translation of the resolution is as follows.—

"8. In the opinion of this Sanatana Dharma Mahasabha, it is extremely necessary in order to make the community physically and religiously strong, that even when the wedding ceremony has been performed the consummation of marriage should not take place till the girl has attained the age of 16 years."

This measure is the first effort of its kind and I am of opinion that the line of least resistance should be adopted in this matter by all those who want its success. The fixing of minimum age-limit has by no means a binding effect on the higher age. For instance, we see that in several Western countries, the age of consent is much below the age in which marriages usually take place. That being so, I think that it is but proper that the views of such a large number of people should not be ignored and that the minimum marriageable age for girls should be fixed at twelve years. If any legal protection be deemed necessary in respect of the consummation of marriage, that might be afforded to the girls by further raising the age of consent. Of course it might be argued that the age of consent clause of the Indian Penal Code is a dead-letter. But it must also be recognised that any social legislation, if it has to succeed, must not be so drastic as to make it wholly unacceptable to a large number of people. I hope, therefore, that those who advocate the raising of the minimum marriageable age of girls above 12 would appreciate the difficulties underlying its acceptance and be content with fixing the minimum marriageable age of girls at 12 years. We should wait to see the measure of success that the piece of legislation achieves in this modified form."— (Ganganand Sinha)

THE CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929).

| Year. | No. | Short title. | How repealed or otherwise affected by legislation |
|-------|-----|---|---|
| 1929 | XIX | The Child Marriage Restraint Act, 1929. | Amendment Act III of 1930 |

[1st October, 1929.

An Act to restrain the solemnisation of child marriages

WHEREAS it is expedient to restrain the solemnisation of child marriages; It is hereby enacted as follows:—

Short title, extent and commencement 1. (1) This Act may be called THE CHILD MARRIAGE RESTRAINT ACT [1929]¹.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of April, 1930.

Definitions 2. In this Act, unless there is anything repugnant in the subject or context,—

(a) “child” means a person who, if a male, is under eighteen years of age, and if a female, is under fourteen years of age;

(b) “child marriage” means a marriage to which either of the contracting parties is a child;

(c) “contracting party” to a marriage means either of the parties whose marriage is thereby solemnised; and

(d) “minor” means a person of either sex who is under eighteen years of age.

Punishment for male adult below twenty-one years of age marrying a child 3. Whoever, being a male above eighteen years of age and below twenty-one, contracts a child marriage shall be punishable with fine which may extend to one thousand rupees.

4. Whoever, being a male above twenty-one years of age, contracts a child

Leg Ref.

¹ The figures “1929” were substituted for the figures “1928” by Act VIII of 1930, Schedule I.

Notes.

Sec 1: ACT, NOT ULTRA VIRES.—Where in a prosecution for a Hindu Child Marriage the accused pleaded that the Act was *ultra vires*. Held, that so far as the Hindus were concerned the changes introduced in the Select Committee were not such as to render inadequate the previous sanction of the Governor-General and render the Act invalid. 146 I C. 298=1933 Cr C. 1027=14 Pat. L T 438=1933 Pat. 471 Courts ought not to treat the Act as a legislative imposture. 146 I C 298=14 Pat.L T. 438=1933 Pat 471

The marriage of a child in contravention of the provisions of the Child Marriage Restraint Act is not declared by that Act to be an invalid marriage. The Act merely imposes certain penalties on persons bringing about such marriages. 1936 A L J 1097=1936 All 852

The Act aims at and deals with the res-

traint of the performance of the child marriage. It has nothing to do with the validity or invalidity of the marriage. The question of its validity or invalidity is beyond the scope of the Act. 158 I.C. 1007=36 Cr L.J. 1483=1935 A.W R 115

Although the Act does not render a child marriage void, a Court of law ought not to sanction expenditure of funds in the hands of the Court, through its receiver, for the purpose of meeting a child marriage, of which the Legislature has clearly expressed its disapproval by the Act. 63 Cal. 1153

APPLICABILITY TO SUBJECTS OF NATIVE STATES.—The Child Marriage Restraint Act is applicable to all offences committed under the Act in British India, though the offenders are foreigners or subjects of Native States. 39 C W N 656

Prosecution under the Act—Acquittal—Revision to High Court—Interference—Principles and practice. See 16 P L T 629=1935 Pat. 474

SECS 4 AND 5.—Where a marriage of a girl under 14 is conducted on the authority of a certificate from a person who holds less

Punishment for male adult above twenty one years of age marrying a child.

marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

5. Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves

Punishment for solemnising a child marriage.

that he had reason to believe that the marriage was not a child marriage.

Notes.

qualification than that of a Civil Surgeon that the girl is not under 14, the persons concerned are guilty and their action is not in good faith as they ought to have gone to Civil Surgeon to obtain certificate. The existence of the certificate so obtained is a matter which may be taken into account in considering whether imprisonment or fine should be ordered. 148 I. C. 351=1934 All. 331. A trial under this Act may be summary, as it is permitted by S. 260 (1) (a), Cr. P. Code, as the offences charged come under the heading "offences not punishable with imprisonment for a term exceeding six months". And the mere provision in S. 18 that the trial is to take place in the Court of the District Magistrate does not mean that the trial should not be summary. 1934 Cr. C. 414 (2)=1934 All. 331=148 I. C. 351.

Secs. 5 and 6: GAUNA CEREMONY NOT PERFORMED—EFFECT.—The fact that the *gauna* ceremony has not been performed as yet does not affect the performance of the marriage, which is complete as soon as the ceremony or the marriage is performed. Consummation is not a part of the marriage ceremony. 158 I. C. 1006=36 Cr. L. J. 1483=1935 A. L. J. 1166.

RESPECTIVE SCOPE—Secs 5 and 6 deal with different offences. S. 6 provides for the offence only in case where a minor himself contracts a child marriage. It is only in such a case that any person having charge of the minor, whether a parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage, permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable. S. 5 deals with the cases in which the marriage is not contracted by a minor. The section not only relates to priests and strangers but is wide enough to cover the case of the fathers of both the bridegroom and the bride. 158 I. C. 1007=36 Cr. L. J. 1483=1935 A. L. J. 1166.

SENTENCE ON PRIEST—The Courts are not at liberty to treat the Act as a legislative imposture. In order to make it effective the Court should pass a deterrent sentence on the priest or other celebrant without whose aid the Act could not have been infringed. 146 I. C. 298=14 Pat. L. T. 438=1933 Pat. 471. For the purposes of S. 5 of the Act it is only the marriage ceremony that has to be considered. It is quite immaterial where, when or by whom the *tilak* ceremony is per-

formed. The marriage cannot be properly called a "consequence" of the *tilak* ceremony. Therefore, the offence, under S. 5, of performing, conducting or directing a child marriage, must, under S. 177, Cr. P. Code, be enquired into by a Court within whose jurisdiction the marriage is performed. 150 I. C. 993=35 Cr. L. J. 1175 (1)=1934 A. L. J. 681=1934 All. 820 (1).

Liability of parents, *see* 1932 Nag. 174.

The mere submission of an application to the Municipal Board for permission to hold a *nach* with music and fire works, etc., on the occasion of a marriage would not amount to an offence under S. 5 of the Act. 162 I. C. 389 (2)=36 Cr. L. J. 616=1936 O. W. N. 480=1936 Oudh 311.

Though the Child Marriage Restraint Act makes no mention of abetting, yet, under the provisions of the Penal Code, a prosecution is possible for abetting an offence, although the accused is not the father or one of the parties who is under age so long as the other party is below the prescribed age. In other words, even if the prosecution is unable to establish that the son of the accused was under 18 years of age, yet if the Court is satisfied that the girl was under 14 years of age, the father of the boy would be guilty of abetting an offence under the Act. 16 Pat. L. T. 629=1935 Pat. 474.

The Child Marriage Restraint Act is limited in its operation to British India and only strikes at marriages contracted in British India. A child marriage contracted outside British India is not an offence under the Act and cannot be punished under the Act. The Act contains no provision such as is contained in S. 4, I. P. Code, and the prosecution has therefore to prove that the Act makes penal a child marriage performed outside British India. S. 6 of the Act only aims at permitting or failing to prevent a marriage which is made penal under the Act, and does not impose a penalty for permitting a marriage which is lawful. 37 Bom. L. R. 885=1935 Bom. 437.

The Child Marriage Restraint Act makes it an offence to celebrate a child marriage. This penal law applies not only to the celebration of such a marriage in British India by any one, but also to the celebration of such marriages even outside British India by native Indian subjects. The petitioners were convicted under Ss. 5 and 6 of the Act. They pleaded that at the time of marriage, it was doubtful whether Frenchpet where

6. (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both:

Punishment for parent or guardian concerned in a child marriage

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that, where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

7. Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Indian Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

8. Notwithstanding anything contained in section 190 of Code of Criminal Procedure, 1898, no Court other than that of a Presidency Magistrate or a District Magistrate shall take cognizance of, or try, any offence under this Act.

9. No Court shall take cognizance of any offence under this Act save upon complaint made within one year of the solemnisation of the marriage in respect of which the offence is alleged to have been committed.

10. The Court taking cognizance of an offence under this Act shall unless it dismisses the complaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 202 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry.

11. (1) At any time after examining the complainant and before issuing process for compelling the attendance of the accused, the Court shall, except for reasons to be recorded in writing, require the complainant to execute a bond,

Notes.

the marriage was celebrated for which they were convicted, was part of British India, and therefore they were not liable to be convicted. *Held*, that the Act was extra territorial and that the mistake of fact under which they were labouring, namely that Frenchpet was French territory and not British India, even if *bona fide*, did not render the celebration of the marriage innocuous or innocent, and it did not follow that the proceedings were void or that the conviction was wrong. A mistake of fact like the one could be pleaded successfully only if on account of such mistake an act which otherwise would be an offence ceased to be an offence. There was consequently nothing illegal in the conviction. 45 L. W. 210=1937 Mad. 273=(1937) 1 M.L.J. 388

Sec 8.—See 1934 All. 331, cited under S. 4.

Reading S. 8 of the Act with S. 10 (2) of the Cr. P. Code, it must be held that

an Additional District Magistrate who is invested with all the powers of a District Magistrate under S. 10 (2) of the Cr. P. Code, is empowered to try cases under the Child Marriage Restraint Act. 45 L. W. 435=(1937) 1 M.L.J. 498.

Sec 10.—The Court taking cognizance of an offence under the Act is bound to hold a preliminary inquiry before taking further actions. Unless the complaint is dismissed under S. 203, Cr. P. Code, failure to hold preliminary inquiry will vitiate the trial. 12 Lah. 383. A Court taking cognizance of an offence under the Child Marriage Restraint Act is not bound to hold a preliminary inquiry before issuing summons on the accused. 15 Lah. 63=35 P.L.R. 8=35 Cr.L.J. 1436=151 I.C. 830=1934 Lah. 155.

Sec 11.—The provision contained in S. 11 (1), is imperative and failure of a Magistrate to record any reason for not requiring the complainant to execute a bond is a material irregularity which cannot be cured by S. 537, Cr. P. Code. 143 I.C.

with or without sureties, for a sum not exceeding one hundred rupees, as security for the payment of any compensation which the complainant may be directed to pay under section 250 of the Code of Criminal Procedure, 1898; and if such security is not furnished within such reasonable time as the Court may fix, the complaint shall be dismissed.

(2) A bond taken under this section shall be deemed to be a bond taken under the Code of Criminal Procedure, 1898, and Chapter XLII of that Code shall apply accordingly.

THE INDIAN CHRISTIAN MARRIAGE ACT (XV OF 1872).

| Year | No | Short title. | Repealed or otherwise how affected by legislation. |
|------|----|--|--|
| 1872 | XV | The Indian Christian Marriage Act, 1872. | Repealed in part by Act XVI of 1874. Repealed in part and amended by Act XII of 1891. Amended by Acts VI of 1886, S. 30, cl. (a), (b), (d), and II of 1891. Section 81 substituted by Act XIII of 1911, Section 82 and Sch. II amended by Act I of 1903. Section 86 amended by Acts X of 1914 and XXXVIII of 1920 Amended Act XVIII of 1928. Declared in force - in the Sonthal Parganas, Reg. III of 1872, S. 3, as amended by Reg. III of 1899, S. 3, in the Arakan Hill District, Reg. I of 1916 S. 2, in Upper Burma (except the Shan States), Act XIII of 1898, S. 4; in British Baluchistan, Reg. II of 1913, S. 3. |

Prefatory Note—Mr Ritchie, to whom the task of drafting the Christian Marriage Bill and getting it passed in the Legislative Council was entrusted, thus explained the object of the Bill.—The object of the Bill is to put an end to the state of uncertainty which now exists in regard to marriages in India of persons, one or both of whom are of the Christian religion, but which are solemnized in any of the modes expressly recognized by the law as valid. These modes are three in number, two of them being generally applicable to all persons of whatever denomination of the Christian religion, and one being applicable only to a particular class. The first consists in the performance of the marriage ceremony by a clergyman in Holy Orders, according to the sense in which the English Law understands that term, that is a clergyman who has been episcopally ordained. No particular rite or religious ceremony is legally requisite to this form of marriage, but the presence of a clergyman in Orders at the time of the mutual promise to become man and wife is essential. The clergyman need not be of the same religious denomination as either of the parties. But the clergyman of the denomination which does not recognise episcopacy, who has not been ordained by a Bishop confers no special privilege by his presence, and stands on the same footing in this respect as a layman. This was the only form of marriage recognised by the English Common Law as valid, as was decided in 1844 in the House of Lords in the well-known case of *The Queen v Mills*. In 1848 it was provided by an Act of Parliament (58 Geo. III, c. 84) that marriages between persons one or both of whom were of the Church of Scotland solemnized by ordained ministers of that church as by law established or by a chaplain of the East India Company in India should be of the same force and effect as if they

Notes.

279=34 C.L.J. 554=37 C.W.N. 626=1933 Cal. 433 (1)

The mere fact that the security bond executed by the complainant under S. 11 is

defective does not affect the merits of the case and, therefore, does not vitiate the trial 162 I.C. 389=37 Cr.L.J. 616=1936 Oudh 311.

were solemnized by ordained clergyman of the Church of England according to the rites and ceremonies of the Church of England. The privilege was subsequently extended by the Legislative Council to ordained Ministers of the Church of Scotland other than Government Chaplains (*see* Act XXIV of 1860). Until the reign of Queen Victoria no other positive law regarding the solemnization of marriages existed in India. But there was a general impression in consequence of Lord Stowell's famous decision in *Darlymple v. Darlymple*, that the presence of a Clergyman in Orders required by the English Marriage Act was not essential to the validity of a marriage in any part of the British Dominions beyond the operation of these Acts; and that a simple contract of marriage in words showing that it was to take effect at once would suffice. The House of Lords in *Mills' case* decided upon the opinion of the English Judges, that the English Common Law of marriage as above stated obtained in Ireland, though the Marriage Act did not extend there, and that the presence of ordained Clergyman in Orders was thus essential. In consequence of the doubt thus thrown upon the validity of the marriages in India the absence of a Clergyman in Orders, the Statute 14 and 15 Vict. c. 40 commonly called the Indian Marriage Act, was passed. This was followed by Act V of 1852 which gave effect to the provisions of the Statute. Under these Acts, marriages in the presence of a Marriage Registrar were legalized. No religious ceremony was necessary, but it was optional to the parties to go through any religious ceremony they please. The Act of Parliament legalized all past marriages solemnized in India by persons not in Holy Orders, not being otherwise invalid, by declaring them valid in law to all intents and purposes. But the doubt which existed as to the validity of such marriages at Common Law was not cleared up in regard to marriages contracted after the Statute. For it was provided that "nothing in the Act shall invalidate any marriage which might be solemnized in India by any person in Holy Orders, or under the Statute of George III already cited, or any other marriage which under the law in force for the time being in India might have been there solemnized if the Act had not been passed, provided that the Governor-General in Council might provide by laws and regulations for the registration of such marriages". The doubt thus left open as to marriages contracted since 1851 still existed in 1872. On the one hand Sir Erskine Perry when Chief Justice of Bombay, and Doctor Lushington, as Dean of the Arches, had held that the principle laid down in *Queen v. Mills* could not be applied to a country such as India or Australia in which on the first introduction of English Laws and institutions, there were clergymen in Holy Orders before whom marriage could be celebrated (*see* the case of *Malcolm v. Crisall*, Perry's Oriental Cases 75; Indian Decisions, Old Series, Vol IV, p. 69) and the House of Lords by passing a Divorce Bill founded on Sir Erskine Perry's decision, has, to some extent though by no means conclusively, sanctioned that view. On the other hand the Court of Exchequer had held that the decision in question extended to invalidate a marriage performed between British subjects in Beyrout solemnized before a British clergyman not in Orders. And the Statute of 1848, and the Act of 1860, in favour of marriages performed by Ministers of the Scotch Church, seemed to show that the legislatures both in England and in India considered that the English Common Law applied to Indian marriages. It was almost impossible to determine which of these views was correct though it might be the former was right in principle. But the result of the doubt was, that there was a distressing degree of uncertainty as to the validity of many marriages solemnized since 1857, and that a great deal of fraud with regard to the performance of a sham marriage ceremony by persons having no special qualifications but pretending to be qualified has passed unpunished. In 1854 it was brought to the notice of the Government, that a person who had once been a schoolmaster but had never been ordained to the ministry in any way, professed to have authority to marry, and did perform the ceremony of marriage between several couples of Native Christians in the Backergunge District. Similar practices had been found to have prevailed in other districts, but as the person officiating did not profess to be a Marriage Registrar but only to have authority to marry, and as according to the view of the law the marriages thus solemnized were legal, and the persons referred to therefore, as witnesses did assist in rendering the marriages effectual, it was found impossible to punish him for his imposition. It was felt by the Government of India to be time to put end to the uncertainty which then surrounded the question and which, on so important a subject as the validity of marriages, ought not to be allowed to continue for a day longer than could be avoided. One ground upon which it was supposed that the Legislature in India left the question unsettled for some year prior to 1872, was that a law effectually dealing with the subject of Christian marriage must to some extent, effect, or interfere with the provisions of the English Statute of 1851, which it was then beyond the power of the Legislative Council as then constituted, to touch. The difficulty was removed as the Indian Councils Act contained no restriction upon the interference with the Act of Parliament passed in the year above mentioned, and the proposed change of law was quite within the competency of the Council as was constituted, after the Indian Councils Act. The only effectual mode of dealing with the question appeared to be to pass a law declaring that after the passing of the proposed Christian Marriage Act no marriage between persons, both or one of whom shall profess the Christian religion,

shall be valid in law unless it be celebrated in one of the modes expressly declared and recognized by law (see Secs. 4 and 5 of the Act). There was then no hardship in thus declaring the law in 1872. For the Marriage Acts of 1851-52 had been previously for over 10 years in operation. Their provisions were generally well known throughout India and the facilities for contracting marriage under those Acts had been rendered great by the appointment of Registrars at every place of any importance, both in the British Dominions and in those foreign States in alliance with Great Britain. In regard to past marriages it was proposed to declare that all marriages previously contracted in the presence of persons not in Holy Orders if not otherwise invalid, should be deemed good and valid. This was the course which had been adopted on occasions on which Parliament has prescribed a stricter rule for the future than that which had previously existed, or had been supposed to exist in regard to marriages (See *Proceedings in Council and Statement of Objects and Reasons*.)

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THE INDIAN CHRISTIAN MARRIAGE ACT (XV OF 1872)¹

[NB:—Throughout the Act for 'Native State' and 'Native States' the words 'Indian State' and 'Indian States' have been substituted by Order in Council, 1937.]

[18th July, 1872.]

An Act to consolidate and mend the law relating to the solemnization in India of the marriages of Christians.

WHEREAS it is expedient to consolidate and amend the law relating to the solemnization in India of the marriages of persons professing the Christian religion; it is hereby enacted as follows:—

PRELIMINARY.

1 This Act may be called THE INDIAN CHRISTIAN MARRIAGE ACT, 1872.

Short title.

It extends to the whole of British India,² and so far only as regards Christian subjects of Her Majesty, to ³[Indian States.]

Extent.

[Commencement.] Repealed by the Repealing Act, 1874 (XVI of 1874).

2. The enactments specified in the fifth schedule hereto annexed are repealed but not so as to invalidate any marriage confirmed by, or solemnized under any such enactment.

Enactments repealed,

And all appointments made, licences granted, consents given certificates issued and other things duly done under any such enactment shall be deemed to be respectively made, granted, given, issued and done under this Act.

For clause xxiv of section 19 of the Court Fees Act, 1870, the following shall be substituted:—

"xxiv Petitions under the Indian Christian Marriage Act, 1872, sections 45 and 48."

3. In this Act, unless there is something repugnant in the subject or context,—

Interpretation-clause

"Church of England" and "Anglican" mean and apply to the Church of England as by law established:

Leg. Ref.

¹ For the Statement of Objects and Reasons, see *Gazette of India*, 1871, Pt. V, p. 473; for Proceedings in Council, see *ibid.*, 1870, Supplement, p. 1077; *ibid.*, 1871; Supplement, pp. 1426, 1643; *ibid.*, 1802, Supplement; pp. 257, 728, 742, 805, 813 and 858. This Act is based on 14 and 15 Vict., c. 40, and 58 Geo. III, c. 84 (both Statutes relate to marriages in India and are now no longer in force), and Acts V of 1852 and V of 1865; the last two Acts were repealed by this Act.

² Act XV of 1872 has been declared in force in Upper Burma generally (except the Shan States) by the Burma Laws Act (XIII of 1898), S. 4 (1), and Sch. I, Bur. Code; in the Hill District of Arakan by the Arakan Hill District Laws Regulation (IX of 1874), S. 3, *ibid.*, in British Baluchistan by the Baluchistan Laws Regulation (I of 1890), S. 3, Bal. Code; and in the Sonthal Parganas by the Sonthal Parganas Settlement Regulation (III of 1872), as amended by the Sonthal Parganas Justice and Laws Regulation (III of 1899), Ben. Code; also by notification under S. 3 of the Scheduled Districts Act (XIV of 1874), *infra*, in the following Scheduled Districts, namely:—the Districts of Hazaribagh, Lohardaga and

Maubhum, and Pargana Dhalum and Kolhan in the District of Singhbhum [see *Gazette of India*, 1881, Pt. I, p. 504]; and the North-Western Provinces Tarai [see *ibid.*, 1876, Pt. I, p. 505]. The District of Lohardaga now called the Ranchi District (see *Calcutta Gazette*, 1899, Pt. I, p. 44) included at this time in the Palamu District, which was separated in 1894.

³ Substituted by Order in Council, 1937

Notes

Sec. 1.—There is nothing either in the Divorce Act or in the Christian Marriage Act as regards the age of consent for a Christian marriage. Under S. 7, Divorce Act, the Indian High Courts have to act according to the principles and rules of English Courts. Therefore in India the age of consent for a Christian marriage will be determined according to the law in England at the time of the marriage. 55 A. 243=144 I C. 960=1933 A.L.J. 168=1933 All 135 (2).

Sec. 3.—The word "means" in this section is an inclusive term. Sec 40 A. 393 noted under S. 68 *infra*. "Christian," see 18 M. 230; "Native Christian," see 40 A. 393=45 I C. 519; 16 A.L.J. 414

"Church of Scotland" means the Church of Scotland as by law established;

"Church of Rome" and "Roman Catholic" mean and apply to the Church which regards the Pope of Rome as its spiritual head;

"Church" includes any chapel or other building generally used for public Christian worship:

"minor" means a person who has not completed the age of twenty-one years and who is not a widower or a widow;

1[* * * *]

the expression "Christians" means persons professing the Christian religion;

and the expression "Native Christians" includes the Christian descendants of Natives of India converted to Christianity, as well as such converts;

2["Registrar-General of Births, Deaths and Marriages" means a Registrar-General of Births, Deaths and Marriages appointed under the Births, Deaths and Marriages Registration Act, 1886.]

PART I.

THE PERSONS BY WHOM MARRIAGES MAY BE SOLEMNIZED.

4. Every marriage between persons, one or both of whom is 3[or are] a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section, and any such marriage solemnized otherwise than in accordance with such provisions shall be void.

Marriages to be solemnized according to Act.

Persons by whom marriages may be solemnized.

5. Marriages may be solemnized in India—

(1) by any person who has received episcopal ordination, provided that the marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of which he is a Minister;

(2) by any Clergyman of the Church of Scotland, provided that such marriage be solemnized according to the rules, rites, ceremonies and customs of the Church of Scotland;

Leg. Ref.

¹ Omitted by Order in Council, 1937

² This paragraph was added by the Births, Deaths and Marriages Registration Act (VI of 1886), S. 30, cl. (a)

³ These words were inserted by the Repealing and Amending Act (XII of 1891), Sch II

Notes.

Sec 4 MARRIAGE OPPOSED TO RULES OF CHURCH—VALIDITY OF.—The distinction advanced in a contention that though a marriage carried out in complete disregard of the rules of the Church to which the parties to the marriage belonged, may be gravely unlawful, it would nevertheless, according to the canon law of the Roman Church, be valid is a distinction unknown to civil law. 55 A. 185=144 I C. 906=1933 All. 122.

Secs 4 and 5.—Validity of marriage of Christian with non-Christian, see U.B.R. (1897-1901), Vol. II, pp. 488 at 491 As to scope and applicability of the section, see 40 A. 393; 14 M. 342; 19 M. 273; 47 I.C. 544. As to persons authorized to perform marriages, see also 32 I.C. 897. A Hindu by religion performing a marriage according to the Hindu mode between two persons one of whom is a Christian commits an

offence under S. 68 See 40 M. 1030=33 M L J 148. A mixed marriage celebrated by the Catholic Church otherwise valid, is not invalidated for want of banns. 56 A. 428=1934 A L J 1129=1934 A. 273

JURISDICTION.—The various grounds on which the Court can give a decree of nullity under the Divorce Act refer to cases where there has been a marriage validly performed. Questions arise under Ss. 4 and 5, Christian Marriage Act, when the marriage has not been validly performed. There is a clear distinction between a decree of nullity of a valid marriage and a declaration that the marriage itself is illegal and void. There can therefore be no doubt that there is jurisdiction in the High Court to hear and decide questions under the Christian Marriage Act. [47 I.C. 544, Rel on; 13 Beng. L. R. 109 and 12 Cal. 706 (F.B.), Ref.] 55 A. 185=144 I C. 906=1933 All. 122

Sec. 5: SCOPE.—Rules in S. 5 refer to those things which must be done before the ceremony of marriage can be performed. The section deals only with the necessary preliminaries to the ceremony, the ceremony itself, and the person who performs it. It has nothing to do with Canon law. 55 A. 185=144 I.C. 906=1933 A. 122.

(3) by any minister of Religion licensed under this Act to solemnize marriages:

(4) by, or in the presence of, a marriage Registrar appointed under this Act.

(5) by any person licensed under this Act to grant certificates of marriage between Native Christians.

6. The Provincial Government, so far as regards the territories under its administration, and the [Central Government] so far as regards any [Indian]¹ State, may, by notification in the official Gazette ²[¹] grant licences³ to Ministers of Religion to solemnize marriages within such territories and State, respectively, and may, by a like notification, revoke such licences

Grant and revocation of licences to solemnize marriages.

7. The Provincial Government may appoint one or more Christians, either by name or as holding any office for the time being, to be the Marriage Registrar or Marriage Registrar⁴ for any district subject to its administration

Senior Marriage Registrar. Where there are more Marriage Registrars than one in any district, the Provincial Government shall appoint one of them to be the Senior Marriage Registrar.

Magistrate when to be Marriage Registrar. When there is only one Marriage Registrar in a district, and such Registrar is absent from such district, or ill, or when his office is temporarily vacant, the Magistrate of the district shall act as, and be, Marriage Registrar thereof during such absence, illness or temporary vacancy.

8. The [Central Government] may, by notification in the [Official Gazette], appoint any Christian, either by name or as holding any office for the time being to be a Marriage Registrar in respect of any district or place within [any Indian State]

Marriage Registrars in Native States. The [Central Government] may, by like notifications, revoke any such appointment.

Licensing of persons to grant certificates of marriage between Native Christians. 9. The Provincial Government⁵ (so far as regards any [Indian]¹ State) the [Central Government] may grant a licence to any Christian, either by name or as holding any office for the time being, authorising him to grant certificates of marriage between Native Christians.

Any such licence may be revoked by the authority by which it was granted, and every such grant or revocation shall be notified in the official Gazette.

Leg. Ref.

¹ Substituted by Order in Council, 1937

² Omitted by Order in Council, 1937 under former Acts, see the Indian Christian Marriages Act (1872), Amendment Act (II of 1891), S 1 (2) and (3).

³ As to validation of licences granted

⁴ For notifications under the powers conferred by this section in (1) Ajmer-Merwara see Aj. R. & O (2) Bombay, see Bom. R. & O.; (3) British Baluchistan, see *Gazette of India*, 1892; Pt. II, p. 53, (4) Burma, see Bur. R. M.; (5) Central Provinces, see C. P. R. & O.; (6) Punjab, see Punj. R. & O.; (7) the United Provinces of Agra and Oudh, see North-Western Provinces and

Oudh List of Local Rules and Orders, Ed 1894, p. 42.

⁵ For instances of such licences granted in Burma, see *Burma Gazette*, 1899; Pt. I, p. 284.

Notes.

Sec 6 —This section was substituted for the original S. 6 by the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), S 1 (1).

For notifications in the North-Western Provinces and Oudh, under the powers conferred by Ss. 6, 7, 9, 62, 82, 83 and 85, see North-Western Provinces and Oudh List of Local Rules and Orders, Ed., 1894, p. 42.

PART II.

TIME AND PLACE AT WHICH MARRIAGES MAY BE SOLEMNIZED

Time for solemnizing marriage 10. Every marriage under this Act shall be solemnized between the hours of six in the morning and seven in the evening:

Provided that nothing in this section shall apply

Exceptions to—

(1) a Clergyman of the Church of England solemnizing a marriage under a special licence permitting him to do so at any hour other than between six in the morning and seven in the evening, under the hand and seal of the Anglican Bishop of the Diocese or his Commissary, or

(2) a Clergyman of the Church of Rome solemnizing a marriage between the hours of seven in the evening and six in the morning, when he has received a general or special licence in that behalf from the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is so solemnized, or from such person as the same Bishop has authorized to grant such licence, ¹ or

(3) Clergyman of the Church of Scotland solemnizing a marriage according to the rules, rites, ceremonies and customs of the Church of Scotland].

Place for solemnizing marriage 11. No Clergyman of the Church of England shall solemnize a marriage in any place other than a church ² [where worship is generally held according to the forms of the Church of England],

unless there is no ³ [such] church within five miles distance by the shortest road from such place, or

unless he has received a special licence authorizing him to do so under the hand and seal of the Anglican Bishop of the Diocese or his Commissary

For such special licence, the Registrar of the Diocese may charge such additional fee as the said Bishop from time to time authorizes

Fee for special licence

PART III.

MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION LICENSED UNDER THIS ACT.

Notice of intended marriage 12 Whenever a marriage is intended to be solemnized by a minister of Religion licensed to solemnize marriages under this Act—

one of the persons intending marriage shall give notice in writing, according to the form contained in the first schedule hereto annexed, or to the like effect, to the Minister of Religion whom he or she desires to solemnize the marriage, and shall state therein—

(a) the name and surname, and the profession or condition, of each of the persons intending marriage,

(b) the dwelling-place of each of them.

(c) the time during which each has dwelt there, and

(d) the church or private dwelling in which the marriage is to be solemnized:

Provided that, if either of such persons has dwelt in the place mentioned in the notice during more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

Leg Ref.

¹ This portion was added by the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), S. 2.

² These words were added by the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), S. 3.

³ The word "such" was inserted by the Indian Christian Marriage Act (1872), Amendment Act (II of 1891), S. 3

Notes

13. If the persons intending marriage desire it to be solemnized in a particular church, and if the Minister of Religion to whom such notice has been delivered been entitled to officiate therein, he shall cause the notice to be affixed in some conspicuous part of such church.

Publication of such notice.
But if he is not entitled to officiate as a Minister in such church, he shall, at his option, either return the notice to the person who delivered to him, or deliver it to some other Minister entitled to officiate therein, who shall thereupon cause the notice to be affixed as aforesaid.

Return or transfer of notice
14. If it be intended that the marriage shall be solemnized in a private dwelling, the Minister of Religion, on receiving the notice prescribed in section 12, shall forward it to the Marriage Registrar of the district, who shall affix the same to some conspicuous place in his own office.

Notice of intended marriage in private dwelling.
15. When one of the persons intending marriage is a minor, every Minister receiving such notice shall, unless within twenty four hours after its receipt he turns the same under the provisions of section 13, send by post or otherwise a copy of such notice to the Marriage Registrar of the district, or, if there be more than one Registrar of such district, to the Senior Marriage Registrar.

Sending copy of notice to Marriage Registrar when one party is a minor.
16. The Marriage Registrar or Senior Marriage Registrar, as the case may be, on receiving any such notice, shall affix it to some conspicuous place in his own office, and the latter shall further cause a copy of the said notice to be sent to each of the other Marriage Registrars in the same district, who shall likewise publish the same in the manner above directed.

17. Any Minister of Religion consenting or intending to solemnize any such marriage as aforesaid, shall, on being required so to do by or on behalf of the person by whom the notice was given, and upon one of the persons intending marriage making the declaration hereinafter required, issue under his hand a certificate of such notice having been given and of such declaration having been made:

Issue of certificate of notice given and declaration made.

Provided—

(1) that no such certificate shall be issued until the expiration of four days after the date of the receipt of the notice by such Minister;

(2) that no lawful impediment be shown to his satisfaction why such certificate should not issue; and

(3) that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorized in that behalf.

18. The certificate mentioned in section 17 shall not be issued until one of the persons intending marriage has appeared personally before the Minister and made a solemn declaration—

Declaration before issue of certificate
(a) that he or she believes that there is not any impediment of kindred or affinity or other lawful hindrance to the said marriage,

and, when either or both of the parties is or are a minor or minors,

(b) that the consent or consents required by law has or have been obtained thereto, or that there is no person resident in India having authority to give such consent, as the case may be.

19. The father, if living, of any minor, or, if the father be dead, the guardian of the person of such minor, and, in case there be no such guardian, then the mother of such minor, may give consent to the minor's marriage,

Consent of father, or guardian, or mother.

Notes.

Sec. 18.—See 16 All 212.

and such consent is hereby required for the same marriage, unless no person authorized to give such consent be resident in India.

20. Every person whose consent to a marriage is required under section 19 is hereby authorized to prohibit the issue of the certificate by any Minister, at any time before the issue of the same, by notice in writing to such Minister, subscribed by the person so authorised with his or her name and place of abode and position with respect to either of the persons intending marriage, by reason of which he or she is so authorized as aforesaid.

21. If any such notice be received by such Minister, he shall not issue his certificate and shall not solemnize the said marriage until he has examined into the matter of the said prohibition, and is satisfied that the person prohibiting the marriage has no lawful authority for such prohibition, or until the said notice is withdrawn by the person who gave it.

22. When either of the persons intending marriage is a minor, and the Minister is not satisfied that the consent of the person whose consent to such marriage is required by section 19 has been obtained, such Minister shall not issue such certificate until the expiration of fourteen days after the receipt by him of the notice of marriage.

23. When any Native Christian about to be married takes a notice of marriage to a Minister of Religion, or applies for a certificate from such Minister under section 17, such Minister shall, before issuing the certificate, ascertain whether such Native Christian is cognizant of the purport and effect of the said notice or certificate, as the case may be, and, if not, shall translate or cause to be translated the notice or certificate to such Native Christian into some language which he understands.

24. The certificate to be issued by such Minister shall be in the form contained in the second schedule hereto annexed, or to the like effect.

25. After the issue of the certificate by the Minister, marriage may be solemnized between the persons therein described according to such form or ceremony as the Minister thinks fit to adopt:

Provided that the marriage be solemnized in the presence of at least two witnesses besides the Minister.

26. Whenever a marriage is not solemnized within two months after the date of the certificate issued by such Minister as aforesaid, such certificate and all proceedings (if any), thereon shall be void

and no person shall proceed to solemnize the said marriage until new notice has been given and a certificate thereof issued in manner aforesaid.

PART IV.

REGISTRATION OF MARRIAGES SOLEMNIZED BY MINISTERS OF RELIGION

27. All marriages hereafter solemnized in India between persons one or both of whom professes or profess the Christian religion, except marriages solemnized under Part V or Part VI of this Act, shall be registered¹ in manner hereinafter prescribed.

Leg. Ref.

¹ As to the establishment of general registry offices of births, deaths and marriages,

see the Births, Deaths and Marriages Registration Act (VI of 1886), Ch. II.

28. Every Clergyman of the Church of England shall keep a register of marriages and shall register therein according to the tabular form set forth in the third schedule hereto annexed, every marriage which he solemnizes under this Act.

Registration of marriages solemnized by Clergymen of Church of England

29. Every Clergyman of the Church of England shall send four times in every year returns in duplicate, authenticated by his signature, of the entries in the register of marriages solemnized at any place where he has any spiritual charge, to the Registrar of the Archdeaconry to which he is subject, or within the limits of which such place is situate.

Quarterly returns to Archdeaconry.

Such quarterly returns shall contain all the entries of marriages contained in the said register from the first day of January to the thirty-first day of March, from the first day of April to the thirtieth day of June, from the first day of July to the thirtieth day of September, and from the first day of October to the thirty-first day of December, of each year respectively, and shall be sent by such Clergyman within two weeks from the expiration of each of the quarters above specified.

Contents of returns

The said Registrar upon receiving the said returns shall send one copy thereof to the 1[Registrar-General of Births, Deaths and Marriages]

30. Every marriage solemnized by a Clergyman of the Church of Rome shall be registered by the person and according to the form directed to that behalf by the Roman Catholic Bishop of the Diocese or Vicariate in which such marriage is solemnized,

Registration and returns of marriages solemnized by Clergymen of Church of Rome.

and such person shall forward quarterly to the 1[Registrar-General of Births, Deaths and Marriages] returns of the entries of all marriages registered by him during the three months next preceding.

31. Every Clergyman of the Church of Scotland shall keep a register of marriages,

Registration and returns of marriages solemnized by Clergymen of Church of Scotland.

and shall register therein, according to the tabular form set forth in the third schedule hereto annexed, every marriage which he solemnizes under this Act,

and shall forward quarterly to the 1[Registrar-General of Births, Deaths and Marriages], through the Senior Chaplain of the Church of Scotland, returns, similar to those prescribed in section 29, of all such marriages.

32. Every marriage solemnized by any person who has received episcopal ordination, but who is not a Clergyman of the Church of England, or of the Church of Rome, or by any Minister of Religion licensed under this Act to solemnize marriages, shall, immediately after the solemnization thereof, be registered in duplicate by the person solemnizing the same; (that is to say) in a marriage-register-book to be kept by him for that purpose, according to the form contained in the fourth schedule hereto annexed, and also in a certificate attached to the marriage-register-book as a counterfoil.

Certain marriages to be registered in duplicate

33. The entry of such marriage in both the certificate and marriage-register-book shall be signed by the person solemnizing the marriage, and also by the persons married, and shall be attested by two credible witnesses, other than the person solemnizing the marriage, present at its solemnization.

Entries of such marriages to be signed and attested.

Leg. Ref.

¹ These words were substituted for the words "Secretary to the Local Government"

by the Births, Deaths and Marriages Registration Act (VI of 1886), S. 36, cl. (b).

Every such entry shall be made in order from the beginning to the end of the book, and the number of the certificate shall correspond with that of the entry in the marriage-register-book.

34. The person solemnizing the marriage shall forthwith separate the certificate from the marriage-register-book and send it, within one month from the time of the solemnization, to the Marriage Registrar of the district in which the marriage was solemnized, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar,

Certificate to be forwarded to Marriage Registrar, copied and sent to Registrar-General.

who shall cause such certificate to be copied into a book to be kept by him for that purpose,

and shall send all the certificates which he has received during the month, with such number and signature or initials added thereto as are hereinafter required, to the 1[Registrar-General of Births, Deaths and Marriages].

35. Such copies shall be entered in order from the beginning to the end of the said book, and shall bear both the number of the certificate as copied, and also a number to be entered by the Marriage Registrar, indicating the number of the entry of the said copy in the said book, according to the order in which he receives each certificate

Copies of certificates to be entered and numbered

36. The marriage Registrar shall also add such last-mentioned number of the entry of the copy in the book to the certificate, with his signature or initials, and shall, at the end of every month, send the same to the 1[Registrar-General of Births, Deaths and Marriages].

Registrar to add number of entry to certificate, and send to Registrar-General.

37. When any marriage between Native Christians is solemnized under Part I or Part III of this Act, the person solemnizing the same shall, instead of proceeding in the manner provided by section 28 to 36, both inclusive, register the marriage in a separate register-book, and shall keep it safely until it is filled, or if he leave the district in which he solemnized the marriage before the said book is filled, shall make over the same to the person succeeding to his duties in the said district.

Registration of marriages between Native Christians under Part I or III, custody and disposal of register-book

Whoever has the control of the book at the time when it is filled shall send it to the Marriage Registrar of the district, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar, who shall send it to the 1[Registrar-General of Births, Deaths and Marriages], to be kept by him with the records of his office.

PART V.

MARRIAGES SOLEMNIZED BY, OR IN THE PRESENCE OF, A MARRIAGE REGISTRAR.

38. When a marriage is intended to be solemnized by, or in the presence of a Marriage Registrar, one of the parties to such marriage shall give notice in writing in the form contained in the first schedule hereto annexed, or to the like effect, to any Marriage Registrar of the District within which the parties have dwelt.

Notice of intended marriage before Marriage Registrar.

Leg. Ref.

¹ These words were substituted for the words "Secretary to the Local Government" by the Births, Deaths and Marriages Registration Act (VI of 1886), S. 36, cl. (b).

Notes.

Sec 38: SCOPE—NOTICE—AGE—IF TO BE

FILLED IN.—The section governs the schedule and the space left for age is not necessary to be filled with that particular, because no such provision is made in the section (*Dean v. Green*, 8 P.D. 89, Foll.; *In re Bains*, 1 Cr. & P. 31, Diss. from.) 39 C.W.N. 1303=36 Cr.L.J. 1462=1935 C. 678

or, if the parties dwell in different districts, shall give the like notice, to a Marriage Registrar of each district,

and shall state therein the name and surname, and the profession or condition of each of the parties intending marriage, the dwelling-place of each of them the time during which each has dwelt therein, and the place at which the marriage is to be solemnized:

Provided that, if either party has dwelt in the place stated in the notice for more than one month, it may be stated therein that he or she has dwelt there one month and upwards.

39. Every Marriage Registrar shall, on receiving any such notice, cause a copy thereof to be affixed in some conspicuous place in his office

When one of the parties intending marriage is a minor, every Marriage Registrar shall, within twenty-four hours after the receipt by him of the notice of such marriage, send, by post or otherwise, a copy of such notice to each of the other Marriage Registrars (if any) in the same district, who shall likewise affix the copy in some conspicuous place in his own office.

40 The Marriage Registrar shall file all such notices and keep them with the records of his office, and shall also forthwith enter a true copy of all such notices in a book to be furnished to him for that purpose by the Provincial Government, and to be called the "Marriage Notice-Book",

and the Marriage Notice-Book shall be open at all reasonable times, without fee, to all persons desirous of inspecting the same.

41. If the party by whom the notice was given request the Marriage Registrar to issue the certificate next hereinafter mentioned, and if one of the parties intending marriage has made oath as hereinafter required, the Marriage Registrar shall issue under his hand a certificate of such notice having been given and of such oath having been made:

Provided--

that no lawful impediment be shown to his satisfaction why such certificate should not issue;

that the issue of such certificate has not been forbidden, in manner hereinafter mentioned, by any person authorized in that behalf by this Act;

that four days after the receipt of the notice have expired; and further,

that where, by such oath, it appears that one of the parties intending marriage is a minor, fourteen days after the entry of such notice have expired.

42. The certificate mentioned in section 41 shall not be issued by any Marriage Registrar, until one of the parties intending marriage appears personally before such Marriage Registrar, and makes oath--

(a) that he or she believes that there is not any impediment of kindred or affinity, or other lawful hindrance, to the said marriage, and

(b) that both the parties have, or (where they have dwelt in the districts of different Marriage Registrars) that the party making such oath has, had their, his or her usual place of abode within the district of such Marriage Registrar,

and, where either or each of the parties is a minor,--

(c) that the consent or consents to such marriage required by law has or have been obtained thereto, or that there is no person resident in India authorized to give such consent, as the case may be.

Notes.

Secs. 41 and 42.—As to the meaning of "oath," see the General Clauses Act (X of 1897), S. 3, cl. (36) and S. 4. See 16

C.W.N. 417 (Marriage between a Christian husband and a Jewess divorced according to Jewish Law).

43. When one of the parties intending marriage is a minor, and both such parties are at the time resident in any of the towns of Calcutta, Madras and Bombay, and are desirous of being married in less than fourteen days after the entry of such notice as aforesaid, they may apply by petition to a Judge of the High Court, for an order upon the Marriage Registrar to whom the notice of marriage has been given, directing him to issue his certificate before the expiration of the said fourteen days required by section 41.

And, on sufficient cause being shown, the said Judge may, in his discretion, make an order upon such Marriage Registrar, directing him to issue his certificate at any time to be mentioned in the said order before the expiration of the fourteen days so required.

And the said Marriage Registrar, on receipt of the said order, shall issue his certificate in accordance therewith.

44. The provisions of section 19 apply to every marriage under this Part, either of the parties to which is a minor;

and any person whose consent to such marriage would be required thereunder may enter a protest against the issue of the Marriage Registrar's certificate, by writing, at any time before the issue of such certificate, the word "forbidden" opposite to the entry of the notice of such intended marriage in the Marriage Notice-Book, and by subscribing thereto his or her name and place of abode, and his or her position with respect to either of the parties, by reason of which he or she is so authorized.

When such protest has been entered, no certificate shall issue until the Marriage Registrar has examined into the matter of the protest, and is satisfied that it ought not to obstruct the issue of the certificate for the said marriage, or until the protest be withdrawn by the person who entered.

Effect of protest

Petition where person whose consent is necessary is insane or unjustly withholds consent.

45. If any person whose consent is necessary to any marriage under this Part is of unsound mind,

or if any such person (other than the father) without just cause withholds his consent to the marriage,

the parties intending marriage may apply by petition, where the person whose consent is necessary is resident within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or if he is not resident within any of said towns, then to the District Judge.

And the said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way;

and, if upon examination such marriage appears proper, such Judge of the High Court or District Judge, as the case may be shall declare the marriage to be a proper marriage

Such declaration shall be as effectual as if the person whose consent was needed had consented to the marriage;

and, if he has forbidden the issue of the Marriage Registrar's certificate, such certificate shall be issued and the like proceedings may be had under this Part in relation to the marriage as if the issue of such certificate had not been forbidden.

46. Whenever a Marriage Registrar refuses to issue a certificate under this Part, either of the parties intending marriage may apply by petition, where the district of such Registrar is within any of the towns of Calcutta, Madras and

Petition when Marriage Registrar refuses certificate

Bombay, to a Judge of the High Court, or if such district is not within any of the said towns, then to the District Judge.

The said Judge of the High Court, or District Judge, as the case may be, may examine the allegations of the petition in a summary way, and shall decide thereon.

The decision of such Judge of the High Court or District Judge, as the case may be, shall be final, and the Marriage Registrar to whom the application for the issue of a certificate was originally made shall proceed in accordance therewith.

Petition when Marriage Registrar in Native State refuses certificate.

thereon.

47. Whenever a Marriage Registrar resident in any¹ [Indian] State refuses to issue his certificate, either of the parties intending marriage may apply by petition to the Central Government who shall decide

Such decision shall be final, and the Marriage Registrar to whom the application was originally made shall proceed in accordance therewith

48. Whenever a Marriage Registrar, acting under the provisions of section 44, is not satisfied that the person forbidding the issue of the certificate is authorized by law so to do, the said Marriage Registrar shall apply by petition, where his district is within any of the towns of Calcutta, Madras and Bombay, to a Judge of the High Court, or, if such district be not within any of the said towns, then to the District Judge.

The said petition shall state all the circumstances of the case, and pray for the order and direction of the Court concerning the same,

and the said Judge of the High Court or District Judge, as the case may be, shall examine into the allegations of the petition and the circumstances of the case;

and if, upon such examination, it appears that the person forbidding the issue of such certificate is not authorized by law so to do, such Judge of the High Court or District Judge, as the case may be, shall declare that the person forbidding the issue of such certificate is not authorized as aforesaid,

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage as if the issue had not been forbidden.

Whenever a Marriage Registrar appointed under section 8 to act within any¹ [Indian] State is not satisfied that the person forbidding the issue of the certificate is authorised by law so to do, the said Marriage Registrar shall send a statement of all the circumstances of the case, together with all documents relating thereto, to the Central

Government.

If it appears to the Central Government that the person forbidding the issue of such certificate is not authorized by law so to do, the Central Government shall declare that the person forbidding the issue of such certificate is not authorized as aforesaid

and thereupon such certificate shall be issued, and the like proceedings may be had in relation to such marriage, as if the issue of the certificate had not been forbidden.

49. Every person entering a protest with the Marriage Registrar, under this Part, against the issue of any certificate, on grounds which such Marriage Registrar, under section 44, or a Judge of the High Court or the District Judge, under section 45 or 46, declares to be frivolous and such as ought not to obstruct the issue of the certificate, shall be liable for

Liability for frivolous protest against issue of certificate.

Leg. Ref.

¹ Substituted by Order in Council, 1937.

the costs of all proceedings in relation thereto and for damages, to be recovered by suit by the person against whose marriage such protest was entered.

50. The certificate to be issued by the Marriage Registrar under the provisions of section 41 shall be in the form contained in the second schedule to this Act annexed or to the like effect, and the Provincial Government shall furnish to every Marriage Registrar a sufficient number of forms of certificate.

Solemnization of marriage after issue of certificate 51 After the issue of the certificate of the Marriage Registrar,

or, where notice is required to be given under this Act to the Marriage Registrars for different districts, after the issue of the certificates of the Marriage Registrars for such districts,

marriage may, if there be no lawful impediment to the marriage of the parties described in such certificate or certificates, be solemnized between them, according to such form and ceremony as they think fit to adopt.

But every such marriage shall be solemnized in the presence of some Marriage Registrar (to whom shall be delivered such certificate or certificates as aforesaid), and of two or more credible witnesses besides the marriage Registrar.

And in some part of the ceremony each of the parties shall declare as follows, or to the like effect :—

"I do solemnly declare that I know not of any lawful impediment why I *A.B.*, may not be joined in matrimony to *C.D.*"

And each of the parties shall say to the other as follows or to the like effect :—"I call upon these persons here present to witness that I, *A.B.*, do take thee, *C.D.*, to be my lawful wedded wife [*or husband*]."

52 Whenever a marriage is not solemnized within two months after the copy of the notice has been entered by the Marriage Registrar, as required by section 40 the notice and the certificate, if any, issued thereupon, and all other proceedings thereupon, shall be void,

and no person shall proceed to solemnize the marriage, nor shall any Marriage Registrar enter the same, until new notice has been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid.

53. A Marriage Registrar before whom any marriage is solemnized under this Part may ask of the persons to be married the several particulars required to be registered touching such marriage.

54. After the solemnization of any marriage under this Part, the Marriage Registrar present at such solemnization shall forthwith register the marriage in duplicate; that is to say, in a marriage register-book, according to the form of the fourth schedule hereto annexed, and also in a certificate attached to the marriage-register-book as a counterfoil.

The entry of such marriage in both the certificate and the marriage-register-book shall be signed by the person by or before whom the marriage has been solemnized, if there be any such person, and by the Marriage Registrar present at such marriage, whether or not it is solemnized by him, and also by the parties married, and attested by two credible witnesses other than the Marriage Registrar and person solemnizing the marriage.

Every such entry shall be made in order from the beginning to the end of the book and the number of the certificate shall correspond with that of the entry in the marriage-register-book.

Certificates to be sent monthly to Registrar-General

55 The Marriage Registrar shall forthwith separate the certificate from the marriage-register-book and send it, at the end of every month, to the 1[Registrar-General of Births, Deaths and Marriages].

The Marriage Registrar shall keep safely the said register-book until it is filled, and shall then send it to the 1[Registrar-General of Births, Deaths and Marriages], to be kept by

Custody of Register book.

him with the records of his office.

Officers to whom Registrars in Indian States shall send certificates.

56. The Marriage Registrars in [Indian] 1 a States shall send the certificates mentioned in section 54 to such officers as the [Central Government] from time to time, by notification in the [Official gazette]

appoints in this behalf.²

57. When any Native Christian about to be married gives a notice of marriage or applies for a certificate from a Marriage Registrar, such Marriage Registrar shall ascertain whether the said Native Christian understands the English language, and, if he does not, the Marriage Registrar shall translate, or cause to be translated,

Registrars to ascertain that notice and certificate are understood by Native Christians.

such notice or certificate or both of them, as the case may be, to such Native Christian into a language which he understands;

or the Marriage Registrar shall otherwise ascertain whether the Native Christian is cognizant of the purport and effect of the said notice and certificate.

58. When any Native Christian is married under the provisions of this Part, the person solemnizing the marriage shall ascertain whether such Native Christian understands the English language, and, if he does not, the person solemnizing the marriage shall, at the time of the solemnization, translate, or cause to be translated, to such Native Christian, into a language which he understands, the declarations made at such marriage in accordance with the provisions of this Act.

Native Christians to be made to understand declarations

Registration of marriages between Native Christians

59. The registration of marriages between Native Christians under this Part shall be made in conformity with the rules laid down in section 37 (so far as they are applicable), and not otherwise.

PART VI *

MARRIAGE OF NATIVE CHRISTIANS.

On what conditions marriages of Native Christians may be certificated

60. Every marriage between Native Christians applying for a certificate shall, without the preliminary notice required under Part III, be certified under this Part, if the following conditions be fulfilled, and not

otherwise:—

Leg. Ref

¹ These words were substituted for the words "Secretary to the Local Government" by the Births, Deaths and Marriages Registration Act (VI of 1886), S. 30, cl. (b)

² Substituted by Order in Council, 1937

³ Cf. S. 24 (2) of the Births, Deaths and Marriages Registration Act (VI of 1886)

The Commissioner of Ajmer-Merwara has been appointed under this section for the Rajputana States, see Aj. R. O.; the Agent, Governor-General, Central India Agency, for States in Central India; see *Brit. Enact.*

N.S. (C.I.), Ed. 1899, p. 45; the Registrar-General of Births, Deaths and Marriages, Madras, for the Mysore State, see *ibid.*, Mad and Mys., p. 47; the First Assistant to the Resident for the Hyderabad State, see *ibid.* (Hyd.), p. 26

³ As to the validation of past marriages solemnized under Part VI between persons of whom one only was a Native Christian, and penalty for solemnizing such marriages under Part VI in future, see the Marriages Validation Act (II of 1892).

(1) the age of the man intending to be married shall exceed sixteen years, and the age of the woman intending to be married shall exceed thirteen years;

(2) neither of the persons intending to be married shall have a wife or husband still living;

(3) in the presence of a person licenced under section 9, and of at least two credible witnesses other than such person, each of the parties shall say to the other—

"I call upon these persons here present to witness that I, *A.B.*, in the presence of Almighty God, and in the name of our Lord Jesus Christ, do take thee *C.D.*, to be my lawful wedded wife [*or husband*]" or words to the like effect.

Provided that no marriage shall be certified under this Part when either of the parties intending to be married has not completed his or her eighteenth year, unless such consent as is mentioned in section 19 has been given to the intended marriage, or unless it appears that there is no person living authorized to give such consent.

61. When, in respect to any marriage solemnized under this Part, the conditions prescribed in section 60 have been fulfilled, the person licenced as aforesaid, in whose presence the said declaration has been made, shall, on the application of either of the parties to such marriage, and on the payment of a fee of four annas, grant a certificate of the marriage.

The certificate shall be signed by such licenced person, and shall be received in any suit touching the validity of such marriage as conclusive proof of its having been performed.

162. (1) Every person licenced under section 9 shall keep in English, or in the vernacular language in ordinary use in the district or State in which the marriage was solemnized, and in such form as the [Provincial Government] by which he was licenced may from time to time prescribe,¹ a register-book of all marriages solemnized under this Part in his presence, and shall deposit in the office of the Registrar-General of Births, Deaths and Marriages for the territories under the administration of the said [Provincial Government], in such form and at such intervals as that Government may prescribe, true and duly authenticated extracts from his register-book of all entries made therein since the last of those intervals.

(2) Where the person keeping the register-book was licenced as regards a Native State by the [Central Government] references in sub-section (1) to the [Provincial Government] therein mentioned shall be read as references to the [Provincial Government] to whose Registrar-General of Births, Deaths and Marriages certified copies of entries in registers of births and deaths are for the time being required to be sent under section 24, sub-section (2), of the Births, Deaths and Marriages Registration Act, 1886.

Leg. Ref.

¹ This section was substituted for the original S. 62 (relating to the keeping and form of the register-book) by the Indian Christian Marriage Act (1872) Amendment Act (II of 1891), S. 4.

² For notifications issued under the powers conferred by this section in—(1) Assam, see *Assam Gazette*, 1901, Pt. II, p. 397; (2) Bengal, see Ben. R. & O.; (3) Burma, see Bur. R. M., (4) the Central Provinces, see

C. P. R. & O.; (5) Punjab, see Pun. R. & O., (6) the United Provinces of Agra and Oudh, see North-Western Provinces and Oudh List of Local Rules and Orders, Ed. 1894, p. 42. For notifications in the United Provinces of Agra and Oudh, under the powers conferred by Ss. 62, 6, 7, 9, 82; 83 and 85, see North-Western Provinces and Oudh Lists of Local Rules and Orders, Ed. 1894, p. 42.

63. Every person licensed under this Act to grant certificates of marriage, and keeping a marriage-register-book under section 62, shall, at all reasonable times, allow search to be made in such book, and shall, on payment of the proper fee, give a copy, certified under his hand, of an entry therein.

Searches in register-book and copies of entries
Books in which marriages of Native Christians under Part I or Part III are registered.

64. The provisions of sections 62 and 63, as to the form of the register-book, depositing extracts therefrom, allowing searches thereof, and giving copies of the entries therein, shall, *mutatis mutandis*, apply to the books kept under section 37.

65. This Part of this Act, except so much of sections 62 and 63 as are referred to in section 64 shall not apply to marriages between Roman Catholics. But nothing herein contained shall invalidate any marriage celebrated between Roman Catholics under the provisions of Part V of Act No. XXV of 1864¹ previous to the twenty-third day of February, 1865.

Part VI not to apply to Roman Catholics Saving of certain marriages.

PART VII.

PENALTIES.

False oath, declaration, notice or certificate for procuring marriage.

66. Whoever, for the purpose of procuring a marriage or licence of marriage, intentionally,—

(a) where an oath or declaration is required by this Act, or by any rule or custom of a Church according to the rite and ceremonies of which a marriage is intended to be solemnized, such Church being the Church of England or of Scotland or of Rome, makes a false oath or declaration, or,

(b) where a notice or certificate is required by this Act, signs a false notice or certificate,

shall be deemed to have committed the offence punishable under section 193 of the Indian Penal Code with imprisonment of either description for a term which may extend to three years and, at the discretion of the Court, with fine.

67. Whoever forbids the issue, by a Marriage Registrar, of a certificate, by falsely representing himself to be a person whose consent to the marriage is required by law, knowing or believing such representation to be false, or not having reason to believe it to be true, shall be deemed guilty of the offence described in section 205 of the Indian Penal Code.

Forbidding, by false personation, issue of certificate by Marriage Registrar.

68. Whoever, not being authorized by section 5 of this Act to solemnize marriages solemnizes or professes to solemnize in the absence of a Marriage Registrar of the district in which the ceremony takes place, a marriage between

Solemnizing marriage without due authority.

Leg. Ref.

¹ Act XXV of 1864 was repealed by Act V of 1865, which was repealed by this Act.

² This section was substituted for the original S. 68 by Act II of 1891. S. 6

Notes.

Secs. 66 and 68.—See 16 A. 212, 40 A. 393; 14 M. 342; 17 M. 391; 18 M. 230; 19 M. 273; 20 M. 12; 6 Mad. H. C. Rep. Ap. 20. No one except a person who professes the Christian religion comes under S. 68 of the Act. The mere fact that a person was baptized as an infant or that he is

attending a Christian school or he is dressing as a Christian is not sufficient to treat him as such. There is no express prohibition preventing a person professing Christianity from doing violence to his faith and marrying a non-Christian, by a non-Christian ceremony. Section 68 does not make it penal for a Christian to marry by a ceremony which is void under S. 4 of the Act. 40 A. 393 A Hindu by religion performing a marriage according to the Hindu mode between two persons one of whom is a Christian commits an offence under S. 68. 40 M. 1030—33 M.L.J. 148.

persons one or both of whom is or are a Christian or Christians, shall be punished with imprisonment which may extend to ten years, or (in lieu of a sentence of imprisonment for seven years or upwards) with transportation for a term of not less than seven years, and not exceeding ten years,

or, if the offender is an European or American, with penal servitude according to the provisions of Act XXIV of 1855 (*to substitute penal servitude for the punishment of transportation in respect of European and American convicts*)¹ [**]

and shall also be liable to fine.

69. Whoever knowingly and wilfully solemnizes a marriage between

Solemnizing marriage out of proper time, or without witnesses.

persons one or both of whom is or are a Christian or Christians at any time other than between the hours of six in the morning and seven in the evening, or in the absence of at least two credible witnesses, other

than the person solemnizing the marriage, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

This section does not apply to marriages solemnized under special

Saving of marriages solemnized under special licence.

licences granted by the Anglican Bishop of the Diocese or by his Commissary, nor to marriages performed between the hours of seven in the evening and six in the morning by a Clergyman of the Church

of Rome, when he has received the general or special licence in that behalf mentioned in section 10.

²[Nor does the section apply to marriages solemnized by a Clergyman of the Church of Scotland according to the rules, rites, ceremonies and customs of the Church of Scotland.]

70. Any Minister of Religion licensed to solemnize marriages under this

Solemnizing, without notice or within fourteen days after notice marriage with minor.

Act who, without a notice in writing, or, when one of the parties to the marriage is a minor, and the required consent of the parents or guardians to such marriage has not been obtained, within fourteen days

after the receipt by him of notice of such marriage, knowingly and wilfully solemnizes a marriage under Part III, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Issuing certificate, or marrying without publication of notice,

71 A Marriage Registrar under this Act, who commits any of the following offences:—

(1) knowingly and wilfully issues any certificate for marriage, or solemnizes any marriage, without publishing the notice of such marriage as directed by this Act;

(2) ³[after the expiration of two months after the copy of the notice has been entered as required by section 40 in respect of any marriage, solemnizes such marriage;]

(3) solemnizes, without any order of a competent Court authorizing him to do so, any marriage, when one of the parties is a minor, before the expiration of fourteen days after the receipt of the notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Senior Marriage Registrar of the district if there be more Marriage Registrars of the district

than one, and if he himself be not the Senior Marriage Registrar;

Leg. Ref.

¹ The words "and to amend the law relating to the removal of such convicts" were repealed by the Repealing and Amending Act (II of 1891).

² Last paragraph was added by S. 7 of the Indian Christian Marriage Act (1872), Amendment Act (II of 1891).

³ Clause (2) was substituted for the original cl. (2) by Act II of 1891, S. 8 (1).

(1) issues any certificate the issue of which has been prohibited, as in this Act provided, by any person authorized to prohibit the issue thereof,

issuing certificate against authorized prohibition. shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

Issuing certificate after expiry of notice, or in case of minor, within fourteen days after notice, or against authorized prohibition.

72. Any Marriage Registrar knowingly and wilfully issuing any certificate for marriage after the expiration of [two months] after the notice has been entered by him as aforesaid.

or knowingly and wilfully issuing, without the order of a competent Court authorizing him so to do, any certificate for marriage, where one of the parties intending marriage is a minor, before the expiration of fourteen days after the entry of such notice or any certificate the issue of which has been forbidden as aforesaid by any person authorized in this behalf,

shall be deemed to have committed an offence under section 166 of the Indian Penal Code.

Persons authorized to solemnize marriage, other than Clergy of Churches of England, Scotland or Rome;

73. Whoever, being authorized under this Act to solemnize a marriage,

and not being a Clergyman of the Church of England, solemnizing a marriage after due publication of banns, or under a licence from the Anglican Bishop of the Diocese or a Surrogate duly authorized in that behalf,

or, not being a Clergyman of the Church of Scotland, solemnizing a marriage according to the rules, rites, ceremonies and customs of that church,

or, not being a Clergyman of the Church of Rome, solemnizing a marriage according to the rites, rules, ceremonies and custom of that church,

issuing certificate or marrying, without publishing notice, or after expiry of certificate; knowingly and wilfully issues any certificate for marriage under this Act or solemnizes any marriage between such persons as aforesaid, without publishing, or causing to be affixed, the notice of such marriage as directed in Part III of this Act, or after the expiration of two months after the certificate has been issued by him:

or knowingly and wilfully issues any certificate for marriage, or solemnizes a marriage between such persons when one of the persons intending marriage is a minor, before the expiration of fourteen days after the receipt of notice of such marriage, or without sending, by the post or otherwise, a copy of such notice to the Marriage Registrar, or, if there be more Marriage Registrars than one, to the Senior Marriage Registrar of the district:

issuing certificate authoriz- edly forbidden; or knowingly and wilfully issues any certificate the issue of which has been forbidden, under this Act, by any person authorized to forbid the issue:

solemnizing marriage authoriz- edly forbidden. or knowingly and wilfully solemnizes any marriage forbidden by any person authorized to forbid the same:

shall be punished with imprisonment for a term which may extend to four years, and shall also be liable to fine.

74. Whoever, not being licensed to grant a certificate of marriage under Part VI of this Act, grants such certificate intending thereby to make it appear that he is so licensed, shall be punished with imprisonment for a term which may extend to five years, and shall also be liable to fine.

Unlicensed person granting certificate pretending to be licensed.

Leg. Ref.

¹ The words within brackets were substituted for the words "three months" by

S. 8 (2) of the Indian Christian Marriage Act, (1872), Amendment Act (II of 1891).

1[Whoever, being licensed to grant certificates of marriages under Part VI of this Act, without just cause refuses, or wilfully neglects or omits, to perform any of the duties imposed upon him by that Part shall be punished with fine which may extend to one hundred rupees].

75. Whoever, by himself or another, wilfully destroys or injures any register-book or the counter-foil certificates thereof, or any part thereof or any authenticated extract therefrom,

or falsely makes or counterfeits any part of such register-book or counter-foil certificates,

or wilfully inserts any false entry in any such register-book or counter-foil certificate or authenticated extract,

shall be punished with imprisonment for a term which may extend to seven years and shall also be liable to fine.

76. The prosecution for every offence punishable under this Act shall be commenced within two years after the offence is committed.

PART VIII.

MISCELLANEOUS.

What matters need not be proved in respect of marriage in accordance with Act.

77. Whenever any marriage has been solemnized in accordance with the provisions of sections 4 and 5 it shall not be void merely on account of any irregularity in respect of any of the following matters, namely:—

(1) any statement made in regard to the dwelling of the persons married or to the consent of any person whose consent to such marriage is required by law:

(2) the notice of the marriage:

(3) the certificate of translation thereof:

(4) the time and place at which the marriage has been solemnized:

(5) The registration of the marriage.

78. Every person charged with the duty of registering any marriage, who discovers any error in the form or substance of any such entry may, within one month next after the discovery of such error, in the presence of the persons married, or, in case of their death or absence, in the presence of two other credible witnesses, correct the error, by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereto the date of such correction, and such person shall make the like marginal entry in the certificate thereof.

And every entry made under this section shall be attested by the witnesses in whose presence it was made.

And in case such certificate has been already sent to the ²[Registrar-General of Births, Deaths and marriages] such person shall make and send in like manner a separate certificate of the original erroneous entry and on the marginal correction therein made.

Searches and copies of entries.

79. Every person solemnizing a marriage under this Act, and hereby required to register the same, and every Marriage Registrar or ²[Registrar-General of Births, Deaths and Marriages] having the custody for the time being any register of marriages or of any certificate, or duplicate, or copies of certificate, under this Act, shall, on payment of the proper fees, at all reasonable times, allow search-

Leg. Ref.

¹ The last paragraph of S. 74 was added by S. 9 of the Indian Christian Marriage Act (1872), Amendment Act (II of 1891).

² The words within brackets were substi-

tuted for the words "Secretary to the Local Government" by S. 30 (b) of the Births, Deaths and Marriages Registration Act (VI of 1886).

ches to be made in such register, or for such certificate, or duplicate, or copies and give a copy under his hand of any entry in the same.

80. Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any marriage-register or certificate, or duplicate, required to be kept or delivered under this Act, of an entry of a marriage in such register, or of any such certificate or duplicate, shall be received as evidence of the marriage purporting to be so entered, or of the facts purporting to be so certified therein, without further proof of such register or certificate or duplicate or of any entry therein, respectively, or of such copy.

81. The 1[Registrar-General of Births, Deaths and Marriages] and the officers appointed under section 56 shall, at the end of every quarter in each year, select, from the certificates of marriages forwarded to them respectively during such quarter, the certificates of the marriages of which the 1-a[Government by whom he was appointed] may desire that evidence shall be transmitted to England,

and shall send the same certificates, signed by them respectively, to the Secretary to the Government of India the Home Department, for the purpose of being forwarded to the Secretary of State for India and delivered to the Registrar-General of Births, Deaths and marriages² [in England]:

Provided that, in the case of the Governments of Madras and Bombay, the said certificates shall be forwarded by such Governments respectively directly to the Secretary of State for India.

Provincial Government to prescribe fees

82. Fees shall be chargeable under this Act for—

receiving and publishing notice of marriages;
issuing³ [certificates for marriage] by Marriage Registrars, and registering marriages by the same;
entering protests against, or prohibitions of, the issue of 4[certificates for marriage,] by the said Registrars:
searching register-books or certificates, or duplicates of copies thereof;
giving copies of entries in the same under sections 63 and 79.

The Provincial Government shall fix the amount of such fees respectively, and may from time to time vary or remit them either generally or in special cases, as to it may seem fit.

83. The Provincial Government may make rules in regard to the disposal of the fees mentioned in section 82 the supply of register-books, and the preparation and submission of returns of marriages solemnized under this Act.

Power to make rules.
Power to prescribe fees⁵ and rules for [Indian]^{1-a} States.

Central Government.

84. The powers conferred on the Provincial Government by sections 82 and 83 [shall]^{1-a} so far as regards [Indian]^{1-a} States, be exercised by the

Power to declare who shall be District Judge.

District Judge.

85. The Provincial Government may, by notification in the official Gazette, declare who shall, in any place to which this Act applies, be deemed to be the

Leg. Ref.

¹ The words within brackets were substituted for the words "Secretary to the Local Government" by S. 30 (b) of the Births, Deaths and Marriages Registration Act (VI of 1886).

^{1-a} Substituted by Order in Council, 1937

² The words within brackets were added by S. 30 (d) of the Births, Deaths and

Marriages Registration Act (VI of 1886).

³ The words "certificates for marriage" were substituted for the words "certificate of marriages" by the Repealing and Amending Act (I of 1903), S. 3 and Sch. II.

⁴ The words within brackets were substituted for the words "marriage certificates" by the Repealing and Amending Act (I of 1903), S. 3 and Sch. II.

1[86. (1) The powers and functions exercisable by the [Central Government] under sections, 6, 8, 9, 47, 48, 56 and 84 shall, so far as regards any Native State which is within the political charge of a [Provincial Government] be [exercisable]² by that [Provincial Government].

The exercise under this section by any [Provincial Government] of powers and functions under sections 6, 8, 9 and 56 shall be by notification in the official Gazette.

(2) The powers and functions exercisable under this Act by the [Central Government] may be delegated to, and exercised by, such officers as he may from time to time appoint in this behalf.]

Saving of Consular marriages.

87. Nothing in this Act applies to any marriage performed by any Minister, Consul or Consular Agent between subjects of the State which he represents and according to the laws of such State.

Non-validation of marriages within prohibited degrees.

88. Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into.

SCHEDULE 1.

(See sections 12 and 38.)

NOTICE OF MARRIAGE.

To a minister [or Registrar] of

I hereby give you notice that a marriage is intended to be had, within three calendar months from the date hereof, between me and the other party herein named and described (that is to say):

| Names. | Condition | Rank or profession. | Age. | Dwelling place. | Length of residence | Church, chapel or place of worship in which the marriage is to be solemnized. | District in which the other party resides, when the parties dwell in different districts. |
|--------------|-----------|---------------------|--------------|----------------------|---------------------|---|---|
| James Smith | Widower. | Carpenter. | Of full age. | 16, Clive Street | 23 days. | Free Church of Scotland Church, Calcutta. | |
| Martha Green | Spinster | .. | Minor. | 20, Hastings Street. | More than a month. | | |

Witness my hand, this

day of

seventy-two.

(Signed) JAMES SMITH.

[The italics in this schedule are to be filled up as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]

Leg. Ref.

¹ Section 86 was substituted by Act XXXVIII of 1920, Sch. I.

² Substituted by Order in Council, 1937.

Notes.

Sec 88.—The Christian Marriage Act is only concerned with the forms in which the marriage is to be solemnized and does not deal with objections to the validity of the

marriage. A Civil Marriage before a Registrar between persons professing the Roman Catholic religion is valid in law. Personal laws in S. 88 includes any personal law apart from any personal law as to the form of the marriage, forbidding any of the parties to enter into a contract of marriage with one another. 32 Bom L. R. 17=1930 Bom. 105.

SCHEDULE II.

(See sections 24 and 50.)

CERTIFICATE OF RECEIPT OF NOTICE.

I, _____, do hereby certify that, on the _____ day of _____, notice was duly entered in my Marriage Notice Book of the marriage intended between the parties therein named and described, delivered under the hand of _____ one of the parties (that is to say):—

| Names. | Condition. | Rank or profession. | Age. | Dwelling place. | Length of residence | Church, chapel, or place of worship in which the marriage is to be solemnized. | District in which the other party resides, when the parties dwell in different districts |
|----------------------|------------------|---------------------|---------------------|-----------------------------|---------------------------|--|--|
| <i>James Smith.</i> | <i>Widower.</i> | <i>Carpenter</i> | <i>Of full age.</i> | <i>16, Clive Street.</i> | <i>23 days.</i> | <i>Free Church of Scotland Church, Calcutta.</i> | |
| <i>Martha Green.</i> | <i>Spinster.</i> | <i>..</i> | <i>Minor</i> | <i>20, Hastings Street.</i> | <i>More than a month.</i> | | |

and that the declaration, ¹[or oath] required by section 17 or 41 of the Indian Christian Marriage Act, 1872, has been duly made by the said (*James Smith*).

Date of notice entered { The issue of this certificate has not been prohibited by
Date of certificate given { any person authorized to forbid the issue thereof

Witness my hand, this _____ day of _____ seventy-two

(Signed).

This certificate will be void, unless the marriage is solemnized on or before the _____ day of _____

[The *italics* in the schedule are to be filled up, as the case may be, and the blank division thereof is only to be filled up when one of the parties lives in another district.]

SCHEDULE III.

(See sections 28 and 31.)²

FORM OF REGISTER OF MARRIAGES.

Quarterly Returns

of
MARRIAGES

for

The Archdeaconry of

{ *Calcutta.*
Madras.
Bombay.

I, _____, Registrar of the Archdeaconry of { *Calcutta.*
Madras,
Bombay, } do hereby

certify that the annexed are correct copies of the originals and Official Quarterly Returns of Marriage within the Archdeaconry of { *Calcutta,*
Madras,
Bombay, } as made and transmitted to me for the quarter commencing the _____ day of _____ ending the _____ day of _____ in the year _____ of Our Lord.

Leg. Ref.

¹ These words were added by the Repealing and Amending Act (I of 1903), S. 3.

² This reference was substituted for the original reference by Act XII of 1891, Second Schedule.

[Signature of Registrar.]
(Calcutta,
Madras,
Bombay.)

Registrar of the Archdeaconry of

MARRIAGES solemnized at {
Allahabad,
Barrackpore,
Bareilly,
Calcutta, etc., etc

| WHEN MARRIED. | | | NAMES OF PARTIES. | | Age. | Condition. | Rank or profession. | Residence at the time of marriage. | Father's name and surname. | By banns or licence. | Signature of the parties. | Signature of two or more witnesses present. | Signature of the person solemnizing the marriage. |
|---------------|--------|------|-------------------|----------|------|------------|---------------------|------------------------------------|----------------------------|----------------------|---------------------------|---|---|
| Year. | Month. | Day. | Christian. | Surname. | | | | | | | | | |
| | | | | | | | | | | | | | |

SCHEDULE IV.
(See sections 32 and 54.)
MARRIAGE REGISTER BOOK.

| Number. | When married. | | | Names of Parties. | | Age. | Condition. | Rank or profession. | Reference at the time of marriage. | Father's name and surname. |
|---------|---------------|-------|-------|-------------------|----------|----------|------------|---------------------|------------------------------------|----------------------------|
| | | | | Christian name. | Surname. | | | | | |
| | Day | Month | Year. | | | | | | | |
| | | | | James | White | 26 years | Widower | Carpenter | Agra | William |
| | | | | Martha | Duncan | 17 years | Spinster | | Agra | White John Duncan |

Married in the

This marriage was solemnized between us { James White, } in the presence of us { John Smith }
Martha Duncan } John Green }

CERTIFICATE OF MARRIAGE.

| Number. | When married. | | | Names of Parties. | | Age. | Condition. | Rank or profession. | Residence at the time of marriage. | Father's name and surname. |
|---------|---------------|--------|-------|-------------------|----------|----------|------------|---------------------|------------------------------------|----------------------------|
| | | | | Christian name. | Surname. | | | | | |
| | Day | Month. | Year. | | | | | | | |
| | | | | James | White | 26 years | Widower | Carpenter | Agra | William |
| | | | | Martha | Duncan. | 17 years | Spinster. | | Agra | White John Duncan. |

Married in the

This marriage was solemnized between us { *James White,*
Martha Duncan. } in the presence of us { *Jhon Smith*
Thon Green }

SCHEDULE V.

(See section 2)

ENACTMENT REPEALED.

| Number and year. | Title. | Extent of Repeal. |
|---------------------------------|--|--|
| Statute 58 Geo. 3, cap. 84. | An Act to remove doubts as to the validity of certain marriages had and solemnized within the British territories in India. | The whole. |
| Statute 14 & 15 Vict., cap. 40. | An Act for marriages in India. | The whole. |
| Act No. V. of 1852 | An Act for giving effect to the provisions of an Act of Parliament, passed in the 15th year of the reign of her present Majesty, instituted "An Act for Marriages in India". | So much as has not been repealed. |
| Act No. V of 1865. | The Indian Marriage Act, 1865. | The whole Act, except so far as it relates to the Straits Settlements. |
| Act No. XXII of 1886. | An Act to extend the Indian Marriage Act, 1865, to the Hyderabad Assigned Districts, and the Cantonments of Secunderabad, Trimulgherry and Aurangabad. | The whole. |

THE CODE OF CIVIL PROCEDURE (V OF 1908).

STATEMENT OF REPEALS AND AMENDMENTS.

| | |
|---|--|
| S. 5 rep. in part, Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I. | S. 123 am., Act XVIII of 1919, S. 2 and Sch. I. |
| S. 7 am., Act I of 1926. | S. 123 rep. in part, Act XI of 1923, S. 3 and Sch. II. |
| S. 8 am., Act I of 1914, S. 2. | S. 125 am., Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I. |
| S. 35-A inserted, Act IX of 1922, S. 2. | S. 126 am., Act XIII of 1916, S. 2 and Sch. I. |
| S. 55 am., Act III of 1921, S. 2. | S. 127 am., Act XXIV of 1917, S. 2 and Sch. I. |
| S. 60 rep. in part, Act X of 1914, S. 3 and Sch. II. | S. 129 am., Act XIII of 1916, S. 2 and Sch. I. |
| S. 60 am., Act XXVI of 1923, S. 2. | S. 130 am., Act XIII of 1916, S. 2 and Sch. I. |
| S. 61 rep. in part, Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I. | S. 130 am., Act XXIV of 1917, S. 2 and Sch. I. |
| S. 67 am., Act I of 1914, S. 3. | S. 138 am., Act IV of 1914, S. 2 and Sch. I, Pt. I. |
| S. 67 rep. in part, Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I. | S. 143 rep. in part, Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I. |
| S. 68 rep. in part, Act XXXVIII of 1920, S. 2 and Sch. I, Pt. I. | S. 156 rep., Act XVII of 1914, S. 3 and Sch. II. |
| S. 103 am., Act VI of 1926, S. 2. | Sch. I, O. 3, Rr. 1 and 4 am., Act XXII of 1926. |
| S. 104 am., Act IX of 1922, S. 3. | Sch. I, O. 5 am., Act XVII of 1914, S. 2 and Sch. I. |
| S. 111 am., Act XIII of 1916, S. 2 and Sch. I. | Sch. I, O. 9 am., Act XXIV of 1920, S. 2 and Sch. I, O. 21 am., Act XXIX of 1923, Ss. 2 and 3. |
| S. 116 am., Act XIII of 1916, S. 2 and Sch. I. | Sch. I, O. 38 am., Act I of 1926, S. 4—addition of R. 13. |
| S. 120 rep. in part, Act III of 1909, S. 127 and Sch. III (Repealed). | |
| S. 122 am., Act XIII of 1916, S. 2 and Sch. I. | |
| S. 122 am., Act XVIII of 1919, S. 2 and Sch. I. | |
| S. 122 rep. in part, Act XI of 1923, S. 3 and Sch. II. | |
| S. 123 am., Act XIII of 1916, S. 2 and Sch. I. | |

Sch. I, O. 41 am., Act IX of 1922, S. 4.
Sch. I, O. 43, R. 1 (o) am., Act XVI of 1930.

Sch. I, O. 45 am., Act XXVI of 1920, Ss. 3, 4 and 5.

Sch. I, Appendix E am., Act X of 1914, S. 2 and Sch. I.

Sch. I, Appendix F am., Act X of 1914, S. 2 and Sch. I.

Sch. V rep., Act XVII of 1914, S. 3 and

Sch. II.

Further amendments were made by the following Acts :—XXII of 1926; XXX of 1926, X of 1927; XVIII of 1928; I of 1929; XXI of 1929; XVI of 1930; X of 1932; XXXV of 1934; XXI of 1937; VIII of 1937; IX of 1937; XVI of 1937 and Parliamentary Order in Council relating to the Adoption of Indian laws.

Some local modifications in former Codes, which are to be read into the present Code by virtue of S. 158 of the latter.—

Ajmere, Reg. I of 1877, S. 28.

Central Provinces, Act XX of 1875, Ss. 11, 12 (added by Act II of 1879, S. 2).

Coorg, Reg. I of 1901, Ss. 11, 12.

Lower Burma, Act VI of 1900, S. 16 (3).

N.-W. Frontier Province, Reg. VII of 1901, Ss. 46, 78, 84 (3).

Oudh, Act XVIII of 1876, Ss. 19 and 22.

Sonthal Parganas, Reg. V of 1893, S. 10.

Declared in force—

(except certain portions) in British Baluchistan, Reg. II of 1913, S. 3;

in the Angul District, Reg. III of 1913, S. 3;

(certain portions) in the Arakan Hill District, Reg. I of 1916, S. 2.

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THE CODE OF CIVIL PROCEDURE (V OF 1908).

[21st March, 1908.]

An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature.

WHEREAS it is expedient to consolidate and amend the law relating to the procedure of the Courts of Civil Judicature; It is hereby enacted as follows:—

PRELIMINARY.

Short title, commencement and extent.

1. 1[**S. 1.**] (1) This Act may be cited as THE CODE OF CIVIL PROCEDURE, 1908.

Leg. Ref.

¹ For statement of Objects and Reasons, See *Gazette of India*, 1907, Pt. V, p. 179, for

Notes.

Sec. 1. CODE.—The object of codification of any branch of law is that on any point

(2) It shall come into force on the first day of January, 1909.

Leg. Ref.

Report of Select Committee. see *ibid*, 1908 Pt. V, p. 35, and for proceedings in Council, see *ibid*, 1907, Pt. VI, p. 135; *ibid*, 1908, pp. 8, 12 and 212.

The figures within square brackets [] represent the corresponding section of the old Act XIV of 1882.

Notes.

specifically dealt with in that Code, the law should thenceforward be ascertained by interpreting the language used therein, and not by a search among the authorities to discover as to what may be the law as laid down in prior decisions. 23 C. 563=6 M.L.J. 71=23 I.A. 18 (P.C.), 28 C. 517.

CONSOLIDATE.—The object of consolidation is to gather and bring up to date the statutory law relating to any particular subject, so that it may serve as a useful Code applicable to the circumstances existing at the time when the consolidating Act is passed. 22 C. 788=22 I.A. 107 (P.C.).

SCORE.—This Code is intended mainly to regulate procedure in Civil Court; it is not primarily intended to create new rights or take away existing ones. 13 L. 618=1932 L. 401, 1930 R. 317=128 I.C. 382. The Code is not exhaustive. An equitable set-off can be claimed independently of the specific provisions of this Code. 1930 A. 875=128 I.C. 763. There is no provision in this Code for making a counter-claim although a set-off is permitted to a defendant. 32 Bom L.R. 212=1930 B. 216. But this Code is to be deemed exhaustive on points specifically dealt with therein. See 24 M.L.J. 235, 10 C.L.J. 527. Where there is no specific provision in the Code it is the duty of the Court to act according to justice, equity and good conscience and to decide the point upon general principles. 2 Pat L.J. 306=39 I.C. 779, 33 C. 927; 2 P.L.T. 240=61 I.C. 922; 1 L. 339=58 I.C. 748; 36 C. 193=1 I.C. 913, 33 C. 1094=10 C.W.N. 719. A Court passing any order with jurisdiction to pass the same, has an inherent power to order that the same be carried into effect. 2 Pat.L.J. 361=39 I.C. 763.

OPERATION.—As the Code deals with procedure only it applies to all actions pending as well as future, in accordance with the general principle that alterations in procedure have always retrospective operation, unless there are good reasons for the contrary. 8 B. 511; 12 C. 583; 21 B. 822; 19 B. 204, 21 C. 940; 27 M. 538; 14 M.L.J. 340, 7 I.C. 11; 9 I.C. 815. See also 19 C.I.J. 545; 1931 A. 735; 1930 C. 34=56 C. 1117; 8 Luck. 504=1933 O. 274; 1930 A. 706. Where a suit was filed when the Code of 1882 was in force but the same was decreed after the new Code took effect and the question of substitution of heirs was raised, the procedure under the new Code was held applicable. 57 C. 148=1930 C. 422=124 I.C. 817. But change

1925 N. 377, 1930 L. 1044. Nor can an appellate Court reverse an order of the Court of first instance because a different rule has been enacted since then. 12 I.C. 553=(1911) 2 M.W.N. 386. See also 36 A. 350 (P.C.). The coming into force of this Code was deferred by Cl. (2), to a long period, with a view to enable persons who had rights under the old Code to have them enforced before this Code came into operation. 40 C. 704. Also S. 154 expressly preserves the right of appeal which shall have accrued to any party at the commencement of this Code.

APPLICATION.—The Code is inapplicable to Village Munsif's Courts. 29 M.L.J. 474, 1930 M. 795. The provisions of the Code do not apply *en bloc* to proceedings in Revenue Courts. 48 I.C. 119=21 O.C. 220. See 21 C. 428; 14 Bom L.R. 947. As to applicability of the Code to proceedings under Probate and Administration Act, see 20 I.C. 281=6 Bur. L.T. 87. A Municipal election tribunal should be guided wherever possible by the provisions of this Code. 91 I.C. 450=1926 M. 1043 (F.B.). In cases where the Cr. P. Code prescribes no procedure a magistrate may well follow procedure laid down in this Code (as in proceedings under S. 202, Cr. P. Code). 52 C. 670=29 C.W.N. 817=88 I.C. 862. The C.P. Code is not applicable to proceedings before the Controller of accounts under the Patents and Designs Act. But the principles underlying the Code, in so far as they are principles of natural justice must be followed by him, as they must be observed by all authorities exercising judicial or quasi-judicial functions. 61 C. 450=152 I.C. 914=38 C.W.N. 729=1934 C. 725.

CONSTRUCTION.—What the law was *prior* to the Act being enacted, is immaterial for the purpose of construing the Act. 6 M.L.J. 71=23 C. 563=23 I.A. 18 (P.C.). It is not right to interpret the Code of Civil Procedure of 1908 with reference to the Codes of 1859 and 1882, 5 Luck 552=1930 O. 148 (F.B.). See also 1931 A. 735, 19 I.C. 793. Where the intention of the legislature is apparent in the Act itself, and the language of the Act is sufficiently flexible, a construction favourable to that intention should be adopted in preference to a strictly literal construction of the words used in the Act. 21 A. 391. The following should not be made to prevail in the matter of construing an Act. (i) Proceedings in the legislature. 22 C. 788=22 I.A. 107 (P.C.); 18 B. 133, but see 33 M.L.J. 591 (593) and 2 C.L.J. 546 (553). (ii) Marginal notes. 26 A. 393=8 C.W.N. 699=31 I.A. 132 (P.C.); 23 C. 55; 25 C. 852=2 C.W.N. 577. (iii) Illustrations to sections. 21 C.W.N. 257=1917 M.W.N. 162=19 Bom L.R. 157=39 I.C. 401=43 I.A. 256 (P.C.), 32 M.L.J. 347; 49 M. 728 (F.B.). (iv) Forms given in the Schedule. 21 C.W.N. 1147=40 I.C. 816; 22 I.C. 690. See also 29 M.L.J. 766. (v) As to

(3) This section and sections 155 to 158 extend to the whole of British India: the rest of the Code extends to the whole of British India, except the Scheduled Districts.

Definitions.

2. [S. 2.] In this Act, unless there is anything repugnant in the subject or context,—

(1) "Code" includes rules:

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the

Notes.

DIVISION OF THE CODE INTO SECTIONS AND RULES—RULES OF CONSTRUCTION.—The body of the Code creates jurisdiction and the rules indicate the mode in which that jurisdiction is to be exercised and they must be read together. 44 C. 929 (F.B.), 41 C. 108. See also 43 C. 148. Provisions of this Code and of the Limitation Act are to be read and interpreted together. See 85 I.C. 29=6 Pat. L.T. 729.

JUDICIAL DISCRETION.—Where the Code leaves certain matters to the discretion of Courts, such discretion should be exercised in accordance with judicial principles and be guided by justice and equity and must not be exercised arbitrarily and in a vague or fanciful manner. 9 R. 281=1931 R. 194=1924 B. 1=48 B. 87 (F.B.), 5 C. 259.

"BRITISH INDIA."—For definition of, see S. 3, Cl. 17 of the General Clauses Act 'British India' includes British Burma. 13 C. 221. Aden, also cantonment of Wadhwan. 9 B. 244. The Code does not apply to Agency Tracts. 13 M.L.J. 15, nor to tributary mahals of Orissa. 29 C. 400. As to application of Code to Sonthal Parganas, see 18 C. 133; 42 C. 116 (P.C.). For a list of Scheduled Districts, see Schedule I to the Scheduled Districts Act (XIV of 1874). Under the powers conferred by S. 5 of the said Act, the Code has been extended to several Scheduled Districts, including Sind, Ajmere, Merwara and the Scheduled Districts of the Punjab.

FOREIGNERS.—Code extends to the whole of British India and foreigners are not excepted from the jurisdiction of British Indian Courts. 49 A. 669=25 A.L.J. 356, following 22 C. 222 (P.C.).

Sec. 2. "UNLESS THERE BE SOMETHING REPUGNANT IN THE SUBJECT OR CONTEXT."—These words have been inserted with a view to enable anomalies being avoided in cases where a strict adherence to the definitions contained in the Code would involve such anomalies. 46 B. 990=24 Bom L.R. 496=67 I.C. 667=1923 B. 26.

Sec. 2 (2): DECREE.—'FORMAL EXPRESSION OF AN ADJUDICATION.'—Unless and until a decree is formally drawn up in terms of the judgment there can be neither appeal nor execution. 15 I.C. 935=8 N.L.R. 22=34 B. 182=4 I.C. 829; 37 B. 480=19 I.C. 894. See also 25 Bom L.R. 826=76 I.C. 763 and 76 I.C. 1014=1924 B. 33. Misdescription of a decision as an order, while in fact it amounts to a decree, does not make the decision any the less a decree. 54 M. 337=132 I.C. 654=1931

M. 471=60 M.L.J. 167. See also 62 I.C. 467; 26 N.L.R. 24=1930 N. 122.

"MATTERS IN CONTEST IN THE SUIT."—

The expression must not be understood as relating solely to the merits of the case. It would cover any question relating to the character and status of a party, sum, to the jurisdiction of the Court, to the maintainability of a suit and to other preliminary matters which necessitate an adjudication before a suit is enquired into. It does not include proceedings preliminary to institution of a suit (e.g.) an application for leave to sue as a pauper and proceedings passed in execution as well as orders granting day costs. 2 L.W. 519=29 I.C. 393, nor an order of punishment for contempt. 27 A. 380. The term 'suit' does not include an application under S. 72, C.P. Code, and an order under the section is not a decree. 1 Pat L.T. 296=57 I.C. 421=5 Pat L.J. 415.

WHAT ARE DECREES.—The decision of a District Court on appeal that the Court below has no jurisdiction, is a decree. 54 I.C. 749=11 L.W. 3. Revisional order passed by High Court. 148 I.C. 893=1934 A.L.J. 552=1934 A. 134. A decision as to possession in a suit for possession and mesne profits is a preliminary decree. 25 I.C. 435=19 C.L.J. 346. Final decree in mortgage suit is decree. 39 C.W.N. 1284. Where one issue is settled and the case remanded to the lower Court for the determination of another issue, the order is a decree. 45 I.C. 100=3 Pat.L.J. 99. An order of abatement of a suit is a decree. 45 C. 94=33 M.L.J. 486=44 I.A. 218 (P.C.); 1 L. 493=57 I.C. 137; 34 I.C. 822=128 P.R. 1916 (F.B.). A formal order recognising the abatement which is an accomplished fact, is not a decree. 38 M.L.J. 266 (abatement owing to the cause of action not surviving). Order rejecting plaint. 151 I.C. 696=59 C.L.J. 250=1934 C. 623. As to order dismissing appeal under O. 41, R. 11, see 30 C.W.N. 334=93 I.C. 909=1926 C. 638. Order refusing to admit appeal as time-barred is decree. 30 C.W.N. 926=44 C.L.J. 44=1926 C. 1105. See also 146 I.C. 462=14 Pat.L.T. 609=1933 I. 498 (incidental decision as to limitation in an application for restitution under S. 144). Order rejecting application for leave to appeal *in forma pauperis* is decree. 42 L.W. 831=159 I.C. 718=69 M.L.J. 781. Finding in a remand judgment clearly adjudicating rights of parties is a decree. 105 I.C. 567. An order limiting the right of the decree-holder to recover mesne profits for a certain period. 1928 C. 804=115 I.C. 591. An order determining the period within which com-

parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

Notes.

pensation shall be payable. 7 P. 491=1928 P. 565=113 I.C. 577. Finding on the question of liability in a suit for contribution. 148 I.C. 1052=11 O.W.N. 606=1934 O. 337. An order dismissing a suit on the ground that the right to sue had come to an end and that the suit had abated under O. 22, R. 1, C. P. Code. 3 Luck. 628. Order dismissing application by legal representative to be brought on record. 36 P.L.R. 359=1935 L. 47. The order for staying execution of a decree till the decision of the appeal clearly falls under S. 2 (2) read with S. 47 and is appealable as a decree. The order conclusively determines the right of the decree-holder to reap the fruits of his decree. 1930 L. 187. But see 1931 A. 129 (2). Order striking off name of a party is a decree. 53 A. 466. So are orders, prescribing the mode of selling mortgaged properties, 53 A. 391, proving for payment of costs to solicitor of party, 1932 B. 378, dismissing application for final decree in mortgage suit, 1932 L. 214. Order refusing personal relief under O. 34, R. 6. 144 I.C. 468=1933 A.L.J. 738=1933 A. 429. Order dismissing appeal as withdrawn. 56 M. 520=143 I.C. 412=1933 M. 442=64 M. L.J. 695. Order dismissing cross-objections. 1933 L. 961. Order refusing interest *pendente lite*. 143 I.C. 43=14 Pat.L.T. 133=1933 P. 207. Order passed under S. 144 is decree. 1935 A.L.J. 995=158 I.C. 908=1935 A. 873; 1936 C. 812. Decree containing adjudications regarding several items—Each adjudication is a decree. 55 A. 672=1933 A.L.J. 1425=1933 A. 473.

WHAT ARE NOT DECREES.—An order granting leave to sue under S. 18 of the Religious Endowments Act is not a decree. 34 C. 584. Order passed by District Judge under S. 84 (2), Religious Endowments Act, in a proceeding under S. 44 of that Act is not a decree. 41 L.W. 682=1935 M. 373=68 M.L.J. 423. See also 11 M. 26 (35)=14 I.A. 160. Order of District Judge setting aside rejection of plaint. 152 I.C. 241=1934 Pesh. 88, also an order rejecting an application for leave to sue as a pauper 21 A. 133. Order passed an application for directions under S. 34, Trusts Act, is not decree. 11 O.W.N. 1533=1935 O. 72; also an order under Trusts Act refusing to remove a trustee, 19 A. 131; also an order under S. 4 of the Bengal Regulation, V of 1799. 9 I.C. 994=18 C.L.J. 877. Order as to costs in application for transfer under S. 15 of the Upper Burma Civil Court Regulation, is not a decree. 44 I.C. 690= (1917) 3 U.B.R. 61, also an order raising attachment of a residential house of the insolvent in insolvency proceedings under the special provisions of the Punjab Laws Act, as the latter do not amount to a suit. 67 I.C. 794=3 Lah.L.J. 338. So also order on a proceeding before the manager dealing with a claim under the Chota Nagpur Encumbered

Estates Act. 16 Pat.L.T. 693=158 I.C. 324=1935 P. 515. An order overruling a plea against the maintainability of a suit is not a decree, 33 I.C. 664=9 Bur.L.T. 195, also a decision in plaintiff's favour on an issue as to his *locus standi* to sue, 20 C.L.J. 476=27 I.C. 317=19 C.W.N. 755; order of remand, 7 Pat.L.T. 535=97 I.C. 105=1926 P. 457. See also 144 I.C. 129=1934 A. 261, 14 Pat.L.T. 735; 37 C.W.N. 1084. A decision on a preliminary issue such as limitation and *res judicata* merely enabling the plaintiff to go on with the suit is not a preliminary decree. 36 I.C. 431=9 Bur.L.T. 119; 21 I.C. 387=18 C.L.J. 48. See also 39 I.C. 100=7 P.R. 1917. Decision on a preliminary issue of *res judicata* is not a preliminary decree. 15 I.C. 566=10 A.L.J. 78, 39 B. 421; 15 I.C. 563=16 P. R. 1913. But see 97 I.C. 780=1926 Lah. 638. Order directing drawing up of final decree 57 M. 437=1934 M. 193=66 M.L.J. 178. Order refusing to pass final decree in mortgage suit. 13 P. 379=149 I.C. 40=1934 P. 225. An order appointing a Commissioner to take accounts is not a decree. 38 B. 302=16 Bom. L.R. 206. Order referring a partnership suit to the Official Referee for determining shares is neither a decree nor a 'judgment'. 73 I.C. 903. An order granting leave to withdraw a suit with permission to sue again is not a decree. 65 C. 719=1922 L. 267; 51 M. 664=55 M.L.J. 345=1928 M. 416; 51 I.C. 766, 11 I.C. 830, 51 I.C. 69=6 O.L.J. 151 (order also directing payment of costs by plaintiff); 17 A. 97, 18 C. 322; 27 C. 362, 15 B. 370. But an order allowing a party to withdraw a partition suit after a preliminary decree affects the rights of the parties and is appealable as a decree. 1912 M.W.N. 494=14 I.C. 259. An order declaring that an appeal has abated is not a decree. 20 A.L.J. 214=65 I.C. 838 (14 A. 172, Foll.). Neither order of original Court returning plaint under O. 7, R. 10, C. P. Code nor decision of appellate Court on appeal from such order is decree 33 A. 479; 1925 B. 431; 158 I.C. 252=1935 M. 574. A decision on an application to file a private award is not a decree. 66 P.R. 1915=31 I.C. 80. See also 9 L. 380=107 I.C. 756=1928 L. 137. Also an order overruling objections to an award. 1 P.L.R. 1911=9 I.C. 385. Also an order filing or refusing to file an award as it is appealable as an order under S. 104 (f), Civil Procedure Code. 110 I.C. 302=1929 L. 367. An order of dismissal of suit as against minor defendants on the ground that the plaintiff had not taken steps to appoint a Court-guardian does not amount to a decree. 33 C.W.N. 742=1929 C. 669. An order refusing to stay execution is not a decree. 122 I.C. 182=1930 A. 121 (1); 141 I.C. 841=9 N.L.R. 121=1933 N. 84. An order passed when the existence of the decree itself is denied is not a decree. 1931 A. 490 (F.B.). So are orders refusing to accept security (32 P.L.R. 806), orders

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in furtherance of scheme decree (1931 A. 765), *see also* 11 O.W.N. 1533, orders rejecting appeal memo. for deficient Court-fee. 59 C 388=163 I.C. 462=1936 Pesh. 140. Order holding that Court-fee paid was correct is not decree. 63 C.L.J. 16=1936 C. 784. Opinion pronounced by a Judge on a reference by Registrar under Cl. 26, R. 50 Original Side Rules (Calcutta High Court) is not decree. 40 C.W.N. 1264 So also order directing an execution case to be dismissed for non-prosecution. 162 I.C. 777=1936 C. 267 Also order in execution giving leave to decree-holder to amend execution petition. 44 L.W. 99=1936 M. 623=71 M.L.J. 256

"CONCLUSIVELY DETERMINES"—To constitute a decree, there must be final adjudication. No particular form is necessary. 16 I.C. 45=1912 M.W.N. 1122. If a decision really determines the rights of the parties fully and finally, it is in the eye of the law a decree and as such appealable even though the Court giving the decision has not formally embodied its result in the form of a decree. 26 N.L.R. 24=1930 N. 122; 54 M. 337=33 L.W. 143=1931 M. 471=60 M.L.J. 167. Decree becomes final when there is no appeal and appeal time expires. 86 I.C. 957=47 A. 533=1425 A. 291. An order disposing of the defendant's claim to set-off is not a decree: the decision could be attacked in an appeal against the final order. 39 I.C. 508=62 P.R. 1917. Regarding decisions upon preliminary issues in a case, such as misjoinder, limitation and Jurisdiction *see* 39 B. 339 (F.B.). As to when a decision whether plaintiff is an agriculturist under the Dekkhan Agriculturists, Relief Act, 1879, amounts to a decree. *see* 12 Bom. L.R. 762, 39 B. 422. An interlocutory order to be decree must conclusively determine the rights of the parties. So an order accepting security for stay of execution proceedings is not a decree. 41 C. 160=20 I.C. 72=17 C.W.N. 1240, also an order directing assessment of mesne profits, 15 I.C. 573, also an order refusing leave to bid, to a decree-holder under O. 21, R. 72. 38 C. 717. Also an order under S. 148 extending time. 35 A. 582. Also an order directing partition in a particular manner passed after the confirmation in appeal of a preliminary decree for a partition and before the final decree. 35 A. 159. Also an order giving directions to the commissioner appointed subsequent to the preliminary decree to take accounts in partnership suit. 107 I.C. 214=1928 Sind. 100. After preliminary decree an order directing that accounts should be taken up to a certain date is merely a finding of fact and not a decree. 1929 L. 699=120 I.C. 429. Also an order extending time for payment of mortgage money under a decree. 39 M. 876=29 M.L.J. 708. But *see* 14 A. 520, also an order disallowing interrogatories. 58 I.C. 721=14 S.L.R. 28

"RIGHTS OF PARTIES"—The words mean rights of parties *inter se* in the subject-matter of the suit. 13 I.C. 800=82 P.R. 1911. It includes general rights such as those relating

to status, jurisdiction, limitation, framing suits, accounts, etc., which if decided must have a general effect upon the proceedings in the suit. 38 B. 392=23 I.C. 889=16 Bom. L.R. 206; 2 L.W. 519=17 M.L.T. 447=29 I.C. 393. The word "parties" includes only those that are joined as plaintiffs or defendants. 20 I.C. 898=16 O.C. 350. The determination of the right of one party to an account is a decree. 40 I.C. 579=3 Pat. L.J. 67 [23 A. 152 (P.C.), Foll.]. Also an order striking out the name of a defendant and dismissing suit as against him. 42 M. 219=36 M.L.J. 169. Also an order finally deciding that a particular defendant is not liable for mesne profits. 1923 C. 308. Also an order dismissing an application for final decree for sale in a mortgage suit. 42 M. 52=35 M.L.J. 552=48 I.C. 298. *See also* 33 C.L.J. 115=59 I.C. 177=25 C.W.N. 595; 1932 L. 214. Also an order refusing to make a decree under O. 34, R. 6. 40 A. 553=47 I.C. 561=16 A.L.J. 488. But an order rejecting the application of one of two claimants, not parties to suit is not a decree. 47 M.L.J. 3=80 I.C. 942=1924 M. 813. An order rejecting an application to be added as a party to the suit is not a decree. 13 C. 100. An order dismissing application to be brought on record as legal representative, is not a decree. 1 L. 493=57 I.C. 137, 20 I.C. 808=16 O.C. 350; 62 I.C. 303=17 N.L.R. 45 (a suit for declaration is not barred by the order). 38 I.C. 833=13 N.L.R. 32. But *see* 39 M.L.J. 218=58 I.C. 498=43 M. 812, where it has been held that such an order is an adjudication on the applicant's claim and hence is a decree. (42 M. 219, Appl., 39 M. 488, Dist.) Where one of several applicants was brought on record as legal representative, there is no abatement within the meaning of O. 43, R. 1 (k) nor any decree within the meaning of S. 2, Cl. (2). 1924 M. 622=40 M.L.J. 129. An order directing a surety to pay the debt of a judgment-debtor is not a decree except for purposes of an appeal under S. 145. 2 Pat. L.J. 197=39 I.C. 648. Order passed on application by surety for cancellation of surety bond. 55 A. 548=144 I.C. 731=1933 A. 382. Conditional order of remand. 144 I.C. 129=1933 A. 261. *See also* 143 I.C. 823=37 C.W.N. 1084=1933 C. 416; 14 Pat.L.T. 735

REJECTION OF PLAINT, ETC.—(a) *What orders are decrees.*—Order rejecting plaint for non-payment of Court-fee is a decree. 67 I.C. 901=3 L.L.J. 237. Also dismissal of suit for deficient Court-fee. 54 I.C. 733=22 O.C. 289. Also rejection of plaint before registration of suit for non-payment of deficient Court-fee ordered to be paid. 62 C. 61=156 I.C. 126=1935 C. 336 (2). An order dismissing an appeal for deficiency in Court-fee is a decree. 15 N.L.R. 15=67 I.C. 225=1922 N. 62. *See also* 63 I.C. 99=1921 P. 337, 51 I.C. 114, 98 I.C. 663=1927 N. 100. Also an order rejecting an appeal memorandum. 16 M. 285; 22 M. 157. But *see* 59 C. 388. Also an order rejecting an appeal as time barred. 98 I.C. 748, 13 M.L.J. 300, 19 I.C. 931=17 C.W. N. 807. Order dismissing suit under O. 17, R. 3, C. P. Code. 101 I.C. 618=1927 R. 148.

Notes

Rejection of an application for a final decree for sale in a mortgage suit, is a decree and not an order under S. 47. 42 M. 52=35 M.L.J. 552; 1932 L. 214. As to order directing defaulting bidder to make good loss on re-sale, see 23 N.L.R. 14.

(b) *What orders are not decrees*—But an order returning plaint for amendment is not a decree. 96 P. R. 1911=11 I.C. 231=216 P. L.R. 1911. Also an order returning a memorandum of appeal for presentation to proper Court is not a decree. 13 A. 320. As to order of remand, see 103 I.C. 864; 6 P. 380=103 I.C. 722.

ORDERS IN EXECUTION PROCEEDINGS.—(See also notes under S. 47)—Every order in execution proceedings is not a decree. It must be an order determining the rights of the parties in the execution proceedings. An order for arrest without notice is not a final order. 1929 M. 718, 1935 R. 500. See also 1929 L. 815. An order granting or refusing process for examination of a witness or determining a point of law arising incidentally and not granting or refusing any relief is not a decree. 115 P.L.R. 1920=55 I.C. 173, 1927 A. 208=99 I.C. 455. An order dismissing for default the objection petition to an execution filed by the judgment-debtor is not a decree. 26 A.L.J. 1395=112 I.C. 380=1929 A. 123. A decision under S. 47 is not a decree unless it determines the rights of the parties with regard to all or any of the matters in controversy. A decision on a question of the valuation to be inserted in a sale proclamation is not a decree. 5 Pat.L.J. 270=55 I.C. 452. Order in execution granting leave to decree-holder to amend execution petition is not decree. 44 L.W. 99=1936 M. 623=71 M.L.J. 256. An order granting leave to execute a decree against any person on the ground that he is a partner made under O. 21, R. 50 (2) and (3) is not a decree. 53 B. 839. Also refusal to postpone a sale. 1929 A. 85. An order determining question of under valuation of property to be sold. 6 O.W.N. 1085. Order under O. 21, R. 66 (proclamation of sale) is not a decree. 59 I.C. 282=1 Pat.L.T. 647. Nor an order on application under O. 21, R. 90. 1936 A.L.J. 959=165 I.C. 654=1936 A. 763. An order in proceedings for a recovery of the loss caused by re-sale owing to the default of the prior purchaser in depositing the purchase-money is a decree. 44 A. 266. An order that the decree-holder is liable for mesne profits by way of restitution is a decree. 56 C. 550. As to order for security to stay execution, see 5 R. 534=104 I.C. 324=1927 Rang. 317.

DISMISSAL FOR DEFAULT.—An order dismissing a suit for default is not a decree. 12 M.L.J. 473, 29 C. 60; 18 C.L.J. 128=20 I.C. 1=18 C.W.N. 604, also an order dismissing an appeal for default, 15 C.L.J. 334=14 I.C. 823 (1); 39 C. 241, 23 C. 115; 23 C. 827, 22 M.L.J. 284, 2 P. 739=75 I.C. 284; 101 I.C. 618=1927 R. 148. Dismissal for default of an objection of a judgment-debtor in execution proceedings is not a decree. 1 O.W.N. 854.

See also 53 C. 679=96 I.C. 705=30 C.W.N. 570, 94 I.C. 1=1926 A. 401.

DECREE—PRELIMINARY AND FINAL.—The preliminary decree is not dependent on the final one but the latter is dependent and subordinate to the former, and does not extinguish it but gives effect to it. 21 C.W.N. 1174=35 I.C. 873 (F.B.). Failure to deposit commission fee after preliminary decree in partition suit—Dismissal of suit is not decree—No appeal lies, but only revision. 86 I.C. 785=1925 P. 433. A preliminary decree ascertains what is to be done while the final decree states the result achieved by means of the preliminary decree. The cases where the legislature contemplates a preliminary decree are specified in O. 20, Rr. 12 to 18. 20 C.L.J. 476=27 I.C. 317=19 C.W.N. 755. There should be only one preliminary decree in a suit to be followed by one final decree, (*Ibid.*) Second preliminary decree in a suit for partition is not impossible where there are facts or circumstances alleged to have come into existence after the passing of the first. 15 I.C. 372=11 A.L.J. 120. See also 1925 P. 433. 57 M. 437=66 M.L.J. 178. In a partnership suit order granting directions to commissioner does not amount to a preliminary decree. 107 I.C. 214. Where, in a suit for accounts, the Court after passing a preliminary decree for accounts, passed a further order fixing the mode of taking accounts and the period for which it should be done, the latter is also preliminary decree. 27 C.W.N. 989=1924 C. 160. Mere omission to style an order a preliminary decree or to embody it as such does not negative the party's right to appeal. 27 I.C. 317=19 C.W.N. 755. A finding whether a party is an agriculturist under the Dekkhan Agriculturists Relief Act is not a preliminary decree. 45 B. 627=60 I.C. 885=23 Bom. L.R. 92, 70 I.C. 728. But if the finding necessarily involves a direction for the taking of an account in the manner provided by S. 13 of the Dekkhan Agriculturists' Relief Act, it amounts to a preliminary decree. 39 B. 422. A decree for accounts is not a mere direction to report but is one determining the rights of the party and is a final decree. 13 I.C. 374=14 C.L.J. 603. An adjudication cannot be partly a decree and partly an order not amounting to a decree. 42 C. 914=29 M.L.J. 70 (P.C.). An order in a suit for taking accounts of a partnership declaring the partnership as dissolved from a particular date and ordering an enquiry by the referee as to who were the partners is a decree in so far as it declares the rights of the parties. It does not cease to be so, because a part of it might have been separately made as an order. So the whole decree cannot be challenged in an appeal against the final decree, not being itself appealed against (*Ibid.*) The decree in appeal is decree in suit, for appeal is a continuation of the suit. 30 M.L.J. 379. In a decree for possession and for mesne profits the decree for possession is final and the decree for mesne profits is only preliminary as the amount has to be found upon further enquiry.

- (a) any adjudication from which an appeal lies as an appeal from an order, or
 (b) any order of dismissal for default.

Explanation.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final:

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made:

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court") and includes the local limits of the ordinary original civil jurisdiction of a High Court:

(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by [the Central Government or the Crown Representative]

(6) "foreign judgment" means the judgment of a foreign Court:

(7) "Government Pleader" includes any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader.

(8) "Judge" means the presiding officer of a Civil Court:

Leg. Ref.

¹ Substituted for words "the Governor-General in Council"

Notes.

In such a suit although one decree is made it is partly preliminary and partly final 1929 C. 383=118 I C 852. Amended decree is the final decree after modification in review. 34 C W N 1002

CONSENT DECREE—'Decree' includes a compromise or a consent decree 34 C.L.J. 96=66 I C 273 (2)

Sec 2 (3). 'DECREE-HOLDER'—[See under DECREE.] "Decree-holder" is not confined only to plaintiff. A sub-mortgagee and a puisne or prior mortgagee sometimes become decree-holder as against the judgment-debtor in suits brought for foreclosure of sale of mortgaged property or for redemption thereof, as on the happening of certain contingencies they acquire the right to have property sold to discharge the amount declared to be due to them 116 I C. 212=1929 L 492. Decree for specific performance can be executed by the defendants as well as by the plaintiff, and the defendants in such a case are "decree-holders" within the meaning of this clause 46 B 990=24 Bom.L.R 496=67 I C 667=1923 B. 26; 59 C 501=36 C.W. N. 172=139 I C 230=1932 C 579. An attaching creditor of the decree-holder is not a decree-holder 80 I.C. 947=1925 A 123. In R. 89 of O 21, this word refers only to the person in satisfaction of whose decree the sale had been ordered, and it does not include any other person who may have a right to claim rateable distribution under S 73 in the sale proceeds. 37 B. 387=15 Bom L R 244=19 I C 475

Sec. 2 (4). DISTRICT COURT—Though the word "District" in the C.P. Code does

include the local limits of a High Court in its Ordinary Original Civil Jurisdiction, still it is not legitimate to construe the words "District Court" wherever they appear to mean and include a High Court in its Ordinary Original Civil Jurisdiction 45 C.L.J. 71=100 I C. 331=1927 C 290

Sec. 2 (5). FOREIGN COURT—Privy Council is not within the definition. 8 B. 571 (574). All other Courts in England are foreign Courts. 8 B 571; 31 C. 274. The Ceylon Court is a foreign Court 32 M. 469 (471). And also Courts in Native States in India (1913) M W N 605, 191 P.R 1888. So also the District Court in Secunderabad cannot 60 I.A 167=56 M 405=37 C W N. 553=1933 P.C 134=64 M L J 562 (P.C.). District Court of Secunderabad—Order of adjudication as insolvent—Prior attachment order of British Indian Court—Not avoided by subsequent adjudication of the foreign Court. (*Ibid.*)

Sec. 2 (6). FOREIGN JUDGMENT—See notes under Cl. (5), *supra*. The decree of a foreign Court against a non-resident foreigner is a nullity. 22 C 222=112 P R 1894=4 M.L.J. 267 (P C); 19 A 450, 24 B. 86, 40 B. 551; 26 C 931, 20 M. 112. The term has not the meaning as regards the word 'judgment' given by Cl (9), *infra* 35 L.W. 763=138 I C 648=1932 M. 661=62 M.L.J. 566. A foreign judgment whether can form a cause of action in British India. 39 M. 773 (F B)

Sec. 2 (8). JUDGE.—A Sub-Registrar is not a judge. 12 B. 36, nor a Registrar acting under Ss. 72, 75 of Registration Act, a Court. 15 A 141; *contra*. 15 M. 138 (F.B.) But this Full Bench decision has not been followed in later Madras cases. See 23 M.L.J. 50, 30 M 326.

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order.

(10) "judgment debtor" means any person against whom a decree has been passed or an order capable of execution has been made:

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

Notes.

Sec. 2 (9): JUDGMENT—Order setting aside *ex parte* decree is a judgment. 145 I. C. 302=10 O W N 794=1933 O 385 What is ordinarily called an "order" is, in fact, a "judgment", as defined in C. P. Code though a document may be so drawn up as to contain not only the reasons for the decision, so as to fulfil the requirements of a "judgment", but also the "formal expression" of the decision of the Court, so as to fulfil most of the requirements of an "order" as defined in S. 2 (14). 1933 A.L.J. 1301=1933 A. 762=147 I. C. 865. Necessity for containing reasons—Applicability to Original Side of High Court. *Sec 29 Bom L.R. 126 See also 15 O.C 78=15 I.C. 212.* As to a written order deciding one of several issues, *see 14 I.C 371.*

Sec. 2 (10): JUDGMENT-DEBTOR—Definition does not include assignee. 13 I.C. 659=1912 M.W.N 176 A person who has stood surety for costs and against whom a decree for costs has been made is a judgment-debtor. 58 B 485=151 I.C 78=1934 B. 252. A plaintiff or defendant against whom no decree or order capable of being executed has been passed or who has been released from the decree, does not come under this term 19 M. 331; 23 A 346. *But see 22 M 131, 23 M 361.*

Sec 2 (11): LEGAL REPRESENTATIVE—This definition is in conformity with the law prevailing in England. 87 I.C 892=28 O.C 177=1925 Oudh 330 The definition herein does not modify personal law 1932 All. 591=54 A 796=138 I.C 746=1932 A.L.J. 727 The expression means a person who in law represents the estate of a deceased person and not necessarily the beneficial owner thereof. 42 M. 76=35 M.L.J 632. *See also 79 I.C. 670=1925 L 2; 1923 O 330* It is not necessary that for his character as legal representative he should be in possession of any property of the deceased. All that is necessary is that he should be a person on whom the estate would devolve 49 A. 645, 1931 Nag 173 The expression means and includes one person as well as several persons according as they represent the whole interest of the deceased person. 14 L 543=142 I.C 649=1933 L 356 The definition herein of "Legal representative" is very wide. 1934 L 1, and it has been meant for the purposes of the C P Code only and is not a general statement of substantive rule of law. 150 I.C 323=1934 A 474 When a member of a Hindu joint family, who has been sued on a pro-note, dies and it is con-

tended that his brothers can be impleaded as legal representatives, it must be shown, *prima facie* that the deceased has an estate before the first definition in S 2 (11) can be applied. 1930 M. 675. Even when no executor is appointed under the will either expressly or by necessary implication, dispositions of the property and the legacies in the will have not the effect of making the legatees the legal representatives 108 I.C. 409=1928 M 243 The term includes a universal legatee 157 I.C. 956=1936 Oudh 7, and also donees from deceased legatee 136 I.C. 543=1932 C. 206=35 C.W.N 1028 A person in possession is a representative of the estate 31 M.L.J. 222=35 I.C. 124, 69 I. C. 179. *See also 1924 C. 362; 9 N.L.J 183=96 I.C. 963=1926 N 476; 89 I.C. 534=1925 O. 515* Court of Wards, is, on the death of the ward in the position of a legal representative. 29 N.L.R 118=1933 N. 85 (Muhammadan widow in possession in lieu of dower is legal representative.) An intermeddler is within the definition. 1924 A. 717. The definition includes an intermeddler with even a part of the estate 115 P.R 1913=39 P.J.R 1914=22 I.C 242 *See also 29 Bom L.R 900; 1934 R. 196.* But the definition is only for purpose of procedure and an intermeddler is not the representative for purposes of succession So the decree passed in a suit in which an intermeddler is impleaded, will not bind the real heir who is not party thereto 1924 A. 717; 75 I.C. 114. The surviving members of a Hindu joint family are not legal representatives. 2 L 114 Succeeding manager of a joint Hindu family is legal representative of previous manager 86 I.C. 178=1925 M 456 Succeeding trustee is legal representative 92 I.C 520=1926 M 540. Official Assignee or Receiver in Insolvency will not be a legal representative. 58 M. 403=154 I.C 934=1935 M. 151=41 L.W. 28=68 M.L.J. 78; 7 A 752, 21 B 205, 29 C. 428; *But see 28 C 419=5 C.W.N 761.* As to executor *de son tort*, *see 30 C.W.N. 565=96 I.C 695=1926 Cal 825* One of several legal representatives impleaded—Sufficiency of. 14 L. 543=142 I.C. 649=1933 L. 356 A widow, where there is an adopted son, is not legal representative of deceased. 11 M 103. Hindu reversioners can continue a suit for possession brought by a Hindu widow as her legal representatives after her death 39 M. 382. In a suit for declaration of the invalidity of an adoption or alienation by a Hindu widow instituted by the presumptive reversioner the next presumptive reversioner can continue the suit as legal representative

[S. 211, Expl.] (12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession:

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after the former's death. 38 M. 406=28 M. L.J. 535 (P.C.). In a later Madras case it has been held that he is not a 'legal representative' within the definition but can be added as a party in a representative action under O 1, Rr 1, 8 and 10. 9 L.W. 166=49 I.C. 268. Decree for injunction against Hindu father cannot be executed against his sons 42 B. 504; 14 P. 732=16 Pat.L.T. 393=157 I.C. 53=1935 P. 275 (F.B.); But see *contra* 55 B. 709=33 Bom.L.R. 1144=1931 B. 484, 38 Bom.L.R. 977=1936 B. 456. This definition of the term 'legal representative' in the Code is not exhaustive, and it should be qualified by Ss 50 and 53 of the Code (*Ibid*). An auction-purchaser is not the representative of the original judgment-debtors in respect of a liability which had arisen subsequent to the mortgages on which the decree for sale was founded but is the representative of the judgment-debtor *qua* the rights and liabilities which stood on the date of the mortgage. 117 I.C. 452=1929 O. 353. A Zamindar, to whom the house and grove in possession of his tenant, escheat on the death of the latter, is not his legal representative. 23 I.C. 969=1 O.L.J. 86.

LEGAL REPRESENTATIVE—PLEAS OPEN TO—A person who is added as a legal representative of a deceased defendant cannot and need not set up in defence pleas which are open to him only personally. 1925 M. 59. See also notes under S. 50. He is not at liberty to depart from or contradict the position taken up by the party in the suit whose legal representative he is. If he has any independent right, then he is bound to apply to come in such right or capacity either with or without assuming the capacity of a legal representative. But so long as he is on the record only as a legal representative, he cannot be allowed to take up a position directly contradictory to that of his predecessor in law. 1935 M. 522=40 L.W. 730.

DECREE AGAINST WRONG LEGAL REPRESENTATIVE—BINDING NATURE OF—A true legal representative will be bound by a decree passed against the wrong legal representative if the following conditions are satisfied: (i) the plaintiff decree-holder must have acted *bona fide*, (ii) the decree obtained must be free from fraud and collusion, (iii) the person wrongly impleaded must have been impleaded in a representative capacity, (iv) the decree or order must have been passed against him as representing the estate of the deceased, (v) the plaintiff must have been ignorant of facts which operate to displace the title of the supposed legal representative, and (vi) the person having the real title must not have intervened during the pendency of the suit. 30 L.W. 778=1929 M. 482. See also 34 P.L.R. 511=141 I.C. 580=1933 L. 380.

It is open to the plaintiff or decree-holder to choose as the legal representative the one who appears to have the *prima facie* title. 30 L.W. 778=1929 M. 482; 63 M.L.J. 319. The actual decision in this case was that a compromise decree consented to by an alleged adopted son of a Hindu widow who died pending suit and as whose legal representative the alleged adopted son was added, was not binding on the proper legal representatives of the widow. And mere failure to make more detailed inquiries would not necessarily lead to the conclusion that the plaintiff had not acted *bona fide*. 144 I.C. 663=29 N.L.R. 89=1933 N. 73.

Sec 2 (12): MESNE PROFITS—As to distinction in the meaning of the term between the English and the Indian Law, see 153 I.C. 232=1935 P. 80. When a plaintiff succeeds in establishing that he was kept out of possession he is entitled to mesne profits. 53 I.C. 124. See also 47 M. 800, also a plaintiff who has obtained a decree under S. 9, Specific Relief Act 1927 Nag 9=97 I.C. 1028, 24 A. 501. As to co-sharers, see 94 I.C. 255=1926 C. 860, 29 N.L.R. 350=1933 N. 316. Where possession is not wrongful no mesne profits can be awarded. 150 I.C. 924=1934 I. 322. Parties in possession are liable for mesne profits although there may be no *mala fide* on their part. 10 W.R. 486. See also 70 I.C. 6=34 C.L.J. 415; 8 W.R. 479, 1 A. 518, 21 C. 14. Where possession of defendant is not wrongful, no mesne profits can be awarded. 150 I.C. 924=1934 L. 322. And the plaintiff claiming mesne profits must be entitled to possession. 37 P.L.R. 50=157 I.C. 90=1935 L. 379. The only relevant consideration for the Court is whether the defendant's possession was wrongful or not. If it was wrongful, the Court is not justified in going further and inquiring what the degree of the misconduct or culpability is. [1 A. 518 (F.B.), 24 A. 376 and 70 I.C. 6, Diss. from: 1931 M.W.N. 813, Foll.] 57 M. 49=66 M.L.J. 263=1933 M. 825=38 L.W. 714. A wrongdoer is liable only to the extent of the wrong he has done. 24 C. 413. As to the extent of the liability of trespasser to pay mesne profits, see 94 I.C. 118=1926 C. 847. The defendant in wrongful possession is liable only for the time he was actually in possession. If he was excluded from possession, he cannot be said to have been in wrongful possession (*Ibid*). Defendant not actually in possession is not liable for mesne profits. 38 I.C. 660=26 C. L.J. 140, 35 C.W.N. 305=132 I.C. 685=1931 C. 663. See also 6 Pat.L.J. 166=61 I.C. 754; 51 C. 853; 24 C. 413; 10 C. 785; 55 I.C. 48. (Defendant would be liable if he has abetted the trespass by the person in actual possession.) As against a wrongdoer, possession relates back to the time when the right to enter accrued. 21 I.C. 590=9 N.L.R. 145 (34

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M. 269, Foll.) The possession of a vendee under a conveyance voidable for fraud and undue influence is wrongful *ab initio*, and not merely from the date when a suit is filed to set it aside. 59 I.A. 147=7 Luck 64=36 C.W.N. 461=62 M.L.J. 451 (P.C.) As to the maintainability of claim for mesne profits between date of decree for possession conditioned on payment of money and date of payment, see 1928 M.W.N. 51

ASSESSMENT OF MESNE PROFITS.—The rental value of the land would ordinarily be the proper basis of calculating mesne profits when the person charged had merely let the land out to others. In such a case the rent that he received, if there was no evidence that a higher rent could "with ordinary diligence" have been obtained, would be the measure of the profits for which he would be liable. But when the wrongdoers cultivated the land themselves, the definition of "mesne profits" in S 2 (12), C. P. Code, clearly makes the cultivation profits the primary consideration. The test set by the statutory definition of mesne profits is clearly not what the plaintiff has lost by his exclusion, but what the defendant has or might reasonably have made by his wrongful possession. What the plaintiff in such a case might or would have made can only be relevant as evidence of what the defendant might with reasonable diligence have received. Land, which was capable of producing more profitable crops, was, in fact, planted by the wrongdoers with indigo, an inferior crop, for their special purpose. In ascertaining the mesne profits payable by them the Courts in India calculated the profits merely upon the basis of more profitable crops which the land was capable of producing. In all such cases the true test would be what the prudent agriculturist would have grown. 57 I.A. 105=58 M.L.J. 215 (P.C.); 59 C. 859=55 C.L.J. 205=138 I.C. 882=1932 C. 600; 62 C. 217=38 C.W.N. 1197=156 I.C. 489=1935 C. 206. See also 47 M.L.J. 730; 3 C.W.N. 904, 25 A. 266, 24 C. 413; 11 I.C. 504=15 C.W.N. 825, 15 I.C. 1; 19 I.C. 974=17 C.W.N. 984, 46 I.C. 624, 61 I.C. 425=1 P.L.J. 235. But see 16 I.C. 126=9 A.L.J. 774, where the basis was held to be what the plaintiff would have made out of the land but for the defendant's unlawful trespass and not what the defendant has done. See also 30 M.L.J. 326; 1923 N. 64 (1), 1930 C. 53; 35 C.W.N. 367=135 I.C. 876=1931 C. 802. The correct principle for the assessment of mesne profits is that the letting value of the property should be determined and not what the defendant actually gained. 10 I.C. 312=16 C.L.J. 93, 1927 R. 116. See also 1935 C. 206=38 C.W.N. 1197; 44 C.L.J. 182=1926 C. 1233, 94 I.C. 255=1926 C. 860. But where the person dispossessed is himself a cultivator of the land in dispute, he is entitled to such profits as the trespasser might have obtained by actual cultivation with due diligence and not merely to what he has really obtained by sub-letting the land. 43 I.C. 53; 20 N.L.R. 112=1924 N. 427. See also 15 W.R. 428; 47 M.L.J. 730; 53 C. 992.

Where the person in wrongful possession of land has given no evidence to show that he could not cultivate the land himself or that the land was in possession of tenants before he entered upon it as a trespasser he is bound to pay mesne profits on the basis as if he was in direct possession of the lands in suit. 1928 C. 474. The principles which would ordinarily guide a Court in determining the mesne profits are: (1) wrongful trespasser should not profit by it, (2) restoration of status before dispossession financially; and (3) use to which decree-holder would have put land if he was himself in possession. 39 I.C. 516=1917 P. 146. In order to assess the mesne profits of property in the wrongful possession of tenants, the Court should direct the Commissioner to ascertain (1) the gross profits which the tenant did obtain (or could reasonably have obtained) from his cultivation of the soil, (2) what ought, reasonably, to be deducted from that gross sum for (a) costs of cultivation, (b) on account of rent paid, and (c) the cost of maintenance of the cultivators. After deducting the cost of cultivation, and the rent paid and the cost of maintenance, the balance left is the 'profit' referred to in S 2 (12). 151 I.C. 922=38 C.W.N. 384=1934 C. 503. As to mode of assessment of mesne profits in the case of a co-sharer's claim based on his exclusion, see 30 N.L.R. 71=147 I.C. 445=1933 N. 316. Assessment can be based by local inspection and crop-cutting experiments conducted by a Commissioner. 47 M. 800. Deduction should be made for cost of cultivation and seasonal fluctuations. 99 I.C. 923=44 C.L.J. 559. See also where lands are subject to floods, deductions ought to be made on that account. 101 I.C. 371=1927 R. 116. In a suit against several trespassers, manner of drawing up decree indicated. 59 C. 859=55 C.L.J. 205=138 I.C. 882=1932 C. 600. The general law about the liability of joint tort-feasors, if mesne profits are taken to be damages, has been modified by the special provisions of this Code. 35 C.W.N. 357=135 I.C. 876=1931 C. 802.

COMPENSATION FOR IMPROVEMENTS AND OTHER EXPENSES.—The person dispossessed is entitled to compensation for improvements effected. 26 C.W.N. 257=35 C.L.J. 121, 42 M.L.J. 243. He is also entitled to compensation for all sums spent by him in managing the property but not for infructuous litigation in connection with the management. 22 M.L.J. 253. All such payments made by the defendant as the plaintiff would have been bound to make if he had been in possession towards rent, revenue or cesses should be deducted from the gross earnings. 17 B. 35; 21 C. 142, 20 N.L.R. 112=1924 N. 427. See also 33 I.C. 520. But the Court should not allow the expenses of collecting the profits unless the defendant entered on the property in the exercise of a *bona fide* claim of right. 20 N.L.R. 112=1924 N. 427; 70 I.C. 6=34 C.L.J. 415; 16 I.C. 866, 22 A. 262; 24 A. 376. But see 1931 M.W.N. 813. Where it was held that the definition of mesne profits takes no account of the culpa-

(13) "moveable property" includes growing crops:

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree:

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court;

Notes.

bility of the party liable, and so the expenses of management or collection should be allowed in the calculation of the mesne profits, even where the defendant has not proved his *bona fides* in taking possession of the property. Cultivation expenses incurred by the trespasser should be deducted, but not costs of collecting rents due from persons in occupation 24 M L J 30. Charity expenses charged on the property should be deducted. 1931 M W N. 813. See also 57 M. 49.

INTEREST ON MESNE PROFITS—Interest should ordinarily be allowed on mesne profits, though the interest as well as the mesne profits are in the discretion of the Court. 70 I.C. 6-34 C.L.J. 415, 50 A. 857=1928 A. 532. See also 10 C. 785; 27 C. 951. (P.C.); 1927 M.W.N. 661, 44 C.L.J. 182=1926 C. 1233=131 I.C. 833=1931 M. 513. The proper rate of interest to be granted on mesne profits is 6 per cent. in the absence of special circumstances. 62 I.A. 53=62 C. 499=68 M.L.J. 580 (P.C.) (noted *infra*). The words "together with interest on such profits" do not refer to interest due after the ascertainment of the amount of mesne profits due under the decree. They contemplate that interest should form a separate item in the calculation of that amount due as mesne profits 30 C. 506. See also 25 A. 275, 1930 A. 525. Mesne profits include interest. Where a decree is silent as to interest on mesne profits, it must be deemed to carry interest at the Court rate of 6 per cent and executed accordingly 44 A. 579, 17 I.C. 915=10 A.L.J. 533. But see 53 I.C. 227=30 C.L.J. 205, 21 A. 425 (F.B.), 27 C. 951 (P.C.), 33 C. 329. Interests should not be allowed for more than three years from the decree or until possession within that time, 27 C. 951 (P.C.). The Court has a discretion whether to allow interest on mesne profits after three years or not. 31 I.C. 387=2 L.W. 1129, 1931 M. 513. Mesne profits carry interest from the date of the preliminary decree awarding the same 46 A. 842, 33 C. 29. Liability—Joint wrong doer for mesne profits. See 53 C. 992, 1931 C. 802.

BURDEN OF PROOF—When mesne profits are claimed, the onus of proving what profits might with diligence have been received in any year lies upon the party claiming mesne profits 62 I.A. 53=62 C. 499=39 C.W.N. 405=(1905) P.C. 49=68 M.L.J. 580 (P.C.). Profits always means the difference between the amount realized and the expenses incurred in realizing it. In the case of mesne profits 10 per cent is the customary allowance in India for the expenses of collection, and it is unnecessary for the person liable to pay mesne profits to adduce any evidence on the subject (*Ibid.*). But the onus of proving what profits the person in wrongful possession actually

received lies on the person in possession. 47 M.L.J. 730. See also 47 M. 800; 1933 M.W.N. 1182=1933 M. 825. Where it is shown that a portion of the suit land had been let out at a produce rent, the Court will be justified in presuming that the entire land was so let out 53 C. 992. See also 99 I.C. 923=44 C.L.J. 559.

PRACTICE—Mesne profits should be determined in the suit itself and not by way of execution for a fixed sum of money. 39 C. 220. Transfer to higher Court of protracted proceedings on account of the mesne profits accruing during pendency of litigation swelling up to an amount beyond the pecuniary jurisdiction of the original Court is not an interruption so as to make the subsequent proceedings in the higher Court a different suit 58 I.C. 179=24 C.W.N. 342. Plaintiff filed a suit for loss of crops on 15th October, 1930, alleging that defendants had dispossessed him on 1st June, 1930. It was not shown that defendants had or should have received any profits before that time. It was held that no cause of action as to the claim brought existed on the date of suit 147 I.C. 709=1933 N. 222 (55 I.A. 299 and 31 M. 502, Dist).

Sec. 2 (13)—This definition has set at rest the conflicting decisions that existed previously among the different High Courts. Under the General Clauses Act, S. 3 (25) "standing crops" are immoveable property. But it is otherwise under this definition. This definition must be taken to be confined to the limited purposes of this Code 27 I.C. 935.

Sec. 2 (14)—See also notes under S. 2, Cl (2) and S. 2, Cl (9). As to nature of order for alimony pending suit for divorce, see 32 C.W.N. 179. An order made on a notice of motion for contempt of Court would be an order within the meaning of S. 2 (14), C.P. Code, and be executable under S. 36, C.P. Code 36 Bom.L.R. 992=1934 B. 452.

Sec. 2 (15)—As to construction of this definition see, 8 B. 105. As to whether vakils of Indian High Courts can practice before the Judicial Committee of Privy Council, see 16 C. 636. Pleader, vakil or attorney duly appointed to act for a party, has authority to do all acts incidental to that general authority, and they will be binding on the party. 9 S.L.R. 218=34 I.C. 928. But the acts must be *bona fide*, neither due to fraud or mistake, nor against the express instructions of his client (*Ibid.*) 29 I.A. 76=25 M. 367=6 C.W.N. 641=4 Bom.L.R. 543 (P.C.). He may withdraw the suit as to frame or withdraw any plea. 21 M. 274=8 M.L.J. 40; may get a witness summoned, dispensed with his evidence. 25 M. 367 (P.C.) (noted *supra*); may abandon an issue

(16) "prescribed" means prescribed by rules:

(17) "public officer" means a person falling under any of the following descriptions, namely:—

Notes.

(*Ibid.*). 38 I.C. 800. But unless specially authorized, he cannot consent to the settlement of a case by oath being taken by the opposite party. 14 B. 455, or give up a portion of the claim. 12 W.R. 279, 3 B.L.R. (App) 15, or transfer a decree. 2 N.W.P. H.C.R. 695, or consent to a decree in respect of property not in suit. 2 M. (A.C.) 420.

ADMISSION BY PLEADER—Admissions of fact by pleader made during the actual progress of a suit and not in mere conversation are binding on the party. 9 W.R. 375; 485; 10 W.R. 322, 21 W.R. 332, 21 M. 274, 15 I.C. 156, 20 C.W.N. 995, 7 C.W.N. 351; 86 P.L.R. 1916=104 P.W.R. 1916=35 I.C. 870. It is not necessary that the client must be present when the admission is made. 2 M.I. A. 253; and the party who wants to repudiate the admission as being against his instructions should do so at the earliest opportunity. 38 I.C. 800. The admission should however, be within the scope of the pleader's authority. 18 W.R. 436. He may admit liability and a decree may be passed thereon against the client. 21 W.R. 332. Verbal admissions by pleader must be taken as a whole and should not be unduly stretched. 6 A. 406. Court is not to act upon admissions by pleader, where the evidence of the records shows that they were wrongly made. 104 P.L.R. 1916=179 P.W.R. 1916=36 I.C. 212; nor upon mere opinion expressed by pleader adverse to his clients' claim. 18 M. 72. Nor upon an erroneous admission as a point of law. 24 B. 360=2 Bom.L.R. 467; 45 I.C. 983; 52 I.C. 178; 8 S.L.R. 156=27 I.C. 357. See also 27 C. 156. Mere allegation of party to the contrary is not sufficient to contradict his pleader in respect of a statement of fact made on his behalf by the pleader. 136 I.C. 622=1931 A. 415.

AUTHORITY TO COMPROMISE—A pleader employed to conduct a case has no implied authority to compromise it, and there must be express authority in the *Vakalatnama* if the compromise is to bind the client. 21 M. 274; 41 M. 233=41 I.C. 429; 4 C.W.N. 169. But it is otherwise in the case of Counsel. 13 A. 272; and also in the case of attorney or solicitor. 7 Bom.H.C.O.C. 79. In any event, the compromise should not be against clients' express instructions. 41 C.L.J. 213=88 I.C. 369=1925 C. 866, 32 C.W.N. 44=106 I.C. 309=1928 C. 378. Nor with reference to matters outside the scope of the particular case. 27 C. 428. A pleader should have special *Vakalatnama* to enter into any particular compromise. 9 S.L.R. 218=34 I.C. 928. But see *contra* 12 M.L.T. 348=23 M.L.J. 381. Compromise entered into outside the Court, would be binding only when sanctioned by the Court. 52 C. 386=88 I.C. 413=1925 C. 696; 55 C. 113=104 I.C. 387=1927 C. 714. Compromise may be set aside at the instance of party, if pleader, council or

solicitor had consented under misrepresentation or mistake. 6 C. 687; 3 R. 261=1925 R. 314. But the application should be made before the judgment is pronounced. 13 A. 272; 13 C. 115.

REFERENCE TO ARBITRATION BY PLEADER—A pleader duly appointed to act for a party has authority to apply for a reference to arbitration, and the same would be binding on his client even if it is against the wishes of his client. 9 S.L.R. 183=34 I.C. 845. The Code of 1908 has effected a change of the law in this respect (*Ibid.*) 6 N.W.P. 210 and 14 B. 455, which held otherwise were under the old Code.

WITHDRAWAL OF SUIT BY PLEADER—Pleader holding *Vakalatnama* to do all acts necessary in connection with the suit, has *prima facie* power to apply to withdraw the suit, provided there is nothing to show that the same is contrary to the clients' instructions, or due to misconduct of the pleader. 5 W.R. 80.

Sec. 2 (16) "RULING"—As to the meaning of this term see cl. (18), *infra*.

Sec. 2 (17)—[Note the legislature amendment of this definition.] Cf. definition of 'public servant' in I. P. Code, S. 21. A person may be a 'public servant' without being a 'public officer'. 6 Bom.H.C.R. 64. The following persons have been held to be public officers within S. 2 (17)—*Receiver* under the Provincial Insolvency Act, 44 B. 895; *Receiver* appointed by Civil Court, 34 C.W.N. 671, 57 C. 1127; 132 I.C. 634=1931 C. 503=35 C.W.N. 161=58 C. 850, 36 L.W. 694=140 I.C. 458=1932 M.W.N. 1240=1933 M. 105, see however, 1931 C. 175=53 C.L.J. 31=130 I.C. 894. *Official Liquidator*, 148 I.C. 448=11 O.W.N. 398=1934 O. 158, 148 I.C. 714=1934 N. 201. Where, however, the liquidator has acted through the Deputy Commissioner notice to the Deputy Commissioner would be sufficient and no separate notice to the liquidator is necessary. 30 N.L.R. 240=148 I.C. 714=1934 N. 201. *A British officer, in Indian army*, 50 I.C. 683=21 Bom.L.R. 143, an *officer of the Indian Staff Corps*, 24 C. 102, a *Naib Nazir*, 2 N.W.P.H.C.R. 298, a *Patwari*, 2 A.H.C.R. 148; but see 18 C. 534; a *Cantonment Committee* constituted under Indian Cantonments' Act, 34 B. 583=12 Bom.L.R. 45; the *Administrator-General*, 8 C.W.N. 913; the *Official Trustee*, 7 C. 499, 12 M. 250, a *village headman*, 2 Bur.L.J. 29=1923 R. 250; officers holding commissioned rank in the Indian Subordinate Medical Service, 23 I.C. 985=17 O.C. 99; a *common manager* appointed under the T.P. Act, 24 C.W.N. 138=30 C.L.J. 279, 59 C. 961; *Official Assignee*, 49 B. 638=27 Bom.L.R. 545. The *Manager of Court of Wards* not a public officer, 55 I.C. 515. See also 105 I.C. 729; 1928 S. 76. But see 3 A. 20; 1 B. 318; 13 B. 343; 11 M. 317. *Municipal Councillor* not a public officer, 1930 M.W.N. 821.

- (a) every Judge,
- (b) every member of the Indian Civil Service;
- (c) every commissioned or gazetted officer in the military ¹[naval or air forces of His Majesty] ²[* * *] while serving under ³[the Crown];
- (d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties;
- (e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement;
- (f) every officer of ³[the Crown] whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice or to protect the public health, safety or convenience;
- (g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of ³[the Crown] or to make any survey, assessment or contract on behalf of ³[the Crown] or to execute any revenue process or to investigate, or to report on any matter affecting the pecuniary interests of ³[the Crown] or to make, authenticate or keep any document relating to the pecuniary interest of ³[the Crown] or to prevent the infraction of any law for the protection of the pecuniary interests of ³[the Crown]; and
- (h) every officer in the service or pay of ³[the Crown] or remunerated by fees or commission for the performance of any public duty;
- (18) "rules" means rules and forms contained in the First Schedule or made under S. 122 or S. 125.
- (19) "share in a corporation" shall be deemed to include stock, debentured stock, debentures or bonds; and
- (20) "signed" save in the case of a judgment or decree includes stamped.

3. [S. 2.] For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court

4. [S. 4.] (1) In the absence of any specific provision to the contrary,

Leg. Ref

¹ Substituted by Act XXXV of 1934.

² Words 'including His Majesty's Indian Marine' omitted by Act XXXV of 1934.

³ Substituted for the words 'the Government' by Govt of India (Adapt. of Indian Laws) Order, 1937.

Notes.

Sec. 2 (19).—As to definition of, 'stock' see S. 2, Indian Trustees Act XXVII of 1866, and of 'bond', see S. 2 (5), Indian Stamp Act II of 1905 'Debenture' and 'debenture-stock' are nowhere defined in any enactment, but they are well-known terms in the commercial world. A *debenture* is a bond in the nature of a charge or Government stock or the stock of a public company. 'Debenture stock' is borrowed capital consolidated into one mass for the sake of convenience. Instead of each lender having a separate bond or mortgage, he has a certificate entitling him to a certain sum, being a portion of one large loan (*Lindley*, p. 346).

Sec. 2 (20).—Cf the definition of the term 'signed' in the General Clauses Act, where it is given a restricted meaning. That a person should be unable to write or sign his name

is not a condition precedent to the use of a stamp 3 A. 575. As to whether signing includes initiating, see 8 A. 293, 185 P. R. 1889 (F. B.)

Sec. 3.—The list of Subordinate Courts in the section is not exhaustive and does not exclude all other Courts from being subordinate to the High Court. 37 B. 114=17 I. C. 676. So a collector exercising judicial functions under the Bombay Mamlatdar's Act is subordinate to the Bombay High Court. (*Ibid.*) Judge should follow the rulings of the High Court to which he is subject. 17 B. 555, 10 C. 82, 15 B. 419; 6 M. 424, 19 C. W. N. 841=4 Pat. L. J. 565; 29 M. L. J. 63=42 I. A. 155=37 A. 359 (P. C.). A decision of the Privy Council is binding on Courts in India though delivered in an appeal not coming from an Indian Court 38 M. 941=25 M. L. J. 162 (P. C.). The original side of High Court sitting in insolvency is not a Court subordinate to the High Court in its appellate jurisdiction. 55 M. L. J. 671=1928 M. 1091

Sec. 4.—This section cannot be construed as making inapplicable the C. P. Code in respect of proceedings under Special or

Savings. nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

5. [S. 4-A.] (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the 1[Provincial] Government, 2[* * * * *] may, by notification in the 3[* * * * *] official Gazette, declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the 1[Provincial] Government, 2[* * * * *] may prescribe

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceeding relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

6. [S. 6, last para.] Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

Leg. Ref

¹ Substituted for 'Local' by Govt of India (Adapt. of Indian Laws) Order, 1937.

² Words 'with the previous sanction of the Governor-General in Council' and the words 'with the sanction aforesaid' have been omitted by Act XXXVIII of 1920

³ Word 'Local' omitted by Govt of India (Adapt. of Indian Laws) Order, 1937

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Local laws, as it only enacts that where there is an inconsistency, the rules of the C.P. Code do not prevail as against the rules contained in the Special or Local laws. 3 C. 221. In view of S 4 the law applicable to soldiers is the Army Act and it overrides S 60 of the Code. 43 B. 368=28 Bom. L. R 137. S 40, C. P. Code, gives validity to a local Act and a Court to which a decree is sent for execution outside the local sphere may be bound by the local Act but no local legislature can prescribe the procedure for any Court beyond its territorial jurisdiction. As far as the latter Court is concerned the Act is in the same position as the legislation of a foreign country. Hence the United Provinces Court of Wards Act could not be invoked in a proceeding in Bengal 56 C. 704. It is the section of the Oudh Laws Act that applies to the recording of evidence in criminal cases relating to a proceeding before the Chief Court and not O. XVIII, R 6. C. P. Code. 8 O.W.N. 635=132 I.C. 270=1931 O 385. So also in case of application for leave to appeal to Privy Council, S 12 (1) of Oudh Courts Act and not S. 109 of

the C. P. Code, will apply 8 O.W.N 1207=134 I.C. 1017=1932 Oudh 163 Procedure under Co-operative Societies Act excludes that under C. P. Code 142 I.C. 487=1933 N. 211. The parties to a suit can validly agree, even apart from the Indian Oaths Act, that they will abide by the statement of a witness, including one who is a party to the suit, and they can leave the decision of all points including costs arising in the case to be made according to the statement 146 I.C. 84=1933 A.L.J. 1127=1933 A 861 (F.B.)

Sec. 6. -A Court cannot execute a decree sent to it for execution, where the decree has been passed in a suit, the value of which exceeds the pecuniary limits of its jurisdiction. 16 C. 457, 17 C 465, 37 C. 574, 12 B 155 But see 7 M 397; 17 M. 309 (contra) In suits for possession of land and mesne profits, both past and future, the pecuniary limits of the jurisdiction of the Court is to be determined only with reference to the past profits claimed and the value of the land. Although when the actual decree is passed for past and future profits, the sum is found to exceed the pecuniary limit of the Court's jurisdiction it does not matter, and the decree will not be one passed without jurisdiction. 40 M 1=39 I.C. 439; 25 M. 543; 33 A. 97=7 I.C. 385; 16 A. 286; 53 C. 14=89 I.C. 726=1926 C. 1076; 6 Pat.L.J. 54=60 I.C. 346; 2 Pat.L.J. 394=41 I.C. 231 As to applicability of section to proceedings before the Calcutta Improvement Tribunal, see 31 C.W.N. 142=94 I.C. 170=1926 C. 853

7. [S. 5.] The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

(a) so much of the body of the Code as relates to—

(i) suits excepted from the cognizance of a Court of Small Causes;

(ii) the execution of decrees in such suits;

(iii) the execution of decrees against immovable property; and

(b) the following sections, that is to say,—

section 9,

sections 91 and 92,

sections 94 and 95 [so far as they authorize or relate to (i) orders for attachment of immovable property, (ii) injunctions, (iii) the appointment of a receiver of immovable property, or (iv) the interlocutory orders referred to in cl. (e) of section 94]; and

sections 96 to 112 and 115.

8 [S. 8.] Save as provided in sections 24, 38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882, the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay:

²[Provided that—

(1) the High Court of Judicature at Fort William, Madras and Bombay, as the case may be, may, from time to time, by notification in the ³[*] official Gazette direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882, and with such modifications, and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court;

(2) all rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, shall be deemed to have been validly made.]

PART I.

SUITS IN GENERAL.

Jurisdiction of the Courts and Res judicata.

9. [S. 11.] The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Courts to try all civil suits unless barred.

Leg. Ref.

¹ Substituted for words 'so far as they relate to injunctions and interlocutory orders' by Act I of 1926.

² Provisos (1) and (2) added by Act I of 1914.

³ Word 'Local' omitted by Govt. of India (Adapt. of Indian Laws) Order, 1937

attach a mortgage debt). 132 I.C. 208; 10 N.L.R. 17 (cannot attach a share of joint family property).

ATTACHMENT BEFORE JUDGMENT.—A Small Cause Court can order attachment before judgment of movable property 46 C. 717=53 I.C. 814 It cannot order attachment before judgment of immovable property. (See O XXXVIII, R. 13, *in/ro*). The earlier rulings to the contrary in 52 C. 275=82 I.C. 109=1925 C. 1 (F.B.), being prior to insertion of R. 13, is no longer good law.

Sec. 8.—Decree of Madras Small Cause Court transferred to mofussil District Munsif for execution—District Judge can hear appeal from order in execution proceedings 49 M.L.J. 104.

Sec 9: SCOPE OF THE SECTION.—The Civil Courts are *prima facie* entitled to determine

Notes.

Sec. 7. POWERS OF SMALL CAUSE COURT IN EXECUTION.—A Small Cause Court acting as such cannot attach immovable properties in execution. This is so even though the Small Cause Court is also an ordinary Court, unless the decree has been formally transferred to the ordinary side 132 I.C. 208 See 44 I.C. 252 (can attach and sell a preliminary decree for foreclosure). 16 I.C. 816 (can

Explanation.—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of question as to religious rites or ceremonies.

Notes.

all civil matters, legislation that ousts their jurisdiction must be very carefully examined, and unless the Courts are satisfied that the conditions upon which they are ousted are fulfilled to their own satisfaction, they will not hold that they are debarred from inquiring into any matter before them. They will not take the mere *ipse dixit* of the authority which ousts them, unless the law definitely states that they are bound to do so. 11 R. 125=1933 R. 124. See also 67 M.L.J. 1=61 L.A. 177=57 M. 443=1934 P.C. 84=118 I.C. 327 (P.C.) The burden of proof is on the party who seeks to oust the jurisdiction of Civil Courts 1928 L. 121 (F.B.) When the Statute which creates the right also prescribes a special remedy, the person aggrieved is limited to the remedy so prescribed. If, however, a legal right is recognised, to exist apart from and independently of the statute and no special remedy is provided, the Civil Courts would continue to exercise their jurisdiction under S. 9 of the C.P. Code 143 I.C. 514=29 N.L.R. 278=1933 N. 193 (F.B.) See also 43 L.W. 262=1935 M.W.N. 1207=160 I.C. 209=1936 M. 421 But see 1935 A.W.R. 1094=157 I.C. 270=1935 A.L.J. 1111.

SPECIAL TRIBUNAL.—The grant of jurisdiction to a Special Tribunal to deal finally or exclusively with the cases arising out of the lawful administration of a particular statute cannot take away the jurisdiction of the Civil Courts to afford relief against any illegality committed under colour of that Statute. If the special tribunal arbitrarily refuses to exercise its jurisdiction or if the rules which create the special tribunal and lay down the procedure are themselves impeached as being *ultra vires*, then the Civil Courts have jurisdiction to correct the illegality and give proper relief to the aggrieved person 143 I.C. 514=29 N.L.R. 278=1933 N. 193 (F.B.) Where a right and liability has been created by statute and where the legislature has left to another authority the appointment of a tribunal to try such liability and the framing of the procedure under which the tribunal so to be appointed is to carry out its duties, but the tribunal so contemplated by the legislature has never been brought into existence, the subject has the right to proceed in the ordinary Civil Courts with corresponding rights of appeal, unless and until the legislature carries out its duty of appointing a special tribunal. 14 P. 24=152 I.C. 805=15 Pat.L.T. 623=1934 P. 670 (2) (F.B.) Per *Courney Terrell, C.J.*—When a special tribunal has been appointed and its procedure framed, then the subject cannot proceed to a civil suit in the event of the special tribunal refusing or neglecting to carry out its duties in a proper manner, in other words, refusing or neglecting to exercise its jurisdiction. (*Ibid.*)

JURISDICTION OF CIVIL COURTS IN GENERAL.

—Every presumption should be made in favour of the jurisdiction of a Civil Court, which can be taken away only by express words or by necessary implication. 17 C.W. N. 408=17 C.L.J. 239, 33 M. 208; 10 Pat.L.T. 157, 1932 O. 199 (F.B.) The jurisdiction of Courts depends upon the allegations made in the plaint and not upon those which may be ultimately found to be true. 1922 N. 10=18 N.L.R. 121. After annexation of Burmah the *Thathanabany* or the Burmese Buddhist hierarchy ceased to have jurisdiction to decide civil disputes between members of the Burmese Buddhist priesthood. It is only Civil Courts established by law that could do so. 13 R. 548=158 I.C. 865=1935 R. 376 (F.B.), (6 R. 783=114 I.C. 540=1929 R. 77, Over.) Courts have power in any matter of spiritual and temporal character to enquire into the laws or rules of the tribunal or authority which has inflicted the alleged injury. 39 M. 1056=30 M.L.J. 423. A Court will interfere in a case of dismissal of an officer of a Trust Corporation where the relationship between the officer and the corporation is one of trust and *estui que trust* but will not, where the relationship is a contractual one. 41 C. 19. The question of propriety of any fine inflicted by the Dharmakartha on an inferior spiritual dignitary is within the competence of the Civil Court. 21 M.L.J. 730. The Civil Court can question the appointment of a trustee by the Devasthanam Committee if it is not made reasonably and in good faith. 42 M. 668. Where certain Jagu money is attached by a Magistrate for realization of arrears of maintenance due under order passed under S. 488, Cr. P. Code Civil Court has no jurisdiction to entertain suit for declaration the amount is not liable to seizure or attachment. 39 P.L.R. 100.

EXPRESSLY OR IMPLICITLY BARRED.—The jurisdiction of Civil Court is expressly barred when there is some enactment or rule of law precluding a Civil Court from taking cognizance of a suit. 14 C. 644. See also 152 I.C. 861=11 O.W.N. 1435=1935 O. 96. As to suits expressly barred by statutes, see 26 A. 594, 42 M. 647=37 M.L.J. 23 (custody of minor under the Guardian and Ward Act) 30 M. 126 (suit for land, as emolument of office under the Hereditary Village Officers Act, 1895) and other cases dealt with by special enactments. See also 36 Bom.L.R. 1245=1935 B. 91=154 I.C. 583 (suit to set aside award made under Co-operative Societies Act); 43 B. 211=21 Bom.L.R. 27 (suit to recover the value of silver confiscated by the order of Collector under the Sea Customs Act). In this case, however, it was held that if there had been no legal adjudication of the matter by the Collector of Customs in accordance with the provisions of the Sea Customs Act, the jurisdiction of the

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Civil Court to take cognizance of the suit was not ousted. (*Ibid*) No Court in British India has jurisdiction to grant a declaratory decree to the effect that a decree passed by their Lordships of the Judicial Committee is illegal and void. S.23 of Act 3 and 4, Will IV Cl. 31 (1833) conclusively bars not only the challenging of any order of His Majesty in Council in execution proceedings, but also bar the jurisdiction of a Court in India to declare the order illegal and void. 158 I.C. 338=1935 O.W.N 1071. Where a special tribunal out of ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. 1935 A.W.R 1094=157 I.C 270=1935 A.L.J. 1111. The Civil Courts have no jurisdiction, if the tribunal comes to a conclusion after due enquiry. But if the conclusion is arrived at without any sort of enquiry and without an opportunity being given to the parties to be heard, the jurisdiction of the ordinary Civil Courts is not taken away. 43 B 221, 115 I.C 650=26 A.L.J 673=1928 A. 511. The jurisdiction of the Civil Courts is not barred by S. 287 of the Madras City Municipal Act as the Standing Committee of the Madras Corporation cannot be treated as a special tribunal constituted to decide claims between the house-owners and the Corporation. 38 M 41=23 M.L.J 531. Cognizance may also be impliedly barred by general principles of law such as suits relating to acts of State and public policy. Suit to declare title to decree not barred by S. 47 or by S 9, C.P. Code 1931 R 24. Suit *re* order in partition proceedings lies. 54 A. 646=138 I.C 465=1932 A. 293 (F.B) Suit for profits by one co sharer of an occupancy holding against another can be tried by the Civil Court, and its jurisdiction is not ousted by S 230 or the Fourth Schedule of the Agra Tenancy Act (1926) 1935 A.L.J 112=155 I.C 37=1935 A. 271 Ss. 26-J and 188 of Bengal Tenancy Act do not oust jurisdiction of Civil Court to entertain suit by landlord *for* recovery of the balance of the transfer fee. 63 C.L.J 105=1936 C 786

SUITS RELATING TO ACTS OF STATE BARRED—A suit for damages against Government for acts done in the exercise of sovereign powers does not lie in a Civil Court. 1 C 11. But where the act complained of is professedly done under the sanction of Municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power does not oust the jurisdiction of Civil Court. 4 M. 344; 5 M 273. Publication in the Government Gazette, respecting the conduct of a public servant is an act of State in respect of which no action for libel lies. 27 B 189. A resumption of an imam by Government is an act of State. 28 I.C. 934. But *see* 6 M 361. Resumption by Government of certain functions entrusted to non feudatory Zamindars in Central Provinces is an act of State and consequently

no action lies in a Civil Court. 39 C. 615=39 I.A. 31 (P.C.); 10 L. 338. Appointment to the office of Ghatwal or Digwar is a matter for Government and Civil Courts have no jurisdiction in respect of the office. 23 I.C. 849=18 C.W.N. 1036

SUITS AGAINST MUNICIPALITIES—A suit lies for a declaration that plaintiff has a right to vote and to stand as a candidate at a Municipal election. 24 C. 107. *See also* 48 C 378. As to power of Criminal Court to question action taken by Municipality, *see* 93 I.C 827=1926 L. 461. A Municipality has direction to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion unless it is exercised in a capricious, wanton and oppressive manner. 12 B. 490=1937 L. 252. Where powers are given to a public body of acquiring property for purposes of an Act, misuse of the powers is actionable in a Civil Court. 47 C 500=47 I. A. 45=38 M.L.J 511 (P.C.) [Affirming 44 C.L.J. 219.] The Civil Court has jurisdiction to entertain a suit for declaration that the owner of certain land sought to be acquired by the corporation is entitled to compensation. 44 C. 87=43 I.A. 243=32 M.L.J. 631 (P.C.) Refusal of licence by Municipality is not justified and a Civil Court can interfere. 20 Cr L.J 705=17 A.L.J. 976=52 I.C 785. As to jurisdiction of a Civil Court to decide questions of franchise, *see* 52 C. 943. A suit for declaration that assessment of town-tax by a Panchayat is illegal and *ultra vires*, is one between a subject and a branch of the local Self-Government not dealing with rights but with a question of taxation, and as such is not of a civil nature, and Civil Court has no jurisdiction to entertain it. 1936 A.L.J 33=159 I.C 897=1936 A. 917

SUITS BARRED ON GROUNDS OF PUBLIC POLICY—Suit against a witness for defamatory statements, contained in the evidence given by him. 30 M 222, 17 B 172, 15 C 264. *See also* 10 M 87, 11 M. 477. Suit by a witness to recover money agreed to be paid to him in consideration of his giving evidence. 4 M.H.C.R 7. Suits for damages against a judicial officer for acts done in good faith in the discharge of his judicial functions. 2 M.H.C.R. 396, 12 A 115. (But when he acts illegally, without due care and attention, and beyond the limits of his jurisdiction, an action lies. 9 C 341, 6 M H.C.R. 423.) Suits on agreements void on grounds of public policy, *e.g.* suit for rent of lodgings knowingly let to a prostitute. 18 W.R 445. Suit to enforce an agreement to suppress a criminal prosecution. 8 C. 24

CASTE QUESTION—This term may be defined generally to be a question which relates to matters affecting the internal autonomy of the caste and its social relations. 56 B 242=34 Bom L.R 343=137 I.C. 461=1932 B 122 (F.B.); 23 B. 122; 34 B 467=4 I.C 108. In the matter of caste customs over which the ecclesiastical chief has jurisdiction the Civil Court cannot interfere. 17 M 222. *See also* 157 I.C 302=1935 N. 156. Refusal to invite a member of caste on any

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picious occasions does not give rise to a cause of action in a Civil Court. 17 I.C. 527 = 1912 M.W.N. 1220. See also 15 B. 599, 10 B. 661, 18 B. 115. "Neota" is not a legal but a social obligation and is therefore not recoverable by means of a suit. 34 P.L.R. 218 = 1933 L. 317 (1). See also 20 B. 190 which relates to a sum of money which, by a resolution of the caste, every casteman was to pay on the occasion of any marriage in his family. The power of a Civil Court to decide questions relating to caste disputes is fully considered by Chandavarkar, J., in 20 B. 174. See also 27 Bom.L.R. 1503. The right of conscience, i.e., the right of individual members of a community to hold certain religious beliefs and opinions is not a matter within the cognizance of Civil Court. But the right to remain in the community or to exercise the rights and privileges of the members of the community is a civil one and must be decided by the Civil Court when called in question. 157 I.C. 302 = 1935 N. 156. Temporary exclusion of some members of a caste from social intercourse with other families on account of infringement of caste rules at the instance of the panchayat is not for the Civil Court. 23 I.C. 801 = 12 A.L.J. 522. See also 15 B. 599; 18 B. 115. But where plaintiff is expelled from the caste suit will lie to determine whether plaintiff's expulsion from caste is valid or not because it is not a matter of social privilege but of legal right which forms part of his status. 15 B. 599, 10 M. 133. See also 21 C. 463, 23 B. 122, 24 B. 13, 12 M. 495, 17 M. 222. A properly assembled caste Panchayat or meeting have jurisdiction to outcaste members of its community who have committed caste offences, and when the Panchayats' proceedings are in order and in consonance with natural justice Civil Courts will not and cannot interfere in the same. 37 Bom.L.R. 417 = 158 I.C. 414 = 1935 B. 361. The general principles applicable to expulsion of members from a club apply to cases of expulsion from caste, while it is open to doubt whether there is an inherent power in the caste not dependent on proof of usage within the caste. 37 Bom.L.R. 603 = 159 I.C. 650 = 1935 B. 367. In order to justify such expulsion, there must be a caste offence, the rules of procedure of the caste, if any, must be complied with, and notice of the charge and of the meeting should be given to the accused and other members of the caste (*Ibid*). Where the requirements of natural justice are complied with, the Civil Court will not act as a Court of appeal in reference to the decision of the domestic tribunal. 37 Bom. L. R. 261 = 157 I.C. 127 = 1935 B. 268. Nor is it necessary that there should be before the domestic tribunal evidence of the character which would be required in a Court of law. (*Ibid*). Civil Courts may deal with a caste question where the character of a member has been unjustly injured. 28 M.L.J. 58 = 2 L.W. 446 as to whether suits in respect of caste property are maintainable in Civil Courts. So also suits for inspection of accounts of caste pro-

perty. 5 B. 83, 34 B. 467. See also 50 B. 124 = 1926 B. 69, 19 B. 507. Suit by caste members to inspect caste documents is maintainable. 56 B. 242. A claim by five of the members of a caste to use the *H'adi* and the vessels is one of a civil nature. 1921 B. 522. In a case where membership of a caste involves rights to property, the Court has jurisdiction to entertain a suit by a member in respect of expulsion of caste which has been carried out in complete disregard of the rules of the caste. If a caste chooses to make a rule as to the procedure and methods to be adopted in respect of a caste offence, the caste must comply with the rule, and when that rule is disregarded by the caste, the Civil Court will interfere and give relief to the aggrieved member of the caste. 36 Bom.L.R. 901 = 1934 B. 431.

RIGHT TO RELIGIOUS HONOUR.—A right to religious honour is not cognizable, unless it is an emolument attached to an office. 45 I.C. 959 = 7 L.W. 614, 12 L.W. 480 = 53 I.C. 483, 10 I.C. 110 = (1911) 1 M.W.N. 353; 16 I.C. 338 = 14 Bom.L.R. 513; 156 I.C. 460 = 8 R.M. 3 = 1935 M.W.N. 615 = 41 L.W. 384 = 1935 M. 621 = 69 M.L.J. 14. See also 32 M. 291. A suit does not lie for a mere honour or dignity unconnected with fees, profits or emoluments. 2 B. 476, 51 I.C. 905; 7 M. 91; 10 B. 233, 19 M. 62, 41 M.L.J. 247, 41 L.W. 752 = 158 I.C. 375 = 1935 M.W.N. 520 = 1935 M. 679. So also in case of right to obtain *theetham* or honours in a particular order of precedence in a temple. 44 L.W. 539 = 1936 M.W.N. 954 = 1936 M. 973 = 71 M.L.J. 588. Suit for declaration and injunction in respect of a right to be carried in a palanquin on certain days through public streets is not maintainable. 45 B. 590. See also 3 M.I.A. 198. Courts will not decide disputes as to precedence or privilege between purely religious functionaries. 45 B. 590, 1933 M. 264 = 143 I.C. 104.

RIGHT TO WORSHIP, ETC.—A suit to establish the right to worship in a temple according to the worshipper's belief is a suit of a civil nature. 44 B. 410. See also 145 I.C. 1014 = 38 L.W. 333 = 1933 M. 726, 76 I.C. 629. A right to worship in a particular manner and with particular incidents attached to it is a civil right. The right of a person to exclusively conduct a *mandahappadi* on the first day of a festival, paying all the expenses himself and receiving all honours and emoluments of that right, is a civil right. 31 M.L.J. 758. See also 35 I.C. 88 = 3 L.W. 512. A suit to establish a person's right to enter a religious place is entertainable. 21 C. 463. Also a suit to restrain the defendant from entering a place of worship. 7 B. 323; 23 B. 122; 13 M. 293.

SUITS IN RESPECT OF TEMPLE PROPERTY.—Hindu idols being property, the right to deal with them is cognizable in a Civil Court. 4 M. 315. See also 3 C. 390. Removal or alteration of *namams* or sacred marks in a temple amounts to an interference with property and will afford a ground of action in a Civil Court. 30 M. 158 = 17 M.L.J. 1. A suit between two Buddhist priests to recover

10 [S. 12.] No Court shall proceed with the trial of any suit in which the

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possession of certain lands and religious manuscripts is one of a civil nature 8 Bur. L.T. 62=27 I.C. 112 A worshipper who is not prevented from worshipping an idol cannot sue its custodians to locate it in a particular temple instead of another 32 C 1072

SUITS TO RECOVER FEES AND EMOLUMENTS ATTACHED TO OFFICES—The payments made to a *vatandar* barber for officiating at some ceremonies are customary fees and therefore can be recovered from another who, without any right, performs them 22 Bom L.R. 410=44 B. 733. Where, however, a donor makes a gift personally to the defendant Maha Brahmin on a day which belonged to the turn of the plaintiff, the plaintiff could not recover the same, as it was made to the defendant in his individual capacity 35 A 412 See also 26 C 356

SUITS FOR A SHARE IN OFFERINGS—Right to share in temple offerings is a civil right 45 A. 437=1923 A. 426, 17 C. 90; 27 C 30; 13 B. 548 A suit for definite amount due to a plaintiff as a co-sharer of the voluntary offerings in a temple realised by the defendant is maintainable in the Civil Court. 26 P. R. 1919=51 I C 236 (26 C. 356, Dist.), 17 M. L. J. 493 But see 132 I C 444

RIGHT TO OFFICE (SECULAR)—The existence of an office involves the existence of some duties to be performed by the holder of the office 28 I C. 459 Where the plaintiff's services are voluntary and gratuitous, and there is no question of any contract the Civil Court has no jurisdiction 37 A. 313. Though an honorary lectureship in a University is an office of consequence, yet there is no injury to the personal right of the lecturer on account of no arrangements being made by the University for the delivery of lectures. 41 C. 518 A suit by one director against the other directors of a limited company to restrain the latter from preventing him from acting as such, is maintainable 51 C 916.

RIGHT TO OFFICE (RELIGIOUS)—Suit by a body of Brahmans that they have a right to recite vedas, etc., in a temple is maintainable. 98 I C 229=1927 M. 131 See also 54 C. 614. Right to the office of hereditary priest to which fees are attached is property and a suit is maintainable in respect thereof 36 B 94 See also 22 Bom L. R. 1202=45 B. 234, 54 C 614 Also a suit for exclusive right to officiate as a purohit to pilgrims to Rameswaram. 9 M. I. A. 348. It is not necessary that any emoluments should attach to the office. 15 C 159 (162) A suit lies for the enforcement of a right to officiate as priest at a certain sacred spot though no fixed fees are attached to it 27 C 30. See also 13 B 429, 13 B. 548, 16 B. 281. Where claim is confined to rights in religious ceremonies as a right to recite sacred texts, the same is not cognizable 28 M 23; 19 M. 62. See also 32 A. 527 (right to

perform Ramlila) The right to hold a certain office in a certain place at a certain season of the year confers upon the holder thereof a legal character so as to enable him to bring a suit to maintain such right. 1 Pat. L. J. 381=35 I C. 345. The gains made by officiating as priest at the bath, etc., to the pilgrims at chaukis on the banks of a sacred river are property in law and a suit for a share in such business is one of a civil nature 27 O C. 114=1924 O 252 (43 A. 581, Ref.). A Gayawal priest can sue for declaration and possession in respect of his gaddi whether it is an office or a business 42 I.C. 478=2 Pat.L.J. 705 Where there is a specific duty of being present at the performance of religious ceremonies, with emoluments attached to it, it must be regarded as an office, in respect of which suit will lie in a Civil Court. 1928 M. 397.

OTHER RIGHTS OF A CIVIL NATURE—Right to go in procession in a public street is a civil right. 29 M.L.J. 91=29 I C 248; 44 B. 410=22 Bom L.R. 307 See also 24 C. 524; 18 B. 693. A Mahomedan's right to slaughter cattle is a common law right. 17 O C. 354=25 I C. 908. So also a suit to establish a claim to perform *utris* ceremony and to manage the offerings thereat 50 B 148 A suit to declare the election of a candidate as void being contrary to law is one of a civil nature 39 A 308 See also 52 C 943. Suit to set aside award is maintainable 3 L 296 A suit for recovery of carcases of dead animals by Mahars is not maintainable in a Civil Court. 47 B 95 See also 15 I C 108 Suit for declaration of validity of election as municipal commissioner is maintainable 37 C.W.N. 122 So also a suit by minor plaintiff *re* order of Revenue Court in partition proceedings 1932 A 293 (F B)

FRANCHISE AND ELECTION—Question relating to Sec 1926 C. 279 A suit for a declaration that plaintiff's election as commissioner of the Municipality is valid, is one of civil nature and cognizable by Civil Courts. 60 C. 438=37 C.W.N. 122=145 I.C. 248=1933 C. 492.

MARRIAGE—Declaring a *pat* marriage invalid 22 N L.R. 134=1926 N 488

RITUAL—Where questions of ritual are involved in the civil rights of persons they ought not to be investigated by the Court 1926 M W.N. 226, 1929 M. 520

ELECTRICITY ACT—Suit against licensee for damages for failure to supply electrical energy. 97 I C. 537=1926 L 349

CO-OPERATIVE SOCIETIES ACT—Civil Courts have no jurisdiction to set aside an award made under the Bombay Co operative Societies Act S 57 of the Bombay Co-operative Societies Act read with S 9, C.P. Code, bars the maintainability of a suit for that purpose. 154 I C 583=36 Bom.L.R. 1245=1935 B. 91.

INSOLVENCY—Suit on debt incurred after adjudication not barred 22 N L R 118

Sec. 10: SCOPE OF THE SECTION—Section

Stay of suit

matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the [Central Government or the Crown Representative] and having like jurisdiction, or before His Majesty in Council.

Leg. Ref.

¹ For words 'Governor-General in Council', the words within brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937

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is mandatory, and no discretion is left to the Courts 36 C.W.N. 667=1932 C. 751=140 I.C. 155 See also 61 C. 670 S. 10 does not bar the institution of a suit but only the trial of it under certain circumstances. A Court cannot dismiss a suit under the section but only postpone its trial. 27 M. L.J. 405; 11 A. 148 (154) (F.B.). There is no necessity for stay where there is no possibility of conflict of decrees. 106 I.C. 661 See also on this section 1925 P. 201, 23 A.L.J. 529=1925 A. 615 Nor does the section dispense with the institution of a suit within the proper time when the law expressly requires such institution. 22 B. 640, 77 I.C. 157, 1925 P. 201. Notwithstanding stay of suit, interlocutory orders such as orders for receiver, for an injunction or for attachment before judgment could be passed. 46 B. 431 Under S. 10 a Court has no jurisdiction to decide the question of *res judicata*. It can only stay the new suit if it finds sufficient reasons 42 C. 926 See also 47 A. 904, 1926 P. 171. Failure of Court to apply section and stay suit—Effect of. 7 Lah.L.T. 4.

OBJECT OF THE SECTION.—The object of S. 10 is to prevent Courts of concurrent jurisdiction from trying two parallel suits in respect of same matter in issue. 36 I.C. 641=24 C.L.J. 514 See also 75 I.C. 231; 48 M.L.J. 251; 23 A.L.J. 585; 1925 A. 677. Object is to avoid conflict of decisions. 29 Bom.L.R. 382=1927 B. 245.

OPERATION OF THE SECTION—If two Courts have concurrent jurisdiction, the institution of proceedings by one party in one Court, cannot, in law, prevent the other party from taking proceedings with respect to the same subject-matter in the other Court, and all that can be done in such a case is to stay proceedings in one of the Courts on the principles of S. 10, in order to avoid multiplicity of litigation 157 I.C. 796, and also to avoid a conflict of decisions on the same points which are involved in the two suits, 1935 S. 225; 1935 L. 76. An appeal is a continuation of the suit for the purposes of the section. 82 I.C. 539, 24 C.L.J. 514; 30 I.C. 753=1915 M.W.N. 844, 36 C.W.N. 1=61 M.L.J. 420 (P.C.); 1931 C. 779 (1); 1932 C. 751 Pendency of an appeal before Privy Council is a bar to the trial of a subsequent suit where the same issue is raised, though

the relief claimed is different 23 O.C. 214=58 I.C. 629. The pendency of an application for leave to appeal to the Privy Council is no bar 21 M. 18, 1931 L. 50. A proceeding under S. 47 is not a suit within the meaning of the section 22 M. 256. Interlocutory orders under S. 10 occur in suits and not in execution proceedings. The section is not exhaustive and its application has been extended only to proceedings under certain Acts and miscellaneous proceedings by virtue of S. 141 and this latter section does not cover proceedings in execution of a decree. 119 I.C. 484=1929 L. 694. Where in the absence of a prayer in the plaint the Courts give a direction in the preliminary decree for ascertainment of future mesne profits, a subsequent suit for the same future mesne profits is not barred by S. 10. 57 M.L.J. 515.

APPLICABILITY OF SECTION—One test of applicability of section to a particular case is whether on the final decisions being reached in the previous suit, such judgment would operate as *res judicata* in the subsequent suit. 61 C. 670=38 C.W.N. 818=154 I.C. 645=1935 C. 1, 36 C.W.N. 667=110 I.C. 155=1932 C. 751. It is not necessary for applicability of the section that the subject-matter and the causes of action should be the same (*Ibid*). Where the matters in issue in one are directly and substantially in issue in another, the mere addition in the second suit of a prayer for declaration of illegality of an interim order of attachment in the first suit, and of a prayer for an injunction against the first suit being proceeded with, will not affect the identity of the two suits. 61 C. 670 (*noted supra*) The three essential conditions that are necessary to bring in operation S. 10 are (1) that the matter in issue in the second suit is directly and substantially in issue in the previously instituted suit, (2) that the parties in the two suits are the same, and (3) that the Court in which the first suit is instituted is a Court of competent jurisdiction to grant the relief claimed in the subsequently instituted suit. Where the Court deciding the earlier suit based on title was shown to have no jurisdiction to grant relief as to valuation and apportionment which formed the subject-matter of the later suit, *held*, that the later suit could not be stayed under S. 10. 60 C. 1096=1933 C. 887. S. 10 requires that "the matter in issue" in the later suit should be directly and substantially in issue in the earlier suit; the section will not apply when only "a matter in issue" is common to both the suits. According to the balance of authority in Madras, the expression "the

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matter in issue" denotes the entire subject in controversy. 67 M.L.J. 748; 155 I.C. 1002=41 L.W. 449=1935 M. 112. See also 61 C. 670=38 C.W.N. 818; 1935 L. 816. S. 10 is not applicable to the stay of a suit connected with a pending appeal. But the Court has inherent jurisdiction to stay the suit if that is in the interest of both parties. 144 I.C. 107=1933 L. 50. It is mandatory upon the Court, under S. 10, not to proceed with the trial of any suit in which the matter raised is also raised in a previously instituted suit. But it is discretionary with the Court to stop the proceedings at an earlier stage. As a matter of common sense and convenience, if the second suit is parallel to the first, then the best course for everybody concerned is to put a stay upon or arrest altogether the second suit at the earliest possible moment, and in a proper case the Court has power to stay a suit generally at any stage it thinks expedient to do so. 61 C. 670=38 C.W.N. 818. It is hardly open to a party to blow hot and cold and ask the Court not to inquire into an application filed by such party until a previous suit in respect of the same subject-matter filed by him is decided by another Court. 149 I.C. 1169=1934 S. 38.

CONDITIONS FOR OPERATION OF THE SECTION.—There must be substantial identity between the matters in dispute and parties in the earlier and later suits. 44 B. 283; 9 I.C. 929=13 Bom. L.R. 109; 48 M.L.J. 251=88 I.C. 421. 'Matter in issue' has reference to the entire subject-matter in controversy and every matter in dispute should be in issue in both the suits. 82 I.C. 539; 36 I.C. 641=24 C.L.J. 514; 4 Pat. L.J. 557, 48 M.L.J. 251, 103 I.C. 274=26 L.W. 241, 8 L.L.J. 76=26 P.L.R. 185=1926 L. 304; 47 A. 915; 51 A. 1017, 6 R. 775, 1929 O. 341. But see 1932 C. 751. It is not sufficient that there are some issues common to the two suits. 1927 B. 245, 1935 M. 112; 15 L.W. 646=1922 M. 304, 1925 M. 574, 1929 A. 805, 4 Luck. 573, 1931 O. 313. An application under S. 20, Sch. 2, is not a plaint and the hearing of such an application is not a suit though under sub-C1 (2), S. 20, it has to be numbered and registered as a suit. S. 10 is applicable only to suits. 1929 L. 533. Where objections to an award are preferred in a Court no application under S. 10, C.P. Code, for stay of proceedings lies on the ground that a suit in respect of the same subject-matter has been instituted in another Court by the applicant. (1928 S. 169 and 1934 S. 38, Rel on.) 1935 S. 228.

EFFECT OF CONTRAVENTION OF SECTION.—A decree passed in contravention of S. 10 is not a nullity and cannot be disregarded in execution proceedings. 22 P.R. 1919=46 I.C. 419.

'THE MATTER IN ISSUE'.—The expression denotes the entire subject in controversy, and the section is not applicable when there is only 'a matter in issue' common to both the suits. 40 L.W. 715=153 I.C. 769=1935 M. 24=67 M.L.J. 748, 41 L.W. 449=1935 M.W.N. 123=155 I.C. 1002=1935 M. 112, 160 I.C. 805=1935 L. 816. See also 1929 A. 805.

"PREVIOUSLY INSTITUTED SUIT".—The date of presentation of plaint and not date of admission is the date of institution for the purpose of this section. 62 C. 1115. Suit first instituted in wrong Court and subsequently in proper Court—Suit instituted by opponent in another Court in the meantime—Which suit is previous. See 144 I.C. 56=1933 S. 177. In order to arrive at a correct decision as to whether a subsequent suit is "parallel" to a previous suit, so as to attract the application of S. 10, C.P. Code, regard must be had to the position of affairs at the time when each of the suits is respectively instituted and what would be the position of affairs when both the suits have been tried and finally determined. The real criterion to apply is, supposing the first suit was determined, would the position then be that when the second suit was instituted, the matters raised in the second suit were *res judicata* by reason of the decision in the prior suit. 61 C. 670=38 C.W.N. 818. Where stay of prior criminal proceedings was asked because of the institution of a civil suit subsequently, *held*, that the principle of S. 10 might be applied and stay refused. 151 I.C. 897=1934 A.L.J. 342=1934 All. 131.

SUIT IN NATIVE STATE.—High Court can order party before it not to proceed with suit in Native State. 1927 B. 135=29 Bom. L.R. 138.

SAME PARTIES, ETC.—See 15 L.W. 667=68 I.C. 167, 31 I.C. 25. See also notes under S. 11.

LITIGATING UNDER THE SAME TITLE.—See also notes under S. 11.

INHERENT POWERS.—Stay of suit under inherent powers. See S. 151, C.P. Code. 123 I.C. 50=1930 L. 527; 1933 L. 50; 141 I.C. 186=1933 L. 603.

POWERS OF THE HIGH COURT.—The High Court on its Original Side can order a party to a suit before it not to proceed with a suit instituted by him in a mufassal Court in such a way as to delay or embarrass the trial of the suit in the High Court. 44 B. 283.

BURDEN OF PROOF.—The onus is on the defendant to show that the case comes under S. 10. 39 I.C. 908=3 Pat. L.W. 327.

APPEAL.—An order by a single Judge of the High Court refusing to stay a suit under S. 10, C.P. Code, is a judgment within Cl. 15 of the Letters Patent and is appealable. 61 C. 670=38 C.W.N. 818.

REVISION.—The High Court can entertain an application for revision from an order under this section, if suitable grounds are disclosed. 33 P.L.R. 787=139 I.C. 48=1933 L. 34. An order under S. 10 is not a decision of a case within S. 115 and not liable to revision. 67 I.C. 870=4 L.L.J. 425=1922 L. 54. But see 139 I.C. 48. See also 141 I.C. 177=34 P.L.R. 86=1933 Lah. 191. An order staying a second suit under the inherent jurisdiction of the Court to avoid the risk of conflicting rulings may, if the risk be groundless, be revised under S. 107 of the Government of India Act. 141 I.C. 186=34 P.L.R. 123=1933 L. 605.

Explanation.—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

11. [S. 13.] No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they are any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Notes.

Sec. 11 APPLICATION OF SECTION.—Not exhaustive of the law of *res judicata*. 16 M. 141; 24 M.L.J. 469; 48 C. 499=40 M.L.J. 423 (P.C.); 26 M. 760; 39 C.L.J. 40=79 I.C. 520=1924 C. 600; 94 I.C. 423=1926 S. 236; 27 P.L.R. 504=1926 L. 603=8 L. 15; 56 C. 639; 117 I.C. 83=1929 L. 781, 1930 L. 487; 32 Bom. L.R. 389; 58 I.A. 158=53 A. 103=61 M.L.J. 196 (P.C.); 61 C. 1=151 I.C. 743=1934 C. 430, 146 I.C. 138=1933 O. 507 (F.B.); 158 I.C. 1074=1935 C. 596, 1935 L. 826. The section not being exhaustive, English decisions may be referred to ascertain the general principles governing the doctrine. 59 I.A. 247=10 K. 22=63 M.L.J. 64 (P.C.) But the general principles cannot be extended to cases which are within S. 11. 9 I.C. 910=1926 L. 670; 56 M.L.J. 52, 152 I.C. 894=1934 S. 112; 1935 C. 792, 40 C.W.N. 174; or where the application of doctrine is expressly forbidden by S. 11 1934 N. 178. If a case clearly comes within the purview of S. 11, then it is not allowable to fall back upon the more or less nebulous doctrine of the general principles of *res judicata*, and cases must be decided according to the language of S. 11 as interpreted by Courts. 14 L. 437=146 I.C. 880=1933 L. 646. See also 145 I.C. 334=1933 L. 614; 14 L. 369=141 I.C. 454=1933 L. 551. The principle of *res judicata* is mutual; and even a successful party may in some cases be bound by an adverse finding. 38 Bom. L.R. 853=165 I.C. 987=1936 B. 402. Foundation of rule is there should be an end to litigation as to any issue which has been determined between the parties by a Court of competent jurisdiction. 1 P. 174. See also 36 B. 283, 1929 M. 404, 61 C. 1=1934 C. 430, 60 C.L.J. 324. Where the decision of the Court in a previous suit determined that S. 12-A, Chota Nagpur Encumbered Estates Act, did not apply to a transaction, a Court, in a new suit between the same parties with regard to the same transaction, cannot try anew the issue as to its applicability. 63 I.A. 53=15 P. 203=40 C.W.N. 289=1936 P.C. 46=70 M.L.J. 122 (P.C.). See also 159 I.C. 462=1935 C. 725. The doctrine of *lis pendens* does not prevail over the rule of *res judicata* if the latter is applicable. 61 C. 494=38 C.W.N. 492=1934 C. 552. The principle of *res judicata* cannot be pleaded against a statute. But when the decision in the prior suit was not a pure question of law but was a mixed question of law and fact, the rule would apply. 1935 A.L.J. 490=156 I.C. 810=1935 A. 588. Certainty is essential for the application of the rule of *res judicata*. 1930 M.W.N. 729. Plea of

res judicata not a matter of jurisdiction but mixed question of law and fact—Decision on—Final. 9 P. 674. *Res judicata* differs from estoppel. One ousts the jurisdiction of the Court, while the other shuts the mouth of a party. 36 B. 283=29 S.L.R. 455=164 I.C. 43=1936 S. 99. Does not cover all cases of estoppel by judgment. 36 M. 141=24 M.L.J. 469; 40 A. 593 (P.C.). Allowing a decree to become barred will bar a suit again on the same cause of action. 33 C. 679, 41 M. 641=34 M.L.J. 167 (23 M. 629, 1188, 25 M. 300, Appr.); 99 I.C. 478=1927 O. 60. Dismissal of suit, if contention not established, bars a subsequent suit on the same contention in another form. 37 B. 224. A matter, which is *res judicata*, cannot be agitated afresh merely by reason of a suggestion, made in a judgment which was unnecessary to the decision of the case, that the party may bring another suit. 158 I.C. 995=1935 Pesh. 150. The rule of *res judicata* could not be invoked by the plaintiff whose contentions in the two suits were mutually contradictory. 1936 M. 988. Where an application was held by the Court as not being maintainable under S. 47, C.P. Code and the same was confirmed in appeal, a party to it cannot raise the question in a subsequent suit as to applicability of S. 47. 42 L.W. 442=1935 M. 615=69 M.L.J. 139. An order striking out a person's name from the list of defendants is in effect an order dismissing the suit as against him and the dismissal of the suit as against him is final unless and until it is set aside by way of appeal. When the dismissal becomes final, a subsequent suit seeking the same relief against such person does not lie. 152 I.C. 1079=1934 R. 154. Where causes of action are distinct, as many actions as there are causes of action can be brought. 27 C. 142; 1930 A.L.J. 913. A decree in an administration suit does not bar a suit for distribution of the shares declared by the decree. 64 I.C. 813. Where, in a suit for accounts of a dissolved partnership, there was found due to a defendant a certain amount, but he remained *ex parte* and did not choose to ask for a decree for that amount, there is nothing to prevent that party from claiming the amount due in the prior suit by a fresh suit. 1934 M. 665=67 M.L.J. 413. Dismissal of a prior suit for declaration of title by adverse possession no bar to a subsequent suit provided 12 years' adverse possession after the date of prior suit is proved. 33 A. 463, 1926 L. 668. The dismissal of a suit by reversioner for declaration that he was the next reversioner is no bar to a subsequent suit for possession of the property. 70 I.C. 685=20 A.L.

Explanation I.—The expression “former suit” shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Notes.

J. 672, 1931 A. 21 Dismissal of suit for partition under a *compromise* not carried out does not bar a *second suit for partition*. 37 A. 155, 36 M. 46, 35 M. 75; 20 C.L.J. 583. So also where the first decree, declaring the right of parties to partition, has not been given effect to. 37 B. 307=56 I.C. 610, 31 I.C. 205. But see 40 I.C. 820=1917 M.W.N. 327. Rule has no application to a case where a suit is withdrawn with *liberty for another suit*. 11 I.C. 831. Withdrawal of suit in appeal—Findings in judgment permitting withdrawal of suit after allowing appeal—Not *res judicata*. 39 C.W.N. 586. Where there are two *inconsistent decisions*, later decision operates as *res judicata*. 44 A. 319, 65 I.C. 877, 37 A. 531, 31 M.L.J. 219; 46 A. 220. See also 18 R.D. 414; 155 I.C. 726=1935 N. 122, 155 I.C. 571=1935 A. 645 Where there are two decrees operating as *res judicata*, the earlier decree must prevail 49 A. 606. The plea of *res judicata* is available not only as regards *final conclusions*. But also regarding the *findings* necessary for arriving at conclusions. 39 M. 1202=27 M.L.J. 529; 39 C.L.J. 40=79 I.C. 520 See also 1933 L. 534. To operate as *res judicata*, the finding must be material and necessary 61 C. 1=151 I.C. 743=1934 C. 430. There is no distinction, regarding *res judicata*, between questions of fact and questions of law 1935 R.D. 242 A judgment can operate as *res judicata* only in so far as it finally determines a controversy which is directly and substantially in issue in the case 18 N.L.J. 32 The plea of *res judicata* may be *waved by the party*. 31 M.L.J. 219; 155 I.C. 571=1935 A.W.R. 270=1935 A. 645 The party omitting to plead *res judicata* intentionally invites the Court to decide the case on the merits and having failed to secure a decision in his favour he cannot go behind it (*Ibid*) 48 C.L.J. 577=114 I.C. 129=1929 C. 163. Rule applies though the value of the property on a former occasion was higher. 1931 L. 217=134 I.C. 524

APPLICATION.—Prior decision on a point of jurisdiction is *res judicata* in subsequent suit relating to same subject-matter as on any other point. 39 P.L.R. 117

VOID DECREES OR DECREES OBTAINED BY FRAUD.—A void decree cannot operate as *res judicata*. 7 B. 408. A decree obtained by fraud or collusion, is nullity. 26 A. 272; 24 A. 242; 144 I.C. 524=1933 L. 573. So also a judgment of a Court not competent to decide it is a nullity 28 M. 42, 1930 A. 681, or an order without jurisdiction for the execution

of a decree, 1928 M. 746=114 I.C. 545, or decision on an issue which Court was not competent to decide 107 I.C. 895=1928 O. 298. It is open to any party to show that the judgment was obtained by fraud or collusion or that there was want of jurisdiction and in such case S. 11 would not apply. 1936 A. W.R. 1009=1936 A.L.J. 1162.

ERRONEOUS DECISIONS.—A Court empowered by law to try a suit has power to try it either rightly or wrongly A judgment of a Court having jurisdiction, however erroneous, cannot be a nullity and will operate as *res judicata*. 157 I.C. 917=1935 M. 835=69 M.L.J. 196. A *wrong decision* operates as *res judicata*. 60 I.C. 404; 1918 M.W.N. 580=49 I.C. 369; 10 Pat.L.T. 630; 1930 R. 294; 1931 A. 425; 1932 B. 257; I.R. 1933 M. 46; 18 R.D. 414, 1933 R. 383, 16 Pat.L.T. 448=158 I.C. 734=1935 P. 526 As to wrong decision on question of law, see 7 L.R. 21 (Rev.), 38 Bom.L.R. 853=165 I.C. 987=1936 B. 402, 162 I.C. 709=40 C.W.N. 627=1936 C. 200, 42 L.W. 446=1935 M. 835=69 M.L.J. 196; 14 P. 633=159 I.C. 173=16 Pat.L.T. 819. Even an issue of law wrongly decided does operate as *res judicata*, as S. 11 makes no distinction between an issue of fact and an issue of law, specially when there is identity of the matter in issue and also the identity of the causes of action 14 L. 442=143 I.C. 90 (2)=34 P.L.R. 452=1933 L. 325. As to wrong decision on mixed questions of law and fact, see 1926 O. 417, 65 M.L.J. 684=1933 M. 925. An erroneous decision on the *question of the construction of a deed* of transfer operates as a bar. 29 B. 339 (347) (P.C.), 10 C. 697; 41 C. 778; 31 M.L.J. 97; 59 I.A. 74=54 A. 93=62 M.L.J. 371 (P.C.), 1932 B. 257. An erroneous decision as to when the cause of action for a particular claim arises would be *res judicata*. 38 Bom.L.R. 853=165 I.C. 987=1936 B. 402. So also where a decision between the parties was considered by the Court and declared not to be *res judicata*, the latter decision, even if erroneous in law, operates as *res judicata*. 39 P.L.R. 117 When a Court trying a rent suit decides a question of title, if the decision is necessary for the purposes of that suit and the question is directly and substantially in issue between the parties, the decision, though erroneous, must be treated as constituting *res judicata*. 158 I.C. 734=16 Pat.L.T. 448=1935 P. 526. Whether distinction can be made between decisions on abstract questions of law and concrete questions such as construction of a particular document, see 45 B. 1260 in which 18 B. 525 is considered. Apparently no distinction can be made. 2 P. 771.

Notes.

CHANGE IN LAW.—WHETHER AFFECTS *res judicata*.—A change in the law or a different interpretation of it by the appellate Court cannot operate to reopen matters which had previously become *res judicata*. 121 M. 18; 56 C. 728 (F.B.). See also 26 M. 104. But see 65 M.L.J. 305=1933 M. 745 (Decision on procedure). Similarly what is not *res judicata*, at the time a suit is filed cannot have that effect by the change in the law. 85 I.C. 574=1925 M. 1107.

DECISION ON QUESTIONS OF LAW.—An erroneous decision on a point of law may be *res judicata*. 24 A. 138; 29 M. 225; 28 C. 318; 19 I.C. 244, 21 I.C. 979=19 C.L.J. 34, 15 I.C. 911=15 C.L.J. 684, 45 I.C. 252, 39 C. 848, 9 N.L.J. 183=96 I.C. 963=1926 N. 476, 46 B. 1260, 28 Bom.L.R. 876=1925 B. 481, 99 I.C. 528=1927 A. 206. But see 5 O.W.N. 50. An issue of law may be *res judicata* if the cause of action in the subsequent suit is the same as in the former suit. 9 I.C. 568=13 C.L.J. 119; 37 M.L.J. 554; 10 C. 1087, 15 A. 327; 26 M. 104; 31 B. 128, 28 M. 517. See also 1928 C. 777=1930 P. 585, 131 I.C. 878; 34 Bom.L.R. 198; 33 Bom.L.R. 1443. See also 14 L. 442 cited *supra*. Where a decision lays down what the law is and is found to be erroneous, it cannot have force of *res judicata* in a subsequent proceeding to recover a different relief. 39 C. 848; 32 M.L.J. 63; 32 C. 749, 22 B. 669; 1930 L. 907. An erroneous decision that cocoanut garden did not constitute improvement under S. 3 (4)(f), Madras Estates Land Act, should be confined to matters which existed at time of the decision. Hence that decision would not be *res judicata* with reference to areas and trees not in existence then. 45 L.W. 15=1937 M. 254=(1937) 1 M.L.J. 233 (F.B.). The decision on a question of law in one proceeding does not bar later proceeding except that the right established in favour of one party in the former proceeding cannot be questioned in a subsequent proceeding. 40 M. 989=31 M.L.J. 513. See also 30 M. 461, 32 C. 729, 49 C.L.J. 357=1929 C. 445, 53 B. 676, 31 P.L.R. 123, 36 L.W. 664. Where in a prior suit for rent, the defendants did not contend that the suit must be dismissed as the plaintiff had failed to comply with S. 194 of the Agra Tenancy Act, they are not debarred from raising the plea in the subsequent suit. 49 A. 918. The existence of a custom is a question of fact and an erroneous decision on the point operates as *res judicata* even though the subsequent suit relates to different properties. 47 I.C. 373. See also 94 I.C. 463=1926 A. 410; 119 I.C. 768=1929 L. 769 (1). But see 22 I.C. 138. As to question whether a custom is or is not opposed to public policy, see 144 I.C. 669=1933 L. 606. An issue of mixed law and fact stands on the same footing as an issue of fact for purposes of *res judicata*. 28 C. 318, 65 M.L.J. 684=1933 M. 925, 87 I.C. 811=1926 C. 80; 29 M. 225, 92 I.C. 769=1926 L. 251, 56 C. 728 (F.B.), 1932 P. 337 (construction of document); 14 L. 31=142 I.C. 724=1933 L. 274 (question whether a

document was an award or not); 14 L. 409=141 I.C. 577=1933 L. 594 (question of executability of a decree). As to decision on a question of procedure, see 65 M.L.J. 305=145 I.C. 397=1933 M. 745. Section does not apply where the decree is a nullity for want of jurisdiction. 1935 Nag. 28. The rule that estoppel by *res judicata* does not apply to a question of law has no force in the case of consent decree. 35 M. 75=21 M.L.J. 709. Decision based on an admission made by a legal practitioner on an erroneous conception of law is not *res judicata*. 6 R. 691.

RES JUDICATA IN SUITS FOR REDEMPTION.—If a decree in a redemption suit does not extinguish the right to redeem, it does not operate by way of *res judicata* so as to prevent the Courts under S. 11, C.P. Code, from trying a subsequent suit for redemption. 56 A. 561=61 I.A. 362=1934 P.C. 205=67 M.L.J. 813 (P.C.). The right of redemption could not be extinguished by the preliminary decree and could only be extinguished by a final decree. 75 I.C. 919=1923 L. 680. The right to redeem is not lost unless an order absolute is obtained under S. 93, T.P. Act (now O. 34, R. 8) and a fresh suit for redemption is not barred by the preliminary decree for redemption. 18 I.C. 326 (All.); 24 A. 44. See also 44 A. 730, 69 I.C. 167, 48 A. 17; 27 A.L.J. 761, 32 A. 215, 43 B. 334 (F.B.); 25 Bom.L.R. 211; 47 B. 692, 5 L. 371. As to cases in which the right of redemption was held to have been extinguished under the previous decree, see 46 B. 348, 39 M. 896=30 M.L.J. 13 following 25 M. 300 and 31 M. 354, 49 M. 691=50 M.L.J. 612; 18 C. 139, 85 I.C. 480=1925 All. 484. In the case of decree for sale obtained by a mortgagee who does not take further proceedings and bring the property to sale, the mortgagor can file a fresh suit for redemption though he fails to redeem under the original decree. 39 B. 41, 1930 B. 401. But in 39 M. 896=30 M.L.J. 13, it was held that whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption, there is in each case a conditional decree for redemption in favour of the mortgagor and a subsequent suit for redemption is barred. See also 49 M. 691=50 M.L.J. 612 reversing the decision cited in 1925 M. 1191. Where a decree provided payment of the mortgage-money in instalments, in default of which the mortgagee was to remain in possession and also reserved the right to redeem a subsequent suit to redeem not barred. 45 B. 1335. See also 23 A.L.J. 888=1926 A. 20. Second suit for redemption of mortgage—Maintainability—Decree in prior suit by *Melcharathdar*—Non-payment of mortgage-money—Second suit by *Jemmi* not barred. 1937 M. 213.

APPLICATION OF THE PRINCIPLE TO EXECUTION PROCEEDINGS.—The principle of *res judicata* applies to proceedings in execution of a decree. 31 C. 22, 24 A. 138; 2 P. 772; 11 I.A. 181 (P.C.); 47 C. 446, 92 I.C. 254=1925 L. 640; 1926 N. 476; 102 I.C. 94=1926 O. 216; 100 I.C. 23=9 L.L.J. 173, 99 I.C. 1006=

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1927 L. 179; 1929 R. 182; 51 A. 346; 110 I.C. 337, 1930 O. 65=5 Luck. 456; 1930 O. 305; 123 I.C. 881; 10 P. 607; 33 Bom.L.R. 781; *ibid.*, 797; 36 C.W.N. 367; 15 L. 869=1934 L. 316; 1934 R. 231, 64 M.L.J. 629=1933 M. 466=1935 L. 949. It is not every order passed in execution, but only certain description of orders that have operation as *res judicata*. 17 C. 57. Although the general principle of *res judicata* is applicable to execution proceedings the special rules laid down in explanations to S. 11 ought not to be applied to execution cases. 3 P.L.T. 403=67 I.C. 656=1922 P. 289, 37 A. 589, 24 M. 681, 70 I.C. 530=1923 R. 119 (2). See also 64 M.L.J. 629, 1933 N. 287. Finding on an unnecessary point in previous execution application will not bar the same being questioned in subsequent application. 39 P.L.R. 189 Expl. 4 should not be extended to execution proceedings and the order made in execution proceedings should not have the force of *res judicata* unless the point raised in subsequent proceedings was actually raised in former proceedings and decided 1933 N. 287. See also 144 I.C. 365=1933 M. 595. Either expressly or impliedly and on the merits, 1937 L. 211. Where execution application is dismissed as not maintainable in the form in which it was brought, and the liability of the judgment-debtor was not considered, it is not *res judicata* as regards the liability of the judgment-debtor. 1937 C. 226. But it would be otherwise if the liability had been considered and decided. (*Ibid.*) A decision in one stage of an application is not *res judicata* in another stage of the same application 40 M. 1016. As to the extent to which the rule applies to successive applications in execution, see 45 A. 735, 95 I.C. 31, 3 O.W.N. 241=1926 O. 291 and cases referred to therein, 1926 P. 478; 1926 N. 164; 48 A. 245, 48 A. 201, 1926 M. 177, 7 Pat L.T. 353=1924 P. 628, 1926 M.W.N. 33=1926 M. 177; 1926 N. 164, 33 Bom.L.R. 797, 36 C.W.N. 367. An order *ultra vires* does not operate as *res judicata* 4 P. 440=1925 P. 807. A decision in a previous application to execute a maintenance decree to the effect that the application is barred is no bar to a subsequent application to recover maintenance for a different period. 18 M. 482, 30 M. 504, 46 B. 467 (limitation); 34 A. 518 (where the order was made *ex parte*). But see 6 B. 54; 9 C. 65. When the decision on the prior application was one on a question of procedure as it then stood, it does not operate as *res judicata* when that procedure itself is changed by the statute law. 39 M. 923=30 M.L.J. 460. The decision as to whether the execution of a decree is time-barred or not, though erroneous, will operate as *res judicata* in a subsequent application for execution 24 A. 282, 24 M. 669. See also 40 M.L.J. 556; 2 P. 771, 46 B. 467; 1927 O. 216, 102 I.C. 94, 1 Luck. 171. But it has been held that an order that a particular application for the recovery of

mesne profits awarded by a decree is not barred by the 12 years' rule under S. 48, C.P. Code, is no bar to a plea by the judgment-debtor that a subsequent application for the same purpose is barred by that rule. 53 M. L.J. 440. Where a plea of limitation was raised by the judgment-debtor in a previous stage of an execution application, but was rejected, the same plea could not be raised again in a subsequent stage of the execution proceedings. 48 I.A. 45=40 M.L.J. 197 (P.C.). The judgment-debtor would be precluded from raising the contention, though the decision is arrived at *ex parte*, after notice to the judgment-debtor. 66 I.C. 751; 1927 M. 813; 45 B. 453, 44 B. 227, 1927 M. 149, 113 I.C. 92; 10 P. 607; 159 I.C. 641=1935 L. 844. But where attachment order was made *ex parte*, and there was no personal service nor declaration by Court that there was sufficient service of notice, the question of limitation can be raised in respect of a later execution petition 1937 M. 84. In some extreme cases even when there is declaration as to sufficiency of service made by Court, judgment-debtor may be permitted to raise question of limitation 1935 A.W.R. 1371=1935 A.L.J. 1189 (F.B.). Where the Court after examining the decree-holder and holding that the application for execution was in time ordered notice to the defendant and the latter though served did not appear, but the decree-holder also being absent and not taking steps the execution was dismissed, the judgment-debtor can in a subsequent application for execution raise the plea that the prior application was beyond the period of limitation, as there was no decision on the question of limitation in the prior execution case. 38 C.W.N. 1144=40 C.W.N. 510. But where the judgment-debtor appeared and allowed an order of attachment to become final, he could not subsequently contend that the decree was barred by time. 151 I.C. 1015=30 C.W.N. 163=1934 C. 465. The *ex parte* order need not be written in *extenso* covering all objections raisable by judgment-debtor. The subsequent dismissal of execution petition for non-prosecution or other cause does not affect the bar of *res judicata* 1928 M. 1052. Where notice is not served the rule has no application. 30 Bom. L.R. 38, 1929 L. 334, 36 Bom.L.R. 115=150 I.C. 866=1934 B. 113, 146 I.C. 317=1933 M. 844. But want of notice to the judgment-debtors will not make the dismissal of the execution petition put in by the judgment creditor any the less *res judicata* against the latter. 145 I.C. 397=1933 M. 745=65 M.L.J. 305. Even in an application for transfer of a decree, it is open to the judgment-debtor to plead limitation and he ought to do so. 47 M. 641=47 M.L.J. 4. But see 131 I.C. 702=157 I.C. 971=1935 P. 485. If a judgment debtor after receiving notice to show cause why the decree should not be transferred to another Court for execution does not raise all his objections to execution such as limitation, discharge, etc., it will not be open to him to raise such pleas in a later execution petition on the

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ground of constructive *res judicata*. 1929 M. 199. See also 92 I.C. 47=1926 N 200; 1 Luck. 171; 1928 M.W.N. 152. But not where no notice on judgment-debtor was personally served and no declaration of due service was made by the Court. 44 L.W. 460=1936 M. 812=71 M.L.J. 317. A question of the liability of a judgment-debtor may be treated as *res judicata* in subsequent proceedings in execution of the same decree when it has been dealt with and disposed of at an earlier stage of those proceedings even by a necessary implication. 35 P.L.R. 692=1934 L. 637 (2). The non-appearance in a petition to transfer a decree with which defendant 4 had no connection cannot create any constructive *res judicata* that the property of the testator in the hands of that defendant was liable to be proceeded against in execution. 144 I.C. 30=1933 M. 508. It cannot be said that the principle of constructive *res judicata* has no application to execution proceedings. Where the effect of the prior decision is that the application for execution is held as maintainable it has the effect of deciding that the person at whose instance the application is held maintainable has a right to maintain it. 151 I.C. 913 (2)=38 C.W.N. 141=1934 C. 472. See also 1933 L. 3=144 I.C. 259 (Objection as to the power of an agent to file execution not raised in previous application) But the principle is not applicable to application for restitution or to application for execution of portion of a decree. 38 P.L.R. 723=163 I.C. 97=1936 L. 246. An order in execution to the effect that the decree is not executable is *res judicata* in subsequent execution proceedings. 4 P.L.J. 330=47 I.C. 154. An objection that a decree could not be executed not raised at the first execution application, could not be raised in a subsequent stage. 44 A. 350; 4 Pat.L.J. 213; 80 I.C. 905. See also 31 C. 22, 99 I.C. 870; 151 I.C. 285=1934 Pesh. 64; 38 P.L.R. 580, 160 I.C. 448=1936 Pesh. 9. But where notice of execution petition was affixed on the outer door of the defendant's house when he was absent and there was no declaration by Court that the notice was duly served, it was not due service for the purpose of constructive *res judicata* and the defendant can in subsequent proceedings show that the application was out of time. 142 I.C. 765=64 M.L.J. 637=1933 M. 406. See also 64 M.L.J. 629=1933 M. 466; 1937 M. 84. A decision as to limitation in an execution application filed by the attaching creditor is not *res judicata* in a subsequent execution proceedings between the decree-holder and the judgment-debtor. 143 I.C. 542=1933 P. 210. The fact that the subsequent application for execution relates to different items of property does not take the case out of the rule. 45 M.L.J. 71. Judgment-debtor not objecting to addition as supplemental judgment-debtor or purchaser of equity of redemption during pendency of execution of mortgage decree is precluded from objecting later on that the purchase was only benami for the decree-holder. 1929

M. 404. But an omission to raise the objection to a wrong claim in execution, is not *res judicata* in a latter execution application, proceedings. 44 A. 159; 1933 A. 922. But see 1934 C. 472 cited *supra*. Failure to raise a plea of payment or to dispute correctness of amount claimed in execution, will not bar judgment-debtor from raising the same at a later stage or in subsequent proceedings. 45 L.W. 291=(1937) 1 M.L.J. 296. Finding as to the value of property in an application to set aside execution sale is not binding on auction purchaser at a subsequent sale. 105 I.C. 153. Where a judgment-debtor omits to raise the objection that an application in execution is not made to the proper Court having jurisdiction, he is not precluded from contending that subsequent applications of which he has had no notice, are also not made to the proper Court. 42 L.W. 856=1935 M. 935=69 M.L.J. 466. The principle of constructive *res judicata* should not be applied to execution proceedings unless the decision of the question subsequently sought to be agitated was given expressly or by necessary implication or must be deemed to have been implied in the previous decision. 40 M. 780. See also 144 I.C. 365=1933 M. 595. Even if a point is decided by necessary implication, it operates as *res judicata* in subsequent proceedings in the course of the same execution. Where a declaratory decree for maintenance was executed from time to time, without protest by the judgment-debtor, he cannot be allowed subsequently to object on the ground that the decree, being merely declaratory, was not executable. 14 L. 409=141 I.C. 577=1933 L. 594. See *contra* 157 I.C. 865=1935 Pesh. 119.

Per Sulaiman, C. J.—(1) Where there has been an express adjudication by the Court in the presence of parties, then the question must be considered to have been finally decided, no matter whether it is raised again at a subsequent stage of the same proceeding, or in a subsequent execution proceeding. (2) Where an objection is taken but is dismissed or struck off, even though not on the merits, and the application for execution becomes fructuous, the judgment-debtor is debarred from raising the question of the invalidity of that application. (3) Where an objection to execution is taken, but it is not dismissed on the merits or is dismissed for default, and the application for execution does not become fructuous, the judgment-debtor is not debarred from subsequently raising the question that that application was not within limitation. (4) Where no objection to the execution is taken but the application becomes partly or wholly fructuous and such fructification necessarily involves, the assumption that the application was made within limitation, then after such fructification the judgment-debtor is debarred by the principle of *res judicata* from raising the question that that application was not within limitation. (5) Where no objection is taken but the application for execution does not fructify, the judgment-debtor

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is not debarred by the principle of *res judicata* from raising the question of limitation later 1935 A.W.R. 1371=1935 A.L.J. 1189 (F.B.). S. 11, Expl. IV does not extend to execution proceedings. An issue not raised in a claim proceeding can be subsequently raised in an application under O. 21 R. 50 (2). 44 A. 130. See also 90 I.C. 276; 1925 P. 588. But see 15 L. 869=35 P.L.R. 429=155 I.C. 286=1935 L. 200; 1936 L. 942, 1936 L. 167, holding that the principle of constructive *res judicata* as embodied in Expl. IV applies to execution proceedings. While raising his objections in answer to a notice under O. 21, R. 12, the judgment-debtor is not bound to raise all other points than the maintainability of execution application. The dismissal of that objection does not operate as *res judicata* so as to preclude a subsequent objection by him as to the mode of execution 146 I.C. 1024=1933 L. 826. See also 1928 M. 203. An objection of a judgment-debtor in execution proceedings which is dismissed for default does not operate as *res judicata* against the judgment-debtor to prevent him from making the same objection again. 1935 A.L.J. 403=157 I.C. 426=1935 A. 502; 1935 A.L.J. 278=153 I.C. 508=1935 A. 238. But see 1935 C. 816. So also where no order was passed by the Court on an application and where the proceeding itself was withdrawn without the Court considering the pleas raised by the party. 158 I.C. 891=1935 M. 786. Nor where the original decree-holder had ceased to prosecute his application and the assignees did not present a fresh execution application under O. 21, R. 16, C. P. Code 1935 L. 966. Where after the execution application has been registered a notice is issued to the judgment-debtor under O. 21, R. 22, C. P. Code, but on the date on which he is asked to show cause, he is absent and fails to object to the execution on the ground that the application is barred by limitation, and the execution petition itself is dismissed for default, the judgment-debtor is not barred by the principle of constructive *res judicata* from raising the question of limitation in a subsequent application 159 I.C. 637=39 C.W.N. 1206=1935 C. 664. See also 39 C.W.N. 583=156 I.C. 604=1935 C. 306. Judgment-debtor having waived proclamation is barred from objecting to absence of attachment after several adjournments. 139 I.C. 866; 1928 M. 203; 1930 M. 414=120 I.C. 863, 1930 M.W.N. 729. Omission to appear and settle terms does not bar a plea that property was not liable to attachment in execution. 46 M. 768=45 M. L.J. 346. An order of attachment before judgment maintained in spite of objections does not act as *res judicata* in execution proceedings as to attachability of property attached. 150 I.C. 213=1934 L. 153. Omission by judgment-debtor to object to the execution being taken out for an excessive amount does not bar the same objection in later petitions. 1929 M. 903. See also 1929 R. 172; 143 I.C. 783=1933 N. 182. But a decree-holder having recovered by execution from

judgment-debtor the amount stated in his execution petition as being due under the decree is precluded from putting fresh execution petition for further sums as being due under decree. 119 I.C. 223 (2)=1929 R. 182. But an erroneous order recording adjustment passed without notice to parties does not bar a subsequent application for recovery of a larger sum as due. 142 I.C. 579=1933 S. 112. A plea that an application for setting aside an execution sale is barred cannot be set up by the auction-purchaser at a late stage of the proceeding. 48 B. 638. Where no finding is given by a Court on an issue as to the jurisdiction of a Court to pass certain order which forms the basis of the execution proceedings, the question of the application of the doctrine of *res judicata* cannot arise in such a case 159 I.C. 739=1935 N. 250 (F.B.). Where an objection petition in an execution proceeding is dismissed for non-prosecution, there is no adjudication on the merits and it cannot be *res judicata* 67 I.C. 663=1923 C. 287. Also dismissal for default of an execution application. 1929 B. 217; 160 I.C. 835=44 L.W. 565=71 M.L.J. 490. But see 144 I.C. 488=1933 L. 697. Where the controversy was between the legal representatives of the decree-holder and an alleged assignee of a portion of the decree regarding the right to execute the decree and where the previous application by the legal representatives was dismissed for default of appearance. See also 163 I.C. 38=1936 P. 616. An order passed by the Court *ex parte* after notice duly served, binds the defendant on general principle of *res judicata* as much as a contested order. 37 M. 462=26 M.L.J. 189, 26 M.L.J. 83. See also 45 B. 453, 44 B. 227, 1927 M. 149, 10 P. 607, 1927 M. 813. An omission to object to the execution application being not in accordance with law operates as *res judicata*. 1928 C. 861. But see 1935 A.L.J. 642=155 I.C. 673=1935 A. 727. Omission to object to assignment of decree by judgment-debtor after due notice and the recognition of assignment by Court bars judgment-debtor from questioning assignment at later stage. 40 C.W.N. 1393. Even where judgment-debtor objects and the Court proceeds with execution with intervening assignee substituted as decree-holder, the assignment, by implication, operates as *res judicata* 1935 R. 174. The dismissal of an execution petition bars a fresh execution petition for a different relief if based on the same question of fact 122 I.C. 579=1929 M. 404. As to effect of dismissal of an application for delivery after an order for delivery had been passed once, see 65 M.L.J. 305=145 I.C. 397=1933 M. 745. The issue of notice to legal representatives of deceased judgment-debtor under O. 21, R. 22 does not involve the question whether a particular property belongs or not to the deceased judgment-debtor and that question is not barred by *res judicata* in later proceedings 1928 M. 746=114 I.C. 545; 60 M.L.J. 628=1931 M. 303. Where an application is made in a pending

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execution to bring on record a person as the legal representative of the judgment-debtor and such person's objection for his being impleaded is dismissed, he can subsequently raise the plea that the execution is barred by limitation as he is not bound to take this objection when he was sought to be impleaded. 150 I.C. 947=11 O.W.N. 814=1934 O. 289. Where an objection to sale on the ground that the land was service inam and was not liable to be sold was dismissed, the same objection cannot be raised in subsequent execution proceedings against some other items of the same survey number, even though a decision of the Collector was obtained in the meantime under the Madras Hereditary Village Officers Act that the land was service inam land 140 I.C. 779=1933 M. 130. Order in execution proceeding regarding nature of land to be sold is not final and cannot operate as *res judicata* to a later suit. 7 O.W.N. 1162=1931 O. 62. Where however judgment-debtor with full knowledge allows settlement of proclamation, and the sale, he cannot afterwards impeach the sale on the ground that the mortgagee has caused to be sold in execution proceedings properties which were not comprised in the suit mortgage and which could not therefore be lawfully sold. 40 C.W.N. 428. An over allowing claim to rateable distribution becomes final when not appealed against or set aside otherwise, and principles of *res judicata* would apply to it. 1936 L. 891. The principle of *res judicata* must be applied wherever it is relevant, and a decision between the parties in execution proceedings operates as *res judicata* in a subsequent suit between them. 158 I.C. 1059=37 Bom.L.R. 123=1935 B. 174.

APPLICATION OF PRINCIPLE TO OTHER MISCELLANEOUS PROCEEDINGS.—Dismissal of an application to set aside an *ex parte* decree (not a suit within the meaning of the section) on the ground of non-service of summons would bar a subsequent suit to set aside the decree on the same ground. 1 R. 500, 14 P. 439=16 Pat.L.T. 647=1935 P. 458. Where an application for setting aside an *ex parte* decree is withdrawn as being defective in certain formalities, a second application for the same purpose is not barred by *res judicata* by reason of the prior application having been dismissed. 152 I.C. 974=11 O.W.N. 1639=1935 O. 35. Where an application to amend a decree has once been refused on the merits, the decision is conclusive between the parties, and no further applications would lie. 27 I. C. 300, 39 C. 265 See also 107 I.C. 390=1928 L. 244. It has however been held that a suit lies 40 C. 541 Where in a proceeding under O. 22, R. 5, a certain person is (or is not) held to be the legal representative of a deceased party the same question can be re-agitated in a separate suit and is not barred by the rule of *res judicata* 1924 L. 465; 1936 A.L.J. 622=163 I.C. 283=1936 A. 412 (82 A. 109, Foll. and 24 A.L.J. 546, Diss.) A construction placed on particulars of decree by

the trial Court is not *res judicata* in execution of the decree of appellate Court which confirmed the decree of the trial Court but did not discuss or refer to the meaning of those words 14 L. 591=142 I.C. 408=1933 L. 352 Where an application under S. 151, C.P. Code, to set aside a compromise decree was summarily dismissed on the ground that such relief could not be given under S. 151, a suit for setting aside the decree on the ground of fraud is not barred. So also the rejection of an application for review 1930 O. 112; 5 P. 276 A question at issue between the parties once heard and finally decided, binds the parties at subsequent stages of the same suit, under general principles of law, though not under S. 11. 48 C. 499=40 M.L.J. 423, 94 I.C. 313=1926 O. 420, 122 I.C. 724; 1930 P. 260, 1930 O. 378 (F.B.) Dismissal of a petition owing to failure of petitioner to produce evidence in support of the facts alleged in the petition is a dismissal on the merits and so is binding on the Court as well as the parties. 1929 M. 404. Rejection of application for a rule does not bar Court from granting rule on a subsequent occasion in interest of justice. 161 I.C. 26=1936 P. 119. A dismissal of an application, on the ground that it was not accompanied with a vakalat-nama does not operate as *res judicata* in a subsequent application in respect of the same subject-matter. 152 I.C. 110=11 O.W.N. 1373=1934 O. 491. See also 152 I.C. 974 (Application withdrawn as defective in certain formalities Failure to raise the plea of non-transferability by the mortgagors in the suit before the passing of the decree does not prevent him from raising it in execution 48 A. 385. The validity of an order made at one stage of litigation unless forthwith challenged by an appropriate proceeding in a superior tribunal is conclusive between the parties and cannot be questioned or collaterally attacked at a later stage. 70 I.C. 6=34 C.L.J. 415; 42 I.C. 392, 39 C.L.J. 251=81 I.C. 527; 138 I.C. 103, 150 I.C. 735=1934 L. 416. See also 1934 M. 292; 8 L. 477; 144 I.C. 978=1933 O. 207. Question of title to property decided by Civil Court cannot be raised again under S. 4, Provincial Insolvency Act. 38 P. L.R. 757=163 I.C. 520 Finding of Court in insolvency proceedings that secured creditor has relinquished his security for benefit of creditors is *res judicata* and cannot be agitated afterwards. 14 R. 529=164 I.C. 1061=1936 R. 393. Where an application under S. 22 of the Insolvency Act is dismissed on the merits, the same issue cannot be once again raised in the ordinary Civil Courts. 39 A. 626; 41 A. 378; 63 M.L.J. 778 (under Ss. 4 and 54 of the Prov. Ins. Act). 39 A. 626, 41 A. 378, 1933 N. 373. Insolvency proceedings are not suits within the meaning of S. 11. Where in an application in insolvency the Court decided that certain persons were not partners a subsequent suit for determining that those persons were partners, is not barred by *res judicata*. 37 C.W.N. 390=1933 C. 673. But where in a proceeding between Official Assignee and third person it was found by Insol-

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venue Court that a certain firm was a branch of the insolvent firm, and the decision was necessary for the question before it and was upheld by High Court on appeal, it was held that the decision operated as *res judicata* between the parties. 14 R. 652. But in a *petition for adjudication* questions as to title to property as between the debtor and others cannot properly arise for determination, and a decision at that stage cannot be regarded as a final determination. 156 I.C. 537=42 L. W. 7=1935 M. 634 As to partition proceedings in revenue courts, see 130 I.C. 382. Where a revenue suit is instituted for ejecting the tenants and this is the only jurisdiction exclusively vested in the Revenue Courts, that Court cannot determine the question of title in that case and its decision therefore cannot operate so as to prevent the Civil Courts from entertaining the subsequent suit, which involves the question of title 1935 L. 739. As to different application in Revenue Court regarding same subject-matter, see 15 L.R. 361 (Rev.)=18 R.D. 331 As to the effect of proceedings for the correction of revenue papers in a subsequent suit, see 14 L.R. 27 (Rev.)=17 R.D. 23. The principle of *res judicata* is applicable to proceedings taken under the U.P. Land Revenue Act. 14 L.R. 298 (Rev.)=17 R.D. 418. See also 14 L. R. 147 (Rev.)=17 R.D. 232 The decision in *qabiz ghaur qabiz* proceedings cannot operate as *res judicata*, when the parties are not present and no issues are struck. 1936 R.D. 44. An order by the Assistant Record Officer passed in the course of revision of records declaring a particular person as an occupancy tenant, does not operate as *res judicata* in a subsequent suit to eject that person as a non-occupancy tenant. 1935 R.D. 407. In proceedings for demarcation of areas and fixing rent in the course of mutation, defendant claimed exproprietary rights, but they were disallowed. Subsequently when the landholder sued to eject him, held, that the disallowance of his claim in prior mutation proceedings did not operate as *res judicata* but that it was a distinctively relevant fact. 18 R.D. 580=15 L.R. 681 (Rev.). Where application for mutation has been dismissed, fresh application under S. 34, U.P. Land Revenue Act, on same grounds and in respect of same succession or transfer is not maintainable. 18 R.D. 711 (1)=16 L.R. 104 (Rev.) The decision on a question of title, in proceedings under the Land Acquisition Act, to apportion the compensation payable, does not operate as *res judicata*. 20 M. 269. See also 12 C. 484 (P.C.); 34 C. 466; 45 M. 320=43 M.L.J. 78; 56 B. 50 An order in a claim case, on the validity of a wakf is not *res judicata* in a suit between the same parties, in which the property in dispute is not the same as that in the claim case though both were included in the wakf 44 C. 698=37 I.C. 887. A decision in a previous proceeding for letters of administration, negating the claim of A as heir of the deceased, arrived at after hearing full evidence, bars a subsequent

suit by A for declaration that she is the heir of the deceased. 1 R. 258; 36 C.W.N. 583=164 I.C. 743=1936 R. 401. The finding of a Court under the Succession Act with regard to the genuineness or otherwise of a will is conclusive and operates as *res judicata* against the parties affected [1914 Bom. 8 (F.B.), Foll.] 161 I.C. 47=1936 Pesh. 39. An order passed after contest in a probate proceeding is *res judicata* in any subsequent proceeding of any sort against the caveators who contested it as also those who had an opportunity of putting forward their objection 46 M.L.J. 583. See also 57 I.A. 24=58 M.L.J. 171 (P.C.), 36 C.W.N. 583=1932 C. 634. But an order passed on compromise in such proceeding cannot operate as a bar to an application for probate of the same will. 51 C. 745 An order dismissing the application of a party to revoke the grant of probate is conclusive and operates as *res judicata* in subsequent proceedings. The unsuccessful party cannot therefore re-agitate the matter by entering caveat in a subsequent application for a fresh grant. The fact that the grant had been revoked in the meanwhile at the instance of another person does not remove the bar. The revocation of a grant is not a revocation for all persons, and the parties who have once unsuccessfully attempted to get it revoked cannot come in again 39 C.W.N. 1071. A decision given in a case under S. 37 of the Agra Tenancy Act that certain land is ancestral land bars a subsequent suit by the defeated party for declaration that the land was separately acquired by his branch 14 L.R. 141 (Rev.)=17 R.D. 239 Proceedings taken under S. 77 of the Registration Act cannot operate as *res judicata* so as to bar a suit for specific performance 54 A. 68 Word 'suit' in S. 11 includes also arbitration proceedings 41 C.W.N. 193 Objection raised before arbitration tribunal may also be *res judicata* in subsequent suit 1932 L. 378, 1926 S. 42; 1928 S. 20; 1930 S. 195, 1936 L. 865

"FORMER SUIT"—For meaning of "suit", see 1930 P. 588, 13 Pat.L.T. 793 A decision in proceedings for dispaupering will not act as *res judicata* in the case when the issue is before the Court as an issue in the suit, as the proceedings for dispaupering is not a "former suit" within the meaning of S. 11 149 I.C. 1004=1934 A. 323. An application to file an award under para. 20 of C.P. Code does not bar a subsequent suit for recovery of the properties covered by that award. 147 I.C. 684=1934 M. 68. The expression denotes a previously decided suit under Expt. I, and the same rule applies to appeals 37 C.L.J. 184=74 I.C. 591; 12 A. 678; 12 P. 139=141 I.C. 762=1933 P. 78; 32 A. 67; 8 P. 107. Judgments coming into existence during the pendency of proceedings by way of appeal or revision are not excluded from the operation of the rule of *res judicata*, if such judgments are allowed to become final. 59 M. 777=43 L.W. 189=1936 M. 190=70 M.L.J. 223. Therefore if a suit is decided between the same parties by a Court establishing the title

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of one of the parties to the property in dispute, and such decision has become final, the decision constitutes the question of title *res judicata*, even for the purpose of an appeal or revision from a decree in another suit between the same parties in another Court though the decision relied on as *res judicata* has been given only after the decision appealed against or sought to be revised (*Ibid*).

A finding based on evidence in appeal on a ground different from that given by the lower Court would operate as *res judicata*, 58 B. 544=36 Bom. L.R. 612=1934 B 313. Where there were two suits in the primary Court, decided by a common judgment but concluded by separate decrees and an appeal is preferred only in the first suit, while none is preferred from the decree in the second suit, the decree made in the latter becomes final and operates as *res judicata* so as to bar the appeal 37 C.L.J. 184=74 I.C. 591; 1924 P. 823, 74 I.C. 583. So also in two cross suits for damages involving the same issue and ending in two separate judgments, decreeing the one and dismissing the other. 34 C.L.J. 281=64 I.C. 574, 74 I.C. 583; 35 A. 187; 19 I.C. 76, 11 A.L.J. 214 (where one appeal abates by reason of the death of the appellant). 2 R 623 (where appeal from one decree dismissed). But if there is nothing prejudicial to the appellant in the decree from which no appeal has been brought, which is not raised and cannot be set right if the appeal which he has brought succeeds the right of appeal is not barred by *res judicata*. 45 A 506 (F.B.); 87 I.C. 804=1925 A. 488.

"MATTER DIRECTLY AND SUBSTANTIALLY IN ISSUE"—The decision of an issue is *res judicata* only when the issue arises directly and not incidentally having regard to the subject-matter of the particular suit or proceeding. 14 P. 70=157 I.C. 433=1935 P 306. See also 65 C.L.J. 90=1937 C. 237. The expression "matter in issue" in S 11 of the Code is distinct from the subject-matter and the object of the suit as well as from the relief that may be asked for in it, and the cause of action on which it is based and the rule of *res judicata* requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different 33 C.W.N. 876. See also 1933 O 535; 37 Bom L.R. 62=1935 B. 131. The matter in dispute should have been put in issue and then decided. 62 M.L.J. 221=1932 P.C. 50=36 C.W.N. 365 (P.C.) See also 56 C.L.J. 369. It should have been put directly in issue. 60 C.L.J. 324=1935 C. 256. The word "directly" seems to be used in contradistinction to the words "incidentally" and "collaterally". The words "substantially" means "in effect though not in express terms" 25 C 136. In a rent suit by a landlord against a tenant, there being no dispute as to the relationship of landlord and tenant, or as to the rate of rent or of the period in arrears, an issue as to whether the landlord has included in the suit all the plots of land covered by the *jamas* in question, is

only an incidental or collateral issue. 62 C.L.J. 517=1936 C. 772. But the relationship of landlord and tenant is the very foundation of a decree in a suit for rent and therefore when such a suit has been decreed the Courts must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit 165 I.C. 623=17 Pat L.T. 633=1936 P. 556. The dismissal of a suit which was primarily one between a landlord and tenant, does not bar a subsequent suit based on title, the plaintiff claiming in the second rights, as against the defendants, which it was not possible to raise in the prior suit. 155 I.C. 7=37 Bom L.R. 62=1935 B. 131. A decision on a point not substantially in issue in a suit cannot operate as *res judicata* 17 I.C. 860. See also 1926 P.C. 63=30 C.W.N. 673; 96 I.C. 625, 50 M.L.J. 136 (P.C.), 7 Pat L.T. 150=1926 P. 87, 48 A. 17; 1926 C. 1228, *ibid* 513, 1927 B 145 (Case-law reviewed), 1933 L 920 Under Expl. III the matter must have been alleged by one party and either denied or admitted by the other 6 A 358, it does matter whether the cause of action is the same or different provided the matter directly and substantially in issue, has been directly in issue in a former suit between the same parties. 2 P. 772. But see 144 I.C. 734=1933 R. 106 (First suit for rent, second suit for damages for use and occupation), 58 C.L.J. 145=37 C.W.N. 1144 (Question of abandonment of holding in the second suit after the termination of the earlier suit). In order to see what was in issue in a suit, or what has been heard or decided, the pleadings and the judgment must be looked at and not merely the decree. 37 I.C. 674=14 A.L.J. 1171, 12 I.C. 9=14 C.L.J. 220, 51 I.C. 981=1919 P. 393, 21 A. 251, 16 C. 173; 24 I.A. 33, 29 M. 42, 33 C. 116. See also 150 I.C. 519=1934 O. 265. If a question was directly and substantially in issue in the previous case it will operate as *res judicata* though decided on other grounds as well 41 I.C. 479. But where all issues framed in former suit were decided against plaintiff, yet eventually decision of suit was based on one issue only the bar of *res judicata* will not apply as to other issues 161 I.C. 63=1936 Pesh. 61. For a matter to be in issue under S. 11, it is not necessary that an express issue should be framed on it, but it is sufficient if a decision about it is necessary for the decree. 9 L.W. 84=52 I.C. 258; 53 C. 837; 58 C.L.J. 196, 159 I.C. 45=1935 R. 118. But see 62 M.L.J. 221 (P.C.). Or if raised in the pleadings and decided after arguments. 113 I.C. 155. The decision in a previous case on an issue which did not arise at all, cannot operate as *res judicata* in any subsequent suit 43 I.C. 754, 13 L 524. As to when a decision on an irrelevant issue can operate as *res judicata*, see 102 I.C. 28(2), 1927 M. 643=103 I.C. 90; 33 Bom.L.R. 1303; 1937 M. 114. Finding on question not necessary for decision of former suit, and not forming basis of decision would not be *res judicata*. 1936 C. 203; 1935 C. 733. Especially where appellate Court held that

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the question did not arise at all in the former suit. 165 I.C. 213=17 Pat.L.T. 677 It is the *matter in issue* and *not the subject-matter of the suit* that forms the essential test of *res judicata*. 13 B. 25; 1925 O. 444, 89 I.C. 282, 63 C. 550 Matter in issue in suit need not be in issue in appeal. 4 A.W.R. 1484=153 I.C. 497=1935 A. 268 A suit relating to a $\frac{1}{2}$ share in property covered by a deed of gift is not barred by *res judicata* by reason of a previous litigation relating to $\frac{1}{2}$ share retained by the donor, when the cause of action is distinctly different and the questions involved in the suit were not substantially and directly in issue in the previous suit. 1936 R.D. 275=1936 O.W.N. 582. Where the question whether a particular sale-deed was a valid document was directly and substantially in issue in the previous suit, the decision of the issue is *res judicata* though the property involved in the subsequent suit is different from the one which was the subject of the prior suit. 45 A. 515, 4 R. 8, 106 I.C. 861 (2)=1928 N. 112 So also where the question decided is as to the validity of an adoption. 8 M. 219, 2 I.A. 283; 13 A. 53, 13 B. 25; 24 A. 112; 30 A. 470, or as to the status of one party in relation to the other. 152 I.C. 894=1934 S. 112. Ejectment suit in respect of certain items—Defendant's plea that village is an unsettled jaghir and that they have occupancy rights—Court's decision negating the pleas without deciding whether the village is an estate is no bar to the plea of occupancy rights being raised in subsequent suit in respect of other items. 29 L.W. 760=119 I.C. 577=1929 M. 529. See also 13 R.D. 114. Where pending a suit for a certain share in an estate the estate is partitioned by Collector and six estates are formed before the suit is decreed, a fresh suit for distribution of decreed share to newly formed estates is not barred. 1934 P. 515. Landlord and tenant—Suits for ejectment and rent—Dismissal on ground of no relationship—Subsequent suit for possession of title—If barred. 159 I.C. 515=61 C.L.J. 366=1935 C. 607. Rent suit—Decree on basis of agreement as to amount—If *res judicata* as to rate of rent. 1935 C. 766. Dismissal of suit on promissory note by assignee against the promisor and the assignor bars a second suit for damages by assignee against the assignor. 4 Luck. 603=1929 O. 172 (F.B.). The bar of *res judicata* cannot be evaded by claiming some more reliefs in addition to those claimed in the first suit. 107 I.C. 674 Nor on the ground that the form of subsequent suit is different from that of prior suit. 157 I.C. 302=1935 N. 156. A premature decision in former suit is not *res judicata*. 62 M.L.J. 177=1932 M. 233. A passing remark by a judge does not amount to a finding. 1932 L. 232=137 I.C. 296; I.L.R. 1936 N. 138=164 I.C. 931=1936 N. 148 An unnecessary direction as to the remedy to be resorted to by the party with reference to a particular claim would not operate as *res*

judicata, and the party may have resort to any other remedy that may be open to him. 40 C.W.N. 341.

OTHER ILLUSTRATIVE CASES. *Rent suits.*—

A rent decree is *res judicata* on the question of the existence of the relationship of landlord and tenant. 54 I.C. 763, 25 I.C. 204; 10 I.C. 363, 60 C.L.J. 13 (Order of revenue officer under S. 105, B.T. Act, assessing fair and equitable rent). This is so even if the decree is passed *ex parte*. 49 A. 658. Where in a previous suit by A against B, it was held that B was a tenant of A, a subsequent suit by B against A and C, a *pro forma* defendant for a declaration that B is not a tenant of A but of C is barred. An incidental determination of an issue of title in a suit for rent is not a bar to any issue of title being raised subsequently. 34 I.C. 123; 63 I.C. 762; 51 I.C. 356, 20 C.L.J. 135; 50 I.C. 598; 15 I.A. 97, 25 C. 136; 25 C. 428. See also 30 C.W.N. 593=94 I.C. 837=1926 C. 650. Dismissal of previous suit under S. 77, Madras Estates Land Act, by Revenue Court, on ground that relationship of landlord and tenant did not exist will not be *res judicata* in subsequent suit in Civil Court for having relative rights of parties adjudged. 1937 M.W.N. 189=1937 M. 303. The decision in a prior suit for rent does not operate as *res judicata* in a later suit for declaration of title as between the parties but the prior decision can be taken into account as evidence. 60 C. 1307=37 C.W.N. 924. See also 37 Bom.L.R. 62=1935 B. 131 (First suit as between landlord and tenant—Second suit on title) But where the entire question of title to the property was directly and substantially in issue in the previous suit, as in the case where the tenant sets up his own ownership, denying that of the landlord, the decision will operate as *res judicata*. 12 I.C. 9, 42 I.C. 785 (2). See also 85 I.C. 804=1925 C. 1004, 147 I.C. 1055=1934 P. 282 If the question of title thus substantially in issue in the former suit had been decided, the decision will operate as *res judicata* in a subsequent suit for rent for a subsequent period. 1 C. 202; also 24 A. 112 If an issue as to the nature of the tenure held by the defendants was directly raised in the previous suit for rent, the decision on the point will operate as *res judicata* in subsequent suits for rent. 25 C. 136, 14 M.L.J. 379; 13 M. 287, 26 B. 25, 30 M. 510; 30 A. 470; 1930 O. 335; see also 14 L.R. 867 (Rev.) Where a previous suit for enhancement of rent was decreed in spite of the defendant setting up a permanent tenancy the decree is not *res judicata* in a subsequent suit for ejectment in which the same claim is set up by the defendant. 8 L. 573=52 M.L.J. 663 (P.C.). When a *recurring liability* is the subject of a claim, a previous judgment dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata*. 11 A. 148. See also 54 B. 162; 27 A.L.J. 1257; 1930 P. 585 A decision in a suit for rent relating to a

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certain period will be *res judicata* in subsequent suit for rent for a later period unless the matter in dispute was peculiar to that particular year. 1934 M. 563=40 L.W. 656. See also 65 M.L.J. 684=1933 M. 925. A rent decree is not *res judicata* as to the rate of rent or as to the area for which the rent is payable but only as to the amount due for the years for which the suit was brought 68 I.C. 298; 1923 C. 282 (2), 3 O.W.N. 313 (Sup)=98 I.C. 77=1927 O. 32. [It is, however, good evidence on these points 47 I.C. 173, 1922 P. 213.] But if the Court determines them it is binding on the parties in a suit for rent for subsequent years 43 C.L.J. 116=94 I.C. 844=1926 C. 672. The question of rate of rent is a necessary issue in a suit for enhancement of rent and the Court's decision thereon is *res judicata* in a subsequent suit for rent, in which the same question is at issue. 59 I.C. 752. This is so even if the decree is passed *ex parte* 91 I.C. 380=1926 C. 767. But the question whether defendant is *occupancy* or *non-occupancy* tenant is not a necessary issue in suit by landlord for enhancement of rent. 1935 R.D. 407. A decision in a suit by ryot to set aside a *distrain* on the ground that the tender of patta is not proper operates as *res judicata* on the point in a subsequent suit for rent. 45 M.L.J. 199. Where after the dismissal of a suit for rent, a subsequent suit by the tenant for a declaration of his rights was decreed and a suit was thereupon filed for the apportionment of rent, *held*, that the previous rent suit operated as *res judicata*, 35 C.W.N. 46. Order regarding rate of rent in one *falsi* is *res judicata* regarding a subsequent *falsi*. 1932 M.W.N. 639. Dismissal of a suit for rent does not bar a subsequent suit for damages for use and occupation. 144 I.C. 734=1933 R. 116. A decision as to the nature of possession held by a party, in a prior suit, operates as *res judicata*. 46 M. 525=43 M.L.J. 737. See also 57 I.A. 208 (P.C.); 18 R.D. 449=15 L.R. 558 (Rev.); 18 R.D. 411=15 L.R. 537 (Rev.) Suit for rent by landlord against tenant—Plea of partial dispossession and suspension of rent—Decision negating plea—Subsequent plea in later suit—When barred by *res judicata*. 40 C.W.N. 166. Where a claim of a third person based on a mortgage is disallowed, and also his suit for a declaration of his mortgage rights is dismissed, he cannot enforce by a regular suit his rights under the mortgage. 44 M. 268=40 M.L.J. 7. Suit by heirs against widow for possession dismissed for non-payment of dower debt ordered by Court to be paid by plaintiff to widow. Second suit for possession by the heirs is not barred. 47 A. 250. First suit by auction-purchaser to set aside order of redelivery under O. 21, R. 101, C.P. Code, dismissed. Subsequent suit for partition of the judgment-debtor's share not barred. 49 M. 596=50 M.L.J. 681. Where a reversioner brought a suit for a declaration that an adoption by a widow is not binding on him

and got a decree, the question of relationship is *res judicata* in a subsequent suit for a declaration that a gift by her is not binding on him. 59 I.C. 808. Dismissal of a suit to declare an alienation by a widow was not binding on the reversioner is *res judicata* in a subsequent suit by the reversioner for possession after the death of the widow. 59 I.C. 946. See also 1925 M. 1270. But the decision in a suit against Hindu sons on a mortgage executed by their father upholding the mortgage cannot operate as *res judicata* in a suit by the sons of the defendants in the former suit (grandsons of the alienor) to set aside the mortgage 43 L.W. 677=1936 M. 488=70 M.L.J. 627. The dismissal of a prior suit by the plaintiff's ancestor for *chur* right in a river on the ground that it formed part of his estate, bars the subsequent suit for establishing his right of fishery in the said river. 1927 C. 403. Where a suit for possession of certain parts of a permanent holding was dismissed on the ground that the plaintiff was not entitled to the tenure a subsequent suit for recovery of certain other plots alleged to form part of the same tenure, is barred by *res judicata* 37 C.W.N. 810=1933 C. 879=147 I.C. 719. A previous decision between the parties regarding the ownership of a wall in dispute is *res judicata* in a subsequent suit for injunction regarding the wall and for possession of the strip of land, and a decision of the survey officer with regard to the boundary given in the interval cannot prevail against the previous decision 36 Bom.L.R. 502=1934 B. 248=152 I.C. 60. The decision in a suit based on a possessory right is no bar to a subsequent suit on title. 16 I.C. 431. But it has been held that the decision in proceedings under S. 9, Specific Relief Act, operates as *res judicata* so as to bar a subsequent suit between the parties on the question of possession 60 C. 1171=37 C.W.N. 1148=1933 C. 923. Where on the death of the previous holder of an estate an application was presented by the appellant for mutation of his name in place of the deceased and the application was based on a valid adoption of the applicant but the application was rejected and subsequently a suit was filed against the applicant challenging the validity of his adoption. *Held*, that the order rejecting the application did not operate as *res judicata* as the validity of adoption was not considered and decided by the Court during the proceeding on the application 159 I.C. 437=1935 C. 716. In a previous suit the question of validity of wakf was raised and decided on the admission of parties to the suit and on other matters into which the question of the validity of wakf did not directly, but incidentally enter. In a subsequent suit the validity of wakf was in issue and it was held that the decision in the previous suit did not bar its decision in the subsequent suit. 1935 C. 792.

"HEARD AND DECIDED."—To support a plea of *res judicata* there must be a point in issue. 1936 O.W.N. 717=164 I.C. 466; and the

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matter in issue must have been heard and finally decided. 45 C. 442; 21 M.L.J. 57, 1930 O. 465; 52 A. 901=1930 A.L.J. 1524; 52 A. 901, 36 Bom.L.R. 694=1934 B. 329; 1935 A.L.J. 279. Where the appellate Court has expressly refused to decide the case on the merits, there is no *res judicata*. 159 I.C. 419=37 P.L.R. 378=1935 L. 686 Nor where suit was rightly dismissed as being premature. 1935 L. 974. Previous judgment upon merits after hearing some evidence on both sides though in plaintiff's absence is *res judicata*. 1928 C. 271 (2). Where a transaction was incidentally referred to in a suit in the Court of Small Causes, and it was not finally decided, a subsequent suit raising the same is not barred. 5 R. 527. So also a matter expressly left open by the parties cannot operate as *res judicata* 48 A. 34; 96 I.C. 302; 1931 P. 1=130 I.C. 785; 135 I.C. 843=1931 A.L.J. 1076 Also where the plaintiff is referred to a separate suit against one of the defendants on the ground that the claim against him cannot be enquired into in the same suit. 146 I.C. 487=1933 M. 868 Where in previous suit the question to be considered in the subsequent suit was not raised or could not be raised and decided having regard to the form in which the parties to that case were arrayed, the judgment in that suit could not operate as *res judicata* 158 I.C. 656=1935 C. 641. It is sufficient if the decision in the previous suit impliedly decides the point 40 B. 210; 23 M.L.J. 740, 54 I.C. 952=24 C.W.N. 223, 1928 L. 888=113 I.C. 120. In order to ascertain what matter was heard and finally decided, the pleadings and the judgment should be examined 2 Pat.L.J. 159=38 I.C. 211, 37 I.C. 674=14 A.L.J. 1171 See also 1927 B. 145 (Case-law reviewed) 10 Pat.L.T. 630 The refusal of a Court to try extraneous issues in a case does not bar a subsequent suit 36 I.C. 650. The party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contentions against such a decision 46 M. 768=45 M.L.J. 346, 119 I.C. 829=1929 P. 338, 52 A. 1024=1930 A. 699, 1930 M.W.N. 729=128 I.C. 455. Where in a prior suit for possession and future mesne profits, the Court did not purport to decide the question of future mesne profits, a subsequent suit for mesne profits *pendente lite* is not barred. 40 A. 292; 41 M. 188=33 M.L.J. 699 (F.B.). See also 30 M.L.J. 326, 1929 P. 678; 58 C. 1040 But it has been held by the Bombay High Court that where the decree is silent as to the claim of future mesne profits it will be taken to have been refused and a separate suit will be barred by the Expt V to S 11 44 B. 654 But see 58 C. 1040 Decision of a point on the ground of limitation only and not on the merits does not operate as *res judicata* 73 I.C. 705=1923 L. 150 (2); 116 I.C. 142=1929 M. 687, 139 I.C. 375 Dismissal for technical defect does not operate as *res judicata* 63 I.C. 344; 19

A.L.J. 706; 1929 L. 596; 1934 O. 491 Dismissal for default does not operate as *res judicata*. 24 I.C. 480=12 A.L.J. 911; 41 I.C. 905 (Cal.), 24 I.C. 17; 54 I.C. 789; 2 P. 739; 39 B. 41, 16 C. 98=15 I.A. 156, 24 B. 251, 1929 B. 217, 30 Bom.L.R. 1089; 134 I.C. 1171, 1932 L. 643 See also 12 P. 179=144 I.C. 59=1933 P. 208 (Dismissal of application for amendment of decree for failure to file process forms) Nor dismissal under O. 9, R. 3 85 I.C. 509=1925 O. 337. Nor rejection of plaint for non payment of deficit Court-fee, after remand. 40 C.W.N. 1390 Nor dismissal for misdescription of suit property 1925 L. 193 Nor dismissal for non-joinder or misjoinder of parties, or multifariousness. 43 M.L.J. 572; 24 I.A. 50; 8 A. 282; 1927 C. 794. See also 146 I.C. 487=1933 M. 868, 37 Bom.L.R. 62=1935 B. 131=155 I.C. 7; 1671 C. 274=1937 O.W.N. 239; 1935 M. 696. Also dismissal for want of jurisdiction. 5 B. 48=7 I.A. 18 (P.C.); 1934 O. 449 Also dismissal for want of cause of action 118 I.C. 711=1929 A. 844, 59 C.L.J. 328=1934 C. 799. Nor withdrawal of claim suit 1928 A. 689, 110 I.C. 818 (2) Also dismissal for non-prosecution under R. 36 of Ch. X of the Calcutta High Court Original Side Rules. 38 C.W.N. 1132 Dismissal of suit on ground that plaintiff was not entitled to raise the plea on which suit was founded, without any inquiry into his title cannot be taken to be a decision that for all time and in all proceedings between the parties it must be taken that the plaintiff had no title 43 L.W. 116=160 I.C. 753=1936 A. 165. A dismissal of a suit under O. 17, R. 3, for want of prosecution operates as *res judicata* in respect of the rights of the plaintiff to recover in a subsequent suit the property sued for in the first suit 10 M. 272, 13 M. 510, 40 A. 590 Even in case of representative suit when conducted without any negligence 38 P.L.R. 809=165 I.C. 808=1936 L. 385 Suit by a Hindu reversioner for declaration that a mortgage executed by a widow is invalid dismissed on the ground that plaintiff was not the reversionary heir—Subsequent suit by him after widow's death for possession is barred 49 M.L.J. 142 But see 1931 A. 21. Decision in prior redemption suit about the amount due to the mortgagees is *res judicata* in subsequent suit by one of the mortgagees for the amount due to him 27 A.L.J. 908=119 I.C. 97=1929 A. 814 Decision on issue not necessary for disposal of former suit cannot be considered to be *res judicata* in a later suit, where the point involved arises for decision 41 L.W. 753=1935 M. 551=68 M.L.J. 625 A statement by the judge in the judgment which is merely obiter and without which the suit has already been decided does not operate as *res judicata* 1935 L. 96=157 I.C. 816; 38 P.L.R. 790=1936 L. 18. But see 17 Pat.L.T. 356. Award in respect of a certain transaction is barred under S 11 by a decree passed in respect of the same transaction, even though the decree is of a subsequent date to the date of the award 39 P.L.R. 117

HEARD AND FINALLY DECIDED—Where a

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question is already decided by a Judge, and the same Judge subsequently arrives at a contrary decision on the same question in the same proceeding, the reopening of the question is barred by *res judicata*. 17 Pat L. T. 756=164 I.C. 282=1936 P. 447. Dismissal of suit filed under O 21, R. 63, C P Code (which was really unnecessary as the attachment was withdrawn) on the ground that the matter came under S. 47, and without considering the merits, will not be *res judicata*. 160 I.C. 835=1936 Pesh 41. In cases where a will is in question, no decree or decision in proceedings to which the executors are not parties can be binding on any person or can obliterate the will 1936 C. 585.

EXPLANATION V.—The legal effect of this explanation is that of treating the omission to grant the relief asked for in the plaint as equivalent to an express refusal and the claim thereto in a fresh suit as *res judicata*. 14 M. 328, 21 C. 265, 21 A. 425. Relief claimed but not expressly granted—Decree in prior suit substantially in favour of plaintiffs but the findings being against them—Appeal not preferred—Effect in subsequent suit, see 38 M.L.J. 374; 1927 M.W.N. 116=101 I.C. 648. It refers to the case where several heads of relief independent of each other are claimed, put in issue, and duly controverted, and one of them is neither granted nor refused 12 B. 454. The granting of future mesne profits which the Court has a right to give or refuse is not such a relief. 15 M.L.J. 462, 32 C. 118, 21 A. 425 (F.B.), 25 B. 115, 24 M. 681; 80 I.C. 710. Where the mortgagee claims a money decree and in default of payment for sale of the mortgaged property, but is content to take a money decree only, he could not sue again to have the amount paid by sale of the mortgaged property 33 C. 849. See also 145 I.C. 373=1933 R. 158.

ILLUSTRATIVE CASES.—The words "relief claimed" refer to a relief which the Court is bound to grant and not one which it is discretionary with the Court to grant. (21 A. 425, 41 M. 188, Ref.), 1931 P. I. Previous suit for certain properties—Statement by plaintiff that he would pay additional Court-fee if it was found that he was entitled to further properties—Subsequent suit for further properties not barred. 1926 M.W.N. 94=93 I.C. 1=23 L.W. 415. Redemption suit—Claim for mesne profits—Withdrawal of claim for mesne profits—Separate suit, if lies. 1926 C. 178; 25 A.L.J. 425. In ejectment suit prayer for use and occupation referred—Subsequent suit after notice—Question of damages cannot be gone into 104 I.C. 190=1927 P. 395. Mortgage suit—Personal remedy asked for in plaint—Decree silent regarding same—Effect—Party not barred from subsequently asking for the same. 53 M.L.J. 489, 157 I.C. 533=1935 A. L.J. 279=1935 A. 411. But where a definite application under O 34, R. 6 was made and not granted, it would operate as *res judicata*. 38 P.L.R. 700=163 I.C. 119=1936 L. 388.

EX PARTE DECREE.—An *ex parte* decree can operate as *res judicata*. 16 C. 300; 40 C.L.J. 507; 26 A.L.J. 185; 85 I.C. 562=1925 M. 1025, 50 A. 394, 116 I.C. 567=1929 A. 346; 1929 A. 761 (2); 144 I.C. 669=1933 L. 606. But the only matter that can be *res judicata* is matter in respect of which relief has been claimed by the plaintiff in the plaint 16 C. 300, 27 I.C. 999; 9 L.R. 345 (1) (Rev.). On this point, see also 6 Bur.L.J. 148. Where a previous suit for arrears of rent was decreed *ex parte*, the defendant cannot contend in a later suit for arrears of rent that the relationship of landlord and tenant did not exist. 49 A. 658. Two constructions possible regarding *ex parte* decision—*Res judicata* not to be inferred 1929 A. 29=113 I.C. 758. Rent—*Ex parte* decree for arrears of—If *res judicata* as to rate of rent—Test 118 I.C. 497=1929 M. 673.

CONSENT AND COMPROMISE DECREES.—S.11 is not strictly applicable to consent or compromise decrees as it applies in terms only to what has been heard and finally decided by Court. 35 M. 75=21 M.L.J. 709, 1935 P. 39=16 Pat.L.T. 12, 153 I.C. 515=1935 O. 121, 30 B. 395, 116 I.C. 116=1929 M. 96; 1933 S. 53. Expl 5 has reference to what has been adjudicated by the Court and not to the result arrived at by a compromise, in which the parties may have omitted to settle a part of their dispute, even though a decree may have been passed in accordance therewith 149 I.C. 244=11 O.W.N. 528=1934 O. 293. The plea of estoppel by *res judicata* may prevail even when the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. If the legality of an act is a point substantially in dispute, it may be a fair subject of compromise in Court like any other disputed matter, and a decree passed on such compromise is valid and binding until it is set aside, and will operate as *res judicata*. 164 I.C. 703 (2)=38 Bom L.R. 593=1936 B. 301. But not in case where the legality of transaction was not in dispute and it depended on facts not disclosed in the case 153 I.C. 585=11 O.W.N. 1571=1935 O. 121. A compromise decree cannot be taken to decide every point that ought to have been pleaded, as a decree on the merits must 51 A. 575. A consent decree however raises an estoppel. 24 C. 216; 24 B. 77, 43 C.L.J. 116=94 I.C. 844=1926 C. 672, 4 Luck 181. A consent decree operates as *res judicata* if the question agitated between the parties in the subsequent suit had been put in issue in the prior proceedings though ultimately it was decided against the contesting party by his consent 1929 M. 694=117 I.C. 295, 111 I.C. 1=1928 C. 852, 121 I.C. 164=1930 S. 195. The Court, if the matter is in any way challenged, should be careful to see that the decree, if by consent, is not vitiated by fraud or otherwise. 63 C. 454. A consent decree or order is as effective as a decree or order passed on contest, not only with reference to the conclusions arrived at in the suit in which it is passed, but with regard to every step in the process of rea-

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soning on which the conclusion is founded, i.e., the findings on the essential facts on which the judgment on the ultimate conclusion is founded. 63 C 550. A consent decree passed between the predecessor-in-interest of the parties, touching matters now substantially and directly in issue, between them, is *res judicata* 36 B 283, 46 A. 820. See also 145 I C 352=1933 O 322. But see 148 I C 548=1934 L. 758. To have such effect, the consent decree should have the effect of deciding finally the question raised. 151 I C. 964=1934 M 454=67 M L J. 198. A consent decree relating to matters outside suit does not operate as *res judicata* 48 C. 1059. The decision by oath of any matter in issue in a former suit between the parties is *res judicata* in a subsequent litigation between them 36 M. 287=24 M L J. 321, 24 M. 444. A decree or order passed on a *razinama* would constitute the matters contained in it *res judicata* between the parties to suit 36 M 45=21 M L J. 820, 21 B 465; 36 L W 414. But a compromise in a suit between the predecessors of the parties in which the issue in question in the later suit was neither raised nor decided, does not operate as *res judicata* in a later suit between the parties. 150 I C 1005=1934 A 1038. A deed of compromise entered into in the course of a revenue proceeding and making a purely temporary arrangement for the purpose of the Revenue Courts does not operate as *res judicata* in subsequent suit in a Civil Court 147 I C 715=1934 A 75.

THE DECISION MUST BE NECESSARY FOR THE DETERMINATION OF THE SUIT—Matter which was not necessary for the decree passed in the suit is not matter directly and substantially in issue in the suit which was heard and finally decided 5 C W N 445; 26 M 104. See also 101 I C 522=4 O W N 307; 102 I C 22 (1), 30 Bom L R 902=1928 B. 349, 31 Punj L R 406; 1930 A L J 1309. If in the mortgage suit it is necessary for the Court to decide whether the trees were included in the mortgaged property, and, on the pleadings the Court does decide that the trees were not in the mortgaged property, the decision must operate as *res judicata* between the parties if the issue is raised again between them in a subsequent suit 9 Luck 291=147 I C. 984=1934 O 50. If a finding arrived at on a certain issue is sufficient to completely dispose of the case other findings on other issues not necessary for the disposal of the case are not a final decision of the matter covered by them and do not operate as *res judicata*. 36 I C 643; 70 I C. 666, 44 B 321, 7 I C 317=1923 L. 523, 73 I C. 854=1923 L. 248, 43 C L J 501=95 I C. 1011=1926 C 1003. See also 1934 R 375. Where there are two findings, either of which would in law be sufficient to dispose of the case that one which in the logical sequence should have been first found rendering the determination of the other issue unnecessary, is the finding which operates as *res judicata* 9 I C 983=8 A L J

409; 28 I.C. 580=21 C L J 296; 17 A.174. But it has been held by the Madras High Court that the decision on both the issues would be *res judicata* and the rule of logical priority is inapplicable. 38 M 158. See also 113 I.C. 155. If a decision is based on two grounds, both of them operate as *res judicata* 31 M L J 97. Where a judgment is based on findings on more than one issue but it is doubtful as to on which issue the final conclusion is based, the decision on all issues is *res judicata*. 34 M L J. 431. A question raised at the instance of a party and decided by the Court as necessary operates as *res judicata*, even though the issue in the previous suit was in fact not necessary 63 I C. 161=33 C L J 317; 10 Pat L T. 630, 118 I C. 168, 57 C 672. When a Court decides a case upon a preliminary point as well as on merits, it cannot be said that the decision on the merits does not operate as *res judicata* 1930 L 487, 1930 A 619; 24 C. 900. But see 40 C. 29. Where an ejection suit is dismissed on the ground of absence of notice, a finding recorded, that the permanent tenancy alleged by the defendant, is not proved, cannot operate as *res judicata*. 47 M 453=46 M L J. 198, 43 B. 568, see also 18 C. 647. But where first Court decreed the suit for ejection negating the claim of permanent occupancy, but the appellate Court reversed it for want of a proper notice to quit, though upholding the finding as to the nature of the tenancy, the decision on the point is *res judicata* 46 M L J 515. But see 40 B 662 (a suit of a declaratory nature); 1929 C 449. Where an appellate Court confirms the decision of the trial Court by deciding on one point only without giving its decision on another point which was also decided by the trial Court, the decision on this point is not *res judicata* in subsequent suit 42 C L J 500=92 I C. 981=1926 C. 163, 4 Luck 404, 37 C W N. 892. An *obiter dictum* not necessary for the decision of the case is not a decision on a point directly and substantially in issue and does not constitute *res judicata* 45 A. 466, 4 Pat. L J 682=52 I C 338=1919 P H C C. 343, 142 I C 606=1933 L. 412; 1933 L 404, 14 L R 457 (Rev)=17 R. D. 591. Where a suit was dismissed on grounds of limitation, but a finding was also recorded against the plaintiff to avoid a remand in case the appellate Court took a different view, the finding will not operate as *res judicata*. 47 M L J. 532. Where a suit is decided in favour of the defendants, but there is a finding adverse to them that finding is not *res judicata* against them. 48 C. 460, 47 M L J. 487, 11 C 301; 18 B 597; 17 A. 174; 18 C. 647, 55 M. 483; 18 R D 509; 141 I C 399=34 P L R 225=1933 L 218. See also 146 I.C. 710=1933 O 439. Finding on an issue adverse to the plaintiffs successful in the earlier suit will not operate as *res judicata* against them in a later suit 56 C 639; 27 A.J.J 1100=1929 A 910; 1930 L. 149; 1933 M 770. It is not the law that where a plaintiff's suit is dismissed, there is generally no *res judicata* on the findings in his favour 34 M L J 641,

Explanation IV.—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

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12 L.W. 277; 1 C. 144; 10 M. 102. The defendant is entitled to appeal against such findings. 47 M. 633; 47 M.L.J. 487. When a decree was based on independent grounds and the adverse finding was not implied in the decree, it would not operate as *res judicata*. 37 M. 25=21 M.L.J. 947. But where the decision on an issue is necessary but the party against whom the finding is made could not appeal, as the final decree is in his favour the decision on that issue is *res judicata*. 34 M.L.J. 431; 24 C. 900, 36 L.W. 388. Such a finding may be appealed against and constitutes *res judicata*. 40 I.C. 771. The fact that a party against whom an issue is found has no right of appeal does not affect the rule of *res judicata*. 34 M.L.J. 431=29 M.L.J. 535. Ejectment suit—Decree for rent in—Question of title need not be decided. 30 Bom L.R. 1602=1929 B. 32.

Sec. 11, Expl. IV.—(See also notes under heading 'Constructive *Res judicata*'). The correct principle as to constructive *res judicata* is that if the decree made in the earlier suit is such that it would be inconsistent with the plea which might and ought to have been raised, but not actually raised, it must be taken that there has been, for the purpose of *res judicata*, a final decision by necessary implication. 157 I.C. 381=39 C.W.N. 692=61 C.L.J. 301. Pre-decree compromise not presented to court in previous suit and a decree was passed on merits, the compromise cannot be pleaded in subsequent suit 39 P.L.R. 29. Expl. 4 can be applied only if it could be shown that the Court had passed an order in the earlier proceedings adverse to such party. 158 I.C. 891=1935 M. 786. Also the parties should be litigating under the same title. 156 I.C. 543=1935 L. 753. Expl. IV, embodying the rule of constructive *res judicata* applies to execution proceedings as well I.L.R. 1936 N. 30=165 I.C. 948=19 N.L.J. 129=1936 N. 123; 163 I.C. 671=1936 R. 218. As regards application of this Explanation, there is no distinction between consent decree and decree on contest 37 P.L.R. 65=157 I.C. 749=1935 L. 487. The rule will apply even with reference to questions of law, e.g., the legality of any particular act forming the subject of a compromise decree 29 S.L.R. 455=164 I.C. 43=1936 S. 99. Omission to raise plea of *res judicata* in earlier stages will not entitle party to raise it after appellate Court remanded the case to be tried on merits. 1936 C. 454. So also as to plea of want of jurisdiction, see 161 I.C. 324=1936 S. 34. Where a decree is a nullity for want of jurisdiction, Expl. 4 to S. 11 would not apply. 157 I.C. 90=1935 N. 28. Adverse finding against successful party cannot operate as *res*

judicata. 1935 M.W.N. 871=1935 M. 701

This explanation does not apply to the case of an application for restitution under S. 144: 153 I.C. 572=1935 A. 195. A defendant who has applied under O. 9, R. 13, C.P. Code, for setting aside a decree on the ground that proper service has not been carried out and has failed, is barred from agitating the same point later on in an appeal from that decree or in a petition for revision against the order passing the decree. The order of the Court will stand in his way. Conversely a defendant who has failed in an appeal or revision on that point cannot subsequently have recourse to proceedings under O. 9, R. 13, C.P. Code, for decision on it. 160 I.C. 462=1936 Pesh. 1. A Court is empowered to entertain an objection to attachment under S. 60 (1) (c) at any time and decide it on the merits even though it was not raised at a preliminary stage. It would not be barred by principle of *res judicata* (1930 N. 11 and 1930 A. 727, Foll.) 1935 L. 942. So also where it was raised but not decided 38 P.L.R. 691=1936 L. 930. A holder of two separate mortgages is not prevented from suing separately on each of such mortgages either by O. 2, R. 1 or by S. 11. The two separate mortgages give rise to two independent causes of action; hence O. 2, R. 1, does not bar the second suit. (1921 C. 321, 20 A. 322 (F.B.); 1924 P. 77, Foll., 1915 B. 54, Not Foll.) 159 I.C. 758=1935 N. 226 (F.B.), 63 C.L.J. 110=1936 C. 698. Successive suits for redemption would not be barred when no final decree had been passed in the former suits and the mortgage was extinguished 15 P. 607=163 I.C. 908=17 P. L. T. 564=1936 P. 420. Where in execution of a decree the decree-holder gets declaration that only half interest in certain property is liable to attachment, he cannot in execution of another decree against same judgment-debtor claim to attach the whole interest in the same property 159 I.C. 465=1935 R. 399. A suit was brought on the basis of a mortgage deed impleading therein besides the Hindu mortgagor, his sons and grandsons also, who are the appellants. The Court dismissed the claim against the appellants and gave the plaintiff a money-decree only against the mortgagor. In execution plaintiff could not be allowed to attach and sell the entire joint family property 1935 O.W.N. 1113=158 I.C. 490. Where in a previous suit decided on an award, the entire property including the house in dispute was treated as jointly owned by the brothers, and neither before the Court nor before the arbitrator did the plaintiff set up the plea that he was the exclusive owner of this house under his father's will, he is barred from relying on the will under

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Expl. IV in a subsequent suit by him for a declaration that the house was his exclusive property 157 I. C. 368 (Lah.). Where a person who had a subsequent mortgage over a property had also in addition to this redeemed a prior mortgage and a puisne mortgagee sued on his mortgage impleading the former only as a subsequent mortgagee but not as an assignee of the prior mortgagee and in execution of the decree so obtained by which it was ordered that the claim of the plaintiff puisne mortgagee was to be satisfied first, the subsequent mortgagee claimed that he was entitled to be paid first his money due as assignee of prior mortgagee. *Held*, that the rule of *res judicata* did not apply and that to make the rule applicable it was necessary for the plaintiff puisne mortgagee to attack his rights as assignee of the prior mortgage. 1935 Lah. 218. *See also* 1936 A.W.R. 653=1936 A.L.J. 774=165 I.C. 7=1936 A. 578 (F.B.); 19 N.L.J. 290. But *see* 18 N.L.J. 274. Plaintiff who was prior mortgagee in his suit for sale failed to claim benefit of S. 101, T.P. Act. as against puisne mortgagee in respect of portions of mortgaged property already purchased by him. It was held that he would not be debarred by *res judicata* from making the claim in defence to suit by puisne mortgagee on his mortgage 43 L.W. 478=1936 M. 473=70 M.L.J. 505. In a previous suit as regards a claim to the Mahantship of an Asthal, the defendant had to defend himself against that claim, but he was not put forward any claim of his own to the Mahantship. Hence a later suit by the defendant for declaration of his own title to the office of Mahant and for possession of the properties of the Asthal was not barred by *res judicata*. 62 C.L.J. 153. A woman defended a certain suit under the plea that she was heir to certain property in dispute under the customary law. The suit was decided against her. Subsequently she filed a declaratory suit basing her title to same property as heir under Mahomedan law. *Held*, her suit was barred by *res judicata* 158 I.C. 995=1935 Pesh 150. In a pre-emption suit, the minor sons of the vendor were impleaded and were represented by their step brother as their guardian *ad litem*. The pre-emptor paid the amount and got possession, subsequently the minor sued to set aside the sale by his father as not being valid. It was contended that this plea ought to have been raised in the pre-emption suit and as such the doctrine of constructive *res judicata* applied. This contention was held not tenable 159 I.C. 693=1935 L. 489. A suit against two defendants was decreed as against defendant 2 and plaintiff was asked to pay costs of defendant 1. In an appeal by the plaintiff against costs, defendant 2 was impleaded but he made no contest and he was asked to pay costs of defendant 1. Subsequently defendant 2 filed an appeal against the main decree passed against him. It was contended by the plaintiff that the points in dispute in the appeal ought to have been raised in the appeal as to costs by plaintiff

and hence this appeal was barred by *res judicata*. *Held*, that these points were not such as ought to have been raised (though they might have been raised) in the appeal by the plaintiff and that the present appeal was not barred by the constructive rule of *res judicata* 1935 L. 825.

CONSTRUCTIVE RES JUDICATA—Expl. IV.—As to the application of the principal of constructive *res judicata*, *see* 49 All. 502, 59 Cal. 636; 50 M.L.J. 1 (P.C.); 1929 A. 400, 107 I.C. 110; 1930 M. 539; 1930 L. 487; 1930 C. 588, 15 L. 869=1934 L. 316. There is no difference in this matter between consent decree and decree passed *per ipsum*. 29 S.L.R. 455=164 I.C. 43=1936 S. 99. As to applicability of doctrine to land acquisition proceedings, *see* 160 I.C. 1010=1936 Pesh 29. The rejection of a plea as having been raised too late operates as *res judicata*. 91 I.C. 683=1926 Cal. 511. Question of jurisdiction wrongly decided in previous suit, no objection being raised—Decision operates as *res judicata* 28 Bom.L.R. 879=98 I.C. 341=1926 B. 481. Omission by judgment-debtor to challenge liability where it does not affect decree-holder's position creates no estoppel 71 I.C. 772. It is not only necessary that the matter might have been a ground of attack or defence but also it ought to have been so made. 60 I.C. 393, 2 Pat. L.T. 285, 1 A.L.J. 498, 1930 R. 197, 1930 M. 539, 146 I.C. 395=34 P.L.R. 925=1933 L. 279, 37 P.L.R. 65. A person is not bound to sue on an alternative cause of action and failure to sue in the former suit does not bar a subsequent suit 103 I.C. 888=1927 N. 322, 1929 L. 872 (2). But *see* 1931 M. 268. Plea which might hurt need not necessarily be raised in prior suit—No bar. 8 Lu. 602. The question whether any matter ought to have been made a ground of attack or defence in a former suit depends upon the particular facts of each case. 20 C. 79=19 I.A. 234 (P.C.), 60 C. 1158=37 C.W. N. 1001=1933 C. 900. The plea sought to be raised in the second suit must also be directly relevant to the issue in the first suit, 1925 M. 226=1924 M.W.N. 666. *See also* 46 I.C. 929, 40 C.L.J. 507. In a pre-emption suit, the pre-emptor is not bound to set up his own title in that alternative 96 I.C. 71=1926 O. 545. A suit for recovery of possession of immovable property need not be resisted on the ground of right of maintenance. 143 I.C. 657=1933 Pesh 61. Decree on mortgage—Subsequent suit by heirs questioning the right of mortgagor to alienate, not barred. 4 P. 510. The Explanation in authorising a fiction that the matter contemplated by it was in issue, implies necessarily the further fiction that it was adjudicated upon 8 M.L.J. 28, 26 M. 760; 117 I.C. 805. The matter would be deemed to have been decided against the party omitting to allege it 2 A. 100; 25 B. 189. But *see* 2 C. 171. *See also* 35 C. 975. Where the correctness of the previous decision has been doubted. Where in an interpleader suit as among several widows of the last male holder the factum or validity of the adoption of a son by one of the widows

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was not challenged, the question must be heard to have been raised and decided. 1928 O. 155=108 I.C. 817. It is only where the subject-matter of the two suits is the same that the matter can be said to have been heard and decided. 24 C. 711. Such a question cannot be treated as *res judicata* unless there is a judicial determination expressed or implied on the matter not put directly in issue. 28 C. 17; 1 R. 363. Validity of the will as a whole in dispute in earlier suit—Specific plea against the provision for 'election' under certain conditions contained in the plea was not necessary for the decision of the suit—Question about the 'election' in later suit not barred by *res judicata*. 10 L. 389; 30 Bom. L.R. 562=113 I.C. 298. Where plaintiff claims title to certain property, he ought to put forward all means of attack in his armoury. 72 I.C. 14; 20 C. 79=191 A. 234 (P.C.). 25 B. 189. See also 37 I.C. 119; 20 I.C. 890. 26 M. 645, 3 B. 537. But see 1931 B. 187. Former suit for rectification of sale-deed and for possession of property wrongly shown as exempted from sale—Subsequent suit for possession of property shown as sold in the sale deed—No bar of *res judicata* as causes of action are distinct. 167 I.C. 414=1937 O.W.N. 252. Where a suit by the widow of the last male-holder against the purchasers in execution sale on the ground that the properties had been gifted to her by her husband was dismissed, she cannot in a subsequent suit by the daughter of the last male holder in which she was added as a party, claim a right to share in the properties as the new claim ought to have been made a ground of attack in the former suit itself. 67 M.L.J. 709=152 I.C. 1049. Suit by adopted son to set aside alienations—Decree in respect of one item against one defendant—Failure to include all reliefs—Subsequent suit in respect of same item against the other defendants—Barred by S. 11, Expl. IV, O. 2, Rr. 1 and 2. 32 Bom. L.R. 1473. Where the prior suit failed on account of omission to plead a family custom, a subsequent suit based on such custom is barred. 47 A. 158. Where the right to recover possession would accrue only on the sale being set aside the plaintiff suing for cancellation of the sale need not pray for possession and a fresh suit for the latter relief will not be barred by S. 11 or O. 2, R. 2. 57 B. 456=35 Bom. L.R. 630=1933 B. 398. Where the plaintiff had on a former occasion sued for a certain relief on the strength of one title, he cannot afterwards claim the same relief on the ground of another title of which on the former occasion he might have availed himself. 24 C. 83; 31 M. 385; 2 C. 252; 49 M.L.J. 701; 25 A.L.J. 1035. But see 58 B. 119 cited under "LITIGATING UNDER THE SAME TITLE". It is not necessary to put forward a claim and also an inconsistent claim in the alternative in the same suit. 24 M.L.J. 418, 29 A. 331=34 I.A. 72 (P.C.); 52 I.C. 813, 1919 M.W.N. 287, 72 I.C. 14=1923 R. 122, 35 B. 507; 47 A.

561, 107 I.C. 110. A subsequent suit based on a claim of title, which the plaintiff, owing to want of knowledge of it could not put forth as a ground of attack in a prior suit, is not barred under Expl. IV. 37 I.C. 119, 10 I.C. 991. Where a suit for money on the basis of a contract for supply of boats at an agreed rate, is decided against the plaintiff, he cannot bring a subsequent suit to recover the same money as compensation for services rendered. 15 I.C. 374. Sub-mortgagee—Suit by, as assignee of mortgage dismissed—Subsequent suit as sub-mortgagee—Barred. 116 I.C. 738=1929 A. 400. But see 1930 A.L.J. 1572, 35 L.W. 429. Suit to enforce charge—Claim in plaint for personal remedy also—Grant of decree for sale—No decision on question of personal remedy—Subsequent claim for such relief not *res judicata*. 1935 A.W.R. 344=1935 A.L.J. 279. A suit by a Hindu son to avoid a sale in execution of a decree against his father on the ground that the sale was tainted with immorality, is barred by a similar previous suit on the ground that the property was joint family property. 65 I.C. 511=1923 A. 231. See also 46 M. 135. Where a plaintiff sued to eject a trespasser basing his claim on an ancestral right and failed therein, he could not bring another suit against the same defendant claiming to be the heir of a certain person. 34 I.C. 456= (1916) 1 M.W.N. 286; 11 Beng. L.R. 158 (P.C.); 31 M. 385. But see 58 B. 119 cited *infra*. Omission to plead available ground of defence would bar the defendant from raising the same plea again in a subsequent suit. 72 I.C. 91=1924 L. 83, 1933 P. 526; 1933 M.W.N. 1289; 24 I.C. 212; 31 C. 79; 20 A. 81, 7 B. 272, 59 M.L.J. 262=52 A. 272 (P.C.); 1930 A.L.J. 601, 1930 A.L.J. 1569; 152 I.C. 426=11 O.W.N. 1368 (Omission to plead right to trees in a suit for possession treating the defendant as a trespasser). Prior suit on *mutual account*—*Ex parte* decree—Subsequent suit by the defendant in earlier suit for sum of money due for the same period—Barred by constructive *res judicata*. 1927 A. 799 (1)=25 A.L.J. 711. Where a prior suit for possession is decreed on the basis of a gift, a subsequent suit questioning the title of the donor to make a gift is barred. 1 Luck. 78. A person brought in to defend his rights in respect of one property in a suit, ought to set up his rights, if any, to the other properties in the suit as well. 1917 M.W.N. 336=38 I.C. 184. A defendant in a suit is under no obligation to avail himself of the right to claim a set off. 28 M.L.J. 513, 49 M.L.J. 14; or counter-claim, see 24 L.W. 282=97 I.C. 478=1926 M. 1020. Where in a simple suit for rent the tenant puts forward a plea of dispossession and allows a decree to be passed for the entire rent it cannot be held that he was bound to take a plea as to dispossession of part of the holding so as to bar the plea being raised in a later suit for rent for a subsequent term. 146 I.C. 878=57 C.L.J. 306=1933 C. 793. Where a suit for possession of property based on a lease alleged

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to have expired is dismissed on the ground that the lease is not proved, a subsequent suit for possession based on ownership is not barred by *res judicata*. 22 M 323, 23 M 629; 9 M. 251. See also 23 L W 58=92 I C 245=1926 M. 849, 63 I.C. 717=3 L.L.J. 215. Where a suit for possession of certain property by the plaintiff treating the defendant as his tenant, is dismissed on the finding that the relationship of landlord and tenant did not subsist, a second suit by the plaintiff alleging that he was a reversioner entitled to the properties, is not barred by *res judicata*. 1919 M W N 287, 1927 O 341, 1926 M. 234. So also where A sues B for redemption of an alleged mortgage but fails to prove the mortgage and the suit is dismissed, he can sue again as owner. 35 B 507. Separate suits for possession and mesne profits against same defendants are maintainable though the claim for mesne profits might have been joined in the previous suit. 26 Bom L R. 288=80 I C. 259. See also 25 A.L.J. 425; 6 R. 691; 1929 R. 55, 1929 C. 566. So also where the first suit for declaration of title to property purchased by plaintiff and subsequently pre-empted by another person was dismissed, a subsequent suit for refund or purchase-money is not barred. 1933 L 1017=147 I C. 651. Where one suit for partition of some of the joint family properties was brought and disposed of, another suit for partition of the remaining properties is barred. 44 M.L.J. 652. But see 31 Bom L.R. 640=1929 B 323, 32 C.W.N. 1023=1928 C. 459. The plea of *res judicata* cannot be raised to bar a suit for partition of certain property which had been by mistake omitted to be included in the former suit for partition. 149 I.C. 244=11 O.W.N. 528=1934 O 293 relying on 1921 B. 323. First suit as *mittima adopted son*—Second suit as *apatisa son* barred. 5 R. 565. First suit barred on exclusive title—Joint possession with certain relatives ordered—Second suit on the ground that those relations had already released their rights barred. 1927 M. 120=99 I C 525. Widow impleaded as legal representative in mortgage suit—Widow's individual rights not raised—Subsequent suit for declaration of widow's rights barred. But see 112 I.C. 266=1928 O. 411; 5 Bur.L.J. 114=1926 R. 191. Prior suit for specific land based on exclusive title—Subsequent suit for partition and possession of share—Not barred. 24 L.W. 453=1926 M 1128. Ejectment suit—Dismissal of—Redemption—Subsequent suit for—Not barred by *res judicata*. 120 I.C. 420=1929 L 833.

PRINCIPLE OF CONSTRUCTIVE RES JUDICATA APPLIES TO SUITS ON MORTGAGES.—In a mortgage suit, all claims relating to the mortgage right up to the end of the proceedings, must be determined and a defendant who omits to put forward a counter-claim cannot bring a subsequent suit for recovery thereof. 12 L.W. 173, 26 B 661. In a suit for redemption of usufructuary mortgage, must be included the entire accounts between the parties in relation to the mortgage, the claim of the

mortgagor for overpayments to the mortgagee or excess profits received by the latter must also be included, and if they are not included, a subsequent suit in respect of such claims would be barred by reason of S. 11, Expt IV and O 2, R. 2, C.P. Code. 162 I.C. 709=40 C.W.N. 627=1936 C 200. The mortgagor obtaining possession in a redemption suit by him cannot subsequently sue for profits realised by the mortgagee for a period prior to the date of delivery of possession. 30 A 36. Where mortgagee has failed in a suit for redemption to obtain an order for sale of a mortgaged property on failure of payment by the mortgagor of the mortgage amount within the time fixed for payment, he cannot afterwards bring a separate suit for sale upon his mortgage. 13 B. 507. See also 7 L 40. (As to *res judicata* in suits for redemption, see under a separate heading.) Where in a suit by a prior mortgagee the puisne mortgagee is also impleaded as a party and a decree is passed directing the sale of the property, the persons claiming under the parties to a previously puisne mortgagee is not debarred from enforcing his mortgage in a subsequent suit. 41 M 90=35 M.L.J. 639. See also 1 Luck 25. A prior mortgagee who is impleaded in a suit on a subsequent mortgage, but whose mortgage is not impugned has a paramount title outside the controversy of the suit and is not bound to set up his mortgage as a defence. 47 C 662=38 M.L.J. 424 (P.C.), 35 A. 111; 18 C.W.N. 1013. 58 I.C. 33, 1930 A. 163; 36 C.W.N. 1138, 144 I.C. 716=1933 N 190. But where it is sought to displace his prior title and to postpone it to the title of the plaintiff, it is the duty of the prior mortgagee to prove his title and if he fails to do so, the decision in the suit will operate as *res judicata* against him. 21 435=4 Pat L T 118. Where in consequence of the failure of the prior mortgagee to claim priority under his mortgage, a decree for sale follows, in pursuance of which the properties are sold, he could not thereafter enforce the claim under his prior mortgage. 39 C 527, 34 A. 599=19 C.W.N. 947, 4 Luck. 25=115 I.C. 833=1929 O. 463. But see 10 J. 234. Where the issue in respect of prior mortgage was struck off on the prior mortgagee not desiring to press for an enquiry in respect of his mortgage his claims are not barred by *res judicata*. 110 I C 79=5 O.W. N 210=1929 O 88. Where in a suit on a mortgage executed by two brothers, a third brother also was impleaded as a *pro forma* defendant, and there was no assessment in the plaint that the mortgage had been in respect of the share of the third brother as well, the question that this share was not liable to the mortgage would have been a question of title paramount outside the scope of the suit, and his sons are not precluded by the rule of *res judicata* from bringing another suit after his death, that the previous decree is not binding so far as it related to their share. 150 I.C. 529=58 C.L.J. 294=1934 C. 384. See also 61 C 294=150 I.C. 321=38 C.W.N. 492=1934

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C. 552. (Where the prior mortgagee who had purchased the property in execution of his decree was impleaded in a suit by a subsequent mortgagee) Suit to redeem invalid mortgage dismissed—Suit for redeeming a different mortgage not barred. 1930 M. 264. Suit for redemption—Sub-mortgagee made a party—Decision of his rights in his absence—No *res judicata*. 6 O.W.N. 851=1929 O. 455. If being a party to a suit on a mortgage prior to his own, he omits to claim his right to redeem such prior mortgage, he cannot afterwards sue for that purpose on the mortgage he has omitted to plead. 24 A. 429 (P.C.) See also 20 A. 110 (F.B.); 26 M. 770. A subsequent mortgagee claiming title as owner of a portion in a prior mortgage suit may set up his title in a separate suit as the question cannot be raised in the former suit. 16 A.L.J. 639=40 A. 584. On this point, see also 52 M.L.J. 52. Redemption suit by part owner or equity of redemption—Omission to pray for possession of other mortgage items does not bar suit for contribution. 27 A.L.J. 1162=1929 A. 696. Mortgage suit—Defendant impleaded as person interested in equity of redemption—Plea as to paramount title can be raised in later suit. 1929 C. 672. But see 58 C. 1222. Usufructuary mortgagee purchasing entire property from one of the heirs—Omitting to plead the mortgage in defence to a suit for possession of their shares by other heirs—Is debarred from suing on his mortgage, if he fails in former suit. 50 A. 306=1925 A. 714. SUIT ON MORTGAGE.—Preliminary and final decrees passed without any objection by mortgagors—Sale of properties—Suit by mortgagors for declaration that preliminary and final decrees were void for want of jurisdiction, dismissed—Application for personal decree against mortgagors—Question as to jurisdiction. Held, that the effect of the dismissal of the mortgagor's suit was that the question of jurisdiction became *res judicata* between the parties. 14 R. 94=161 I.C. 989=1936 R. 87 (S.B.)

"SAME PARTIES, ETC."—A judgment not *inter partes* or *in rem* is not *res judicata* in a subsequent suit though it may be received as evidence. 8 P. 122. See also 1934 O. 449; 1935 A.W.R. 95; 18 R.D. 700, 11 O.W.N. 1608. The matter decided in a previous suit is *res judicata* only as against those who had been parties to the previous suit. 33 A. 493; 26 C. 428, 54 C. 770=53 M.L.J. 123 (P.C.). Person party to suit but omitted in formal order by oversight is affected. 57 I.A. 24=1930 P.C. 22=58 M.L.J. 171 (P.C.). Where some of the defendants in a previous suit do not appear and are exempted from plaintiff's claim the decision in it does not operate as *res judicata*. 1 A.L.J. 363, 12 C. 580. S. 11 does not apply when the plaintiff, in the later suit were not parties to the previous suit, and only the defendants were parties. The decision in the prior suit does not therefore operate as *res judicata*, and the defendants who were parties to the previous

proceedings are also not in any way bound by the decision in the prior proceedings. 59 C.L.J. 320=1934 C. 788 See also 18 R.D. 339. Appeal by several parties—Death of one pending appeal—Legal representative not brought on record—Common decision—Binding nature of on legal representative 53 M.L.J. 220=103 I.C. 618. Where in a previous appeal in which the issue was decided the plaintiff and the defendant were arranged on the same side as respondents, it was, held, that the decision was *res judicata* in a subsequent suit. 151 I.C. 70=1934 P. 270. A decision arrived at in a prior suit is not *res judicata* against a person who was merely a nominal defendant in the previous suit. 35 I.C. 543; 12 C. 580, 25 B. 549, 27 A. 59. *Res judicata* operates against a person who took an active part in the litigation in contesting the claim of the plaintiff notwithstanding the fact that he was described as a *pro forma* defendant. 21 C.L.J. 157=27 I.C. 954=19 C.W.N. 1280 (14 B. 176; 14 B. 408, Dist.); 85 I.C. 953=1925 C. 985. But see 40 C.W.N. 1205=165 I.C. 662. As to the application of the principle to *pro forma* defendant, see 23 I.C. 381, 45 I.C. 318. A *pro forma* defendant in a suit would be as much bound by the decision therein as any other defendant. 1917 M.W.N. 330=38 I.C. 184, 44 I.C. 546. But see 39 B. 29. But where in the former suit, no relief was claimed against the *pro forma* defendants and the nature of the two suits is wholly dissimilar and the cause of action arose only in consequence of the decision in the first suit, the second suit is not barred. 14 L. 380=141 I.C. 435=1933 L. 109. See also 40 C.W.N. 1208=64 C.L.J. 3, 1935 L. 942; 62 C. 642=39 C.W.N. 938=61 C.L.J. 193; 40 C.W.N. 1205=165 I.C. 662. A party unnecessarily impleaded in the previous suit is not bound by a decree therein. 44 A. 428. See also 5 O.W.N. 510. See also 1935 N. 61. Where a suit for declaration of title to an office is dismissed, a subsequent suit against another party for recovery of money alleged to be due to the person entitled to the office is not barred by *res judicata*. 44 M. 778=41 M.L.J. 223. A decree for partition in a suit instituted by one member of a joint family impleading the others as parties is *res judicata* between all the sharers who are parties to the suit. 27 M.L.J. 76=24 I.C. 294. As to *res judicata* in the case of minors, see 1935 L. 44. The bar of *res judicata* cannot be evaded by addition of unnecessary and non-contesting parties in the subsequent suit. 1929 A. 500. Decision in a prior suit between B and A that certain wkf. is void is *res judicata* in later suit by B against A and C for declaration that the property was wkf. 1928 L. 888=113 I.C. 120. A decision against a mortgagor is not binding on a mortgagee whose title under the mortgage arose prior to the suit against mortgagor. 40 B. 679, 10 P. 234, 140 I.C. 796. See also 150 I.C. 868=1934 A.L.J. 597; 140 I.C. 796=1933 L. 66; 41 L.W. 600=1935 M.W.N. 506=1935 M. 414. The same rule holds good in the case of purchaser, lessee or donee also.

Explanation VI.—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

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See 1933 L. 66; 35 B. 297. A lessor cannot be considered as a party claiming under his own lessee and the dismissal of the latter's suit for ejectment does not bar the present suit for ejectment by the lessor 1527 B. 270; 1935 O.W.N. 674=155 I.C. 1087=1935 O. 394. So also in the case of creditor and debtor. 105 I.C. 647=32 C.W.N. 248. As to whether attaching decree-holder and auction-purchaser are representatives of judgment-debtor, see 1935 A.L.J. 1001=156 I.C. 387=1935 A. 888; 1936 A.L.J. 295=163 I.C. 239=1936 A. 722. In a suit under O. 21, R. 63, the decree-holder claims under his judgment-debtor within S. 11, and a decision in previous litigation between the claimant and the judgment-debtor recognising the latter's title to the property, is *res judicata* in a subsequent suit by the claimant under O. 21, R. 63, impleading the attaching decree-holder and judgment-debtor as parties 151 I.C. 41=1934 R. 206. An auction-purchaser is a representative of the judgment-debtor for the purpose of S. 11, C.P. Code, though he may not be one under S. 47, C.P. Code. 141 I.C. 448=1933 L. 171. A pre-emptor only stands in the shoes of the original vendee, a decision in whose favour operate as *res judicata* in a subsequent suit by the vendor for setting aside the sale 143 I.C. 883=1933 L. 529. Party who is privy to a decree is bound by the decree whether he has notice thereof or not 1929 R. 183. Decision against a reversioner is not *res judicata* against another 43 A. 558. As to how far, the decision in a suit by one reversioner for a declaration that an adoption or alienation by a Hindu widow is invalid, is binding on other reversioners, see 29 M. 390 (F.B.); 27 M. 588, 27 A.L.J. 741=121 I.C. 387. The dismissal of a suit by a Hindu father to set aside an alienation of a joint family properties or the ground of undue influence and fraud is no bar to a suit by the sons to set aside the alienation on the ground, that it is not for a binding family purpose 35 M.L.J. 451. See also 34 L.W. 598=1931 M. 559, 1933 N. 44 (2). When both parties to a subsequent litigation claim through the same part in the prior suit, there is no bar of *res judicata*. 78 I.C. 65, 30 C. 556, 55 M. 40. A decree for ejectment by the landlord against one of several joint tenants of a holding does not bind the other tenants 16 I.C. 698=24 M.L.J. 79. Decision in a suit, in substance on behalf of a trust though in form between private parties is *res judicata* between the trust and the defendants therein. 116 I.C. 142=1929 M. 687. Decision between the insolvent and creditor that the debt is time barred is not *res judicata* between the insolvent and the surety, when the latter was no party to the prior proceedings 1932 A. 610. Suit on mortgage by five brothers. Plea by another

brother that the mortgage amount belonged to others on record. Finding that amount belonged to joint family is not *res judicata* 55 M. 483. Land acquisition proceedings with Collector as party. Subsequent suit by Secretary of State. No bar of *res judicata* 56 B. 501. Where a Municipality has been delegated by Government with an authority to manage certain tanks, a decision in a former suit against the Municipality cannot bind the Government as the Municipality were not the owner of the tanks; and the Government cannot be said to claim under the same title as the Municipality nor the Municipality were litigating under the same title 1935 N. 61 (2).

Sec. 11, Expl. VI.—See 28 M. 457 (F.B.); 13 C. 352, 33 A. 493. For cases where the explanation cannot apply, see 30 M. 185, 33 A. 493. As to the applicability of the explanation, see 14 L. 442=143 I.C. 50=1933 L. 325; 52 M.L.J. 641. Explanation VI applies to those suits only which are instituted in a representative capacity 157 I.C. 106=1935 L. 537. Where the parties are different in two suits, the findings in the previous suit cannot be *res judicata* in the subsequent suit unless it is shown that the plaintiffs in the subsequent suit are claiming under the plaintiffs in the previous suit and the plaintiffs in the previous suit had claimed the right in common for themselves and for the plaintiffs in the subsequent suit 1935 L. 391. The expression "*private right claimed in common*" in Explanation VI, extends also to village communal rights 31 M.L.J. 26, G.C. 49. But see *contra* 52 M.L.J. 641, 1937 L. 70. To attract the operation of Expl. VI, the former suit need not have been instituted with leave of Court 31 M.L.J. 26, 54 M.L.J. 8 (F.B.), but see 43 M. 427=38 M.L.J. 493, 49 I.C. 796, 8 M. 496. Where the litigation is *bona fide* and the non-compliance with the conditions of O. 1, R. 8 has been inadvertent and no injury has been caused the prior decision may come within the explanation but the onus is on the party relying on the plea to prove the exception. *Held*, on the facts that the non-compliance with the conditions of O. 1, R. 8, rendered the prior adjudication of no effect against non-parties and that the doctrine of *res judicata* was inapplicable 60 I.A. 278=56 M. 657=1933 I.C. 183=65 M.L.J. 87 (P.C.); 163 I.C. 817=1936 I. 965. There is no bar if the prior suit is compromised, 55 I.A. 96=54 M.L.J. 609=55 C. 519=1928 P.C. 16 (P.C.) Or withdrawn 14 L.R. 64 (Rev.)=17 R.D. 60. Decree against Municipality in respect of Government land transferred in trust and vested in it under S. 74, Punjab Municipal Act, 1884, operates as *res judicata* in subsequent suit by Government. 1936 L. 998. Prior suit by joint family manager acting on behalf of minor members—Decree therein bind members. See 54 I.A. 122=

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51 B. 450=52 M.L.J. 4/2 (P.C.); 89 I.C. 120=1926 A. 201. Where the father omitted to take part in the previous suit, and declined to redeem doing thereby a great injury to the family property, the right of the son to bring a suit for redemption is not barred 144 I.C. 521=1933 N. 44. Where the effect of a compromise entered into by a karta of a family is to the advantage of the family and major members have assented to it either expressly or impliedly these majors should not be allowed to litigate the same point again 1934 P. 617 (1). A decree obtained by a trustee on behalf of the trust is binding also on all persons interested in the trust 46 A. 657. A suit for setting the amount of Kattubadi from an Agraharam is one in which all the agraharamdars are necessarily interested and the decision is binding on all agraharamdars. 43 M. 427=38 M.L.J. 493. Where a suit instituted *bona fide* in respect of a public right claimed in common was dismissed, a subsequent suit by two others in respect of the same right is barred 36 A. 424. Where a collateral files a suit for a declaration of title and for possession claiming the whole property for himself thereby excluding the title of any other collateral, it cannot be said that he must be deemed to have been litigating on behalf of any other reversioner or collateral. The decision in that suit does not operate as *res judicata*, but it is of great evidentiary value 1935 L. 505. Where a suit by a reversioner brought in a representative capacity that an alienation made by a Hindu widow in possession is without legal necessity is decided after a fair contest in the absence of fraud and collusion the decree will be binding on the whole body of the reversioners 44 A. 19. See also 103 I.C. 454=28 Punj L.R. 369, 145 I.C. 352=1933 O. 322. But see 95 I.C. 178=1926 A. 573, which holds that one reversioner does not represent the whole reversionary body, and so a finding against one does not bind another. 51 I.A. 381, Ref. Where in a previous suit against the adoptive mother, a decision is given that she possessed no authority to adopt, it is binding on the adopted son, though he may have been adopted by her subsequent to the decision and could have been no party to the previous litigation 108 I.C. 817 (855).

REPRESENTATIVE SUIT—As to what is a representative suit and how to decide whether it is one or not, see 54 M.L.J. 587=109 I.C. 199. A judgment *benamidar* operates as *res judicata* against the real owner 15 M. 267, 4 A.L.J. 689, 18 A. 69; 22 B. 679. A decree against a *shebait* as representing the *idol* is binding on his successor in the absence of fraud or collusion 42 C. 440. See also 1935 A.W.R. 95=157 I.C. 1092=1935 A. 255. Also decrees against holders of similar offices as trustees, *karnam*, etc. 11 M. 191; 12 M. 235, 9 B. 198; 29 B. 96; 39 C. 887; 1935 A. 255. So also a decision against a *Karnavun* of a *Tarwad* is *res judicata* against the junior members of the *Tarwad*. 44 M.L.J. 443;

17 M. 214; 30 M. 215. See also in the case of a father and son in a joint Hindu family. 1929 M.W.N. 776=120 I.C. 375, 7 P. 840; 53 B. 444; 1929 A. 775=52 A. 71. Objection by Hindu father in execution dismissed for default—Son's suit not barred. 1930 A. 727=127 I.C. 447. Dismissal of a suit brought by the managing member of joint family is a bar to a subsequent suit by a junior member who had been a *pro forma* defendant in the former suit, in respect of the same property and on the same cause of action 42 A. 359. See also 34 L.W. 598, 1933 N. 44 (2). An action by or on behalf of a family may result in *res judicata* as against absent or future members of the family, only when the action was so constituted according to the local rules of procedure or by a representative order or in some other way that all such members can be regarded as represented before the Court. 44 L.W. 73=162 I.C. 461=1936 P.C. 147 (P.C.). A creditor is bound by an adjudication against his debtor on his title to property in the absence of fraud, collusion, etc. 38 M.L.J. 266. But not so a debtor by dismissal of the creditor's suit under O. 21, R. 63. 55 C. 448. Decision against Official Liquidator in the winding up is conclusive on all parties represented by him 43 M. 550=32 M.L.J. 444. A decree fairly and properly obtained against a Hindu widow limited owners in the absence of fraud or collusion, is binding on the reversionary heir 40 A. 593; 36 M.L.J. 597, 43 B. 249, 49 C. 45, 1929 L. 586, 27 A.L.J. 518=119 I.C. 446, 108 I.C. 817. The principle does not apply to compromise or an award decree. 45 C. 590; 34 M.L.J. 298=43 B. 249 (365); 38 C. 369, 29 A. 239. Where the compromise is due to collusion on the part of the widow a suit by the reversioner is not barred 21 I.C. 605=11 A.L.J. 574. Where an alienee, from a widow of the last owner, gets a declaration of the validity of his alienation against the mother who is the next reversioner, the decision is binding on the male reversioners. 34 M.L.J. 319. Adjudication about B's title subsequent to A's deriving title from B does not bind A as *res judicata* 110 I.C. 548=1928 M. 635. In order that the decision obtained against a Hindu widow might operate as *res judicata*, the widow must represent the estate so that there is trial of the rights of the reversioners and a decree fairly and properly obtained. 14 P. 518=155 I.C. 213=16 Pat L.T. 713. The mere fact that the widow has been impleaded as a party in a suit by rival claimants to the property is not sufficient to confer on her the representative capacity so as to bar a fresh claim by reversioners. 144 I.C. 442=35 Bom.L.R. 118=1933 B. 126. A Hindu widow cannot be deemed to represent her husband's estate so as to bind the reversionary heirs of her husband in relation to anything which she may have done herself to the prejudice of these reversionary heirs. 23 I.C. 761. But the decision in a suit by a widow or a limited owner, in respect of and for the protection of her own rights in certain property bars a subsequent suit by

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reversioners in respect of that property even though such a suit may not be of a representative character (42 I.A. 125 and 1924 P.C. 247, Foll.) 1936 A. 422. A decree given against a Hindu widow on a ground personal to herself and on her admission in the prior litigation is not binding on the reversioner. 21 Bom L.R. 837=43 B. 869. In a litigation which is personal to a widow, the widow does not represent the estate fully so as to bind reversioners. 42 B. 69. As to when a litigation can be said personal to the widow, see 73 I.C. 284=18 L.W. 491. Successor of shebat when bound by decree against predecessor in shebatship barred. 42 C. 244=27 M.L.J. 100 (P.C.). Under Mahomedan Law one heir does not represent his co-heirs, and so decree against one heir does not bind the rest. 11 O.W.N. 1608=153 I.C. 42=1935 O.W.N. 62. A decision against a Municipality operates against the chairman suing subsequently for the same relief. 36 L.W. 664.

DECREES AGAINST MINORS.—S. 11 does not bar a suit if plaintiffs who were minors were not adequately represented in a prior suit. 39 B. 29. See also 6 P. 388; 16 Pat L.T. 484. A compromise involving a minor without the Court's sanction does not operate as *res judicata*. 36 B. 53. Compromise by minor's guardian set aside—No bar to fresh suit on the same allegations. 110 I.C. 550. Where the guardian *ad litem* is guilty of negligence, the decree will not operate as *res judicata* against the minor. 53 I.C. 412; 27 M.L.J. 486, 25 M.L.J. 379, 19 B. 571, 22 C. 8, 65 M.L.J. 518=1933 M. 806. An omission to rely upon a judgment in support of a plea of *res judicata* is not such negligence as would get rid of the bar of *res judicata*. 47 M.L.J. 700. Nor an omission to produce some evidence which existed and which might have been produced. 4 O.W.N. 748=105 I.C. 59=1927 O. 354. An omission on the part of the guardian to produce the document supporting the minor's title to the property in dispute, which it was plainly her duty to do, is gross negligence and the decree in the prior suit would be of no effect and would not operate as *res judicata* so as to bar a subsequent suit by the minor to enforce his rights. 67 M.L.J. 927=40 L.W. 823. A guardian is not bound to contest a suit to which there is no good defence. 47 M. 476=46 M.L.J. 291. Where guardian is not guilty of fraud nor his interests adverse. 9 L.W. 479=51 I.C. 724. The minority of the defendants at the time of prior decision does not preclude the operation of *res judicata* against them provided that some of the defendants had identical interests with theirs. [25 A.L.J. 319 (P.C.), Rel on.] 119 I.C. 567=1929 A. 346. Where on an alienation by the minor's father, a pre-emption suit is filed and the minor's step-brother on his own behalf and as guardian of the minor defends the suit and admits the validity of the sale, the minor cannot subsequently reopen the matter and challenge the validity of sale. 157 I.C. 801=1935 L. 44.

RES JUDICATA AS BETWEEN CO-DEFENDANTS.

—The doctrine should be applied to co-defendants with great caution. 25 C.L.J. 322=21 C.W.N. 639; 51 I.C. 997. To constitute *res judicata* between co-defendants it is necessary there should be (1) conflict of interest, (2) adjudication should be necessary to give appropriate relief to plaintiff and (3) the question must have been finally decided between the defendants. 164 I.C. 468=1936 R. 308, 159 I.C. 340=37 P.L.R. 89=1935 L. 605; 33 M.L.J. 740, 17 A.L.J. 225, 7 L.W. 104; 4 Bur L.J. 250=1926 R. 75, 97 I.C. 205=1926 P. 478, 96 I.C. 406=1926 S. 282, 30 C.W.N. 415=94 I.C. 235=1926 C. 568; 1927 A. 365, 103 I.C. 701; 1927 M. 50, 119 I.C. 167=1929 M. 638, 117 I.C. 100, 13 R.D. 831; 6 R. 575, 110 I.C. 596=1928 M. 630, 1930 P. 355, 148 I.C. 441=1934 L. 688, 151 I.C. 1013=1934 O. 437; 36 Bom L.R. 694=1934 B. 329; 1935 L. 102; 37 P.L.R. 89, 1936 O.W.N. 982. See 58 I.A. 158=53 A. 103 (P.C.), 61 M.L.J. 415 (P.C.), 59 C. 636, 59 I.A. 247=10 R. 322 (P.C.), 55 M. 601; 1933 A. 206, 1933 R. 255; 14 L.R. 496 (Rev.)=17 R.D. 655. Where in a suit by the mortgagee the question as to whether there was a partition between the two defendants in that suit was specifically raised and decided and it was not necessary for the adjudication of the claim of the mortgagee. *Held*, that the decision did not operate as *res judicata* in a subsequent suit between the defendants. 157 I.C. 1047=1935 M.W.N. 801=1935 M. 649. Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* as between the defendants, if there is a conflict of interests amongst them, and a judgment defining the real rights and obligations of the defendants *inter se*. 11 B. 216, 20 A. at p. 442 (F.B.), 22 B. 245; 25 B. 71, 18 A. 65, 22 A. 386, 47 B. 534, 46 A. 220, 38 B. 438, 14 L. 442=143 I.C. 90=1933 L. 325, 1933 A. 206, 1933 R. 255, 14 L. 31=142 I.C. 724=1933 L. 274, 1933 P. 146. See also 2 L. 88; 1927 L. 112; 1935 L. 57=37 P.L.R. 89. If the conditions above-mentioned are satisfied, it is immaterial that no distinct issue on the point was struck for trial or that there was no active contest between the co-defendants. 14 L. 31=142 I.C. 724=1933 L. 274 [21 C. 430; 61 M.L.J. 196 and 63 M.L.J. 64 (P.C.), Foll.] One of two mortgagees brought a suit for his half share of the mortgage money to which he had become entitled by partition. Besides the mortgagor he also impleaded the other mortgagee as a party defendant and alleged that the latter's share of the mortgage money had been paid off. The mortgagor defendant pleaded that he had discharged the whole debt by payment to the other defendant-mortgagee. The latter remained *ex parte*. The Court found that the mortgage had not been discharged so far as the plaintiff was concerned and gave him a decree. The other mortgagee then brought a suit for his share of the amount impleading also the plaintiff in the former suit as a party defendant. *Held*, the claim was barred by *res judicata* by

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reason of the decision in the prior suit 42 L. W. 298=1935 M. 821=69 M.L.J. 527 Where in a previous suit, there had been a conflict of interests between the defendants *inter se*, which it was necessary for the Court to decide in order to dismiss the suit, and the Court did in fact decide that conflict against the plaintiff in that suit, the decision would operate as *res judicata* in a subsequent suit by one of the defendants. 40 L.W. 823=67 M.L.J. 927. See also 58 B. 544=36 Bom.L. R. 612=1934 B. 313. Even if the plea of the plaintiff and one of the defendants be identical, a decision between the co-defendants would be *res judicata* 1935 L. 102=157 I.C. 771. See also 157 I.C. 776=37 P.L.R. 274=1935 L. 544 Where there is no finding or only a vague finding there is no *res judicata* 1929 M. 291, 7 R. 80 Where in a suit brought against the mortgagor and mortgagee by a third party, a finding is given that the mortgagee is entitled to add the amount spent by him in defending his title, to his mortgage money and recover it when the mortgagor seeks to redeem the property, the finding constitutes *res judicata* in a subsequent suit for redemption 1 Luck. 367 A finding against a defendant who is not a necessary party is not *res judicata*. 25 B. 589. Where a defendant is *ex parte*, it cannot be said that there has been an active contest between him and another defendant who is not *ex parte*. 14 M. 324, 57 I.C. 252 See also 157 I.C. 511=1935 A.W.R. 867=1935 A. 678 Where in a *partition suit*, none of the parties claimed or resisted partition except the plaintiff, any questions regarding partition which might thereafter arise between defendants remains open to be decided 47 B. 534. See also 96 I.C. 406=1926 S. 282, 146 I.C. 131=1933 O. 415. In partition suits decision of issues between co-defendants *inter se* is *res judicata*. 27 A.L.J. 883=118 I.C. 175; 4 Luck. 713=1929 O. 275 Where in a previous partition suit, the plaintiffs in the subsequent suit were not mere *pro forma* defendants, but actively supported the plaintiffs in the former suit, and claimed their share, the decision in that suit would be *res judicata* 58 B. 544=36 Bom.L.R. 612=1934 B. 312 A sued B, B-1 and C for partition of joint family estate held by B. The estate was in the name of B-1 who was the son of B. B at first denied any joint estate but later on entered into a compromise with A admitting the jointness of the estate. The compromise was admitted to Court and a decree was passed on it. In a suit by C against B and B-1 to get his share of property. Held, that the former decision was *res judicata* as to the jointness of the property. 1936 M. 252 In a former suit it was necessary to decide the dispute between the plaintiffs and defendants as to the validity of certain sale for the purpose of giving the plaintiff appropriate relief. In the subsequent suit, the same question as to the validity of the sale was again in issue between the same defendants, who were ranged as

plaintiff and defendant 1, though the subject-matter of this suit was different. Held, the decision in the former suit was binding upon them and that issue was *res judicata*. 14 P. 611=39 C.W.N. 1124=1935 P.C. 139 (P.C.).

RES JUDICATA AS BETWEEN THE CO-PLAINTIFFS—A finding to become *res judicata* as between co-plaintiffs must have been essential for giving relief against the defendant. 36 B. 207 It must be also on points actively contested between co-plaintiffs 38 I.C. 213, 1917 M.W.N. 14 There must also be conflict of interest between persons ranged as co-plaintiffs. 70 I.C. 232=1921 P. 369. On the point, see also 17 I.C. 205=14 Bom.L.R. 854, 21 M. 8, 36 B. 207, 31 M.L.J. 77; 1933 L. 569. Where in the prior suit it was not necessary to decide the rights of the plaintiffs *inter se* for granting relief as against the defendants and the later suit related to the individual right of one of the original plaintiffs, the prior decision did not operate as *res judicata*. 57 B. 488=35 Bom.L.R. 418=1933 B. 287

LITIGATING UNDER THE SAME TITLE.—See 1936 M.W.N. 1154=71 M.L.J. 823. The phrase "litigating under the same title" means litigating in the same capacity. 140 I.C. 796=1933 L. 66, 153 I.C. 585=1935 O. 121, 1933 O. 535=147 I.C. 540. It does not matter if the transfer attacked in one case is a mortgage and in the other case a gift 140 I.C. 796=1933 L. 66, 11 O.W.N. 157=153 I.C. 585=1935 O. 121; 31 N.L.R. (Supp.) 202=163 I.C. 179=1936 N. 71 Litigating under the same title mean that the demand should be of the same quality in second suit as in first suit 57 C. 258=33 C.W.N. 876, 140 I.C. 796, 1933 O. 535=147 I.C. 540, 1935 N. 61 "Title" is not the same as "cause of action" 116 I.C. 738=1929 A. 400 A person who litigates a suit as the representative of a deceased defendant and who sues for the same subject-matter in his own right, does so in a different capacity and is not affected by the rule of *res judicata*. 17 C. 57 See also 5 M. 239; 1929 A. 352, 1927 M. 110 Where the first suit by plaintiff claiming succession to the suit property as daughter of the deceased owner, a woman was dismissed on the ground that she was an illegitimate offspring, a second suit by her claiming to succeed to the same property, as heir to her brother is not barred 58 B. 119=149 I.C. 821=35 Bom.L.R. 1131=1934 B. 36. It cannot be said for the purpose of the section that a decision on a plea of *ius tertii* is a decision between the parties litigating under the same title when the *ius tertii* is put forward and actually relied on in later case by the third person 50 M. 877=53 M.L.J. 864 A decision against a person in his individual capacity does not bind his successor in the office of trustee of an endowment. 47 C. 866 See also 69 I.C. 528. Where the plaintiff in a subsequent suit sues under a title different from the one he endeavoured to support in a prior suit, the decision in the prior suit will not be *res judicata*. 55 I.C. 767=31 C.L.J. 163. See 9 C. 945; 19 L.W. 369=1924 M. 576, 1931 O. 21, 1930 A.L.J. 1254; 1933 L. 920. Prior suit

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for possession in personal capacity does not bar subsequent suit as shebais and managers and in respect of property of idol. 156 A 422. A suit under S. 92, C.P. Code, for a scheme is not barred by a prior suit by them in which the defendant was held to be hereditary trustee 43 M.L.J. 448. Dismissal of a suit by the members of a community to assert their personal rights is no bar to a subsequent suit by them as representatives of the community to establish the right of the community 18 A.L.J. 150. See also 1 Luck. 489. A suit by the plaintiff as owner is not barred because of a previous suit by him as expectant reversionary heir, as he cannot be said to be litigating under the same title. 117 I.C. 68. Where, in the former suit, the grandfather of the present plaintiff only claimed the property in dispute as reversioner, the second suit by the plaintiff for partition of the property on the footing of its being joint family property is not barred by *res judicata* 149 I.C. 244=1934 O 293. A decision against a Municipality regarding a tank the management of which is delegated to it by the Government cannot bind the Government, which cannot be said to claim under the same title as the Municipality. 31 N.L.R. 165=156 I.C. 180=1935 N. 61. There is no question of *res judicata* where the judgment has been delivered by a Court not competent to deliver it affecting the subject-matter of the suit. 37 B 563, Rel. on, 1935 R 517, 156 I.C. 1031 (L.)

COURT MUST BE COMPETENT TO TRY THE SUBSEQUENT SUIT—The section applies only when the Court whose decision is cited as *res judicata* is competent to try the second case 1 A.L.J. 503. See also 1925 M 1270, 91 I.C. 1026=1926 C 603, 43 C.L.J. 606=1926 C 1053, 56 M.L.J. 52=110 I.C. 551=1928 M. 840, 108 I.C. 623, 1931 A 454=53 A 560; 12 Pat L.T. 582, 151 I.C. 70=1934 P 270, 57 B. 456=35 Bom L.R. 630=1933 B 398, 14 L 437=146 I.C. 880=1933 L 646, 1933 L 614, 14 L.R. 248 (Rev.)=17 R.D. 314. In determining the competency of a Court for purposes of *res judicata*, a distinction has to be drawn between an inherent want of jurisdiction and want of jurisdiction on grounds to be determined by the Court itself. The first makes the decree a nullity which can be ignored, and which will not be *res judicata*. The second does not make the decree a nullity but only voidable. 42 L.W. 446=1935 M 835=69 M.L.J. 196. The "competent" Court is the Trial Court and it does not affect the question whether the decision is that of an appellate Court. 44 A. 712; 5 C. 832, 30 B 220, 23 C 415; 35 C. 356, 9 L.R. 264 (Rev.)=12 R.D. 547; 58 C.L.J. 120. See also 49 A 543=164 I.C. 118=1936 O.W.N. 784=1936 O. 387. The fact that in the two suits appeals may lie in different Courts does not affect the application of the rule. 32 A. 67. See also 99 I.C. 299=1927 A 189. Court which decided the former suit must have been competent to try and decide not only the particular matter in

issue in the later suit but also the latter suit itself in which the issue is subsequently raised. 45 B. 805, 29 C. 707 (P.C.), 14 L. 369=141 I.C. 454=1933 L. 551. See also 35 C. 553; 25 A. 138, 25 C 571, 35 C. 356; 1932 A. 483. In determining the jurisdiction of the Court which decided the former suit regard should be had to the jurisdiction on the date, not of the subsequent suit, but of the former suit. 19 C.W.N. 128, 27 I.C. 954, 10 C. 697; 11 C. 153, 15 M. 494, 10 L. 528, 1928 L 929; 1932 C. 271=59 C 636, 37 C.W.N. 810=1933 C. 879. Where property in two suits is identical, the mere fact that its value has arisen in the interval between the two suits and the subsequent suit is, therefore, beyond the pecuniary jurisdiction of the former Court, cannot affect the question of *res judicata*. 1936 L. 998=44 L.W. 530=1936 M 951=71 M.L.J. 619. Court which at date of the institution of the first suit had jurisdiction to try the subsequent suit but was deprived of such jurisdiction before it pronounced judgment in the first suit, is a "Court of jurisdiction competent to try such subsequent suit." 42 M. 702=37 M.L.J. 248. If the Court which passed the decree in the first suit is competent to try the subsequent suit, it is immaterial that it is prevented from entertaining the subsequent suit by reason of the existence of another Court with preferential jurisdiction. 28 B 338, 27 M. 63, 29 M 65. See also 54 C 114, 54 A 824=1932 A 660. Where the previous suit relates to only a portion of the property which is the subject-matter in the subsequent suit, if the other conditions under S 11 are satisfied, the finding in the previous suit that the property therein is ancestral will be *res judicata* as regards that portion of the property which is the subject-matter in the subsequent suit notwithstanding the fact that the subsequent suit is beyond the limit of the pecuniary jurisdiction of the previous Court 1935 L 391. A plaintiff cannot evade the provisions of the section by joining several causes of action against the same defendant in the subsequent suit and instituting it in a Court of superior jurisdiction. 28 C 72, 22 A.L.J. 745=1924 A 849, 50 A. 306=1928 A 714=113 I.C. 745. Or by including new properties in the claim so as to make the entire claim beyond the jurisdiction of the Court which tried the first suit. 148 I.C. 926=1934 Pesh. 7. Or by intentionally inflating the claim. See 51 M.L.J. 630, 28 Bom L.R. 879=1926 B 481, 1928 A. 127=25 A.L.J. 1035=108 I.C. 462. But it would be different if cause of action in subsequent suit was not available or did not exist at time of former suit. 1935 C 792=40 C.W.N. 174. If any specific question be within the jurisdiction of the Court which decided it in the previous suit, the trial of it is barred though the whole suit is beyond the jurisdiction of the former Court. 25 M. L.J. 379. But see 117 I.C. 83=1929 L. 781; 29 L.W. 760=119 I.C. 377=1929 M. 529, 1935 C. 792=40 C.W.N. 174. Nor can the plaintiff deliberately overvalue the subsequent suit to

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get rid of the bar 39 I.C. 551 The expression "competent to try the subsequent suit" in S. 11 means "competent to try the subsequent suit if brought at the time the first suit was brought". Where the later suit was valued at a figure beyond the pecuniary jurisdiction of the Court trying the first but it was shown that the subject-matter of the prior suit was really undervalued, *Held*, that the Court may be deemed to be competent to try the subsequent suit 37 C.W.N. 810=1933 C. 879=147 I.C. 719 Dismissal of a suit for possession filed in a Munsif's Court is not *res judicata* in a subsequent suit for redemption of mortgage and possession the value of which is beyond the jurisdiction of the Munsif's Court 65 M.L.J. 761=1933 M. 913 Judgment of a Court of British India in respect of property situated in a Native State could not operate as *res judicata* in the Court of the Native State, as it is not competent Court 20 C.W.N. 1213=36 I.C. 710; 37 A. 1=12 A.L.J. 1074. Then the British Indian Court to which the decree of the Court of the Native State is sent for execution refuses execution holding that the decree is a nullity as having not been passed by a Court of competent jurisdiction, such decision is final between the parties and operates as *res judicata* so as to bar a suit on the foreign judgment under S. 13, C.P. Code. 63 C. 1033=63 C.L.J. 175=40 C.W.N. 591. The term 'competent jurisdiction' has regard to the subject-matter as well as the pecuniary limit 17 M. 273; 13 B. 224, 29 M. 65. 24 M. 444, 1930 L. 501=126 I.C. 591, 1930 A. 430=124 I.C. 714, 1930 A.L.J. 1254=130 I.C. 31. Judgment of a Court on issues which it is not competent to try could not operate as *res judicata* in a subsequent suit involving the same issue. 37 B. 563; 20 I.C. 557. Question regarding title to property decided under S. 4, Provincial Insolvency Act at instance of person submitting to it, operates as *res judicata* in a subsequent suit by him for declaration of title I.L.R. 1936 N. 28=164 I.C. 694=1936 N. 112 A decision of a Court of Small Causes on a question of title is not *res judicata* 3 M. 192 (F.B.); 80 I.C. 724; 11 C. 301; 12 I.A. 123; 150 I.C. 17=1934 L. 324. The decision of a Small Cause Court in a suit for rent that tenant was permanent does not operate as *res judicata* in a subsequent suit on the regular side, even though the Small Cause Judge had jurisdiction to decide the latter suit 48 B. 541 Where a suit of the nature cognizable by a Court of Small Causes is tried as a regular suit, the decision operates as *res judicata* though it is not appealable 41 A. 54=47 I.C. 837. But see also 1927 M. 96=98 I.C. 176. A Small Cause suit transferred to a Munsif retains its character as such and his decision does not bar subsequent suits not cognizable by the Small Cause Court. 26 I.C. 56=12 A.L.J. 853. See also 1934 N. 178 A Probate Court is not competent to try an ordinary suit for title and its decision is no bar to a suit in the Civil Court. 15 C.W.N.

1021=10 I.C. 434=13 C.L.J. 547; 20 C. 888; 34 B. 589 But see also 21 M.L.J. 485. A finding by a Probate Court in contentious proceedings operates as *res judicata* between the parties thereto 38 B. 309. See also 31 C.W.N. 898=100 I.C. 510=1927 Cal. 421. The decision of a Settlement Officer construing a grant by the Crown and declaring the nature of the grant and the status and rights of the grantee in accordance with Settlement Circular No. 20 of 1863, is not *ultra vires*, and clearly operates as *res judicata* in a subsequent civil suit between the parties or their representatives 161 I.C. 158=1936 R.D. 35=1936 O.W.N. 100=1936 O. 225 The decision of Revenue Court in a suit exclusively triable by it binds the Civil Court, though the subsequent suit could not be brought in the Revenue Court 43 M. 859=39 M.L.J. 476 See also 3 O.W.N. 210=93 I.C. 62=1926 O. 205; 93 I.C. 374=1926 O. 348; 89 I.C. 810=1926 O. 181, 1926 C. 369=90 I.C. 756, 91 I.C. 528=1926 L. 178; 1926 A. 34; 4 Luck. 220; 19 A. 101 Where the question raised in the suit in the Civil Court was not decided by the Revenue Court in the prior suit as a Court of exclusive jurisdiction there is no bar 3 Luck. 636; 52 A. 823=1930 A. 611 See also 44 L.W. 334=1936 M. W.N. 900=165 I.C. 508=1936 M. 522=71 M. I.J. 227. Where in a suit under S. 105 of the B.T. Act, before the Revenue Officer, the question of the maintainability of the suit on the ground of jurisdiction was raised and adjudicated upon, and it was not appealed against the decree of the Revenue Officer cannot be attacked in a subsequent suit in a Civil Court 30 C.W.N. 974=97 I.C. 702=1926 C. 1180. See also 49 C.L.J. 281=1929 C. 417=120 I.C. 104 The decision by a Revenue Court on a question of title is no bar to the same question being litigated in the Civil Court. 46 I.C. 13; 34 I.C. 354; 67 M.L.J. 268=152 I.C. 246=1934 M. 551. But see 1930 A.L.J. 1281. Decision of Tashildar in suit for arrears of rent is not *res judicata* in subsequent suit for ejectment 1936 A.W. R. 30=1936 R.D. 1. A decision on a question of tenancy by a Rent Court is not *res judicata* in a subsequent suit for declaration of title 21 A.L.J. 476=1924 A. 163, 1933 L. 1016 (1)=147 I.C. 521 But when a Revenue Court is invested with the powers of a Civil Court regarding a particular class of cases, its decision on a question of title will operate as *res judicata* 18 A. 59; 18 A. 270 (F.B.); 29 C. 252 It would not be *res judicata* if the Revenue Court is not so invested 26 A. 601 See also 33 A. 453; 29 A. 601. A Revenue Court's decision in a rent suit declaring a tenant's status bars a subsequent suit in the Civil Court for declaring the tenant as an occupancy tenant 42 A. 191; 58 I.C. 771; 71 I.C. 307; 50 C. 79 But see 100 I.C. 851=1927 O. 183 where the underproprietary rights of the tenants were in question The decision of a Revenue Court on a question as to the existence of the relationship of landlord and tenant cannot operate as *res judicata* in subsequent suit in

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ejectment and for declaration of title, in a Civil Court 30 C. 339; 25 A. 138; 26 A. 468, 26 A. 601. But see 13 M. 287, 33 A. 453. See also 37 A. 280, 41 A. 319. But see *contra* 34 P.L.R. 642=1933 L. 738 where the previous ejectment suit was exclusively within the jurisdiction of the Revenue Court. Certificate Officer under Bengal Public Demands Recovery Act is not a "Court" 112 I.C. 71=1929 C. 130. Decision under Bengal Tenancy Act, S. 106, in a suit for correction of entry in Record-of-Rights is *res judicata* in a subsequent suit. 49 C.L.J. 285=33 C.W.N. 623=1929 C. 385. Prior decision in land acquisition case though between same parties and in respect of adjacent land is not *res judicata* if land is acquired under a different notification. 1928 L. 263=112 I.C. 797.

EFFECT OF APPEAL—When a judgment of a Court of First Instance is appealed against, it ceases to be *res judicata*. 11 A. 148 (161) (F.B.), 24 C. 616; 39 C. 925, 12 L. 497. But if the appeal fails, or abates or is otherwise not proceeded with, the judgment becomes final, and does not lose its effect or finality for the purpose of *res judicata*. 14 P. 633=159 I.C. 173=16 P.L.T. 819; and if the appellate Court declines to decide that issue and disposes of the case on other grounds, the judgment of the first Court on that issue is not a bar to a future suit, 6 B. 110, 5 C.L.J. 653, 164 I.C. 610 (L.). Where the plaintiff's suit was decreed both in the question of title as well as on a plea of adverse possession and the same was confirmed on appeal but in second appeal the question of adverse possession was not argued or considered, *held*, that the adjudication as to adverse possession would operate as *res judicata* in a later suit. 53 B. 676. As to the effect of appeal with some only of the defendants as respondents, see 6 R. 29=54 M.L.J. 88 (P.C.). When an appeal is preferred against the finding of an issue and the appeal is disposed of on other points, the finding of the lower Court cannot operate as *res judicata*. 28 M. 338; 4 Luck. 404. Where in appeal, permission is granted to withdraw a suit with liberty to file a fresh suit, the order of the trial Court on the merits *ipso facto* falls to the ground and hence cannot operate as *res judicata*. 74 I.C. 894; 40 M. 259=32 M.L.J. 477. Dismissal of the application to file appeal in *forma pauperis* decision cannot operate as *res judicata*. 1930 L. 501, 1930 A. 112. Such an order though erroneous and unjustifiable is not void or one made without jurisdiction and consequently the prior suit is not *res judicata*. 31 C.L.J. 482=24 C.W.N. 723 (F.B.); 32 M.L.J. 434. But the contrary has been held in 46 I.C. 322=3 P.L.J. 404, 44 C. 367. The dismissal or withdrawal of an appeal has the same effect as a decision on the merits and leaves the finding of the trial Court final. 22 A.L.J. 365=78 I.C. 677. Where pending a Privy Council appeal the matter is compromised and the appeal withdrawn, the decree of the High Court becomes final. 6 M. 43; 138 I.C. 406. A decision in

the previous suit is final though an appeal is pending against the same in the Privy Council. 4 R. 8; 12 L. 497. Other defendants claiming through 1st defendant, plaintiff appellant not joining 1st defendant as respondent in appeal—Decision of *res judicata* between him and all the defendants. 54 M.L.J. 88.

CONNECTED OR CROSS SUITS TRIED TOGETHER.—Where two actions were tried together and there was a common judgment though separate decrees and no appeal was preferred against one of the decrees, the finding in the suit not appealed against operated as *res judicata* in the connected proceeding taken in appeal. 12 P. 139=141 I.C. 762=1933 P. 78; 75 I.C. 570 (Pat.), 34 C.W.N. 839; 37 C.L.J. 184=74 I.C. 591; 33 A. 51; 33 A. 151; 35 A. 187, 41 A. 54; 2 R. 633; 14 L.R. 552 (Rev.), 1934 Pesh. 116; 15 L.R. 6 (Rev.); 15 I.L.R. 339 (Rev.); 14 L.R. 879 (Rev.); 10 O.W.N. 1093=1933 O. 531; 102 I.C. 171=4 O.W.N. 297, 40 C.W.N. 1176, 62 C. 642=39 C.W.N. 938=61 C.L.J. 193; 156 I.C. 998 (Lah.); 164 I.C. 743=1936 R. 401. But see *contra* 29 M. 333=16 M.L.J. 63; 1926 M. 378=92 I.C. 352, 29 M.L.J. 551, 67 M.L.J. 364; 8 L. 384=104 I.C. 849 (F.B.); 105 I.C. 850=9 L.L.J. 526; 1927 L. 98; 8 L.L.J. 136=93 I.C. 1014, 16 C. 233; 33 C. 1101, 14 L.R. 41 (Rev.)=17 R.D. 32.

CROSS SUITS.—One decided after the other—Decision in the former is *res judicata* in the latter. 96 I.C. 694. See also 8 L. 384 (F.B.); 1927 L. 821; 14 R.D. 324; 34 C.W.N. 839. Where cross-suits between the same parties on the same facts are tried together and disposed of by one judgment but separate decrees are passed and an appeal is preferred against one of the decrees alone, the decree unappealed does not operate as a bar under S. 11, C.P. Code, so as to preclude the appellate Court from dealing with the decrees appealed against. The doctrine of *res judicata* has no application when the very object of the appeal, in substance if not in form, is to get rid of the decision which is pleaded in bar. 152 I.C. 114 (2)=67 M.L.J. 364 [29 M. 333 (F.B.), Foll.] Cross-appeals from the same decree decided by appellate Court allowing one appeal and dismissing the other—Second appeal preferred against decree of dismissal only—No bar of *res judicata*. 50 A. 517.

"CAUSE OF ACTION"—See 16 C. 98 (P.C.) and 34 M. 97.

RENT SUITS—In a suit for recovery of rent under the Bengal Cess Act (1880), the decision as to amount of cess cannot be *res judicata*. 1927 P. 58.

PROOF AND PRACTICE—The judgment pleaded in bar of the suit must be strictly proved. 31 M.L.J. 311. The original pleadings should be filed to sustain a plea of *res judicata*. 47 C. 662=47 I.A. 11=38 M.L.J. 424 (P.C.). Judgments which do not operate as *res judicata* may be used as evidence. See 22 I.A. 60; 24 I.A. 10; 12 A. 1; 25 M. 300 (F.B.); 28 C. 109. Plea of *res judicata* cannot be allowed to be taken for first time in second appeal when not already taken. 111

12. Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.

13. A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except—

(a) where it has not been pronounced by a Court of competent jurisdiction;

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written statement and not discussed in lower Courts 1929 M. 775.

A DECREE is not sufficient evidence to support a plea of *res indicata*, for it does not afford any information as to the matters which were in issue or have been decided 43 L.W. 670=161 I.C. 748=1936 M. 469. Where the judgment of appellate Court was not filed even though it was a confirming judgment, the grounds for decision could not be ascertained and the decision of any particular point by the trial Court could not be treated as *res judicata* 1935 C. 792.

Sec. 12—As to rules which preclude the institution of further suit in respect of same cause of execution, *see* O. II R. 2 (suit in respect of part of claim omitted or relinquished), O. IX, R. 9 (where decree was passed against plaintiff by default), O. XXII, R. 9 (abatement of suit), O. XXIII, R. 1, (withdrawal of suit without leave of Court) Dismissal of suit for non-prosecution under Ch. X, R. 36 of Calcutta High Court Rules (Original Side) does not bar fresh suit 62 C. 15=38 C.W.N. 1132=60 C.L.J. 158=155 I.C. 158=1935 C. 212. Where a person obtains a decree of the extent of the assets against a supposed legal representative of a deceased debtor, who is subsequently found not to be so, a fresh suit on the same cause of action against the right legal representative is barred. 9 Pat. L.T. 807=108 I.C. 558=1928 P. 362.

Sec. 13.—SCOPE AND APPLICATION—This section enacts a rule of *res judicata* in the case of foreign judgments, except in the six circumstances specified in this section. It follows that in order to so operate, two other conditions of S. 11 should be fulfilled 2 L. 107=63 I.C. 387. *See also* 158 I.C. 547=1935 R. 284. A Court which entertains a suit on a foreign judgment cannot enquire into the merits of the original action or the propriety of the decision 46 A. 119. *See also* 28 C. 641, 107 C. 352=47 C.L.J. 263=1928 P.C. 83 (P.C.), 36 Bom. L.R. 844=155 I.C. 711=1934 B. 390. Where a judgment falls under any of the exceptions no judgment on them can be passed in a British Indian Court 50 M. 261=52 M.L.J. 240 (F.B.). Every issue decided by the foreign Court is not binding on the British Indian Court. The expression "matter directly adjudicated upon" in the section should be held to include the right set up by the plaintiff limited only to the particular relief granted or refused 51 M. 720=54 M.L.J. 479; 1929 L. 627=139 I.C.

482. Section is not confined in its application to plaintiffs suing on foreign judgments. A defendant is equally entitled to non-suit the plaintiff on the basis of a foreign judgment. 54 M.L.J. 479=51 M. 720. A foreign judgment has no force or authority as such in British India, but may give a cause of action for a suit to obtain the same relief in British India. 31 M.L.J. 563=43 I.A. 215=44 C. 186 (P.C.). The judgment of a foreign Court obtained on a decree of a Court in British India is no bar to the execution of the original decree. 7 C. 82. A foreign judgment may, in certain specified cases, be enforced by *proceedings in execution*, instead of by a suit (See S. 44.) But S. 44 does not override this section 53 A. 747=1931 A. L.J. 653=136 I.C. 353=1931 A. 689. Hence a British executing Court can enter into the question whether the foreign Court had jurisdiction to pass the decree 37 P.L.R. 240=158 I.C. 232=1935 L. 551; 63 C. 1033=63 C.L.J. 175=40 C.W.N. 591. Foreign judgments in respect of immoveable property in British India do not bar the trial of the same question in British Courts 119 I.C. 482=1929 L. 627. But a suit upon it lies in a British Indian Court. 6 M. 273, 7 M. 164, 24 B. 86, 22 C. 222=21 I.A. 171 (P.C.). *See also* 13 B. 224. A foreign judgment cannot directly affect land situated in British India 19 M. 527. As to the effect of adjudication of insolvency in a foreign Court, *see* 23 M. 458. British Indian Courts are not bound in all cases to take cognizance of a suit based on a foreign judgment, and they may refuse to entertain it on grounds of expediency (*ibid*).

Sec. 13 (a). JURISDICTION OF FOREIGN COURT—A British executing Court has jurisdiction to see whether the foreign Court had jurisdiction to pass the decree in question. Scope of Ss. 13 and 14 considered. 39 M. 24=27 M.L.J. 535 (F.B.), 40 B. 551; 53 A. 747=1931 A.L.J. 653=136 I.C. 353=1931 A. 689. The defendant must either be a subject of the foreign State or reside in it, at the date of suit where the claim against him is of a personal nature 37 M. 163=24 M.L.J. 619; 22 C. 222 (P.C.); 26 C. 931, 24 B. 77, 20 M. 112; 32 M. 469, 158 I.C. 24, 63 C. 1033=63 C.L.J. 175=40 C.W.N. 591, 59 M. 918=43 L.W. 607=1936 M. 552=71 M.L.J. 93. A service on the agent of a firm within jurisdiction cannot create jurisdiction against non-resident partners and the judgment against the firm does not amount to personal decree against them. 37 M. 163=24 M.L.J.

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619 See also 20 M 112, 24 B 77; 63 M.L.J. 761=140 I.C. 588. But where there has been submission to the forum by the partners for many years, a decree against them can be personally enforced against them. Service of suit notice on agent of partnership whose members reside outside jurisdiction does not create jurisdiction on the ground of residence. 37 M. 163=24 M.L.J. 619. Irregularities which do not affect the jurisdiction of the Court do not vitiate a foreign judgment. 30 M. 292, 36 Bom L.R. 844=155 I.C. 711=1934 B 390.

SUBMISSION TO JURISDICTION—Where there has been consent to submit to the jurisdiction of the foreign Court, the decision is binding. 37 M. 163=24 M.L.J. 619. The question whether a party has submitted to the jurisdiction of a foreign Court is one of fact. To give jurisdiction and validity to the decree there must be submission before judgment is pronounced. Submission afterwards, unless supporting an inference that there was submission before, is only effective as creating a sort of estoppel. 57 M. 824=1934 M. 434=67 M.L.J. 187=39 L.W. 705=1934 M.W.N. 620=149 I.C. 1168. See also 39 M. 733=30 M.L.J. 148; 64 M.L.J. 531, 37 M. 163=24 M.L.J. 619; 15 M. 82; 30 M. 292. Though a defendant who remains *ex parte* does not, by that mere fact, submit to the jurisdiction of foreign Court, his conduct both before and after the decree is passed may afford evidence of his submission to jurisdiction and his intention in remaining *ex parte*. 59 M. 918=43 L.W. 607=1935 M. 552=71 M.L.J. 93. See also 53 A. 747=1931 A.L.J. 651=130 I.C. 353=1931 A. 689, 57 M. 824. The protest against jurisdiction must be made at an early stage of the proceedings. 7 M. 105. Where defendant appeared before foreign Court in the suit, thus recognizing its jurisdiction but failed to appear at a later stage and a decree was passed against him *ex parte*, he cannot afterwards in proceedings in execution of the decree, taken in British India, contest that the foreign Court had no jurisdiction. 44 L.W. 752=1936 M.W.N. 1165=71 M.L.J. 833; 63 C. 1033=53 C.L.J. 175=40 C.W.N. 591. The mere fact that a party has once appeared before a foreign Court in the character of plaintiff, is not sufficient to regard him for ever afterwards as having submitted to its jurisdiction in any suit instituted against him later on in that Court, in which he never appeared at all. 71 M.L.J. 838=44 L.W. 752=59 M. 918 (noted *supra*). Nor does the fact that a British subject has entered into a partnership in the foreign country, and that the suit relates to a transaction entered into in the course of the business of the partnership, lead to the inference that he has agreed to be bound by the decision of the foreign Court. 36 L.W. 756=1933 M. 112=63 M.L.J. 761. If the decree at the time when it was passed was an absolute nullity, it cannot be subsequently and retrospectively clothed with jurisdiction by an application by the

judgment-debtor to the foreign Court to set aside the *ex parte* decree. 37 L.W. 410=1933 M. 393=4 M.L.J. 531. But see 8 L. 54=1927 L. 200 where it was held that there was voluntary submission to jurisdiction when a party applied for review of an order passed against him. Execution of power of attorney whether submission. 92 I.C. 491=1926 M. 259. The mere engagement of a pleader to defend a suit, does not amount to submission to jurisdiction, where the pleader reports no instructions at the time of trial. 18 M. 327. But see also 40 M. 112 (P.C.) and 39 M. 95=27 M.L.J. 670. Where defendant appears not voluntarily but under duress or coercive process, the decree cannot be binding. 39 M. 733=30 M.L.J. 148; 64 M.L.J. 531=144 I.C. 557. A submission to jurisdiction for saving property is not a voluntary submission. 39 M. 24=27 M.L.J. 515 (F.B.). What amounts to submission. See 22 N.L.R. 82=1926 N. 77; 1931 A. 689.

PERSONAL ACTIONS—So far as *personal actions* are concerned, competency of jurisdiction must be determined, not by territorial law of the foreign state but by the rules of Private International Law. 63 C. 1033=63 C.L.J. 175=40 C.W.N. 591. A foreign Court has jurisdiction in an international sense in *personal actions* in the following cases, *viz.*, (1) where defendant is subject of the foreign country in which judgment is obtained, (2) where he is such subject when action is commenced, (3) where he, in the character of plaintiff, has selected the foreign Court in which he is afterwards sued, (4) where he has voluntarily appeared in that Court and submitted to its jurisdiction; (5) where he had contracted to submit himself to the foreign *forum* in which the judgment is obtained (*Ibid.*). But the case may be otherwise where the non-resident foreigner is a subject of the same sovereign power which legislates, although even in such a case there must be an express power of territorial legislation conferred by statute to give use to jurisdiction over him (*Ibid.*). Therefore where the judgment is that of a Court in England and the defendant resides in British India, the decree is not a nullity. 28 C. 641; 40 M. 112=44 I.A. 6=15 A.L.J. 92=19 Bom L.R. 206=21 C.W.N. 358=5 L.W. 342=34 I.C. 683=32 M.L.J. 35 (P.C.).

SUIT RELATING TO IMMOVABLE PROPERTY.—Where a suit relates to *immovable property* foreign Court will have jurisdiction where defendant has such property within the foreign jurisdiction in respect of which cause of action has arisen during his stay within that jurisdiction. 63 C. 1033=63 C.L.J. 175=40 C.W.N. 591. But the claim must be with reference to the *property itself*, and it will have no jurisdiction *in personam* over the possessor, even in regard to obligations connected with that property. (*Ibid.*) [*Emmanuel v. Symon*, (1908) 1 K.B. 302.]

SUIT RELATING TO WILL.—Grant of probate of a will or revocation thereof by a foreign Court cannot be treated as a *judgment in*

(b) where it has not been given on the merits of the case;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of British India in cases in which such law is applicable;

Notes.

rem so as to make it incumbent on a Court in British India to hold that the deceased left a will or died intestate 43 L.W. 75=160 I. C. 733=1936 M. 197. The Court in British India can, in spite of the revocation by a foreign Court, hold that the will is true, valid and binding in respect of properties left by the deceased in British India, the devolution of which is governed by the law in British India and not by the law of the place where the owner of the properties resided and died. (*Ibid.*)

SUIT RELATING TO TRUST.—In actions relating to the recovery of the office of trusteeship the Court of competent jurisdiction is the Court of what may be called the domicile of the trust 54 M.L.J. 479

SUIT FOR DIVORCE AND MAINTENANCE.—Where a decree for divorce was passed by a foreign Court under which husband was to pay a monthly sum for maintenance of wife and children, and a suit was filed in British India based on that decree in respect of instalments which had already become due, it is final and conclusive. But she would not be entitled to obtain except by means of a fresh suit for the instalments accruing after the institution of the suit. 158 J.C. 547=1935 R. 284.

Sec. 13 (b)—This clause refers to cases where, for one reason or another, the controversy raised in the action has not, in fact, been the subject of direct adjudication by the Court. 40 M. 112=44 I.A. 6=38 I.C. 683=21 C.W.N. 358=32 M.L.J. 35 (P.C.). Where the defendant raised a defence in the suit but refused to answer interrogatories submitted to him, and his defence was consequently struck out without investigation under the English Supreme Court Rules, and judgment was given to plaintiff, *held*, it was no judgment on merits. (*Ibid.*) Judgment cannot be said to be on merits, when it has only followed as a penalty upon defendant not complying with orders of Court and the facts and circumstances of the case were never gone into at all. 41 A. 521=50 I.C. 780=17 A.L.J. 501; 50 A. 270=105 J.C. 186=25 A.L.J. 877=1927 A. 510. As to the true test of deciding whether a judgment has been given on the merits, *see* 14 L. 58=34 P.L.R. 311=140 I.C. 82=1932 L. 649. Decree passed on admission of defendant is one on merits 16 L. 768=37 P.L.R. 852=158 I.C. 113=1935 L. 396.

EX PARTE DECREES.—Where defendant does not appear, his default and failure to contest after due service of summons tantamounts to an admission of the claim, and judgment given in favour of plaintiff is one on merits (*Ibid.*) 41 A. 521=50 I.C. 780=17 A.L.J. 501; 50 A. 270=105 I.C. 186=25 A.L.J. 877=1927 A. 510. But *see contra*, 50 M. 261=100 I.C. 555=1927 M. 265=52 M.L.J. 240 (F.B.). Where it was

held that a foreign judgment passed on default of appearance of defendant duly served with summons, merely on the plaintiff allegations without any trial or evidence is not one passed on merits (This overrules. 47 M. 877=82 I.C. 425=1925 M. 155=47 M.L.J. 356; 22 L.W. 820=92 I.C. 491=1926 M. 259.) *See also* 62 C. 682=39 C.W.N. 557=61 C.L.J. 29. Decrees passed under Ceylon, C.P. Code, Ss. 85 and 86, on plaintiff's affidavit in the absence of defendant, are not decisions on merits but are a penalty for default of appearance 30 L.W. 349=123 I.C. 579=1930 M. 149=57 M.L.J. 459. *See also* 38 L.W. 232=144 I.C. 22=1933 M. 544. Where pleader holding power does not receive instructions to defend the case on the merits, and appears in it, the mere fact of his being without such instructions, does not prevent the decision from being one on the merits 32 Bom.L.R. 1178=128 I.C. 609=1930 B. 511. *See also* 41 A. 521. Judgment for plaintiff in defendant's absence based on agreement between the parties is one on merits 158 I.C. 547=1935 R. 284; 52 M. 503=29 L.W. 575=1929 M. 469=56 M.L.J. 547. A foreign judgment cannot be said to be not on the merits merely because it happens to be erroneous on the merits 13 B. 244; 24 B. 86, or because it has proceeded on a wrong view as to burden of proof or as to the legal liability of a party. 41 M. 205=45 I.C. 703. *See also* 36 Bom.L.R. 844=155 I.C. 711=1934 B. 390. Absence of notice to defendant before a foreign judgment is passed renders it void 13 M. 496, 11 B. 241. But not mere irregular service of notice 47 M. 877 (noted *supra*).

Sec. 13 (c). **MISTAKE OF LAW**—A mistake of law in a foreign judgment is no ground for vacating it. A wrong view as to burden of proof will not make a foreign judgment erroneous on the face of it 41 M. 205=34 M.L.J. 295. In a suit by a Mahomedan widow for the administration of her husband's estate against the executors, the Supreme Court of Straits Settlements gave her a decree for a third share, including certain properties in British India, even though the probate granted by the Court in respect of the will left by the deceased had been explicitly confined to the property at Penang. In a suit brought in British India on that foreign judgment, *held*, that the judgment was not one on which a suit in British India could be successfully maintained for two reasons: (i) the foreign Court had no jurisdiction to bind, dispose of, or distribute immovable property outside the Crown Colony; so the judgment was founded "on an incorrect view of international law." (ii) Under the Mohammadan Law relating to the Sunnis of the Hanafi School as applied in British India, the widow, who has a child, is only entitled to one-eighth share in the property of her husband. As the foreign Court,

(d) where the proceedings in which the judgment was obtained are opposed to natural justice;

(e) where it has been obtained by fraud;

(f) where it sustains a claim founded on a breach of any law in force in British India.

14. [S. 13, Expl. VI] The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

Courts in which suits to be instituted

Place of Suing.

15. [S. 15.] Every suit shall be instituted in the Court of the lowest grade competent to try it.

Notes.

however, awarded the widow a third share in her husband's property part of which was situate in British India, the judgment was founded "on a refusal to recognise the law of British India in a case in which such law was applicable" 39 L.W. 58=148 I.C. 297=1934 M. 145=66 M.L.J. 209. See also 191 P.R. 1888; 4 M. 359.

Sec. 13 (d).—There must be something in the procedure anterior to the judgment which is repugnant to natural justice 41 M. 205=45 I.C. 703=34 M.L.J. 295. A decree pronounced in absence of a party in personal action by a Court of a foreign State is null and void. 22 C. 222=21 I.A. 171 (P.C.); 40 B. 551, 64 M.L.J. 531=144 I.C. 557. A judgment without notice of suit to the party is contrary to natural justice. 28 C. 641; 29 C. 509, 5 B. 223, 9 B. 346, 11 B. 241; 13 M. 496. Where in a foreign judgment no guardian *ad litem* of a minor was appointed, where legal representative of a deceased defendant were not brought on record and where after a decree a third application for review was allowed such a judgment falls under Cl. (d). 8 L. 54=102 I.C. 523=1927 L. 200. See also 36 Bom. L.R. 844=1934 B. 390=155 I.C. 711 (Case where a foreign Court appointed as guardian *ad litem* a person having adverse interest. A procedure opposed to rules of natural justice) Where a judgment is passed by a Court composed of persons who have an interest in the judgment and its result, it would be contrary to natural justice 191 P.R. 1888. Where a foreign Court has held service of notice of suit sufficient it must be presumed to be correct in the absence of evidence to the contrary. 47 M. 877=82 I.C. 425=1925 M. 155=47 M.L.J. 356

Sec. 13 (e): FRAUD.—Where a decision is obtained by fraud, it is not binding on the parties. 1922 L. 175 See also 15 B. 216 7 M. 164; 191 P.R. 1888. In the case of a domestic judgment, the fraud must be extrinsic to the matter tried in the cause, and not merely that consisting in false evidence or forged documents submitted to the Court, and the truth of which was contested before and passed by it. 26 C. 891. Whether this

rule applies to foreign judgments also. (*Ibid.*) A foreign judgment cannot be rendered ineffective merely by reason of frauds perpetrated on the Court by witnesses other than the plaintiff, the only way in which it can be rendered ineffective on the ground of fraud is by proving that it was obtained by fraud of the plaintiff who relies on it. 36 Bom. L.R. 844=1934 B. 390=155 I.C. 711. See also 144 I.C. 557=1933 M. 393=64 M.L.J. 531.

Sec. 13 (f).—Where limitation only prohibits the remedy but does not destroy the right itself, a foreign judgment cannot be impeached on the ground that the suit could not have been brought in British India under the law of limitation. 2 M. 400, 4 M. 14. Where a foreign Court passed a judgment according to the law of limitation in force in that foreign country, although it is not in accordance with the law of limitation in force in this country, it may operate as conclusive in a suit in a British Indian Court based on that judgment 46 A. 119=21 A.I.J. 890=79 I.C. 332=1924 A. 161, 9 Bur. L.T. 106=35 I.C. 741.

Sec. 14: BURDEN OF PROOF.—In a suit on a foreign judgment, the onus is on the defendant to prove want of jurisdiction 24 M.L.T. 244=49 I.C. 202. See also 13 B. at p. 227; 25 A.L.J. 887=108 I.C. 186=1927 A. 510, 1928 P. 375=9 P.L.T. 397

Sec. 15: SCOPE AND OBJECT OF SECTION.—This and the following sections under the head 'place of suing' regulate the name in British India and apply only to those places where the Code is in force. They deal with matters of domestic concern and prescribe rules for the assumption of territorial jurisdiction by British Indian Courts in matters within their cognizance, and do not govern claims against persons or things wholly outside their jurisdiction. 9 L. 455=109 I.C. 28=1928 L. 297. This section merely lays down a rule of procedure so as to prevent the Courts of higher grades from being overcrowded and it is not meant to oust the jurisdiction of the Courts of higher grades. 7 A. 230 (F.B.). See also 17 C. 255, 25 C. 46; 31 C. 849; 14 M. 183; 14 C.W.N. 322 Exercise of jurisdiction by a Court of higher grade than is competent to try it is a mere irregu-

Suits to be instituted where subject-matter situate.

16. [S. 16] Subject to the pecuniary or other limitations prescribed by any law, suits—

(a) for the recovery of immoveable property with or without rent or profits,

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clarity 7 A. 230, 13 A. 145, 17 C. 155, 1925 R. 278. But see 112 I.C. 187. But exercise of jurisdiction by a Court of lower grade than is competent to try it is a nullity and the decree will be set aside 17 C. 155, 38 C. 639. Effect of Punjab Courts Act, S. 35, on S. 15 1928 L. 484

JURISDICTION—PRINCIPLES REGULATING— In order to determine the jurisdiction of the Court the plaint and not the written statement should be looked into. 13 P. 65=145 I. C. 294=1933 P. 246. Nor does it depend upon the amount found and decreed by the Court. 8 B. 31; 13 A. 320; 16 A. 286. The plaintiff's valuation determines jurisdiction not only of the first Court, but of the Appellate Court (*ibid*). But see 38 C. 639=12 I.C. 464. But where the plaintiff knowingly makes false statements, it is a fraud on the Court and the Court would have no jurisdiction to entertain the suit. 45 A. 193=71 I.C. 411. Consent of parties cannot confer jurisdiction. 9 A. 191=13 I.A. 134 (P.C.). See also 38 C. 639=12 I.C. 464; 24 C.W.N. 633; 89 I.C. 353. See however, 14 C.L.J. 337, 43 C.L.J. 116; 73 I.C. 903. Where the plaint is amended so as to render the claim beyond the pecuniary jurisdiction of the Court in which it is instituted, the suit cannot be tried by that Court 9 M. 208

OVER-VALUATION OR UNDER-VALUATION OF SUIT.—Though jurisdiction is determined *prima facie* by valuation given by plaintiff, he is not quite free to give any arbitrary valuation and thus institute the suit in the Court of his choice 31 B. 73, 40 C. 245=17 I.C. 162; 17 C. 680. Where it is patent on the face of the plaint that suit is over or under valued, the Court will return the same to be presented to proper Court under O. 7, R. 10. Where it is not so patent, even then, the plaintiff may be called upon to prove proper valuation, when objection is raised to it by the defendant. 24 C. 651, 24 M. 158, 21 M. 271. Where in the course of preliminary inquiry it becomes clear to the Court that there has been gross under-valuation, it is the duty of the Court on the motion of either party or *ex proprio motu* to order that the plaint be returned for presentation in the proper Court if the value be held to be not higher than the figure up to which that Court has jurisdiction. 3 A.W.R. 405=1935 A. 157. As to validity of decree passed in suit instituted in Court of lower grade, see S. 11 of Suits Valuation Act, 1887. See, however, 38 C. 639=12 I.C. 464

WHERE SUBJECT-MATTER OF SUIT IS INCAPABLE OF VALUATION—See S. 9 of Suits Valuation Act, 1887. Suits for restitution of conjugal rights are incapable of proper valuation, and plaintiff's valuation must hold good 28 A. 545; 34 C. 352. But the same cannot be said in the case of suits affecting

property, e.g., suit to compel registration of document, suit for removal of *karnavan*, suit to set aside adoption. In such cases the Madras High Court has held that the proper valuation would be the interest of the plaintiff in the property that would be affected by the suit 31 M. 89 (F.B.), 13 M. 56, 14 M. 169, 15 M. 294, 11 M. 266; 6 M. 192, 75 I.C. 115. But see 15 A. 378; 32 C. 734=8 Bom.P.J. 334 in which a different view has been held. See also 11 M.L.T. 155.

Sec 16—As to pecuniary limitations, see S. 15, *supra*, and as to other limitations prescribed by law, see S. 92, *infra* and S. 32 Bombay Civil Courts Act, 1869, Small Cause Courts Acts, Provincial and Presidency

SCOPE AND APPLICATION OF SECTION—This section does not apply to chartered High Courts, *vide* S. 120, applies to moveables. 96 I.C. 691=1926 L. 503. In suits relating to *moveable property* the Court within whose jurisdiction the moveable property is kept has jurisdiction to try the case 147 I.C. 591=1934 A. 226. *Transfer of place* where subject matter is situated to jurisdiction of different Court does not deprive Court which originally entertained the suit from jurisdiction to try to its conclusion 47 M. L.J. 448=87 I.C. 152, 1928 M. 746=28 L.W. 885. The jurisdiction of Courts in British India is governed by the same principles as are applied by Courts of Equity in England except in so far as they may be at variance with legislative enactment. S. 16, C.P. Code, does not lay down any rule of law different from that prevailing in England 28 S.L.R. 54=155 I.C. 677=1934 S. 123. Non-compliance with the provisions of this section and of Ss. 17 to 20, is in no way fatal to the jurisdiction of the Court, and does not render a decree passed by a Court of competent jurisdiction a mere nullity so as to empower the executing Court to refuse to execute it on that ground. 25 S.L.R. 204=131 I.C. 182=1931 S. 47.

Sec 16 (a) IMMOVEABLE PROPERTY.—As to definition of term, see Cl. (25) of S. 3, General Clauses Act, 1897. Trees standing on land are immoveable property, 19 B. 207, but they are no longer such when cut down. (*Ibid*) Growing crops are not immoveable property, see S. 2 (13), *supra*

IMMOVEABLE PROPERTY IN FOREIGN COUNTRY—JURISDICTION OF BRITISH INDIAN COURTS—The English Courts, and so also British Indian Courts, have jurisdiction in *personam* in respect of foreign immoveables against persons locally within their jurisdiction, in cases where there is an equity between the parties arising from contract, fraud, or trust, provided that the decision of title be not directly involved. But such an equity must be of a personal nature, either a fiduciary relationship or privity of some other kind between the parties. Such jurisdiction

- (b) for the partition of immovable property,
 (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
 (d) for the determination of any other right to or interest in immovable property:
 (e) for compensation for wrong to immovable property,
 (f) for the recovery of movable property actually under distraint or attachment,
 shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for

Notes.

in personam has always to be exercised for the purpose of deciding the existence of a valid trust in respect of foreign immovables and for the purpose of giving relief against fraudulent and inequitable dealings with regard to foreign immovables, for ordering accounts of rents and profits and for appointing a receiver of foreign property, and although the Courts have not and could not put the receiver in possession of such property, they have given effect to such orders by dealing for contempt the party preventing possession being taken. 28 S.L.R. 54=155 I.C. 677=1934 S. 123, 23 N.L.R. 170 (suit for mesne profits as to immovable property situated within foreign jurisdiction) British Indian Court has no jurisdiction to pass a decree upon a mortgage of immovable property situated in Berar 4 N.L.R. 61, 1935 N. 192, 31 N.L.R. 43 (Sup.)=159 I.C. 739=1935 N. 250 (F.B.)

S. 16 (b).—When in a suit for partition of movable and immovable property, the latter is situated outside the jurisdiction of the Court, leave can be granted to withdraw the suit, so far as it relates to it and relief may be granted so far as the movables are concerned. 28 M. 216, 25 S.L.R. 275=131 I.C. 186=1931 S. 50, 4 B. 482; 1926 L. 503, 27 M. 157. This clause does not include a suit for dissolution of partnership. 41 A. 513=17 A.L.J. 567=50 I.C. 156

S. 16 (c).—Suit for a declaration that a mortgage in favour of the defendant is *invalid*, falls under the section. 23 M.L.J. 679. Where a Court grants a decree declaring a charge on immovable property situated wholly outside its jurisdiction, a purchaser under such decree would be treated only as a purchaser under a money decree. 8 A. 117. A suit to enforce a charge created on the land for Government revenue on it can be instituted at the place where the land is situated. 29 M.L.J. 639=39 M. 795. Where lands are situated in 2 districts, and an order has been passed by the revenue authorities for the payment of the revenue regarding both the lands in one of the Districts and they were so paid, neither the order nor the payment would show conclusively that a civil suit in respect of that land lies within that district. 149 I.C. 758=1933 P. 555.

S. 16 (d).—RIGHT TO OR INTEREST IN IMMOVABLE PROPERTY, WHAT ARE.—This clause includes a charge on immovable property. 25 S.L.R. 204=131 I.C. 182=1931 S. 47. Right

of fishery in enclosed water. 24 C. 449, a right of ferry, 13 M. 54, right to have a water course opened. 4 W.R. 107. Right to maintenance claiming charge on immovable property in defendant's possession. 40 B. 337=32 I.C. 985; 42 L.W. 647=158 I.C. 1012=1935 M. 1043. Widows estate in husband's immovable properties. 23 B. 1. Suit for money due on promissory note with claim for charge on immovable property. 96 I.C. 752=1926 L. 660. Suit by vendor or vendee to enforce specific performance of contract to purchase land or by vendee for return of purchase money owing to vendor's default to convey. 143 I.C. 759=1933 M. 436. *See also* 33 C. 1065. But *see* 9 Bur.L.T. 119=36 I.C. 431. Suit for recovery of unpaid purchase money. 28 M. 227, Suit for declaration of plaintiffs *right to rent*, where it is denied by the defendant. 22 B. 22.

RIGHT TO OR INTEREST IN IMMOVABLE PROPERTY, WHAT ARE NOT.—A suit for *arrears* of rent is not governed by this section but by S. 20 although the plaintiff's title to the property may incidentally come in question. 6 B.H.C.A.C. 29, 10 I.C. 267=9 M.L.T. 372. Suit for declaring validity of adoption is not governed by this section. 30 L.W. 691. Suit for declaration of title and for administration, declaring prior probate proceeding as not binding does not come under this section. 1925 L. 456=94 I.C. 1046, 1926 L. 503=96 I.C. 691. A suit for declaration that the plaintiffs are beneficiary interested in a decree for sale, although it did not run in their names, does not fall under the clause. 26 A. 603. A suit for dissolution of partnership is not one to a right in immovable property, even though partnership assets include a factory. 41 A. 513=50 I.C. 156. So also a claim for accounts relating to a factory. 1931 L. 673=32 P.L.R. 464=132 I.C. 218.

Sec 16 (e).—This clause refers to torts affecting immovable property as in the case of trespass. 20 C. 689.

S. 16 (f).—As to jurisdiction in a suit for recovery of movable property under attachment by a foreign Court. *See* 14 I.C. 279=1912 M.W.N. 524. In suits relating to movable property, the Court within whose jurisdiction the movable property is kept, has jurisdiction to try the case, 147 I.C. 591=1934 A. 226.

PROVISO.—'Defendant' means all the defendants where there are more than one. 73 I.C. 405=1924 C. 443. A suit by the vendor to enforce specific performance of a contract to

wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.—In this section “property” means property situate in British India.

17. [S. 19] Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate:

Suits for immovable property situate within jurisdiction of different Courts.

Notes

purchase land is a suit for land within the meaning of S 16. The proviso appears to extend the section to a suit by the vendee. Hence the Court in whose jurisdiction the property is situated has jurisdiction to try the suit even though defendant does not reside within the jurisdiction of the Court. 143 I.C. 759=1933 M. 436; But see 9 Bur. L.T. 119=36 I.C. 431. When the relief granted by the award is a declaration of proprietary title to certain immovable property, the proviso to S. 16 is not applicable and the Court outside whose jurisdiction the property is situate has no jurisdiction to file the award. 55 A. 542=1933 A.L.J. 741=1933 A. 380. See also 153 I.C. 300=1934 S. 183 (2). The fact whether the charge, over immovable property was or was not the subject-matter of reference is not material. 25 S.L.R. 204=131 I.C. 182=1931 S. 47. See also 32 P.L.R. 464=132 I.C. 218=1931 L. 673. Suit for mesne profits of lands, situated outside British India can under the proviso be instituted in a British Indian Court, if the defendant is residing within its jurisdiction. 46 B. 108=68 I.C. 510=1922 B. 188. But if the defendant is a non-resident foreigner, the suit would not lie in British Indian Court. 41 L.W. 381=1935 M. 545=68 M.L.J. 506. The Secretary of State for India in Council is not a person who dwells or carries on business or personally works for gain within the local limits of Calcutta within the meaning of the proviso. 40 C. 308. On this section (proviso). The proviso will not apply when the property is in the possession of the plaintiff. 20 C. 689.

S. 17.—OBJECT AND APPLICABILITY OF SECTION.—This section is only permissive, and so where the properties are situate in different jurisdictions, the section is no bar to parties bringing successive suits. 32 I.C. 423=3 L.W. 107 (22 B. 922, 14 C. 835, Foll.). See also 3 M.H.C.R. 376, 14 M. 324; 12 C. 566, 59 I.A. 268=63 M.L.J. 336 (P.C.). The object of the section is to avoid plurality of suits. 16 A. 359. As to applicability of section to movable property, see 96 I.C. 691=1926 L. 503. This section does not apply to Chartered High Courts in their original Civil jurisdiction (See S 120 *infra*). As to applicability to Oudh Rent Act, see 13 R. D.

130. All the Courts situated outside the *Santal Parganas* to which S 17, C P Code applies have concurrent jurisdiction with the Courts inside the *Santal Parganas* for the trial of suits in which the properties involved are both outside and inside the *Santal Parganas* and the value of the properties exceed Rs 1,000, and therefore in ordinary circumstances the Gaya Court has jurisdiction to try such suits, barring of course the restrictions placed under S. 5 of *Santhal Parganas Regulation* (1872) 13 P. 486=152 I.C. 301=1934 P. 292. The C. P. Code including this section extends to Courts established under the Bengal, Agra and Assam Civil Courts Act. 63 I.A. 311=15 P. 567=40 C.W. N. 1061=38 Bom L.R. 768=44 L.W. 88=163 I.C. 49=1936 P.C. 189=71 M.L.J. 60 (P.C.). The choice given by this section can be utilized only if the C. P. Code applies to both the Courts (*Ibid*).

The Court passing decree under this section as to immovable property situated outside its jurisdiction, can also execute it in respect of that property (See S 38 *infra*).

COURTS.—‘Courts’ in S 17 means Courts to which the Code applies. The Court of a district subject to the Code has no jurisdiction under S 17 to entertain a suit so far as it claims a decree for sale of mortgaged land situated in a scheduled district. 42 M. 813=46 I.A. 151=51 I.C. 185=37 M.L.J. 11 (P.C.), or in respect of properties situate out of British India. 54 B. 495=59 M.L.J. 379 (P.C.). See also 42 C. 116=27 M.L.J. 459 (P.C.); 33 B. 373=2 I.C. 489. But if in such suits, properties within jurisdiction also are involved, relief may be given with reference to such properties, while declining relief with reference to the rest of the properties. 14 C. 836; 22 B. 922.

BONA FIDES OF PARTIES.—Jurisdiction vested in Courts—Whether can be taken away by proof of plaintiff items not being within jurisdiction. *Bona fide* suit protected 1930 N. 189. A *bona fide* compromise as to properties situated within jurisdiction will not divest the jurisdiction of the Court to proceed with the trial regarding the claim as to rest of properties outside jurisdiction (included in the suit) unless it was shown that the compromise was a mere continuance to defeat the policy of the rule of procedure as

Provided that, in respect, of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

18. [S. 16-A.] (1) Where it is alleged to be uncertain within the local limits of the jurisdiction, of which of two or more

Place of institution of suit where local limits of jurisdiction of Courts are uncertain.

Courts any immovable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty, record a statement to that effect and thereupon proceed to entertain and dispose

of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

19. [S. 18.] Where a suit is for compensation for wrong done to the

Suits for compensation for wrongs to person or movables

person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain within the local

limits of the jurisdiction of another Court the suit may be instituted at the option of the plaintiff in either of the said Courts.

Illustrations

(a) *A*, residing in Delhi, beats *B* in Calcutta. *B* may sue *A* either in Calcutta or in Delhi.

(b) *A*, residing in Delhi, publishes in Calcutta statements defamatory of *B*. *B* may sue *A* either in Calcutta or in Delhi.

Other suits to be instituted where defendants reside or cause of action arises.

20. [S. 17.] Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

Notes.

to local jurisdiction 12 M 380, 30 A. 560

ILLUSTRATIVE CASES.—Under O. 1, R 3, a plaintiff can in the same suit combine distinct causes of action against several defendants provided that the relief claimed arises from a series of acts or transactions and that there is some common question of law or fact arising in the suit. Where the question that arises for decision is common as against all the defendants, but the property in dispute is situate in different districts S. 17 is applicable and the plaintiff can bring a suit in any one of such districts 124 I C 202=37 L.W 681=1933 M 622. But where plaintiff brought a suit to recover several properties situated in Lahore and Oudh, claiming Lahore properties under a trust deed, as trustee, and Oudh properties under the terms of a will, *held*, that there were distinct and separate causes of action, and a single suit cannot be instituted in one place regarding all the properties 59 I A 268=7 Luck 324=36 C W N 937=1932 P.C 172=63 M.L.J 336 (P C)

Sec 18. REASONABLE GROUND FOR UNCER-

TAINTY.—This may be caused by absence of notification as to the boundaries of a district. 24 C. 449. The boundaries may have also been changed by fluvial action, and uncertainty may be caused thereby

Sec 19.—This section is applicable only to torts committed in British India and only to defendants residing in British India 39 M 433=28 I C. 394 As to the place of suing where the wrong consists of a series of acts, *see* 3 I.B.R 164 As to suits against the Secretary of State for India for damages in respect of tort committed by him, *see* 50 M 449=105 I.C 576=1927 M 689=53 M.L.J. 355

MEANING OF TERMS.—The word 'resides' must be taken to refer to natural persons and not to legal entities such as limited companies or Governments. The words 'carry on business or personally work for gain' are inapplicable to the Secretary of State for India in Council. The business intended by the section is a commercial business and not a business of state or Government. 50 M. 449=1927 M 689=53 M L J 355.

Sec. 20 SCOPE OF THE SECTION.—Sec 19

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on

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M. 477, 19 A.L.J. 696=65 I.C. 93. The C. P. Code does not forbid the institution of a suit against a defendant resident in British India even if the decision may involve adjudication regarding plaintiff's title to immovable property outside British India. 23 N.L.R. 170. Cause of action arising in native state where parties reside—British Courts have no jurisdiction to try suit. 54 B. 192=32 Bom L.R. 171. Court's jurisdiction does not cease because the place of cause of action ceases to be in its jurisdiction after the institution of the suit. 1928 M 746=28 L.W. 885. Agreement cannot confer jurisdiction where there is none. 1929 S 227.

QUESTION OF JURISDICTION—MODE OF DETERMINATION.—It is well-settled that the question of jurisdiction is to be determined with reference to the allegations in the plaint and not with reference to the pleas. Where it was alleged in the plaint that according to the agreement, which was the basis of the suit, the amount claimed was payable at the place of suit, the question of jurisdiction could not be separated from the merits of the case, and the Court should allow the parties to produce their full evidence in regard to the execution of the agreement before coming to any decision as to whether the suit was cognizable by it or not. 151 I C. 726=36 P.L.R. 6=1934 L. 803.

Sec. 20 (a) ACTUALLY AND VOLUNTARILY RESIDES, ETC.—Under S 20 residence means permanent residence, not a temporary or casual residence as traveller. 54 I.C. 65 (Bur.), 38 B 125 Foll. But see 14 I.C. 573 (M.) See also 34 M. 257; 143 I.C. 357=34 P.L.R. 908=1933 L. 120. A Government servant liable to be sent to various places but stationed in one place for several years cannot be said to have only a temporary residence there. 111 I.C. 851=4 Bur. L.T. 183. The mere fact that the defendants had their ancestral home within the jurisdiction of the Court would not give jurisdiction to it. 64 I.C. 688 (1)=19 A.L.J. 822, 38 I.C. 62=112 P.R. 1916. But see 57 C. 65. The fact that the debtor had a family home in a particular place is not conclusive of the question whether he resided there. 145 I.C. 755=34 P.L.R. 658=1933 L. 851 (1). The words actually and voluntarily resides applies only to natural persons and not to legal entities. 1930 L. 818.

CARRIES ON BUSINESS.—The test of 'carrying on business' is not the continuity or intermittency of the business, but the fact of owning interest in the business and receiving profits. 28 N.L.R. 118=140 I.C. 63=1932 N. 114. 'Carrying on business' is used as distinct from personally working. It does not involve personal appearance or personal

effort. It means having an interest in business, a voice in what is done, a share in the profit or loss and some control upon the business. 19 A.L.J. 696=65 I.C. 93. See also 4 M. 29; 96 I.C. 887=31 C.W.N. 174=1926 P.C. 88 (P.C.) But where business is carried on by an agent, he should be an agent in the strict sense of the term. 23 M. 458. The employment of a mere commission agent without power to enter into contract is not enough. 8 B.H.C. 102, 12 B. 507; 8 C. 678; 73 I.C. 205=1923 L. 427=29 S.L.R. 292=164 I.C. 1015=1936 S. 121. Partnership contract by P and D firms both having head offices at Calcutta—P firm having branch at Muzaffarpur District—Contract that jute be purchased by P at Muzaffarpur and sold at Calcutta by D—Suit by P for dissolution of partnership and accounts at Muzaffarpur Court. Held that purchase of suit for purpose of business could not necessarily be 'carrying on business of partnership', and hence Muzaffarpur Court had no jurisdiction. 160 I.C. 353=1936 P. 6. Whether mere letting of house property through an agent can be said to be carrying on business. 66 I.C. 865=1922 L. 164. A minor French subject cannot be said to carry on business in British India merely because he has immovable properties there. 20 L.W. 691. A corporation resides wherever it carries on business, irrespective of the location of its Head Office and if a Bank has 50 branch offices, it has 50 separate and distinct jurisdictions. 4 P.L.J. 141=48 I.C. 943; 1933 L. 11=14 L. 42=149 I.C. 473. See also 8 C. 678, 56 M.L.J. 299. "Business" means commercial business and not business of Government. The whole of a province cannot be said to be a single place for the purposes of Expl II and a Government cannot be sued at any place within that province. 1930 L. 818=126 I.C. 514.

Sec. 20 (b) : LEAVE OF THE COURT.—Leave may be given even after the institution of the suit. 30 B. 570. An application for leave under S 20 (b) can be made after the passing of a judgment on the preliminary issue relating to jurisdiction but before the plaint is ordered to be returned for presentation to the proper Court. 145 I.C. 706=27 S.L.R. 230=133 S. 179. Applicability—City Civil Court, Madras—Suit in—Defendant residing outside Madras—Leave to sue—May be obtained before or after suit. 68 M.L.J. 205. Leave to sue may be granted without previous notice to the defendant. 64 I.C. 794, 25 A. 603. The leave can be granted in appeal by the District Judge. 35 I.C. 74=4 L.W. 411. Where leave to sue was sought for but refused, the suit, cannot go on with the defendants on the record, when no permission was granted by the Court. 46 B. 229. A defendant may be taken to have "acquiesced in such institution" if he does not object.

business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

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See 6 M 349; or apply under S. 22, 30 B. 81. As to when and how objection to jurisdiction is to be taken, see Ss. 21 and 22. When cause of action arises in Courts jurisdiction—Leave if necessary. 1929 S. 170. If leave is granted without notice to the opposite party Court can in the exercise of its inherent jurisdiction, hear objections and pass necessary orders under S. 151. 150 I.C. 559=1933 L. 266. Discretion of lower Court in granting or refusing leave will not be lightly interfered with by the appellate Court, but where the lower Court has refused to exercise its discretion in a fit case, the appellate Court can interfere. 145 I.C. 706=27 S.L.R. 230=1933 S. 179.

Sec 20 (c) CAUSE OF ACTION.—The expression means the bundle of facts which is necessary to be proved to entitle the plaintiff to a decree. 29 B 368; 22 C 451; 23 C.W. N. 517; 30 B 167, 39 A 506; 31 M.L.J. 816; 72 I.C. 920=1923 M. 109, 1924 N. 308; 65 I.C. 425=1922 O. 109=3 A.W.R. 11=147 I.C. 591=1934 A. 226; 61 C 1023=39 C.W.N. 293=155 I.C. 882=1935 C 160, 27 S.L.R. 230=145 I.C. 706=1933 Sind 179, 30 S.L.R. 182=1936 Sind 229; 57 B. 306=35 Bom.L.R. 168. 143 I.C. 335=1933 B 179. It means everything which if not proved gives the defendant an immediate right to judgment, every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse. 58 C 539=134 I.C. 65=1931 C 659, 60 C 918, 28 S.L.R. 102, 1934 R 234. A *bona fide* voluntary assignment affords a valid cause of action not only against the assignor, but also against the original debtor. 1926 S 31, 145 I.C. 706=27 S.L.R. 230=1933 S. 179, 34 P.L.R. 771=1933 L. 940. (Assignment of promissory note within jurisdiction giving rise to cause of action) The cause of action must be antecedent to the institution of suit. 4 P.L.J. 387 (393). The term means the cause of action as it was at the time when the right to sue arose for the first time. Per Krishnan, J., in 31 M.L.J. 816. It has no relation to the defence set up or to the character of the relief prayed for in the plaint. 16 C. 98; 46 I.C. 913. For place of filing an application under Sch. II, para 17, see 1933 L 18.

CAUSE OF ACTION—SUITS ON CONTRACT.—The cause of action in suits on a contract arises at the place where the contract was made or the place where the contract was to be performed or performance completed or at the place where in performance of the contract any money to which the suits relate was expressly or impliedly payable. 1 R. 231. 7 N.L.J. 25, 79 I.C. 30, 13 I.C. 943=16 C.W.N. 325, 27 I.C. 129=8 S.L.R. 107. See also 145 I.C. 464=1933 L. 559, 9 I.C. 824, 11

B 649, 31 M. 223=134 I.C. 65, 1926 C. 100; 1929 S. 227; 58 C 539; 57 B. 306=143 I.C. 335=35 Bom.L.R. 168=1933 B 179. 26 S.L.R. 167=139 I.C. 114=1932 S. 9. If there is a contract made by means of correspondence between the parties, part of the cause of action arises where some of the letters are written or sent, and a suit can therefore be instituted at that place. 39 C.W.N. 171. If the parties to contract for supply of goods agree that the delivery is to be made at a particular place, a cause of action would arise there in part at least, because under the terms of the contract it is the place where a part of the contract is to be performed. And if owing to the action of the buyer the seller is unable to perform the contract at the place agreed upon, he will have a right to institute his suit there. In a suit for damages for breach of contract the cause of action consists of making the contract, and of its breach, so that the suit may be filed either at the place where the contract was made, or at the place where it should have been performed. 56 A 828=153 I.C. 824=1934 A.L.J. 1093=1934 A. 740. Where the plaintiff residing in a place T gave orders to the defendant firm in M to send certain goods for which he sent an advance and instructed them not to send the goods per V.P.P. and when the goods were sent by V.P.P. in contravention of his order he refused to receive them and claimed the refund of the advance paid by him by a suit in the Court at T. Held, that the Court at T had jurisdiction as the contract was made and was to be performed or the performance thereof completed at that place. 40 L.W. 498=1934 M 581=67 M.L.J. 296. A suit for damages for breach of contract can be brought either where the contract was made or where the breach was committed in the place where it ought to be performed. 16 C.W.N. 325, 50 I.C. 139, 21 B. 126, 27 M 494. See also 27 M 355, 103 I.C. 37 (2), 19 S.L.R. 207. Where no place for the performance is prescribed by the agreement, the place where it is intended by the parties that such contract should be performed ought to supply the forum. 13 Bom.L.R. 46; 11 B 649; 31 M. 223.

CONTRACT OF SALE.—A contract is made where it is accepted and the buyer at Agra cannot sue at Agra for breach of a contract to sell goods concluded by acceptance at Delhi. 41 A 602. On this point, see also 60 I.C. 481; 2 L.L.J. 555; 53 I.C. 331. Cause of action may arise in the place of delivery of goods, if such place is an essential part of the contract. 39 A 368. See also 144 I.C. 828=1934 L 44. Even if the price was stipulated to be paid at another place. 1930 N. 90. A suit on account of non-delivery of goods may be brought in a Court of the

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(c) the cause of action, wholly or in part, arises.

Notes.

See 6 M. 349; or apply under S. 22; 30 B. 81. As to when and how objection to jurisdiction is to be taken, see Ss 21 and 22. When cause of action arises in Courts jurisdiction—Leave if necessary. 1929 S. 170 If leave is granted without notice to the opposite party Court can in the exercise of its inherent jurisdiction, hear objections and pass necessary orders under S 151. 150 I C 559=1933 L. 266 Discretion of lower Court in granting or refusing leave will not be lightly interfered with by the appellate Court, but where the lower Court has refused to exercise its discretion in a fit case, the appellate Court can interfere 145 I C 706=27 S L R 230=1933 S. 179

Sec 20 (c) CAUSE OF ACTION—The expression means the bundle of facts which is necessary to be proved to entitle the plaintiff to a decree 29 B 368, 22 C 451, 23 C W N. 517, 30 B 167, 39 A 506; 31 M L J 816, 72 I C. 920=1923 M. 109, 1924 N. 308, 65 I C 425=1922 O. 109=3 A.W.R. 11=147 I C 591=1934 A. 226, 61 C 1023=39 C.W.N. 293=155 I.C. 882=1935 C 160, 27 S L R. 230=145 I C 706=1933 Sind 179, 30 S L R 182=1936 Sind 229; 57 B 306=35 Bom L.R. 168 143 I.C 335=1933 B 179 It means everything which if not proved gives the defendant an immediate right to judgment, every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse. 58 C. 539=134 I C 65=1931 C 659, 60 C 918; 28 S L R 102; 1934 R 234 A *bona fide* voluntary assignment affords a valid cause of action not only against the assignor, but also against the original debtor 1926 S 31, 145 I C 706=27 S L R. 230=1933 S. 179, 34 P L R 771=1933 L 940 (Assignment of promissory note within jurisdiction giving rise to cause of action) The cause of action must be antecedent to the institution of suit 4 P L J 387 (393) The term means the cause of action as it was at the time when the right to sue arose for the first time. Per Krishnan, J, in 31 M L J 816 It has no relation to the defence set up or to the character of the relief prayed for in the plaint. 16 C. 98, 46 I C 913 For place of filing an application under Sch II, para 17, see 1933 L 18

CAUSE OF ACTION—SUITS ON CONTRACT—The cause of action in suits on a contract arises at the place where the contract was made or the place where the contract was to be performed or performance completed or at the place where in performance of the contract any money to which the suits relate was expressly or impliedly payable 1 R 231; 7 N L J 25; 79 I C 30, 13 I C 943=16 C W N 325, 27 I C 129=8 S L R 107 See also 145 I C 464=1933 L 559; 9 I C 824, 11

B. 649, 31 M 223=134 I.C 65, 1926 C. 100; 1929 S. 227; 58 C. 539, 57 B 306=143 I.C 335=35 Bom L.R 168=1933 B. 179 26 S.L R. 167=139 I.C. 114=1932 S 9 If there is a contract made by means of correspondence between the parties, part of the cause of action arises where some of the letters are written or sent, and a suit can therefore be instituted at that place 39 C.W.N. 171. If the parties to contract for supply of goods agree that the delivery is to be made at a particular place, a cause of action would arise there in part at least, because under the terms of the contract it is the place where a part of the contract is to be performed And if owing to the action of the buyer the seller is unable to perform the contract at the place agreed upon, he will have a right to institute his suit there In a suit for damages for breach of contract the cause of action consists of making the contract, and of its breach, so that the suit may be filed either at the place where the contract was made, or at the place where it should have been performed 56 A 828=153 I C 824=1934 A.L. J 1093=1934 A 740. Where the plaintiff residing in a place T gave orders to the defendant firm in M to send certain goods for which he sent an advance and instructed them not to send the goods per V. P P and when the goods were sent by V P P, in contravention of his order he refused to receive them and claimed the refund of the advance paid by him by a suit in the Court at T Held, that the Court at T had jurisdiction as the contract was made and was to be performed or the performance thereof completed at that place. 40 L W. 498=1934 M 581=67 M L J 296 A suit for damages for breach of contract can be brought either where the contract was made or where the breach was committed in the place where it ought to be performed 16 C.W.N. 325, 50 I C 139, 21 B 126, 27 M 494. See also 27 M 355, 103 I C 37 (2); 19 S L R 207. Where no place for the performance is prescribed by the agreement, the place where it is intended by the parties that such contract should be performed ought to supply the forum. 13 Bom.L.R 46; 11 B 649; 31 M 223.

CONTRACT OF SALE—A contract is made where it is accepted and the buyer at Agra cannot sue at Agra for breach of a contract to sell goods concluded by acceptance at Delhi 41 A 602. On this point, see also 60 I C 481, 2 L.L.J. 555, 53 I C 331 Cause of action may arise in the place of delivery of goods, if such place is an essential part of the contract. 39 A 368 See also 144 I.C. 828=1934 L 44 Even if the price was stipulated to be paid at another place 1930 N 90. A suit on account of non-delivery of goods may be brought in a Court of the

MONEY.

place where delivery and payment were to be made 42 A. 480. On this point, see also 71 I.C. 38; 39 M. 195; 43 A. 334, 77 P.R. 1909; 65 I.C. 242, 1924 L. 349, 79 I.C. 30. Where goods are ordered by V.P., the place of suing is the place where the goods were delivered and paid for 42 A. 619. The cause of action for a suit by the seller for balance of accounts due from the buyer arises at the place of consignment of the goods to the railway 24 I.C. 423=1914 M.W.N. 803. Delivery to carrier is equivalent to delivery to buyer. 1925 L. 555=89 I.C. 751, 144 I.C. 828=1934 L. 44 (66 I.C. 501 Not Foll). Cause of action arising in place where money is payable See 42 A. 480, 1925 O. 209. Payment is due at creditor's place in absence of express or implied specification 83 I.C. 339, 118 I.C. 898. Place of performance of contract is place where money is payable. See also 86 I.C. 1046, 89 I.C. 181=1925 N. 408; 40 M.L.J. 806 (P.C.), 1930 O. 91. In a contract of sale of goods by Calcutta firm to Madras firm, where the payment was to be by hundies to be drawn by the former upon the latter, the cause of action for a suit to recover money overpaid arose in Madras, the payment having been made in Madras. 47 M. 403=46 M.L.J. 82. When there is a clause in the contract that all claims should be decided at a particular place, whether suit can be instituted at any other place where cause of action may have arisen See 144 I.C. 828=1934 L. 44 See also 110 I.C. 727; 113 I.C. 783, 119 I.C. 481, 49 M.L.J. 25 (P.C.). Contract—Principal and agent—Supply of goods by agent—Balance struck at principal's place of business—Suit by agent at his place of business—Maintainability 152 I.C. 802=1935 L. 68.

PARTNERSHIP SUITS.—A suit for dissolution of partnership can be brought only at the place of its business 42 P.R. 1916=33 I.C. 953; or where the partnership is entered into, 1929 A. 236; 32 P.L.R. 464=132 I.C. 218=1931 L. 673. If there are two such places at any one place, 23 L.W. 361=92 I.C. 915=1926 M. 427; 50 M.L.J. 298. A suit for dissolution of partnership carried on in foreign territory is maintainable in British India if the parties are resident there 23 Bom.L.R. 543=63 I.C. 959=45 B. 1228. Where partnership business was carried on at two places suit for dissolution can be filed at either place and also at the place where partnership accounts are maintained 50 M.L.J. 298, 1931 L. 673. But where the transactions had at a place cannot be said to amount to "carrying on of business", that place cannot have jurisdiction to entertain suit for dissolution of partnership and accounts. 160 I.C. 353=1936 P. 6 (1926 M. 427. Dist.).

CONTRACTS OF AGENCY.—Where goods are sent to place to be sold there and a sale takes place in contravention of instructions, a suit for damages will be at place A 1924 N. 308. In a suit for damages caused by the agent's negligence, cause of action was held to have arisen in the place where the agent's negli-

gence occurred and the Court elsewhere had no jurisdiction 34 A. 49, 1922 N. 167, 94 I.C. 287=1926 S. 238. The cause of action in a suit for accounts against an agent arises at the place where the contract of agency took place or where it was to be performed and where account was to be rendered or was refused. 55 I.C. 266=12 Bur.L.T. 198, 94 I.C. 287=1926 S. 238. See also 6 L. 153; 1924 A. 530; 10 L.L.J. 87=9 L. 455; 1929 S. 227, 1929 L. 605=119 I.C. 481, 182 I.C. 734; 33 Bom.L.R. 1364=135 I.C. 170=1932 B. 42, 163 I.C. 397=1936 R. 251. Where money was intended to be paid to the plaintiff at his place part of the cause of action arose there 46 M.L.J. 371. Unless the contract clearly indicated the contrary a commission agent is liable to render account only at the place where all the business is transacted 46 A. 465. See also 152 I.C. 802, 92 I.C. 273=1926 L. 287.

CONTRACT FOR REMUNERATION FOR SERVICE.—The defendant wrote a letter from S to plaintiff at F calling upon him to go to S to treat the defendant. After plaintiff's arrival at S an agreement regarding the fees, payment, etc., was arrived at S and the plaintiff was to be paid at S. Plaintiff sued for the fee fixed at F, held, that the cause of action arose at S as the whole contract was made at that place. Held further, that as there was no failure of justice caused by the suit being tried at F the objection as to jurisdiction need not be given effect to in revision 148 I.C. 875=1934 A. 549.

SUIT FOR MONEY.—The cause of action for the payment of a debt will arise at the place where the debt is payable 20 I.C. 683 (Bur.). If there is nothing as to the place where the money under a bond is payable, the Court must be guided by the intention of the parties. 49 I.C. 950. Payment actually made by debtor at place other than where creditor resides resists the above presumption 1930 L. 818=126 I.C. 514. The debtor must seek his creditor and pay him 27 I.C. 1027=1926 M. 1207. See also 24 A.L.J. 48; 23 L.W. 3=1926 M.W.N. 108; 53 I.A. 58=53 C. 88=49 M.L.J. 806 (P.C.), 118 I.C. 718=1929 L. 868 (1); 131 I.C. 303 (2)=1931 L. 431. Where loan was made at creditor's residence in British India to defendant residing outside British India, and the contract was silent as to the place of payment, held that the creditor could institute a suit for the recovery of the amount in the British Indian Court having jurisdiction over his place of residence 59 B. 365=37 Bom.L.R. 357=1935 B. 283.

SUIT ON NEGOTIABLE INSTRUMENTS.—A suit on promissory note lies at the place where it is drawn and signed and dated. 28 M. 19. Where money on a pro-note was intended to be paid in place A the Court at A has jurisdiction to entertain a suit on the pro note, 2 P.R. 1916=31 I.C. 698. The assignment of a promissory note is a part of the cause of action and the assignee can sue on it in the Court within whose jurisdiction it took place. 31 M.L.J. 816, 34 P.L.R. 771=147 I.C. 229=1933 L. 940. See also 21 S.L.R. 192. But not

Notes.

in the place of his residence even if assignment says, that money should be paid there. 1929 C. 306=119 I.C. 295 See also 155 I.C. 953=1935 N. 144. The cause of action on a *hundi* arises at the place where it is endorsed by the payee. 22 C. 451 See also 107 I.C. 218 The dishonour of a *hundi* by non-acceptance constitutes part of the cause of action in a suit against the drawer 20 B. 133 Where a *hundi* drawn in Cawnpore for acceptance and payment in Calcutta is so accepted and paid in Calcutta, part of the cause of action arises in Calcutta 47 C. 588 Where in respect of sale of goods at Tuticorin to plaintiff residing thereby defendant carrying on business at Rangoon, the contract was that plaintiff should make payment by *hundis*, and the defendant should obtain payment by endorsing the same at Rangoon, held, that Tuticorin Court had jurisdiction to entertain suit for damages for short delivery. 41 L.W. 519=156 I.C. 1041=1935 M. 665=68 M.L.J. 504 (F.B.). S. 19 is subject to limitations of S. 19 An action in tort for wrongful conversion of a *hundi* is subject to the rule in S. 19 and must be instituted in the Court within the limits of whose jurisdiction the defendant wrongdoer resides, and the Court within whose jurisdiction the *hundi* is endorsed over to the plaintiff will not have jurisdiction But if the suit is one for money had and received upon an implied contract, the position would be different, for in this case, S. 20 would determine jurisdiction 30 S.L.R. 182=1936 S. 229

MATRIMONIAL SUITS—In matrimonial suits, to which the Divorce Act does not apply, questions of jurisdiction should be decided under the Civil Procedure Code 54 I.C. 65=12 Bur L.T. 120 A Court is competent to try a case of breach of contract of betrothal when the breach took place within its jurisdiction, though the defendants may be residing elsewhere 37 I.C. 114=93 P.R. 1916 In a suit for damages for breach of contract to marry, part of the cause of action arises at the place where the marriage is to take place, though the agreement to marry is entered into at another place 65 I.C. 812 A suit for restitution of conjugal rights may be brought either where the husband resides or the wife resides 18 B. 316, 54 I.C. 120 In a suit for restitution of conjugal rights the mere fact that the plaintiff has his home within jurisdiction is sufficient to give the Court jurisdiction Even where the defendant is not resident within its jurisdiction and the parties had at no time been living together within that jurisdiction the Court cannot refuse to entertain the suit 59 M. 392=43 L.W. 307=1936 M.W.N. 19=161 I.C. 485=1936 M. 288=70 M.L.J. 288 (on appeal from 67 M.L.J. 271 which held otherwise). But where wife's father is also impleaded and injunction is claimed against him, so far as he is concerned it cannot be maintained at the plaintiff's place when the father lives beyond jurisdiction (*Ibid*) A suit for dower lies in a Court within whose jurisdiction the

marriage and divorce took place. 32 C. 146. See also 18 A. 400 A suit for recovery of prompt dower lies also in the place where the plaintiff resides, on the principle that debtor must follow creditor unless there is different contract between them 63 C. 726=40 C. W.N. 392=161 I.C. 427=1936 C. 97

SUITS FOR DAMAGES FOR TORTIOUS ACTS—If tort is committed within the limits of one Court and the tort-feasor resides within the limits of another, both Courts have jurisdiction. 39 M. 483=28 M.L.J. 310 Where a person purchases a ticket for journey by railway at A, but fell out of the train and was injured owing to the neglect of the Railway Co., at B, the cause of action for a suit for damages arises at B and not at A 42 A. 488 See also 9 L. 140=112 I.C. 153 A suit for defamation may be instituted at the place where the defamatory matter was published. 13 B. 178 In a suit for malicious prosecution and arrest part of the cause of action arises at the place where the person is arrested 6 Bom.L.R. 141

INSURANCE CONTRACTS—In cases based on contract of insurance, the words 'cause of action' do not include the loss or damage of the property insured, which is merely a cause of the cause, the real cause of action being failure to pay money under the contract. 1 R. 231=76 I.C. 482=1924 R. 2 But see 1928 N. 305 (2) The only definition of cause of action that will work if it has to be applied to cases of all kinds is the entire set of the facts that gives rise to an enforceable claim In the case of an insurance policy payable at death, the claimant must prove the death of the insured; hence the place of the death of the assured is a place where the cause of action arises, so as to give jurisdiction to the Court of that place. The words "on proof to the satisfaction of directors, that the sum assured has become payable" mean only proof of death of insured 28 S.L.R. 192=151 I.C. 516=1934 S. 76, 44 I.C. 694=22 C.W.N. 517, 41 I.C. 392 (M.), 34 Bom.L.R. 815=140 I.C. 262=1932 B. 292 See also 98 P.R. 1918=45 I.C. 900=29 P.L.R. 1918.

LEASE—A lessee of a grove must apply to the lessor to fix a place for payment of the premium due, and when he does not do so, he has to make the payment at the lessor's place of residence, because he, as a debtor, has to find the creditor. Therefore a suit by the lessor for the premium due can be instituted at the place where the lessor lives, since part of the cause of action arises there, though the lands may be situate and the lessee may reside in a different place. 18 R.D. 403=15 L.R. 527 (Rev.). A instituted a suit in the Court of Small Causes at X against her agent D, for recovery of Rs 100 being the unpaid balance of the premium collected by D in respect of a lease in favour of B On D pleading that he had recovered Rs 800 only and the remaining Rs 100 was paid by B to A herself, A amended the plaint impleading B claiming the sum from B in the alternative. The grove to which the lease related was

Explanation I.—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II.—A corporation shall be deemed to carry on business at its sole or principal office in British India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations.

(a) *A* is a tradesman in Calcutta. *B* carries on business in Delhi. *B*, by his agent in Calcutta, buys goods of *A* and requests *A* to deliver them to the East Indian Railway Company. *A* delivers the goods accordingly in Calcutta. *A* may sue *B* for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where *B* carries on business.

(b) *A* resides at Simla, *B* at Calcutta and *C* at Delhi. *A*, *B* and *C* being together at Benares, *B* and *C* make a joint promissory note payable on demand, and deliver it to *A*. *A* may sue *B*, and *C* at Benares, where the cause of action arose. He may also sue them at Calcutta, where *B* resides, or at Delhi, where *C* resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

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situated at *Y* and *A* resided at *X* where most of her property was held, that the cause of action accrued to *A* at *X* as under S 49, of the contract Act, there was an implied promise to pay at *X* 1933 A. 147=150 I C 289 As to form in suits for rent, with and without an additional prayer for ejectment, under S. 66, B T Act, see 27 C.W.N. 542=1923 C 619=77 I C 253

SUITS AGAINST NON-RESIDENT FOREIGNERS—A British Indian Court has jurisdiction to entertain a suit if the cause of action arises within its jurisdiction, even where the defendant is a non-resident foreigner 59 B 365=37 B L R 357=1935 B 283 (suit for recovery of loan); 35 M L J 189 (a case against a foreign ship-owner for short delivery of goods) See also 56 A 828=153 I C. 824=1934 A L J. 1093=1934 A 740 Neither the fact that the rent sued for is in respect of property situated in a Native State, nor that defendant is resident of a Native State, will prevent British Indian Court from entertaining the suit for rent where the rental agreement had been executed in British India 41 L W. 381=1935 M W N 174=157 I C 281=1935 M 545=68 M. L.J. 506. The question whether its decree could be enforced against him in the foreign Court is one for consideration of the Courts of that State. 35 M L J. 189 See also 29 M. 69 (suit against a subject of a protected Native State). On this point, see also 20 B 133; 17 B. 662; 30 I.A. 220=13 M L J 287=26 M. 544 (P C), 25 B 528.

ARBITRATION—Refusal to refer to arbitration by the other party is a fundamental part of the cause of action in an application under Sch II, para 17 to have the agreement filed in Court. Such refusal confers jurisdiction 1933 L 18=150 I C 674 It is immaterial that the proposed arbitrator resides elsewhere, and the cause of action as to the other reliefs also have arisen elsewhere (*Ibid*).

SUITS TO SET ASIDE DECREE ON THE GROUND OF FRAUD.—A suit to set aside a decree obtained by fraud, where no other relief is claimed, cannot be maintained in any district

outside the district in which the fraud was committed and that the decree obtained. 29 A 418, 25 A 48; 36 A 564 Defendant fraudulently obtained a decree in *S* and transferred it to *A* and in execution had the plaintiff arrested in *A*. Held, a suit to set aside the decree could be filed at *A* as the material portion of the cause of action accrued at *A*. 39 A 607, 5 C.W.N. 559 See also 3 Luck 142=4 O W.N. 1103, 1927 L. 778=100 I C. 164 (2) As to whether the Court in whose jurisdiction the property attached under the decree is situate, has jurisdiction to entertain a suit to set it aside, see 37 A 189 Decree obtained at one place and transferred to another place for execution. Suit to set aside can be filed at either place. 7 L. 61=94 I C 377.

REVISION AND APPEAL—No hard and fast rule as to revision can be laid down in cases of decisions as to jurisdiction under S 20 and each must be decided on its own merits 1923 L 565; See also 41 A 602 Where leave to sue is granted or refused by the trial judge, his discretion should not be lightly interfered with in appeal. But where the trial judge has refused to exercise his discretion, the appellate Court can interfere 27 S L R 230=145 I C 706=1933 S. 179.

Expl I—Defendant having permanent dwelling at one place and temporary residence at another for carrying on business—Goods sold to defendant and document got executed at place of temporary residence—Suit is maintainable at place of permanent dwelling, where there was no intention on the part of defendant to abandon the idea of returning to it 143 I C 357=34 P L R. 908=1933 L 120 (57 C 65, Appr, 2 Bom L R 605 Not Foll, 42 P R 1916=112 P R 1916 Dist). See also 1936 L.853 The onus of proving that he has abandoned his permanent residence lies on the person who so alleges; 1936 I. 853.

Expl. II—The plaintiff carried on business at Amritsar. The defendant firm had its head office at Bombay and a sub-office at Amritsar This sub-office conducted correspondence with its local customers, received orders and moneys were received and

21. [S 16-A (2).] No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at

Objections to jurisdiction

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disbursed The orders placed at Amritsar were not, however, binding unless they were accepted by the head-office. *Held*, that the defendant firm was "carrying on business" at Amritsar and a suit filed at Amritsar was regular. (45 I C 900, R.) 14 L 42=140 I C 473=1933 L 11

Sec 21—SCOPE AND APPLICABILITY OF SECTION—Section 21 is new and the alterations in procedure are retrospective in effect 87 P.R. 1914=26 I C 543 There is a distinction between an absolute want of jurisdiction and an irregular assumption of jurisdiction. 36 C. 193 It is a well established rule that where the Court has no inherent jurisdiction over the subject-matter of a suit, its decree is a nullity even though the parties may have consented to the jurisdiction of the Court. The parties cannot, by their mutual consent, convert it into a proper judicial process although they may constitute the Judge their arbitrator. 27 C.W.N. 542=1923 C 619 See also 146 I.C. 204=1933 M 471=38 L.W. 896. Even when objection is not taken, when there is a complete absence of jurisdiction, acquiescence of the parties cannot give the Court jurisdiction in the matter. (41 I.C. 276, 36 I.C. 457 and 70 I.C. 396, Rel.) 142 I.C. 613 (1)=1933 M 346, 1933 M.W.N. 208, 9 A. 191=13 I A. 134 (P.C.), 11 M. 26, 14 I.A. 160, 9 Bom. 266; 8 B. 313, 9 B.H.C. 242; 38 C. 639; 1931 A. 454, 33 Bom.L.R. 1364=135 I.C. 170=1932 B. 42, 6 Luck. 697, 31 N.L.R. (Supp.) 57=161 I.C. 877=1936 N. 1 (P.B.) The exception contained in this section cannot be so interpreted as to have a wider application than what is justified by the terms of the section 27 C.W.N. 542=1923 C. 619 It is only when the Court is competent to try, and the parties join issues and go to trial that this section is applicable, and the defendant cannot subsequently dispute its jurisdiction 31 N.L.R. (Sup.) 57 (Noted *supra*). But this section does not apply to a case where the objection is not one as to the place of suing, but one going to the nullity of the order of the first Court on the ground of want of jurisdiction and it can be taken at any time The Court of a district subject to the C.P. Code has no jurisdiction under S. 17 to entertain a suit so far as it claims a decree for sale of mortgaged property situated in a scheduled district and the order for sale of the land can be set aside although no objection to the jurisdiction of the first Court was taken 42 M. 813=37 M.L.J. 11 (P.C.) overruling 4 I.C. 411. See also 152 I.C. 135=35 P.L.R. 482=1934 L. 652; 7 A. 230, 13 M. 25; 2 B.H.C. 40, 12 B. 155; 13 B. 424, 13 M. 273; 33 B. 664; 13 B. 650; 23 B. 22, 97 I.C. 770=1926 C. 1101; 33 Bom. L.R. 1364=135 I.C. 170=1932 B. 42; 6 Luck. 697=9 O.W.N. 847=1932 O. 313. Section cannot apply where the case is one of in-

herent incompetency of British Indian Court the cause of action arising outside British India. 10 Lah L.J. 87. Section does not apply to execution of foreign judgments. 86 I.C. 492=1925 M. 788; 120 I.C. 279=1929 L. 449. The section does not apply when the question is whether the suit is triable on the small cause side or regular side (1931 O. 411), or to a case triable in the Original Side of the High Court where part of the cause of action arose outside its jurisdiction and leave to sue had not been obtained therefor 56 B. 324=34 Bom.L.R. 236=137 I.C. 381=1932 B. 291; 40 C.W.N. 65=164 I.C. 907, 160 I.C. 818=1935 R. 517. (1929 C. 358 Rel on, 1926 M. 421; 1920 M. 1019, 1925 M. 117, Dist) Section does not modify Cl 12 of the Letters Patent (Cal.). 56 C. 940. Where the provisions of the Arbitration Act are wholly inapplicable to an award under the Act, it cannot become capable of enforcement under the Act merely on account of the failure to raise any objection in the Court filing the award This section is not applicable to such a case 35 P.L.R. 482=152 I.C. 135=1934 L. 652 The section applies where there is want of territorial jurisdiction not merely at the institution of a suit but at any stage during the progress of it. 47 M.L.J. 448=87 I.C. 152, 47 M.L.J. 192=87 I.C. 341=1924 M. 697, 46 M.L.J. 250

CONDITIONS FOR APPLICATION ON SECTION.—(1) AT THE EARLIEST OPPORTUNITY—All conditions mentioned in the section must be fulfilled before decree can be set aside 96 I.C. 544 (1) Objection should be at the earliest opportunity. 49 M. 74=50 M.L.J. 161 If the plea as to objection is taken in the original proceedings at any stage thereof the Court should return the plaint for proper presentation. The question of delay mentioned in S. 21 is only applicable to appeals and revisions. 10 I.C. 980=4 S.L.R. 264. See also 53 I.C. 331; 8 B. 313, 9 B. 266, 23 B. 679; 10 M. 211; 93 I.C. 103 A question of jurisdiction, as to whether a suit will lie in a British Indian Court, which is a question of law depending upon public documents requiring no proof, can be raised in the appellate Court S. 21, C.P. Code, is no bar to such a question being raised at any stage of the proceedings But where British Indian Courts have power to deal with the *lis*, S. 21 comes into play and operates as an estoppel. 28 S.L.R. 54=1934 S. 123=155 I.C. 677 Trial Court dismissing suit as against one defendant on ground of want of jurisdiction—On appeal by other defendant, appellate Court passing decree against him. 1935 C. 153 The principle underlying the section is that objection to jurisdiction may be waived and it applies as well to collateral proceedings as to proceedings in appeal or revision. 47 M.L.J. 448. A defendant who objects to the jurisdiction of a Court cannot

the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice

Notes

be said to have acquiesced in the trial of the suit if he does not apply for a transfer 27 I.C. 232=14 C.W.N. 1340

(2) FAILURE OF JUSTICE.—A decree passed by Court having no territorial jurisdiction over the subject-matter will not be set aside on that account in the absence of proof of prejudice or failure of justice 149 I.C. 1050=36 P.L.R. 99=1934 L. 233 Where there has been no failure of justice, the plea as to want of territorial jurisdiction cannot be entertained in appeal 49 I.C. 441; 55 I.C. 442, 36 I.C. 431; 1922 L. 164, 1929 A. 236, 31 P.L.R. 616 1932 L. 135=32 P.L.R. 874=136 I.C. 17, 131 I.C. 603=1931 A. 556; 32 P.L.R. 50=1931 L. 142=131 I.C. 276 In a suit on a promissory note where defendant on whom onus lay remained *ex parte* and without satisfactory reasons and a decree was passed (*without jurisdiction*), neither the appellate nor the revisional Court would interfere as there was no failure of justice within the meaning of this section, 158 I.C. 252=1935 M. 574 The question cannot be gone into in *second appeal* unless it was raised at the earliest possible moment in the course of the suit 48 I.C. 465, 41 I.C. 161. An objection as to territorial jurisdiction raised before appellate Court must be determined on merits to ascertain whether there has been a failure of justice. 42 A. 74; 37 I.C. 114=93 P.R. 1916; 87 P.R. 1914=26 I.C. 543; 1922 O. 124, 19 A.L.J. 305=62 I.C. 399. When a suit is instituted in a British Indian Court the Court must determine whether it has jurisdiction to hear the suit or not by the aid of the Code. In case of doubt as to whether a Court had jurisdiction the objection cannot be entertained by the appellate Court unless there has been a consequent failure of justice 147 I.C. 591=1934 A.L.J. 226 See also 1933 P. 555=149 I.C. 758 Although the objection was taken at the earliest opportunity before issues were settled the High Court refused to interfere in revision as there was no prejudice to the parties. 44 I.C. 694=22 C.W.N. 517 See also 2 Pat. L.R. 74=80 I.C. 745

APPLICABILITY OF SECTION 1 TO EXECUTION PROCEEDINGS.—Though S. 21 does not in terms apply to execution proceedings, the principle underlying it, being one of general application, applies to execution proceedings. Where an objection to jurisdiction is not taken before the sale of the property in execution, it cannot be raised at a later stage 40 L.W. 284=1934 M.W.N. 878=152 I.C. 891=1934 M. 573 See also 28 L.W. 885=1928 M. 746. An execution sale after confirmation cannot be avoided on the ground that the Court had no territorial jurisdiction over the property 24 M.L.J. 70 See also 43 M. 675=39 M.L.J. 203 (F.B.), 46 M.L.J. 250. The rule of territorial jurisdiction

does not apply to execution of mortgage decrees 49 M. 74=50 M.L. 161 The section applies to all objections based on the alleged infringement of the provisions of Ss 16 to 18, C.P. Code, as regards the institution of suits relating to immoveable property. A Court executing a decree could not entertain an objection on the ground of want of territorial jurisdiction 43 M. 675=39 M.L.J. 203 (F.B.) See also 50 M. 882=52 M.L.J. 605

(2) APPEAL.—Although S. 21 does not in terms apply to appeals, the principle underlying it is of general application, so as to cover proceedings other than original suits. Hence where an objection as to jurisdiction is not taken in the lower appellate Court, the plea must be deemed to have been waived and cannot be raised in second appeal [43 M. 675 (F.B.); 55 M. 801 (F.B.), 87 I.C. 152; 87 I.C. 341, Ref.] 29 N.L.R. 342=1933 N. 318. Decree cannot be questioned in an appellate Court when the objection has not been raised in the trial Court 93 I.C. 103=7 O.W.N. 1079; nor a Court of second appeal 1930 M. 541. Where first appellate Court upholds objection to jurisdiction and returns plaint for proper presentation, the plaintiff may agitate the matter in second appeal, even though it may not be specifically set forth in memo. of appeal. 131 I.C. 603=1931 A. 556. Respondent to appeal raised preliminary objection based on fact that suit has been overvalued, at a late stage after appellant's arguments had proceeded for some time. *Held*, the Court will not refuse to hear the objection though it may disallow costs to respondent. 14 P. 414=10 Pat. L.T. 103=1935 P. 160.

(3) REMANDED CASE.—Neither S. 21 in terms, nor any principle underlying it is applicable to a remanded case being dealt with by a Court other than the Court specified in the order of remand. 44 M.L.J. 238=72 I.C. 314.

(4) APPLICATION to set aside *EX PARTE* DECREE.—Section applies to application to set aside *ex parte* decree. 52 A. 947=1930 A.L.J. 997.

DECREE WITHOUT JURISDICTION.—INDEPENDENT SUIT TO SET ASIDE DECREE.—MAINTAINABILITY.—S. 21 does not provide against the question of jurisdiction being agitated by means of an independent suit. It only bars the raising of the question for the first time in a later stage of the same suit before the appellate or revisional Court 1931 A.L.J. 240=131 I.C. 248=1931 A. 454, 1923 C. 619=27 C.W.N. 542; 31 N.L.R. 43 (Sup.)=159 I.C. 739=1935 N. 250 (F.B.) See also 28 Bom. L.R. 879=98 I.C. 341=1926 B. 481 But see *contra*, 7 P. 216=9 Pat. L.T. 789=108 I.C. 321=1928 P. 324; 43 M. 675=12 L.W. 217=58 I.C. 871=1920 M.W.N. 460=39 M.L.J. 203 (F.B.); 87 I.C. 152=1925 M. 117=47 M.L.J. 448; 11 L.L.J. 306=120 I.C. 279=1929 Lah. 449.

22. [Ss 22, 23, 24.] Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may at the earliest possible opportunity and in all cases where issues are settled at or before such settlement

Power to transfer suits which may be instituted in more than one Court

apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

To what Court application lies

23. (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under S. 22 shall be made to the

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Sec 22:—SCOPE AND APPLICATION.—This section and S. 23 of the C P Code do not apply to a case in which the question is whether a suit should be tried by a Court subordinate to a High Court or by a High Court or the Chief Court of Oudh. Such a case is not covered by any specific provision of the Code, and in the absence of a rule of law specifically applicable thereto, it is open to the High Court to exercise powers similar to those contemplated by Ss 22 and 23. If it appears that the plaintiff has chosen a forum in utter disregard of the convenience of both parties, for some ulterior object and in abuse of his position as *dominus lites* the High Court can, in the exercise of its inherent power, determine which of the two Courts having jurisdiction should try the suit. 1934 A 14=56 A. 201=1933 A L J 1507=147 I C 513. Neither this section nor S. 23 applies to Chartered High Courts in exercise of Original Civil Jurisdiction. 56 C 940=1929 C 358. Ss 22 and 23 do not provide for the transfer of a case from a Court subordinate to one High Court to the original side of another Court. 69 I C 772. See also 57 I C 649=1 Pat L T 389. This section has to be invoked only in cases where option is given to the plaintiff to choose his own forum (*Vide* Ss 16 and 20), 12 A. L. J. 896=24 I. C. 318, 71 I C 268=1923 A. 288. The provisions of the section are mandatory. An application for transfer cannot be maintained after the settlement of issues. 78 I. C. 608=1925 L 175; 11 P. R. 1917=35 I C 616=16 P. L. R. 1917, 7 L. L. J. 93=88 I C 531=1925 L 322. The Provision as to notice is mandatory. 107 I C 593. Both Courts must have jurisdiction in order that an application can be made under S. 22 or S. 23. Where jurisdiction is denied, no application for transfer can be made. 24 I C 318=12 A. L. J. 896, 71 I C 268=1923 I. 288 (2); 12 A. L. J. 986, 48 I C 105=21 O. C. 217. In an application for transfer under Ss 22 and 23, the question of want of jurisdiction of the trying Court cannot be raised. 34 I C 707; 1 Pat L T 277=56 I C 920. In a suit pending before the Original Side of the High Court an application to transfer the case to the Court where the suit ought to be tried should be made under S. 22, C P Code, on the Original Side of the High Court which has seizin of the case. And the Court

has power to pass such an order under S. 151. 12 R. 548=151 I C 573=1934 R 265 (F B)

GROUND FOR TRANSFER.—The plaintiff has always a right to choose his forum. The jurisdiction conferred by Ss 22 and 23 must be exercised very cautiously and only when a clear cause has been shown. The mere fact that it would add to the defendant's convenience is no ground for transferring a case. 73 I. C. 860. See also 13 B. 178; 69 I C 772, 69 I C 239, 54 I C 935=167 P. R. 1919, 34 I C 686, 25 I. C. 874; 24 I C. 707, 57 I C 649=41 A 381; 32 I C 613=14 A. L. J. 242, 1928 L 183, 1927 L 14=97 I C. 390; 1928 L 159=106 I C. 869. A suit can be transferred only upon two grounds, viz. (a) that there will not be an impartial trial by the trying Court, or (b) that there is manifest preponderance of convenience to the petitioner, if the suit is transferred to the other Court. 56 I. C. 920=1920 P. 235. See also 33 I. C. 797, 106 I. C. 870=1928 M 15; 4 O. W. N. 1114; 97 I C. 390.

BIAS OF JUDGE.—The apprehension that there will not be an impartial trial must be such as a reasonable man might reasonably be expected to have. 1923 L 564. The fact that a Judge has decided a point of law arising in a case analogous to the case is not a good ground for transferring the case from his file. 67 I C 228=1922 L 369, 15 I C 569. Where the Judge merely took an erroneous view in disposing of a certain application but there is nothing to suggest any bias in his mind for or against any party an application for transfer cannot be entertained. 1934 A 37 (2). Observations injudiciously and thoughtlessly made by the Judge, not a sufficient ground for transfer. 29 I C 29. But see 133 I C. 876 (1).

CONVENIENCE OF PARTIES.—Convenience to the parties and witnesses would be a good ground for transfer. 1924 O 410. *Balance of convenience* may be considered in deciding an application for transfer. 72 I C 592=1923 L 383, 44 A. 278, 9 O. L. J. 413=69 I C 717. An order of transfer passed without regard to the convenience of the parties and without hearing the other party is illegal. 33 I. C. 797=23 C. L. J. 295. On this section, see also 85 I. C. 852=6 Pat. L. T. 540.

Sec. 23.—As to scope and application of section, see 50 A. 201, 56 C 940 and 69 I C 772 noted under S. 22, *supra*. The Original Side of a High Court is not subordinate to

Appellate Court

(2) Where such Courts are subordinate to different Appellate Courts but in the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

24 [S. 25.] (1) On the application of any of the parties and after

General powers of transfer and withdrawal

notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may

at any stage—

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the Appellate Side of the High Court within the meaning of S 23 (3), C P. Code (11 L. B.R. 446=77 I.C. 408=1923 R. 22, Overr.) 12 R. 548=151 I.C. 573=1934 R. 265 (F.B.), 27 M.L.J. 645=27 I.C. 455, 45 C.L.J. 71=100 I.C. 331=1927 C. 290. But see *contra* 1928 L. 183 (1922 L. 306, Diss. and 1923 R. 22, Foll.). The High Court may order a transfer of a suit pending in a Court subordinate to it to a Court under a different High Court where another suit between the same parties is pending. 35 C. 541. See also 51 B. 26=100 I.C. 154=1927 B. 79; 1928 P. 640=110 I.C. 699. But see also 20 I.C. 758. A Subordinate Judge is nevertheless subordinate to the District Judge, although the appeal in respect of the particular case of which the transfer is sought lay to the High Court and not to the District Judge. 10 C.L.J. 208=3 I.C. 539. The Oudh Chief Court is a High Court. 4 O.W.N. 1114.

Sec 24 SCOPE OF SECTION.—S 24 is exhaustive of the judicial power to transfer suits and no Court has jurisdiction to transfer a suit from one Court to another unless both Courts are subordinate to it. This power is entirely different in character and legal effect from the one in case of an order returning the plaint for presentation in proper Court. 40 I.C. 393=13 N.L.R. 81. Where a Court having really no territorial jurisdiction enquired fully into the case, but when the defect was found out, returned the plaint, *held*, it was a proper case in which the High Court should send it for disposal to the first Court itself. 21 A.L.J. 86=1923 A. 249. All that is necessary to bring into play the jurisdiction of the High Court or the District Court to exercise the power of transfer and withdrawal given under S 24 is that the suit, appeal or other proceeding sought to be transferred should be 'pending before it' or 'pending in any Court subordinate to it'. The mere fact that the suit, appeal, or other proceeding is pending in a Court not having jurisdiction to dispose of the same cannot oust the jurisdiction of the High Court or the District Court to withdraw or transfer that suit, appeal, or other proceeding from the Court in which it is pending to some other Court competent to try the same. 150 I.C. 942=1934 A.L.J. 345=1934 A. 569. See also 54 A. 824=1932 A. 660, 53 A. 916, Diss. But see 53 I.C. 892=

1919 P. 409, 125 I.C. 334, 1930 L. 195; 150 I.C. 839=1934 S. 95, 37 C. 574, 26 S.L.F. 277=139 I.C. 496=1932 S. 215. The word 'suit' where it occurs for second time in sub-S (2), must be taken to include a proceeding, for otherwise parts of the sub-section would be quite meaningless. 161 I.C. 54=1936 Pesh. 56. This section is wider in scope than S. 22 and no notice before institution of application for transfer is necessary under this section. 146 I.C. 38=1933 L. 635. The transfer of a case from one competent Court to another is not invalid because it may affect some other order of the Revenue Court. 53 A. 62=133 I.C. 319. This section contemplates transfer of case from one existing Court to another existing Court. Hence where a Small Cause Court has ceased to exist or the officer invested with small cause powers has been transferred and there is no other officer possessing such powers, there would be no Court from which the District Court can transfer the case to another Court. To such contingencies S 35 of Provincial Small Cause Courts Act applies. 54 A. 171=1931 A.L.J. 953=136 I.C. 357=1931 A. 574 (F.B.).

GROUNDS FOR TRANSFER, WHEN SUFFICIENT

—Convenience of parties, situation of property and heavy expenses already incurred in engaging Counsel. 101 I.C. 723=1927 N. 219, 27 N.L.R. 307=135 I.C. 402=1932 N. 49, 31 N.L.R. 162. 44 A. 278=65 I.C. 782=1922 A. 65; 160 I.C. 522=1936 Pesh. 5. See also 146 I.C. 38=1933 L. 635. But see 5 A. 60, 41 A. 381=50 I.C. 368. Where a Judge has already expressed an opinion, when deciding another appeal, on one of the questions that have to be decided in the appeal, it is desirable, in the interests of justice, that the appeal should be heard and decided by another Court. 152 I.C. 696 (1)=1934 L. 539=35 P.L.R. 468; 32 P.L.R. 388=133 I.C. 876=1932 L. 291. Transfer of appeal—Judge arriving at findings on evidence—Decree set aside and case remanded on appeal—Transfer to a different Judge desirable. 8 Luck. 347=144 I.C. 570=10 O.W.N. 443=1933 O. 154. Where there are clear indications to justify a party in thinking that the Judge was prejudiced against him. 35 P.L.R. 38=147 I.C. 208=1933 L. 915=77 I.C. 762=1923 L. 564; 1903 P.R. 88. Relationship of Judge to a party. 1932 S. 206, 1923 L. 564. Pecuniary or other personal interest in the case of the presiding

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

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Judge 10 C 915. To avoid conflict of decisions, as where one of two appeals involving same question is pending in District Court and the other in the High Court. 147 I C. 637 =1933 L. 1033 But see 163 I C. 962=1936 P 345, where in somewhat similar circumstances transfer was refused on the ground that no hardship was likely to be caused by allowing the appeals to be where they were.

GROUND FOR TRANSFER, WHEN NOT SUFFICIENT.—That *defendant is an influential man* of the locality is no ground. 98 I C. 859=1927 L. 80 (1). *Prejudice against pleader*, if good ground for transfer See 90 I C. 559=1926 M. 359. The mere convenience of the defendant is no ground for transfer of a case and that a strong case should be made out where such transfer is prayed for 146 I C. 38=1933 L. 635, such as that the expenses and difficulties of the trial would be so great as to lead to injustice, or that the *forum* has been deliberately chosen by the plaintiff for the purpose of working injustice 130 I C. 523=1930 L. 944. The mere fact that in a case of *communal nature the presiding Judge* of the Court is a member of a rival community is no ground for a transfer of the suit from that Court. It must be shown that there is a reasonable apprehension in the mind of the applicant for transfer that he will not get a fair trial 150 I C. 334=36 P. L R. 29=1934 L. 762. Where the *evidence for the parties has been closed and even the arguments have been heard*, it would be most inadvisable if at such an advanced stage when the judgment only is to be pronounced, a case is transferred to another Judge who will be handicapped by the fact that he shall have merely to pronounce judgment in a case in which he has taken no proceedings and recorded no evidence. (1926 M. 359, Foll.) 35 P L R. 574=1934 L. 593 Where a Commissioner passes an order of dismissal of a person from the office of Gatwal and a declaratory suit is filed in the Court of the Subordinate Judge who is also a Deputy Collector, the mere fact that the *Subordinate Judge is subordinate to the Commissioner in his executive capacity* is no ground for the transfer of the suit from his Court. He has to decide the suit sitting as a judicial officer and an appeal from his decision lies to the High Court 1933 P. 638=146 I C. 1087. The fact that the *Judge has once decided the point of law* is not good ground for transfer 1930 L. 176=124 I C. 687 See 133 I C. 876. But see 8 Luck 347=141 I C. 570=1933 O. 154

GROUND FOR TRANSFER—BURDEN OF PROOF.—The onus of establishing sufficient ground for transfer lies heavily on the applicant. He must prove that he has a reasonable apprehension that he might not get justice in the Court in which the suit is pending 35 P L R. 574=1934 L. 593, 153 I C. 386, 41 A. 381=50 I C. 368

NORICE.—Notice should be issued to the parties before a Court passes an order of transfer *otherwise than of its own motion*. 78 I C. 614 (1); 58 I C. 560=18 A L J. 351, 40 I C. 111; 42 I C. 746, 26 O C. 62=74 I C. 249; 1925 L. 189; 90 I C. 287=23 A L J. 948, 84 I C. 238=1923 L. 444; 1931 A L J. 1061, 14 L. 240=34 P L R. 540=1933 L. 558, 53 A. 916=136 I C. 384=1931 A L J. 1061. Notice may not be necessary when transfer is made *suo motu* by the District Court without any motion being made to it by any party 53 A. 916. Party is entitled to *personal* notice, and notice to pleader in original Court is not sufficient. 14 L. 240. Transfer without notice is ground for setting aside *ex parte* decree 1923 L. 44, 18 A L J. 351=58 I C. 560, 53 A. 916. But according to Madras and Calcutta want of notice does not render the order of transfer void, but is a mere irregularity which may be waived. 1932 C. 265=137 I C. 430, 13 M. 211; 21 M L J. 829=8 I C. 7 S. 24 is wider in scope than S. 22 and no notice *before institution of an application* for transfer of case is necessary under S. 24 146 I C. 38=1933 L. 635.

AT ANY STAGE.—These words have been inserted in order to avoid the conflict of rulings that existed previously as to whether an order of transfer can be made *after the hearing of the suit had commenced*. See 22 B. 778, 26 M. 595, 7 A. 342, 15 C. 177

SUIT, APPEAL OR OTHER PROCEEDING.—“Suit” includes execution application 1926 L. 465, 47 A. 57. See also 49 M. 746=50 M L J. 161. ‘Other proceeding’ includes an insolvency petition 22 B. 778, and proceedings in execution 39 M. 485=29 I C. 119=29 M L J. 172. and a proceeding under Indian Companies Act 9 A. 180. But it does not include a proceeding under S. 476 of Cr. P. Code. 49 A. 460=101 I C. 247=1927 A. 469. The word ‘proceeding’ in this section covers all proceedings contemplated at the date when C.P. Code, 1908, was passed and not a special proceeding not then in contemplation but established by a subsequent Act, *viz.*, the Cr. P. Code Amendment Act XVIII of 1923 (*Ibid*). No Court other than the trial or appellate Court can file a complaint under S. 476, Cr. P. Code (*Ibid*). Appeal under S. 476 B to District Judge transferred to Additional Judge—Complaint—Legality. 57 C. 831=34 C. W N. 80

PENDING.—A suit valued at Rs 2,500 was filed in the Court of a munsif who had jurisdiction up to Rs 5,000. He was transferred and his successor had jurisdiction only up to Rs 2,000. *Held*, that District Judge had power to transfer the suit to another Court under this section. All that this section requires is that the suit should be pending in a Subordinate Court which had jurisdiction at the time the suit was filed 1936 A L J. 452=1936 A W R. 254=162 I C. 903=1936 A. 335.

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

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'**COURT SUBORDINATE TO IT**'—A junior subordinate Judge is not subordinate to a senior subordinate Judge. 1 L. 158=52 I.C. 352. and so the latter cannot transfer a suit pending before him to the former (*Ibid.*) See also 59 I. 460=37 Bom L.R. 255=158 I.C. 382=1935 B. 286 The Nagpur Divisional Court was held not subordinate to the Bombay High Court, although it was necessary for a decree for dissolution of marriage under the Indian Divorce Act IV of 1869, required confirmation by the High Court of Bombay. 40 B. 109=31 I.C. 331=17 Bom L.R. 948 A District Munsiff is subordinate to the High Court, and the latter can transfer a suit from the former even after an application for the purpose has been dismissed by the District Court. 11 C.L.J. 218=5 I.C. 771, 87 I.C. 170; 103 I.C. 456=1927 P. 383, 1926 C. 326

'**COMPETENT TO TRY**'—A superior Court has no jurisdiction to direct the transfer of a case from a Court subordinate to it to another Court, which is outside its jurisdiction. 1924 N. 152 See also 88 I.C. 139=1925 L. 561; 150 I.C. 839=1934 S. 95 The expression 'competent to try' refers to competency as regards its pecuniary nature, and the nature and subject-matter of the case, and does not include competency from the point of view of territorial jurisdiction. 6 Luck 347=10 O.W.N. 443=144 I.C. 578=1933 O. 154. 54 A. 824=1932 A.L.J. 984=143 I.C. 75=1932 A. 660 (1920 P. 29 and 136 I.C. 384, Not Appr). The expression means 'of jurisdiction competent to try'; and S. 16 of Provincial Small Cause Courts Act is made elastic by this section. A small cause suit pending before a Sub-Court can be transferred to a District Munsiff for purposes of convenience and joint trial, even though the value of the suit transferred may be beyond the small cause jurisdiction of the District Munsiff. 55 M. 960=1932 M.W.N. 763=36 L.W. 479=139 I.C. 477=1932 M. 683=63 M.L.J. 689 But see 56 M.L.J. 649=1929 M. 513, 1927 M. 321, 52 M. 57=55 M.L.J. 671. A District Court cannot transfer a suit from one Subordinate Court to another newly created and empowered to try subsequently instituted suits. 1918 M.W.N. 291=24 M.L.T. 32=45 I.C. 13 Unless pending cases are expressly transferred by notification effecting change in territorial jurisdiction of a Court, or unless there is specific provision in any enactment to the same effect, the Court in which the suit or appeal was instituted does not cease to have jurisdiction to decide the matter, despite the change in its territorial jurisdiction. 29 N.L.R. 342=149 I.C. 718=1933 N. 318; 58 M. 801 (F.B.). High Court in Insolvency Jurisdiction cannot withdraw insolvency proceedings pending before a Sub-Judge in the presidency. 49 B. 788 An insolvency petition under Presidency Towns Insolvency Act, pending in High Court cannot validly be transferred to a District

Court. 38 M. 472=14 M.L.T. 184=25 M.L.J. 299 An order transferring an application for review to a Court other than the one which decided the case is illegal. 50 I.C. 910. District Judge in whose Court an appeal under S. 476, Cr. P. Code is pending cannot transfer it to a Subordinate Judge, as the latter has no jurisdiction to hear the same. 57 A. 785=1935 A.L.J. 473=157 I.C. 901=1935 A. 440

POWERS OF HIGH COURT—Section applies to Chartered High Courts in their ordinary original civil jurisdiction. 56 C. 940=1929 C. 358 High Court can transfer suit from a District Munsiff's Court, even though the transfer may have been refused by the District Judge, as the High Court has concurrent jurisdiction with the District Court, and the District Munsiff is also subordinate to it. 11 C.L.J. 218=5 I.C. 771, 87 I.C. 170; 103 I.C. 456=1927 P. 383, 1926 C. 326 Transfer of suit from Subordinate Court to High Court—Powers of High Court—Right of appeal against order of transfer. 69 M.L.J. 776 See also 54 C. 126=100 I.C. 797=1927 C. 281. As to the powers of the High Court under Cl. 13 of Letters Patent, see 7 Bom.L.R. 143 (Transfer from Presidency Small Cause Court). 52 M. 57=1928 M. 1091 (Transfer from Provincial Insolvency Court), 4 R. 554=100 I.C. 265=1927 R. 61 (Transfer from one Provincial Insolvency Court to another) See also 156 I.C. 43=1935 A. 750

POWERS OF A DISTRICT JUDGE—A District Judge can transfer a case pending before him to the Additional District Judge. 13 I.C. 6=14 P.L.R. 1912 A District Judge cannot transfer a case to a Court not competent for any reason to try the same. 5 P.L.J. 588=57 I.C. 522=1 Pat.L.T. 637. See also 32 I.C. 788, 37 C. 574 Where an Appellate Court remands a suit for fresh disposal on the merits by the Court which first decided it, the District Judge can transfer it to his own file and decide it. 19 I.C. 552=9 N.L.R. 40 (21 A. 230, Dist). A District Court to which a case has been remanded by the High Court has power to transfer it to the Court of the Additional District Judge, unless the terms of the High Court's order expressly limited those powers. 44 A. 211, 12 A.L.J. 1094=25 I.C. 141 If a District Judge transfers a case remanded by the High Court to a Sub-Judge who disposes of it without objection being taken as to his jurisdiction, the irregularity would not affect the decision on its merits. 23 I.C. 425=15 M.L.T. 304; 19 C.W.N. 143=23 I.C. 69=19 C.L.J. 408, 12 A.L.J. 1094=25 I.C. 141 Suit relating to trust—District Judge's power to transfer to Subordinate Court—Government Notification authorising Subordinate Judges to hear such suits—Legality—If *ultra vires* 59 B. 412=157 I.C. 1086=1935 B. 172=37 Bom.L.R. 120 Transfer of case from Munsiff to Sub-Judge who acts as Small Cause Court is within the District Judge's power, though a party is thereby deprived of his right of appeal. 36 I.C. 881.

- (i) try or dispose of the same; or
- (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or
- (iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn,

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

Notes

S 16 of Provincial Small Cause Courts Act is no bar to the exercise of powers of transfer of the District Judge under this section 37 P.L.R. 177=154 I.C. 112=1934 L 901, 151 I.C. 385=1934 A 530; 147 I.C. 334=1935 A 350 The District Court can withdraw a transmitted execution proceeding to its own file and dispose of it 39 M. 485=29 M.L.J. 712

DELEGATION OF POWERS BY THE DISTRICT JUDGE.—The power of transfer under S 24 can be delegated by the District Judge, but when so delegated it must be exercised in accordance with law. It can only be exercised in cases pending in a Court subordinate to the Court exercising the power 52 I.C. 352=1 L. 158, so a Senior Subordinate Judge to whom the District Judge had delegated the power, cannot transfer a suit from the file of the Junior Subordinate Judge, as the latter is not subordinate to him (*Ibid*) Ss 37 and 44 of the Punjab Courts Act provided for such a delegation in the Punjab 40 I.C. 111=33 P.W.R. 1917

Sec 24 (4): COURT OF SMALL CAUSES.—A Court of Small Causes under S 24 (4) includes Courts vested with Small Cause jurisdiction as well as the Special Courts constituted under the Provincial Small Cause Courts Act 39 A 214=37 I.C. 809; 40 A 525=46 I.C. 893, 38 M 25=17 I.C. 425, 31 B 314=9 Bom L.R. 327 (F.B.), 56 C 588, 1 P. 696=69 I.C. 681=1928 P 49, 27 C.L.J. 461=44 I.C. 881, 56 B 387=34 Bom L.R. 931=130 I.C. 194=1932 B 486. A small cause suit may be transferred to another Court which is not a Small Cause Court, nor one exercising small cause powers 27 N.L.R. 307=135 I.C. 402=1932 N 49; 31 N.L.R. 162, 151 I.C. 385=1934 A 530; 147 I.C. 334=1935 A 350, 1935 A.L.J. 511=157 I.C. 122=1935 A 690; 55 M. 960 (noted *supra*) A small cause suit may, therefore, be transferred to a regular Court irrespective of the small cause powers of the Court to which the suit is transferred. Suit in a Small Cause Court for Rs 900 may be transferred to Sub-Court even though small cause juris-

diction of Sub-Court was only up to Rs 300 56 B 387=34 Bom L.R. 931=139 I.C. 194=1932 B 486 (56 M.L.J. 649=29 L.W. 810=121 I.C. 481=1929 M. 513, Diss.), 55 M. 960=36 L.W. 479=1932 M.W.N. 763=139 I.C. 477=1932 M. 683=63 M.L.J. 689 Such suit must be tried by the Court having no competent small cause jurisdiction, as a regular suit, and an appeal will lie from the decree passed therein 55 M. 960 (noted *supra*) See also 151 I.C. 385=1934 A 530, 1936 L 983, 29 L.W. 810=121 I.C. 481=1929 M. 513=56 M.L.J. 649 But see 54 A 171=136 I.C. 357=1931 A 574 (F.B.), 31 N.L.R. 170=150 I.C. 151=1935 N 42; 40 A 525, 36 I.C. 317=14 A.L.J. 705, 38 M 25, 27 C.L.J. 461, 31 B 314 (F.B.), 1 P. 696, 56 C 588, 50 A 810, 120 I.C. 412, 23 M.L.J. 373 It was however held in 54 A 171, that when the transfer is not or could not be made under this section, an appeal would lie, as in the case where an officer without possessing small cause powers hears a case which was pending before his predecessor in office exercising small cause jurisdiction (38 A. 425 appr., 13 A 324 overruled). A District Judge cannot transfer a case of a small cause nature to a subordinate Court not invested with the powers of a Small Cause Court so long as the Small Cause Court capable of trying it is in existence. 43 I.C. 314. But see 55 M. 960, 1934 L. 901, 147 I.C. 334; 56 B. 387. The section does not apply to cases transferred from a Court of Small Causes to Honorary Munsiff's Courts in U.P. and the decrees passed by the latter Courts in such cases are appealable 54 I.C. 435, 50 I.C. 648.

Small cause suit transferred to Honorary Munsiff—Re-transfer to Munsiff without small cause powers—Inapplicability of section. 1935 A. 765. See also 145 I.C. 701=1933 A.L.J. 1196=1933 A. 662.

APPLICATION FOR TRANSFER.—Where there are numerous suits pending, which are sought to be transferred, an application should be made separately in respect of each suit 49 I.C. 208=4 P.L.J. 13.

25. [S. 20. 21.] (1) Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the [Provincial Government] who may, by notification in the [Official Gazette], transfer such suit, appeal or proceeding to any other High Court.

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case.

1[Provided that no suit, appeal or proceeding shall be transferred to a High Court without the consent of the Provincial Government of the Province in which that High Court has its principal seat.]

INSTITUTION OF SUITS.

Institution of suits.
as may be prescribed

26. [S. 48.] Every suit shall be instituted by the presentation of a plaint or in such other manner

SUMMONS AND DISCOVERY.

27. [S. 64.] Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

Summos to defendants

Services of summons
where defendant resides in
another province.

28. [S. 85.] (1) A summons may be sent for service in another province to such Court and in such manner as may be prescribed by rules in force in that province.

Leg Ref.

¹For the words 'the Governor-General in Council' the words 'Provincial Government' have been substituted, for words 'Gazette of India' words 'Official Gazette' have been substituted, and the proviso to the section has been added by the Government of India (Adaptation of Indian Laws) Order, 1937

Notes.

APPEAL—An order of transfer made by the High Court under this section, not being a judgment either under this Code or under any other express enactment, is not subject to appeal. 13 R. 457=157 I.C. 1107=1935 R. 267 (F.B.)

Sec 25.—Cf S 527 of Criminal Procedure Code, 1898. The Governor-General in Council alone has jurisdiction to pass orders binding on High Courts. 40 M. 835 As to whether parties are entitled to be heard in the matter, see 44 C. 595

REASONABLE GROUNDS FOR OBJECTION.—As to what would constitute reasonable grounds, see 25 Bom L R 713=82 I.C. 352=1924 B 90

Sec 26: SUIT—See O 4, R 1, *infra* Any proceeding which does not commence with a *plaint* cannot be deemed a suit. 23 C 723, 6 A. 269 (P.C.); 22 M. 256; 13 L. 672=33 P L.R. 508=137 I.C. 266=1932 L. 374. It is not sufficient that the proceeding is capable of terminating in a decree or an order having the force of a decree (*Ibid*) An application to file in Court an agreement to refer to arbitration under para. 17 of Sch II of the Code, is not a

suit (*Ibid.*) The essentials of a suit are (i) opposing parties, (ii) a subject in dispute, (iii) a cause of action, (iv) and a demand of relief. 31 B. 393=9 Bom L.R. 530

PRESENTATION.—Presentation must be by delivery to the Court or to its officer either personally or by a pleader 15 M 137 Sending by post is not sufficient (*Ibid.*) See however 8 M. 411 For valid presentation neither time nor place is essential. A Judge may validly accept a plaint presented at his private residence or at any other place, and after office hours 65 I.C. 674=1922 N 167, 47 M. 312=79 I C 1017=1924 M 448, 34 A 482 (Memo of appeal). But the Judge is not bound to receive the same. (*Ibid*) Plaint returned for presentation to proper Court and represented is not continuation of the old suit but filing of a fresh suit 52 B 548=1928 B. 421=30 Bom.L R 970. But not so where plaint is returned *merely for amendment* and re-presented 2 A. 832.

Sec 27 SUIT DULY INSTITUTED, MEANING OF.—Where a suit is dismissed for non-payment of deficit Court-fee, review without notice to the other side is not illegal. Until the suit was registered, the suit could not have been said to be duly instituted 26 C W N. 391=70 I.C. 43=1922 C. 234 See also 52 B 548. Where a suit has been duly instituted, the Court should issue summons to defendant whether he be adult or minor. 22 B. 971. See also 14 C. 204. As to manner prescribed for service, see O. 5, *infra*

Sec 28—See in this connection O. V.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

29. [S. 650-A] Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts:

Service of foreign summonses.

¹[Provided that the Court issuing such summonses have been established or continued by the authority of the Central Government or of the Crown Representative, or that the Provincial Government by whose Courts a summons is to be served has by notification in the Official Gazette declared the provisions of this section to apply to Courts of the Province.]

30. Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;

(c) order any fact to be proved by affidavit.

31. The provisions in sections 27, 28 and 29 shall apply to summonses to give evidence or to produce documents or other material objects.

Summons to witness.

32. The Court may compel the attendance of any person to whom a summons has been issued under S. 30 and for that purpose may—

Penalty for default

(a) issue a warrant for his arrest,

(b) attach and sell his property,

(c) impose a fine upon him not exceeding five hundred rupees;

(d) order him to furnish security for his appearance and in default commit him to the civil prison.

JUDGMENT AND DECREE.

33. [S. 198.] The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

Judgment and decree.

Leg. Ref.

¹The proviso has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, in place of the old proviso which ran as follows —

“Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor-General in Council, or that the Governor-General in Council has, by notification in the Gazette of India, declared the provisions of this section to apply to such Courts” As to notification issued under the old section, see General Statutory Rules and Orders, Vol. I, pp 642-655 and Vol IV, pp 682-684

Notes.

R 23, *infra* As to sufficiency of service, the transmitting Court should presume the correctness of the return made by the serving Court, although the presumption is not irrebuttable 10 B 202; 33 A 649=11 I C

39 But *sec* 22 C 889, where it was held that the transmitting Court should not act upon any such presumption.

Sec 29 WITNESS IN NATIVE STATE—FAILURE TO APPEAR AFTER SUMMONS—PROCEDURE—There is no law by which witnesses in Native States which have made arrangements for mutual service of processes with British India can be compelled to obey the processes, *i.e.*, punished if they fail to do so. If the witnesses so summoned fail to appear, the only way to take their evidence is by commission. The rule as to 200 miles is not applicable in such a case 142 I C 201=1933 M W N 677=1933 M 366=65 M J. J 334

Sec 32 —See 1929 A 850 Section does not apply to a person who has been merely ordered to produce documents 58 I. C 281=5 P L.J. 550

Sec 33 HEARD.—Judgment passed without opportunity given to parties for being

INTEREST.

34. [S. 209.] (1) Where and in so far as a decree is for the payment of

Interest.

such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as

Notes.

heard is illegal and liable to be set aside on appeal. 91 P.R. 1904; 159 P.W.R. 1906, and it is not a mere irregularity that could be condoned under S. 99. 57 I.C. 34. Where case is transferred after hearing arguments, it is illegal for the transferee Judge to pass judgment without giving fresh opportunity for parties to be heard. (*Ibid*) So also where Judge who heard the case was succeeded by another 110 P.R. 1886. Section requires only hearing and does not insist that any part of the proceedings should have taken place before the Judge passing judgment 87 P.L.R. 1905.

DECREE—It is the duty of Court to draw up the decree. 52 I.C. 479=66 P.R. 1919. And party is not bound to apply to Court to do so. 78 I.C. 996=20 N.L.R. 131; 38 B. 331. A mere paragraph in the judgment not drawn up in form of a decree and not embodied in a separate form, does not amount to a decree. 1 L. 223=54 I.C. 913=70 P.W.R. 1920. Omission or neglect to draw up a decree following judgment does not deprive party of his right to appeal. 52 I.C. 479 (*supra*). In cases requiring succession certificate, decree cannot be passed without production of the certificate. 57 I.C. 650. But Court cannot stop drawing up of decree for deficit Court-fee. 11 P. 532.

Sec. 34: SCOPE AND OBJECT OF SECTION—This section has no application to interest antecedent to the date of suit, but is concerned only with interest during pendency of suit and after decree. 60 I.C. 288=32 C.L.J. 239. As to object of section, *see* 106 I.C. 270. Courts are entitled to give interest in their discretion, and this can be given under this section, and also under S. 73, Contract Act. 162 I.C. 352=1936 R. 141. Decree cannot be amended for granting interest. 15 A. 121; 35 I.C. 218. Nor can executing Court grant it. 23 C. 357; 3 Bur.L.J. 58=82 I.C. 427=1924 R. 275.

FOR PAYMENT OF MONEY—A decree for sale in enforcement of a mortgage or charge is not a decree for the payment of money 24 C. 766; 21 M. 364; 19 A. 174; 29 M. 35. Section does not apply where the decree is not for a definite sum of money, but only for partition and accounts. 49 B. 282=94 I.C. 686=1925 B. 406. Decree for money must be construed as including a claim to unliquidated damages 51 M.L.J. 243. But *see* 60 I.C. 288=32 C.L.J. 239. Judgment-debtor depositing decretal amount in Court and applying not to pay to decree-

holder without security during pendency of his appeal—In appeal amount of decree reduced—Decree-holder cannot claim interest since date of deposit, nor judgment-debtor on surplus amount deposited by him. 1929 Lah. 316=120 I.C. 423.

INTEREST DURING PENDENCY OF SUIT—In money suits, question of interest after institution of suit passes from domain of contract into that of judgment, and plaintiff cannot as a matter of right claim interest. 161 I.C. 862=1936 P. 191. The Court has a discretion as to the rate of interest to be awarded after the institution till judgment, and where the Courts below had awarded 8 per cent, the Privy Council refused to interfere 43 M.L.J. 66. *See also* 32 C. 582, 42 A. 230; 12 C. 569; 3 B. 202; 18 C. 164; 17 I.A. 201; 26 I.C. 402; 25 I.C. 658; 96 I.C. 310, 1930 L. 733; 61 C. 711. It is a judicial discretion to be exercised on proper judicial grounds 26 C. 39 (P.C.). Though award of interest pending suit is discretionary, it should not be refused in the absence of proper reasons. 50 I.C. 862=23 C.W.N. 336. *See also* 143 I.C. 43=14 P.L.T. 133=1933 P. 207, 106 I.C. 270. The Court must award interest generally at the contract rate, unless it would be inequitable to do so in which case it must give reasons 61 C. 711; 36 A. 220, 3 A. 91; 28 I.C. 429 (M.), 34 L.W. 843; 143 I.C. 43=1933 P. 207. Where the delay in filing a suit for money is due to the assurances given by the defendant to pay it interest from date of institution to date of decree should not be disallowed on ground of delay. 148 I.C. 964=1934 L. 93. Mere hardship is no ground for disallowing the contract rate unless there is evidence of undue advantage taken by lender. 60 I.C. 733, 60 I.C. 693. *See also* 1935 Pesh. 58. The Court has a discretion to award interest on damages for breach of contract from the date of suit up to the date of decree 39 C. L.J. 77=80 I.C. 87=1924 C. 637. *See also* 27 Bom.L.R. 1168=1925 B. 547, 51 M.L.J. 243. But *see* 1931 Sind. 121. The Court has discretion to grant interest not specifically asked for in the plaint. 2 L. 256; 55 B. 657, 1932 B. 319=161 I.C. 862=1936 Pat. 191. Interest at 6 per cent. will be allowed in a restitution suit from the date of withdrawal by decree-holder till date of repayment to judgment-debtor. 21 C.W.N. 564. *See also* 1933 L. 1011 (*Post diem* interest at 6 per cent.) Interest awarded under this section is no part of the claim or relief granted, as in the case of mesne

the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

Notes.

profits 33 C. 1232 No additional Court-fee is required on account of the claim for interest from the date of suit until realization. 17 B 41. See 34 C. 1252.

FUTURE INTEREST—Award of future interest is in the discretion of Court 14 L. 591=142 I C 408=1933 L. 352. See also 145 I C. 725=1933 L 440, 61 C. 711 Where a just claim has been unnecessarily prolonged by defendant it is just and equitable to award interest from date of suit till realization. 156 I.C. 836=1935 L. 307. Section 141 of the Oudh Rent Act does not control the discretion possessed by the Court under S. 34, C P Code, to allow future interest at such rate as the Court deems reasonable 148 I C 1207=11 O W N. 763=1934 O 239. So also in suit for profits by co-sharer under S 225, Agra Tenancy Act, 1926 1935 A.L.J. 557=155 I.C. 943=1935 A 505 (F.B.).

INTEREST IN MORTGAGE DECREES—This section applies also to mortgage decrees governed by O 34, C. P. Code, and authorises the allowance of interest upon the decretal amount from the expiry of the date of grace fixed in the preliminary decree until the date of realisation O 34 does not in any way exclude the discretion of Court to allow such interest on the decree Even in a case to which old R 4 (1) of O. 34, before its amendment in 1929 applies, the Court has got such power. Rule 11 of O. 34 as amended in 1929, which in clause (b) specifically allows "subsequent interest up to the date of realisation" only gives effect to previous judicial decisions 63 I A. 114=15 P 210=40 C W N 328=1936 P C 63=70 M.L.J. 355 (P.C.). In the case of mortgage the question as to the rate of interest is to be determined by O. 34, R. 11 and not under S 34 8 Luck. 315=144 I. C 983=1933 O 128 The date referred to in O 34, R 2 is the date fixed by Court for payment of money. The Court must ascertain the amount of interest due on the mortgage up to that date according to the contract rate, unless the Court, for some legal reason, sees fit to decrease that rate 36 A 220; 33 M L J. 679; 17 C L J. 120=18 I.C. 747=17 C W N 457. See also 26 C. 39; 34 C. 150; 20 C 360; 20 B. 744; 21 M. 364, 29 C W.N 118=1925 C 268; 1925 N 193 The date cannot be extended by an unsuccessful appeal by the mortgagor or mortgagee 17 C.L.J. 120=18 I.C. 747=17 C W.N 457. The Appellate Court can extend time for redemption and the mortgagee would be entitled to interest at the contract rate up to the extended date. 29 I.C. 289 Where there is no express stipulation for the payment of interest after the due date, the mortgagee would be entitled to damages for non-payment of the debt on the date The measure of damages

would be *prima facie* but not necessarily the contract rate. 4 L 406. [17 A. 511 (P. C.), 3 L 200 (F.B.), Ref] See also 44 A 772. Where the trial Court did not provide for interest on the mortgage money after the date of filing of a suit for redemption it must be deemed to have declined to award any interest for the period. 37 B. 326=25 M L J. 101 (P.C.). Interest from the date fixed for payment to the date of realisation is to be calculated on the principal, interest and costs found to be due on the date fixed and not on the principal alone. Such further interest is to be calculated at 6 per cent., but the Court has a discretion. 42 M 465=36 M L J. 288. See also 47 I.C. 701, 27 I.C. 522; 26 I.C. 177, 34 C 150, 21 M. 364, 29 M 176 A Court may in its discretion allow *post diem* interest though not allowed in the mortgage deed 36 I C. 685, 30 I.C. 323. See also notes under O. 34, Rr. 2 and 4.

INTEREST IN CASE OF NEGOTIABLE INSTRUMENTS.—In suit on promissory note which expressly specifies interest payable, Court cannot reduce such rate to be paid up to date fixed by it after institution of suit, unless it is exorbitant or penal or otherwise against the law. 154 I C. 470 (L) At the same time it is not necessary that the Court should allow stipulated rate of interest up to date of realization (*Ibid*)

INTEREST ON COSTS AWARDED BY PRIVY COUNCIL.—The costs of the Privy Council do not carry interest, unless such interest is specially mentioned 13 P 21=15 P L. T 513=1934 P. 192. But where parties have agreed to have the matter of costs submitted to the discretion of executing Court, the latter can grant it 3 C 602=5 I.A. 78 (P C) Interest is awardable on costs realized but subsequently ordered to be refunded on reversal of decree. 4 C 229; 8 A 262

COMPOUND INTEREST—The Court has jurisdiction to award compound interest under S. 34. [3 A. 91 (P.C.), Rel. on.], 150 I C. 467=36 Bom.L.R. 68=1934 B. 86 An order allowing interest up to date of decree and compounding it with the principal on the date of the decree and allowing interest thereon at the Court rate is sanctioned by S 34, C P Code. But where there is no contract, implied or express, and the interest *ante litem* as well as *pendente lite* has been allowed at a rate considered by the Court to be fair, there is no point in compounding the principal and the interest due up to the date of the decree and making interest to run on the aggregate sum at the same rate Section 34 or its principle is not intended to be used as a means for providing for compound interest but to relieve the debtor of a harder rate of interest. 61 C. 711

(2) Where such a Decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

35. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in Costs.

Notes.

DAMDUPAT—The rule of damdupat is not applicable after suit even in cases where it is otherwise applicable. 40 C 710, 22 B 36, 33 C 1869; 78 I C 632, 1925 N 193. As regards application of rule to mortgage, see 134 I C 274=1931 N 161=27 N L R 116. See also 42 C 826; 35 B 199. But see 26 M. 662.

Sec. 34 (2).—Where a decree is silent with respect to interest, the Court must be deemed to have refused it. 45 M L J 687 =18 L W 606=75 I C. 566=1924 M. 102. There is no inherent power under S 151, C P Code, to award interest in such a case. 3 Bur L T. 58=82 I C 427=1924 R 275. As to the object of the rule, see 106 I C 270.

Sec. 35 AWARD OF COSTS, PRINCIPLES REGARDING—The ordinary rule is that costs should follow the event, but the Court has a discretion to depart from this rule and such discretion is to be exercised on well-recognised principles. 145 I C. 376=1933 R 160, and not arbitrarily. 27 M 341; 7 C W N 647, 58 I C. 421=24 C W N 352, 90 I C 577. See also 1926 O 35; 5 O W N. 35. The Privy Council or any Court of appeal will not interfere with the discretion exercised by the lower Courts. 59 I.A. 1, 35 Bom L R. 569, 142 I C 656=1933 M 224; 1933 O. 455; 1933 A. 311, 1933 N 49; 149 I C 901=11 O.W.N. 754=1933 O 259, 144 I C 76=1933 A 311. Costs by way of disciplinary measure not permissible. But costs against non-parties are awardable. 52 A. 619=1930 A. 225 (F B), 53 M 708 =58 M L J 318. Under S 35, C P Code, the Courts have in certain cases power to make persons who are not parties liable for costs. (1930 A 225, Foll.) 1934 N 250.

(1) Court's power to award costs is not confined only to amount of costs incurred after filing of suit. In certain cases, as where Receiver applies for leave to sue, Court can include in suit also the costs of application for leave to sue. 40 C W N 762. Where both parties make false allegations costs may not be allowed to either side. 31 I C 862. In deciding the question of costs, a Court is entitled to consider not merely the conduct of the parties in the actual litigation but also matters which led up to the litigation. 13 C L J 404=10 I C 90=16 C.W.N. 805; 116 I C 717 (2). See also 148 I.C. 523 =1934 M 183, 1934 A. 746. Where the suit has been caused by the conduct of the

returning officer, each party may be ordered to bear his own costs. 24 C W N. 189=53 I C. 741=30 C L J. 270. Where the litigation was due to vagueness of testamentary directions, costs of all parties should come out of testator's estate. 19 S.L.R. 220. See also 8 P 419. The plaintiff in a suit claimed mesne profits for two years, but the Court by an oversight awarded him profits for three years instead of for two. The defendant appealed, and the appellate Court, while reducing the period for two years, allowed the plaintiff only proportionate costs. Held, in second appeal, that the defendant could have had the mistake corrected without an appeal, and that the plaintiff should not be made to suffer for the mistake of the trial Court and that he should be awarded full costs. 152 I C 180 =11 O W N 1165=1934 O 449. Unless there is a specific reference to any personal order for payment of costs, a decree for costs should not be interpreted to imply a personal decree for costs. 1930 O 167. Section does not empower Court to direct defendant to put plaintiff in funds for the suit or even to secure plaintiff's costs. 34 C W N 319. Costs ordered to be paid by creditor to debtor on setting aside adjudication cannot be set off to the prejudice of solicitor's lien against the debt due by debtor. 32 Bom.L.R. 1076. Where there are several parties, a decree for costs ordinarily imposes a joint and several liability. 13 Pat L T 619. As to the propriety of award of costs against *ex parte* defendants only, when the suit was contested by some other defendants, see 18 N L J 323. A solicitor can enforce in execution costs awarded to him. 1932 B 378. Once a solicitor is on record, the opposing party is entitled to look to him if successful for his costs, if it turned out that the so-called plaintiff is a non-existent person. 145 I C 641=35 Bom L R 554 =1933 B 317. In insolvency proceedings, an order for costs against Receiver imports a personal liability. 54 A 444.

COSTS OF SUCCESSFUL PARTY—As a rule costs should be awarded to the successful party. It is not necessary that he should be wholly successful, and substantial success is enough. 18 B 474, 3 C 473; 24 C W N 352, 40 C.L.J. 504=1925 C 297, 1923 L 513 (2), 54 M L J 603; 1923 L 302 (1); 1936 C 277. No matter how *bona fide* the defence may be, the plaintiff cannot be deprived of his costs unless he has done something which would warrant the Court depriving him of it. 145 I.C 376=

the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid,

Notes.

1933 R. 160 See also 162 I C 837=1936 S 52 (Case where defendant succeeds) The fact that questions of law raised are not easy of solution is not a good ground for not allowing the costs of a successful litigant 23 M L J. 638 Plaintiff finding difficulty in valuing claim—Right to full costs 51 A 509 Mere variation in appeal as to method of computing compound interest in a mortgage suit, would not deprive respondent of his costs in the appeal 1935 M W N. 408=157 I C 232=1935 M 468.

FULL COSTS—Where full costs are not awarded to the successful party, reasons ought to be recorded 14 L R 92 (Rev) =17 R D 164

COSTS OF SUCCESSFUL PARTY, WHEN MAY BE DISALLOWED—In a proper case the Court may deprive the successful party of costs 59 I A 318=56 B 374=63 M L J 623 (P C); 30 C 213, 25 A 287, 31 C 332 (P C), 1929 R 148 (2); 1929 B 267, 148 I C 246=1934 O. 10, or even saddle him with costs of the other party. 9 C W N 844; 21 C W N. 1137 (P C.); 40 A 558. But if it does so, it must give reasons in writing 30 C 536 For other cases regarding conduct of parties determining the award of costs, see 24 C W N 110=30 C L J 417, 17 L W 358=73 I C 329=1923 M 485, 53 B 178, 145 I C 376=1933 R 160, 1929 M 493 (Costs disallowed owing to the vindictive nature of the proceeding launched by the client against his pleader for professional misconduct), 58 I C 421=24 C W N 352, 62 I C 812, 21 I C 944=16 P L R 1914, 38 I C 695=5 L W 672 (*Bona fide* mistake of a temple committee in instituting proceedings), 67 M L J 787 (Personal liability of trustee for costs), 40 I C 614 (Tender of rent due before suit), 65 I C 709 (Delay in the final disposal of the suit due to the laches of the plaintiff) See also 61 M L J 623 (P C), 85 I C 445=1925 O 561 (Vague and loose drafting of grounds of appeal). A successful appellant may not get his costs, because his case was not properly represented in the lower Court 104 I C 325 Costs disallowed where proceedings could have been taken in a cheaper Court 45 B 1236 Where suit is overvalued, costs will be allowed on proper valuation 87 I C 1002 Costs disallowed to the successful party for raising inconsistent pleas regarding effect of document whose construction was in issue 38 I A 104=33 A. 344 (P C.), for putting in confused pleadings. 18 R D 516=15 L R 652 (Rev.) for failure to prove exclusive title set up by successful party. 19 I A 48=19 C. 253 (P C) Costs were awarded to the respondent against the successful appellants in view of special difficulties in construction of will and nature of

contentions. 38 D. 399=26 M L J. 647 (P C.). The Court can disallow costs where suit was based on a state of law, which since has been overruled 43 M. 61=37 M L J 271, 47 B 559. See also 1930 A 167

PRACTICE AS TO AWARD OF COSTS—On a dismissal of suit several defendants should not be awarded separate costs where they are represented by the same advocate and their case is practically identical. 152 I C 71=1934 R. 259 Excessive costs should not be allowed where a plaint is rejected at an early stage 35 P R 1914=25 I C 435 The Court-fee paid on part of the claim subsequently withdrawn cannot be recovered. 23 I C 231 Withdrawal of suit—Court's discretion to award costs is not restricted by the use of the word "shall" in O. 23, R. 1 2 O W N 901=1925 O. 699. Suit not pressed—Defendant not to be deprived of costs because he refused to disclose the details of his defence to plaintiff before suit 1930 B 152 Where the appellate decree is silent as to costs, the decree of the trial Court is the guide to determine the costs 62 I C 299=13 Bur L T 173 Travelling expenses of witnesses can be recovered 67 I C 277=1923 C. 315 (1) It is not the law that it is only the expenses of the witnesses summoned through the Court, that can be included in the costs of the party The costs of the witnesses not summoned through Court are allowable if the party satisfies the Court that he has brought the witnesses from another district and he had paid the expenses and further satisfies the Court that the expenses are reasonable 1928 L 800 In awarding costs, the Court should not include costs of witnesses who were summoned but were not examined in Court 164 I C 689 (1)=38 P L R 219=1936 L 681 On a question of pleaders' fees, the Court will not interfere with the opinion of the Taxing Master unless it is wrong on principle or very clearly wrong in detail 45 B 1234 The words "*abide the result*" are equivalent to the words "*costs in the cause*" 39 M 476=28 M L J 441 As to proper order as to costs that should be passed when suit is remanded for trial on merits, see 164 I C 133=1936 R 316 Order for costs in an interlocutory application to be costs in the cause, cannot be varied by the trial Judge 50 B 430 Taxation of costs in third party proceedings, see 59 I C 18=21 B L R 808 at p. 816 As to costs incurred before the arbitrator or umpire, see 54 M L J 580; 54 A 122. District Court can decide even after an appeal has been disposed of by High Court, whether its own order of taxation is right or not 28 Bom L R 550=95 I C 515=1926 B 367 The costs of an application for stay of execution pending appeal should

and to give all necessary directions for the purposes aforesaid. The fact that

Notes.

ordinarily the costs in the appeal 56 B. 275

S. PARALL SETS OF COSTS—Different sets of costs can be awarded when there are several defendants raising various defences 31 I.C. 312=1915 M.W.N. 1021; 1929 O 536. When the suit of a reversioner against various alienees is decreed with costs, each set of defendants are liable only for the costs proportionate to their interest 1928 M. 16. Where plaintiff's suit is dismissed each defendant is entitled to costs taxed on the basis of the suit valuation and not on the basis of what each defendant's interest might be in the suit itself. 27 Bom L.R. 692=89 I.C. 211=1925 B. 432. When a defence is common and not separate only one set of costs should be awarded. 9 A 205; 4 M.L.J. 281. And it is not material that separate counsel have been engaged 1936 A.M.L.J. 63. See also 11 Bom L.R. 158 (P.C.). Where a suit was brought by the plaintiff against two defendants claiming relief against them in the alternative and his suit was dismissed as against both of them, two sets of costs, one set to each of the defendants, may be properly awarded. 144 I.C. 703=1933 A.L.J. 796=1933 A. 466. Award of costs on abatement of suit, see 37 M.L.J. 596=43 M. 284, 22 M.L.J. 439.

APPORTIONMENT OF COSTS—As to rule for apportionment of costs in England and in India, see 4 P. 510. See also 88 I.C. 141. The expression "*costs will follow the event*" means that where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. So where in a suit praying for sale as well as a personal decree, the plaintiff was given only a mortgage decree and not a personal decree, the Court, if it deprives the defendant of his costs on the issue relating to the personal decree, should, under S. 35 (2), state its reasons for so doing. If it failed to do so, the appellate Court can interfere with the order. 141 I.C. 262=29 N.L.R. 8=1933 N. 49. See also 95 I.C. 446 (2), 142 I.C. 835=1933 R. 38, 144 I.C. 738=1933 L. 329, 1936 A.M.L.J. 63. Case disposed of on a preliminary point—Scale of costs to be awarded. See 1933 R. 337. A party succeeding on a particular issue must ordinarily get his costs of that issue unless there is special reason to deprive him of it or the issues are closely and inseparably connected with each other. 45 I.C. 738=27 C.L.J. 78. Where alternative relief was claimed against either of two defendants who were disputing their liability, the unsuccessful defendant should be made to bear the costs of the successful defendant. 42 I.C. 636.

COURT'S DISCRETION TO AWARD INTEREST ON COSTS—The power to award interest on costs is discretionary and can be inserted after

judgment while framing the decree. 35 I.C. 218; but see also 60 I.C. 345. Where a decree does not allow interest on costs, it cannot be allowed in execution 6 Bom.L.R. Ap 33; 3 C. 351.

NO SEPARATE SUIT FOR COSTS—No separate suit for costs is maintainable when the Court has made no order as to costs. 2 B. 360. *Contribution for costs* among several defendants. See 145 I.C. 250=1933 L. 960.

COSTS IN MORTGAGE SUITS—A mortgagor is ordinarily entitled to costs in a redemption suit unless he forfeits his right by laches. 38 I.C. 655. A mortgagee is ordinarily entitled to costs of suit, unless he is guilty of grave misconduct. 19 I.C. 474. Or he denies the mortgagor's right to redeem 91 I.C. 943=1926 M. 405. As to the circumstances in which a puisne mortgagee may be called upon to pay costs, see 10 R. 308. The Court has jurisdiction in a mortgage suit to make a party other than the mortgagor personally liable for the costs of the litigation, if in the opinion of the Court, the conduct of such party justifies it. 40 L.W. 576=1934 M.W.N. 321. On this point see also 56 M. 469=1933 M. 411=64 M.L.J. 489. In the ordinary way a puisne mortgagee is not made liable for costs in the mortgage suit. If the puisne mortgagee, by his conduct, makes himself liable for the contest, in certain circumstances it may be legitimate to make him pay the costs apart from the costs given in the mortgage decree, but the utmost that he can be made liable for is the extra cost, caused by his unnecessary contest. 1933 R. 335. See also 17 L. 520=38 P.L.R. 1024=164 I.C. 841=1936 L. 607. Where the transferee of the equity of redemption raised several pleas for which there was no foundation, he may be personally liable for costs. 144 I.C. 738=34 P.L.R. 171=1933 L. 329; 48 M.L.J. 213 (Costs in redemption suit). 38 P.L.R. 896=1936 L. 705 (Costs in suit for sale). In an unsuccessful appeal by the mortgagor, the mortgagee is entitled to add to the security the costs of the appeal. 40 A. 473. Mortgage decree with costs, how to be realized. See 93 I.C. 364=1925 C. 1135; 129 I.C. 554; 30 N.L.R. 331=1934 N. 264.

COSTS IN PARTITION SUITS—Costs in a partition suit up to the preliminary decree ought not to be given to plaintiff but to be borne by all the parties. 42 C. 451; 11 L. W. 5. Where in a suit for partition the defendant pleaded prior partition which was eventually proved against, the Court could direct the defendant to pay the costs of the suit. 35 C.W.N. 151.

COSTS IN MAINTENANCE SUITS—While awarding costs Courts have to see whether there was any *prima facie* excessive or exaggerated claim made in the plaint. 1930 M. 479, where exaggeration of claim is due to defendant's conduct full costs can be awarded. 54 M.L.J. 530. Order conditional on

the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any cost shall not follow the event, the Court shall state its reasons in writing.

(3) The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

1[35-A (1) If in any suit or other proceeding, not being an appeal, any party objects to the claim or defence on the ground that the claim or defence of any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward,

Compensatory costs in respect of false or vexatious claims or defences.

Leg. Ref.

¹ Section 35-A was added by Act IX of 1922 which under S. 1 (2) thereof may, with the previous sanction of Governor-General in Council, be brought into force in any province by the Local Government on any specified day.

Notes.

payment of costs—Appeal against order for costs only—Not maintainable 32 Bom L. R. 406.

COSTS IN A REPRESENTATIVE SUIT—See 42 B 566; 60 I.C. 362 Costs of all parties in a scheme suit may be directed to be paid out of the trust funds 25 M L J 199 (P.C.). Trustees ought to have their costs out of the trust estate in legal proceedings concerning the estate, unless they have unreasonably carried on or resisted such proceedings. 39 I.C. 388=21 C W N 339 Where a litigation is caused by the language of a will, its costs should be borne by the estate and not by the trustees 39 M 476, 24 I.C. 96 Costs in pre-emption suits See 71 P R 1915=30 I.C. 517 Costs of intervenor in administration proceedings See 134 I.C. 274, 48 C 352. In an unsuccessful litigation, the Secretary of State is liable to pay costs like any other unsuccessful party 5 P L J 321=56 I.C. 507 Receiver suing or being sued is personally liable for costs like any other litigant. 1931 N 143. As to costs in arbitration, see 54 A 122 The Court has discretion to refuse costs to plaintiff for preferring unnecessary appeal. 63 M L J. 868 As to costs against co-plaintiff financing litigation, see 32 P.L.R. 540

COSTS IN SUIT BY OR ON BEHALF OF MINORS—Next friend or guardian of minor litigants can be made liable for costs. 1929 M. 782, 58 M L J 623. See also 42 L W 542=158 I.C. 831=1935 M 886 But see 50 A 733 The Court has the power to order an unsuccessful infant plaintiff to pay the defendant's costs or to direct it to be paid out of minor's estate and *vice versa* The Court can also order the next friend or guardian *ad litem* to pay the costs personally 61 C 227=151 I.C. 399=59 C L J. 9=1934 C 474

COSTS IN INCOME-TAX CASES—Income-tax reference—Costs of application of assessee to High Court—Made payable by Commis-

sioner who wrongly refused to state a case on assessee's request. 8 R 209 (F B). Income-tax reference—Successful assessee is entitled to recover his deposit. 52 A. 991=1931 A. 23.

PRIVY COUNCIL COSTS—Where a party lodged a case but did not appear at the hearing and the appeal was dismissed with costs, the costs should be paid to respondent 49 M L J 238 (P C) Appeal to Privy Council presented but not prosecuted—Respondent entitled to costs on petition for leave to appeal. 27 Bom L R. 699=89 I C. 213=1925 B. 471.

APPEAL AS TO ORDER FOR COSTS—Appeal does not lie under Clause 15 of the Letters Patent against an order relating merely to costs but an appeal would lie when such order is incidental to a judgment. 26 M L J 350 See also 27 Bom L R 692=89 I.C. 211=1925 B 432 (Appeal lies from order directing how costs are to be taxed) An appeal raising only a question of costs is incompetent where it does not contain a question of law. 47 C 67, 39 I.C. 388=21 C W N 339 An appellate Court will interfere where there is patently erroneous order 26 M L J 356 Appellate Court can interfere if satisfied that the discretion has not been judicially exercised by the lower Court 40 A. 558 See also 45 I.C. 738=27 C L J 78; 44 I.C. 870=22 C.W.N. 372, 20 C.W.N. 929=36 I.C. 655, 122 I.C. 102, 7 O.W.N. 1055 Also where there has been a misapprehension of facts and violation of principle. 42 B 327 See also 24 C.W.N. 352; 16 B 676. Also where discretion exercised by lower Court was based on an erroneous view of the law 166 I.C. 928=1937 O W N 165 Second appeal lies on a question of costs only where an important question of principle has been decided. 41 A 254; 35 C L J. 156, 46 I.C. 544; 12 C. 197; 12 C 171 See also 119 I.C. 449 (F.B) As to revision by High Court, see 24 M L J 212 Order conditional on payment of costs—Appeal against order for costs only—Not maintainable. 32 Bom.L.R. 406

Sec. 35-A—Compensation under section can be awarded only after objection by the opposite party. 94 I.C. 78 (2)=1926 L 472 (2). See also 94 I.C. 790=1926 A 554. Where the Court finds that the defendant has been harassing the plaintiff over a plot

and if the claim, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector, by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less:

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887, and not being a Court constituted under that Act, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees:

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.]

PART II

EXECUTION.

General.

36. The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

Application to orders.

37. [S. 649.] The expression "Court which passed a decree," or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

Definition of Court which passed a decree.

Notes.

of land and repeatedly refusing to obey the orders of the Courts, the Court may award punitive costs against the defendant 14 L. R. 145 (Rev.)=17 R. D. 227. See also 15 L. R. 115 (Rev.)=18 R. D. 29. What is awarded under S. 35-A is nothing but "costs" covered by S. 35 and can be awarded against next friend of minor 52 A. 907=1930 A. 577 (2). Costs allowed are compensatory and not penal. 1931 L. 509=131 I. C. 377. The Collector has no power in hearing an appeal to award penal cost on the ground that the claim was false and vexatious 15 L. R. 115 (Rev.)=18 R. D. 29. See also 14 L. R. 145 (Rev.)=17 R. D. 227. Insolvency Court in exercise of its original civil jurisdiction can award exemplary costs under this section 31 N. L. R. 365=158 I. C. 394=1935 N. 207. It is not material whether this section was in existence when Provincial Insolvency Act came into force. (*Ibid*)

Sec 36.—Section 36, C. P. Code, is not limited to orders made only under the Code, but applies to all orders which can be in-

cluded in the definition of the term "order" as defined in S. 2 (14). An order made on a notice of motion for contempt is an order within the section 36 Bom. L. R. 992=1934 B. 452. Order under O. 21, R. 11 (2) can be executed as if it were a decree. 2 R. 673. Order under S. 34, Guardian and Wards Act, 1890, directing guardian to pay amount for expenses of marriage of a person dependant on the ward, is not within S. 2 (14) of the Code; and hence this section will not apply 41 M. 241=6 L. W. 526=41 I. C. 341. As to orders under the Guardian and Wards Act capable of being executed by proceedings under that Act itself, see 23 A. L. J. 428=88 I. C. 165=1925 A. 457. Decree passed in favour of and against dead man—Distinction between 1929 C. 527=120 I. C. 459. Partial decree in favour of plaintiff—Unsuccessful appeal—Application for mesne profits—Appellate decree as the starting point 1930 C. 308=33 C. W. N. 904.

Sec 37: SCOPE AND APPLICATION.—The section embodies an inclusive definition and cannot be construed against the decree-

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

Court by which decrees may be executed.

Court by which decree may be executed

38. [S. 223, 1st para.] A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

Notes.

holder 137 I C 183=34 L W 27=1932 M 260=61 M L J 307 The section is permissive. If after a Court has passed a decree, the local jurisdiction in respect of the suit is transferred to some other Court, the Court which passed the decree may still execute it 28 C 238, 35 C. 974, 25 C. 315 See also the Full Bench decision in 42 M 821=37 M L J 284, overruling 37 M 462=26 M L J 189, 1928 M 746=28 L W 885, and 61 M.L.J. 307=137 I C 183 Section applies to cases where the territorial jurisdiction of the Court is changed, as also to cases where the status of the parties is changed and the ceasing of the jurisdiction is due to either of these causes 17 B 162 See also 49 M. 746=50 M L J 161; 7 P.L.T. 333=92 I C 900=1926 P 209. On this section, see also 41 C L J 166, 1925 C 679, 4 P 688

Sec 37 (a) —It is only the original Court and not the High Court that has to execute the appellate decree of even the Privy Council 38 M. 382=23 I C. 235=26 M L J 185

Sec 37 (b) CEASED TO EXIST —The power to execute a decree is vested in the Court which passed the decree. But in the event of the Court ceasing to exercise jurisdiction, it would be exercised by the Court which would have power to try the suit at the time when the application was filed 49 I C 958 (P), 48 I C 107=3 P.L.J. 435 A Court does not cease to be Court which passed the decree merely by reason that the headquarters of such Court are removed to another place or merely because the local limits of the jurisdiction of such Court are altered 6 C 513 Nor because the pecuniary limits of its jurisdiction has been altered 2 P.L.J. 113=39 I C 63 Nor by alter of its name 30 I C 205 Nor by change of Judge 4 P 688=7 P.L.T. 333=92 I C 900=1926 P 209 Change of territorial jurisdiction—Abolition of Court—Original execution petition filed in wrong Court—Subsequent conferment of jurisdiction—Effect. See 57 M 995=148 I C 1088=1934 M 283=66 M L J 492 A Court can be said to have 'ceased to exist' only when it has been abolished and not revived 7 P.L.T. 333 (*supra*), or when any special jurisdiction (*e.g.*, small cause powers) has been withdrawn after passing of decree 19 M 445, 49 I C. 958 (P) (Land Acquisition).

CEASING TO HAVE JURISDICTION —A

Court which passed a decree does not lose jurisdiction to execute the same merely because subsequent to the decree its pecuniary jurisdiction has been curtailed. Where the Judge passing the decree had jurisdiction to pass a decree for the amount but his successor before whom the execution application was made had only a more limited jurisdiction so that he could not entertain such suit, *held*, that the succeeding Judge was competent to entertain the application for execution 37 C.W.N. 679=1933 C 684 Where subsequent to the passing of a money decree the area is transferred from the jurisdiction of the Court which passed the decree to that of another Court, the latter Court can execute the decree 45 M L.J. 210; 61 M.L.J. 307 See also 49 I C 958 (P); 48 I C 107=3 P. L J 435 When the Court which passed a mortgage decree is in existence, no other Court has jurisdiction to execute the decree, though the hypotheca may be within its jurisdiction unless and until the decree was transferred to it for execution 42 M 461=36 M L J 199 Where the Court passing a decree loses jurisdiction, the new Court cannot execute the decree without transmission of the decree by the first Court 55 M. 801 (F B) Though a defendant did not object to jurisdiction at the time of the final decree he could do so in execution 50 M 882=52 M L J 605

Sec 38: SCOPE —Section not exhaustive. 47 A. 57 Particular execution application may be transferred (*Ibid*) Court can call back transferred decree. 50 B 439=28 Bom L R 381, 62 M L J. 687 (F.B). Equitable execution—Calcutta High Court original side—Decree creating charge on mortgaged property—Appointment of Receiver with power to sell—Jurisdiction 34 C W N 238=57 C 964

TERRITORIAL JURISDICTION —Territorial jurisdiction though not necessary for the trial of suits is necessary for the executing Court apart from the special and exceptional procedure by precept 33 M L J 750, 35 C.W.N. 77=58 C 832. On this section, see 80 I C 901=1925 P 139 Territorial jurisdiction is a condition precedent to the execution of a decree The Court having jurisdiction over the property which is the subject-matter of the suit in which the decree is passed has alone the power to execute the decree 48 I C 107=3 P L J 435:

39. [S. 223.] (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—
Transfer of decree.

Notes.

o C. 201, 35 I.C. 96, 31 M.L.J. 22 [But see also the cases cited under S. 37 as to loss of territorial jurisdiction after the passing of decree.] So the decree must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being. 4 P.L.J. 141. See also 50 M. 882=52 M.L.J. 605; 55 M. 801=62 M.L.J. 687 (F.B.). But in cases of decrees for sale of mortgage property, an exception has been recognised and a Court can order sale of properties comprised in the mortgage though some of them are situated in another district. 80 I.C. 901. See also 14 C. 661; 15 C. 667, 19 C. 13; 21 C. 689; 22 C. 871, 107 I.C. 195; 29 I.C. 745 (M.) In the execution of a mortgage decree the executing Court has power to order the sale of the property mortgaged, even though the property may be situated beyond the local limits of its jurisdiction. (14 C. 661; 21 C. 639, 15 C. 667, 49 M. 746; 80 I.C. 901, Foll.) 14 L. 457=143 I.C. 574=1933 L. 687.

PECUNIARY JURISDICTION—As to pecuniary jurisdiction of the Court to which a decree is sent for execution, see the cases cited under S. 39. Jurisdiction is not lost in execution, because the interest which accrued after decree has raised the amount due. 10 B. 200. Also where the pecuniary limits of the jurisdiction of the Court are exceeded by the amount of rent or mesne profits ascertained for a period subsequent to the institution of the suit. 21 C. 550; 40 C. 56.

CONCURRENT EXECUTION—There is nothing in law against a decree being simultaneously executed in more places than one against the property of the judgment-debtor. 34 I.C. 302=3 L.W. 336, 4 M.I.A. 529; 8 C. 687, 1929 B. 418. Where a decree is transferred to another Court for execution, concurrent execution of it is permissible in the Court from which the decree has been transferred. 39 I.C. 729=15 A.L.J. 532. But see also 37 M. 231 and 39 M. 640, *infra*; 1930 L. 199; 55 M.L.J. 545=55 I.A. 227 (P.C.); 1936 A.L.J. 237=162 I.C. 51=1936 A. 655. An application for execution has to be made to the Court to which the decree has been transferred and not the Court which passed the decree, so long as the former Court has the seisin of execution proceedings. An application to the latter Court is not a step-in-aid of execution. 39 M. 640=31 M.L.J. 300 (P.C.) affirming 37 M. 231. But see 58 C. 832=35 C.W.N. 77. See also 2 P. 247.

APPLICATION FOR SUBSTITUTION OF LEGAL REPRESENTATIVES—Application by legal representatives for substitution must be made to the Court which passed the decree and not to the Court to which it is transferred

for execution. 55 I.C. 156; 1926 M. 411. This is a matter of procedure and non-compliance with it may be waived. Where the decree-holder applied to the transferee Court for substitution of legal representative, and if the legal representative added acquiesced, he is deemed to have waived the objection. 55 M.L.J. 545=55 I.A. 227 (P.C.).

EXECUTING COURT, IF CAN REFUSE TO EXECUTE—An executing Court cannot refuse to execute a decree passed against a minor not properly represented in a suit. 1928 M.W.N. 227, 15 C.W.N. 725, *fol.*) Decree being a nullity—Single man firm—Suit against firm. Death of person carrying on business—Decree passed after death—Nullity—Power of executing Court not to give effect to it. 34 C.W.N. 36=57 I.C. 931=126 I.C. 118.

Sec 39 SCOPE AND APPLICATION—The section is only directory and not mandatory. 19 C. 13; 15 C. 667. A Court has no power to take away the decree-holder's legal right to execute his decree in such manner as he chooses, having regard to his facilities and convenience. 1 O.W.N. 409. Section 39 only contemplates that the entire decree and not a part of it is to be sent for execution to another Court or Courts. There is no provision in the Code under which a decree-holder can divide a decree into several parts and execute them piece-meal in different Courts or in the same Court. 1935 C. 118=38 C.W.N. 1053, 43 I.C. 186=3 Pat. L. W. 247. Also a decree cannot be transferred for a limited purpose only. 39 I.C. 737=1 Pat. L. W. 582. To make this section applicable, it is necessary that the provisions of the Code should regulate the procedure of both the Courts. 34 C. 576. Section is not applicable to decrees passed under the Presidency Small Causes Courts Act 1928 C. 265.

JURISDICTION OF TRANSFERRING COURT—It is only for limited purposes, *e.g.*, for dealing with applications for recording assignment of decrees under O. 21, R. 16 or to deal with applications against the legal representatives of the judgment-debtor under O. 21, R. 22 that the transferring Court retains jurisdiction. 60 I.C. 1176=37 C.W.N. 1167=1933 C. 906. See also 39 C.W.N. 129=1935 C. 99; 37 C.W.N. 679=1933 C. 684; 162 I.C. 777=1936 C. 267. Transferring Court to decide questions relating to execution. 123 I.C. 881=1930 O. 305; 1929 M. 199=116 I.C. 113. The transferee Court cannot question the power of the transferring Court to order the transfer of a decree for execution. 1934 M. 266=66 M.L.J. 418. Where a decree is transferred for execution without any reservation, the original Court has no longer the power to execute the decree until and unless the decree is returned by the transferee

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

Notes.

Court with a certificate of non-satisfaction It is however open to the original Court to re-transfer the proceedings to itself or to some other Court. If the application for execution is made to the original Court when the transferee Court is seized of the execution, it cannot be said to have been made to the proper Court. 152 I.C. 128=35 P.L.R. 751=1934 L. 728. See also 39 C.W.N. 129.

JURISDICTION OF THE COURT TO WHICH A DECREE IS SENT—The Court to which a decree is sent must be one having jurisdiction and competent to execute the decree, having regard to the amount or the value of the subject-matter. 16 C. 457 at 465, 12 B. 155. See also S. 6. Court to which the decree is transferred must be one having pecuniary jurisdiction to try the suit in which the decree was passed. The provision in sub-S. (2) that the Court may of its own motion transfer a decree to a subordinate Court of competent jurisdiction does not mean that under sub-S. (1) a decree may be transferred for execution to any Court, irrespective of its pecuniary jurisdiction. 1 P. 651. See also 1933 S. 128, 16 C. 457, 37 C. 574. But the Madras High Court has held that the question of competency does not arise where the decree is sent to another Court on the application of the decree-holder. 7 M. 397, 17 M. 309, 1914 M.W.N. 97=22 I.C. 275. See also 12 I.C. 27 (Bur.). The execution Court can substitute legal representatives. 1931 A.L.J. 166=1931 A. 320 (2), but cannot entertain any question as to the transferee's right to the execution sought. 11 P. 94, 1931 L. 90. But the Court passing decree has, even after the transfer of the decree for execution, the power to entertain an application for recognition of the assignment of the decree and for concurrent execution. 63 M.L.J. 788=140 I.C. 591.

NATURE OF ORDER AND LIMITATION—An order transmitting a decree for execution is one of a quasi administrative nature. 78 I.C. 1001. Order for transfer can be made even without there being a formal application. 157 I.C. 971 (1)=1935 P. 485. It would not be a nullity even when made *ex parte* and without notice or without appointment of any guardian to a minor judgment-debtor. 42 L.W. 943=159 I.C. 762=69 M.L.J. 862. Application for transfer of a decree for execution is a step-in-aid. 33 I.C. 523=14 A.L.J. 415, but is not an execution application within the meaning of O. 21, R. 10. 94 I.C. 482=1926 A. 473. Application made to the Court which passed the decree for executing it in respect of property outside its jurisdiction saves limitation and transfer of decree to the proper Court for execution may be ordered. 35 C.W.N. 77. An

order transferring a decree for execution should not be made so as to evade the provisions of the Limitation Act or to validate an invalid application. 42 M. 461=36 M.L.J. 199. An order for transfer cannot be held to be an order for execution which can give rise to the bar of constructive *res judicata* against the judgment-debtor in respect of a later application, on the ground that he did not raise the plea of limitation, though served with notice of application on which transfer order was passed. 157 I.C. 971 (1)=1935 P. 485.

SIMULTANEOUS EXECUTION—A Court has jurisdiction to execute its decree and at the same time send it to another Court for simultaneous execution. The fact that execution is pending before it is no bar to send the decree for execution. 39 C.W.N. 165=156 I.C. 522=1935 C. 268. An order for transfer of decrees to another Court for simultaneous execution without giving notice to the judgment-debtor and without hearing him is not proper (*Ibid.*)

CONCURRENT EXECUTION IN SEVERAL COURTS—A Court has power to send its decree for execution to several places. 14 M.I.A. 529, 8 C. 687. See also notes under the heading under S. 38. Execution case once transferred—Certificate under S. 41 not received—Court passing decree cannot transfer it again to different Court. 29 O.C. 84=1925 O. 428.

PRACTICE AND PROCEDURE—A certificate of transfer of decree need not be signed by judge who passed it. 38 P.L.R. 1101=162 I.C. 489=1936 L. 369. A decree-holder need not make a second application for execution to the Court to which a decree has been transferred, when he has already made one application to the Court transferring the decree. 2 P. 909; 162 I.C. 777=1936 C. 267. When a Court passes a decree and there is a decree in appeal therefrom and thereafter a petition for execution to the first Court, there is only one decree to be executed, *vis*, the original decree as amended by the appellate Court. When in such circumstances a petition for transfer of execution is made and granted it would refer to the decree as amended on appeal, because in the eye of law, there is only one decree, even though the appellate decree is not mentioned in the petition. 38 L.W. 877=1933 M. 872=147 I.C. 386. Questions regarding who are the legal representatives and plea of limitation, if raised, should be decided before transfer. 91 I.C. 1056=23 L.W. 92=1926 M. 411. See also 60 C. 1176=37 C.W.N. 1167=1933 C. 906. An order of transfer of a decree takes effect from the date on which the order is made and the Court to which the decree is so transferred for execution can from that date entertain an application for execution even though a copy of the decree has not been

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court,

(c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it,

(d) if the Court which passed a decree considers for any other reason which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

40. Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.

41. [S. 223.] The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure

Notes.

received by the executing Court (35 M 588, Appr. 55 M.L.J. 120, Oveir) 56 M 692=144 I C 923 (2)=1933 M 627=65 M L J 137 Where proceedings in respect of a transferred decree have terminated in transferee Court, an application for execution may be made in Court which passed the decree even though the certificate of the transferee Court has not been received 39 C W N 129=154 I C 731=1935 C 99 In applying for transfer the mode of execution in the transferee Court need not be stated 1929 C. 529. Award under Arbitration Act—Transfer to subordinate Court for execution—Legality See 151 I C 860 A District Munsif receiving by transfer a decree of a Village Court for execution or withdrawing execution of a decree to his own file cannot transfer the decree to another District Munsif's Court 46 M 734=44 M L.J. 643

Sec. 39 (b) —Where the condition justifying transfer is that set out in this clause, the execution should be limited to that judgment-debtor who satisfies that condition. Execution against another judgment-debtor who does not satisfy that condition is not proper 1936 C. 521.

Sec. 39 (c).—If a Court passes a decree for the sale of property mortgaged, and after the passing of the decree the District within which the property is situate is transferred to another Court, the Court which passed the decree can still sell it. 15 C 667, 19 C. 13, 21 C 639; 22 C 871 For the distinction in the case of execution of money decrees, see 1929 C 818=57 C 67

Sec. 39 (d).—Under this clause a Court which passed a decree in its Small Cause jurisdiction may, for any good reason, transfer it to the other branch of the same Court. The two branches may be regarded as different Courts 8 B 230, 9 B. 237; 6 A

243 (F B), 76 I.C 548=1923 B 371. In 18 B 61 the question whether a Sub-Judge can transfer a decree for execution to a Court of Small Causes, when the property attached was situated within the local limits of his jurisdiction was raised, but not decided. The provisions of this clause have not to be considered at all where the decree directing sale is to be executed not only by sale of property but also by removal of obstruction 30 S.L.R 290=161 I C 524=1936 S 11.

APPEAL.—An appeal lies from an order rejecting an application for transfer 8 C. W N 575.

Sec. 40.—Section applies only when both transferor and transferee Courts are regulated by the C. P. Code 34 C 576, 12 B 230 The law of limitation applicable for execution of a decree transferred to another Province would be the law in force in the transferring Court 17 C 491, 24 C 473, 36 M 108

Sec. 41. SCOPE AND APPLICABILITY OF THE SECTION.—It is only when the Court to which a decree is sent has executed it or has wholly failed to execute it that the Court is bound to send a certificate under S. 41. It does not matter if one application fails 25 Bom L R 453=74 I C 149=1923 B 396 See also 20 A 129. After the issue of a certificate under S. 41, and return of the copy of the decree, the Court to which the decree is transferred ceases to have jurisdiction. 22 A.L.J 1039=1925 A 179; 26 Bom L R 345=1924 B 359, 5 P 398; 1930 L 508, 11 P 513 See also 28 O C 169=1933 L 149 When the result of the execution is not certified execution by Court which passed the decree, if competent. See 39 C W N 129=1935 C. 99=154 I C. 731. Certificates as to result of each application sent under the executive orders of the High Court cannot put an end to the jurisdiction

42. [S. 228.] The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Notes

of the Court to execute the decree. 18 N. L. R. 178=68 I. C. 657=1922 N. 210. As to the applicability of the section to a Court executing its own decree on Small Cause Side, in the Original Side, and entering satisfaction in the Small Cause Register, see 76 I. C. 548=1923 B. 371. On this section, see also 1926 L. 113.

CERTIFICATE OF NON-SATISFACTION—POWER OF TRANSFeree COURT TO GRANT—It is only the Court which has passed the decree that is competent to grant a certificate of non-satisfaction to the decree-holder to enable him to execute the decree in another Court and the Court to which a decree is transferred for execution by means of a certificate of non-satisfaction is not competent to grant such a certificate. The Court can only execute the decree itself and certify the result of execution before it to the original Court. 150 I. C. 905=1934 L. 330.

Sec. 42. SCOPE AND APPLICATION—Section 42, C. P. Code, does not override the plain words of O. 21, R. 16. On the other hand it is subject to O. 21, R. 16. 1934 L. 648. Hence, an application by the assignee of a decree for execution can be properly made only to the Court which had transferred the decree, even though that Court had transferred the decree for execution to another Court before the assignment (*Ibid*). Where a decree is already transferred for execution by Court which passed it, an application for further transfer should be made to the Court where execution is pending. 47 B. 56. But see 1927 N. 367. Section not applicable to execution proceedings of a decree of Madras Small Cause Court transferred to a mofussil Court, but applicable to execution proceedings in the Madras Small Cause Court. 49 M. L. J. 104. Award filed in Court may be transferred for execution. 1931 N. 170=27 N. L. R. 386. Where a decree-holder obtains an order for the transfer of a decree but the decree is not actually sent, the Court which passed the decree has jurisdiction to execute it. 1 P. 328.

POWERS OF COURT IN EXECUTING TRANSFERRED DECREE—Objections to the execution of the decree should be raised before the Court to which it is transmitted for execution. 78 I. C. 1001, 5 R. 775. In executing a decree against a firm Court can determine whether a person is a partner or not. 98 I. C. 855, 131 I. C. 376. The executing Court has power to consider an objection that the decree-holder's demand must be deemed to have been satisfied under S. 18

of the U. P. Court of Wards Act. 46 A. 560. Under Ss. 37 and 42 the Court to which a decree is transferred has powers to stay execution of a decree under O. 21, R. 29. 60 C. 1119=37 C. W. N. 846=57 C. L. J. 444. But see *contra* 162 I. C. 865=1936 R. 184. Transfer for execution—Power of Court to order attachment. 91 I. C. 1043. Transferee Court can order removal of obstruction under O. 21, R. 95 and 97, even though it had not passed the decree or sold the property. 30 S. L. R. 290=161 I. C. 524=1936 S. 11. The transferee Court is not debarred from taking cognizance of objections as to jurisdiction of which the Court which transferred the decree could take cognizance. 152 I. C. 135 (2)=35 P. L. R. 482=1934 L. 652. An executing Court can refuse to execute a decree when it finds that the decree is against a dead person and therefore a nullity. There is no distinction in this respect between the powers of the Court passing a decree and those of the Court to which a decree is transferred for execution. 1934 L. 117 (2).

POWERS NOT POSSESSED BY EXECUTING COURT—The Court to which a decree is sent cannot question the propriety of the order transmitting the decree to such Court. 21 B. 456. See also 7 A. 330, 8 M. L. J. 1, 1930 L. 118. It cannot refuse execution on the ground that questions are raised between the parties that cannot properly be dealt with in execution. 11 B. 528. The executing Court cannot call the legality of a decree in question. 8 C. 687, 31 C. 922, 23 A. 181, 7 Bom. L. R. 659, 4 M. 324, 11 B. 528, 7 B. 481, 10 B. 65. But see 28 B. 378. The Court to which a decree is sent can decide whether or not the execution was barred by limitation. 23 C. 39. But it has no such power when the Court which passed the decree makes an order for execution and then transmits the decree for execution to another Court. 15 B. 28. As to proper procedure to be adopted when judgment-debtor desires to question the order transferring the decree on the ground of limitation, see 14 R. 550=163 I. C. 403=1936 R. 271. Court cannot vary decree. See 4 I. A. 137, 8 C. 332, 15 B. 644, 7 A. 194; 22 C. L. J. 561, 34 I. C. 362, 39 I. C. 537, 99 I. C. 535=27 Punj. L. R. 750, 123 I. C. 531 (L). Nor can it pass an order which has the effect of amending, altering or varying the decree itself. An order for payment of a decree by instalments, which is made after the decree has been passed, undoubtedly has the effect of altering or varying the terms of the original decree, and consequently it is not within

43. [S. 229.] Any decree passed by a Civil Court established in any part of British India to which the provisions relating to execution do not extend, or by any Court established or continued by the authority of the [Central Government or the Crown Representative] in the territories of any foreign Prince or State may, if it cannot be executed within the jurisdiction of the

Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India.

44. [S. 229-B.] (NEW) 2[The Provincial Government may by notification in the Official Gazette declare that the decrees of any Civil or Revenue Courts in any Indian State, not being Courts established or continued by the authority of the Central Government or of the Crown Representative, or any class of such decrees, may be executed in the Province as if they have been passed by Courts of British India.]

3[44-A. (1) Where a certified copy of a decree of any of the superior Courts of the United Kingdom or any reciprocating territory has been filed in the District Court, the decree may be executed in British India as if it had been passed by the District Court.

Leg. Ref.

¹ Substituted for words 'Governor-General in Council' by the Government of India (Adaptation of Indian Laws) Order, 1937

² Section has been substituted by The Government of India (Adaptation of Indian Laws) Order, 1937, in the place of the old section which ran as follows:—

The Governor-General in Council may, by notification in the *Gazette of India*, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with His Majesty and not established or continued by the authority of the Governor-General in Council, or any class of such decrees, may be executed in British India as if they had been passed by the Courts of British India

³ Added by Act VIII of 1937.

Notes.

the competence of the transferee Court to make such an order 12 R. 320=151 I C 937 (2)=1934 R. 165

APPEAL.—Although no appeal lies from the orders of a small Cause Court, still under S. 42 an appeal lies from an order passed in execution of a Small Cause decree transferred to a Court on its Original Side 33 I.C. 523=14 A L J 415; 27 I C. 10=20 C.L.J. 129, *also* 103 I.C 344=1928 B 534 (2). Only one appeal lies against such orders 12 I C 959, 25 C 872 Transfer of decree—Subsequent affirmation in appeal—Fresh order of transfer not necessary 9 P. 829.

Sec. 43.—The section is applicable to decrees passed by Courts in the Scheduled Districts 15 C 365. The Court of the Political Agent at Sikkim is a Court established by authority of Governor-General. 38 C. 859. *See also* cases noted under S. 1, *supra*.

Sec. 44: SCOPE OF THE SECTION.—(*See*

also notes under S. 13.) The concluding words of this section 'as if they had been passed by Courts in British India' do not in any way control the operation of the provisions of S. 13 (a), C P. Code. 37 P.L. R. 240=158 I C. 232=1935 L. 551 A suit does not lie in British India on decrees of the Courts of Native States, such decrees are made executable by Notification by Governor-General in Council under S. 44. 39 M. 24=27 M L J 535 (F B); 1931 A 689=53 A. 747 As to effect of notification *see* 40 C.W.N. 591 The expression "may be executed" gives a discretion to the Court to refuse execution This discretion is not limited to Ss 13 and 14 of the Code 21 L.W. 330=86 I.C. 492=1925 M. 788 These words refer only to the mode of execution 1925 M. 788. As to powers of Court executing decree of foreign Court, *see* 41 C.L.J. 508=1925 C. 955. As to the mode of executing foreign decrees, *see* 2 M. 237 Notice to judgment-debtor is essential. 1925 M. 788. The Law of Limitation governing the execution of foreign decrees in British India is the law in force in British India An order for transmission of a decree to British Court cannot be treated as an order for execution. 40 B 504; 14 C at p 571 The section does not remove the decree of a Native State from the category of foreign judgments. 15 B 216, at p. 219. If the foreign decree has been obtained by fraud, a British Court is not bound to execute it (*Ibid*) A British Court executing a foreign decree can enquire whether the foreign Court had jurisdiction to pass it. 40 B. 551, 40 C.W.N. 591 *See also* notes under S. 13. An application for execution under S. 44 may be resisted on any of the grounds mentioned in S. 13. 39 M. 733=30 M.L.J. 148, 1931 A. 689=53 A. 747.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section be conclusive proof of the extent of such satisfaction.

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Omit the words "or in India" in Explanation 2 of S. 44-A. (Adaptation of Indian Laws Supplementary Order), 1937.

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13.

Explanation 1.—'Superior Court' with reference to the United Kingdom means the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham.

Explanation 2.—'Reciprocating Territory' means any country or territory, situated in any part of His Majesty's Dominions or in India which the Governor-General in Council may, from time to time, by notification in the Official Gazette, declare to be reciprocating territory for the purposes of this section; and 'Superior Courts,' with reference to any such territory, means such Courts as may be specified in the said notification.

Explanation 3.—'Decree,' with reference to a superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and

(a) with reference to superior Courts in the United Kingdom, includes judgments given and decrees made in any court in appeals against such decrees or judgments, but

(b) in no case includes an arbitration award, even if such award is enforceable as a decree or judgment.]

45. [S. 229-A.] (New) ¹[So much of the foregoing sections of this Part as empowers a Court to send a decree for execution

Execution of decrees in foreign territory

to another Court shall be construed as empowering a Court in any Province to send a decree for execution

to any Court established or continued by the authority of the Central Government or of the Crown Representative in the territories of any foreign Prince or State to which the Provincial Government has by notification in the Official Gazette declared this section to apply.]

46 (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept

Precepts

to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

Leg. Ref.

¹ This section has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, in place of the old section which ran as follows:—

"So much of the foregoing sections of this Part as empowers a Court to send a decree for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor-General in Council in the territories of any foreign Prince or State to which the Governor-General in Council has, by notification in the *Gazette of India*, declared this section to apply."

Notes.

Sec. 45—Neither S. 44 nor S. 45 sanctions the transmission of a decree of British Indian Court to a Court in a Native State. 40 M. 1069=33 M.L.J. 130 (F.B.); 32 M.L.J. 487. See also 12 B. 230; 29 C. 400; 39 M. 648; 1929 S. 45; 39 M. 733 (F.B.); 2 M. 237 (337, 338); foreign decrees. 1933 M. 112; 1934 M. 434.

Sec. 46.—An indefinite order stating that an attachment is made permanently is not one contemplated by this section. 163 I.C. 374=1936 L. 486. Unlike in the case of a regular attachment, an attachment by precept can have force only for 2 months unless extended. Therefore payment of money attached under precept may be validly paid over

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree.

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

Questions to be determined by Court executing decree.

47. [S. 244.] (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

Questions to be determined by the Court executing decree.

Notes.

to a subsequent attaching creditor after the said period of 2 months 163 I.C. 374=1936 L. 486 (Reversing 161 I.C. 418=1935 L. 914) An application under the section should be made to the Court which passed the decree. The period of two months may be extended after it has expired. See S. 148. An order extending the period of attachment relates back to the date of the petition and the attachment would be effective though the order was passed after the expiry of two months if the application for extension was put in within the period 34 I.C. 302=3 L.W. 336. Court to which decree is transferred cannot issue precept. 1926 S. 157=92 I.C. 621. The Court which passed the decree can issue a precept even after the decree is transferred to another Court for execution 31 C.W.N. 653=102 I.C. 513=1927 C. 581; 9 R. 561=1931 R. 279. It is not open to the Court issuing the precept to attach such property itself. The Court to which it is issued must attach the property and wait for an application for execution being made by the attaching creditor 146 I.C. 991=1933 A.L.J. 902=1933 A. 844. Court to which precept is issued has power to accept money or security. See 94 I.C. 119=1926 L. 433=27 Punj L.J. 757. Application for precept is a step-in-aid of execution under Limitation Act, Art. 182 (5). 146 I.C. 991=1933 A.L.J. 902=1933 A. 844. Application for attachment, if sufficient to entitle applicant to rateable distribution. See 90 I.C. 527.

Sec 47 SCOPE AND APPLICATION—There are important differences in legal consequences between an application under S. 47 and an application under O. 21, R. 58, in respect of further remedies open to the applicant. If the application is only under S. 47, the applicant's remedy in the event of an adverse order on that application is to appeal against that order whereas if the application is really one under O. 21, R. 58, the applicant's remedy will be by a regular suit 158 I.C. 410=1935 M. 923. Section should be interpreted liberally. 3 P.L.T. 613; 19 C. 683;

15 P. 545=162 I.C. 830=17 P.L.T. 434=1936 P. 289. In considering whether an application is under S. 47 of the Code or not, the substance of the application should be examined in order to find out its true nature. The heading given to it by applicant is not conclusive 140 I.C. 779=1933 M. 130, 161 I.C. 21=1936 L. 725. S. 47 (1) is mandatory and in regard to a matter that properly falls under that section, Court is bound to decide it in execution and has no discretion whether or not to refer parties to a separate suit 1933 M. 825=66 M.L.J. 263=57 M. 49. (56 M. 447, Foll.) See also 56 C. 462, 1929 C. 247. Section draws no distinction between the functions of a Court executing a simple money decree and one executing a decree under O. 34. 15 L. 772=1934 L. 438, 127 I.C. 12=1929 L. 762. Application for personal decree in mortgage suit, if falls under this section 62 C. 28=158 I.C. 1074=1935 C. 596. Section applies only to matters arising subsequent to passing of the decree 67 I.C. 753, 25 Bom L.R. 440, and not to events subsequent to execution sale—Separate suit lies 119 I.C. 881=1929 P. 559. Judgment-debtor's objection that he has no saleable interest is matter to be decided before the decree and not in execution of a mortgage-decree for sale 1929 R. 275 (1). As to whether application for personal decree in mortgage suit may be treated as one under this section. See 62 C. 28=1935 C. 596. Section applies to execution proceedings under Tenancy Acts 1931 A.L.J. 529. An application under S. 173 (3) of the Bengal Tenancy Act, to set aside a sale falls under S. 47, C.P. Code, and an appeal therefore lies against the order on such application 60 C.L.J. 36=1935 C. 89=154 I.C. 347. This section applies to execution proceedings of rent decree 16 P.L.T. 443=156 I.C. 881=1935 P. 227. Question of priority as between rival heirs claiming to be entitled to execute decree falls under this section 59 B. 417=37 Bom L.R. 150=157 I.C. 658=1935 B. 298. (But see 151 I.C. 473=1934 A. 730.) But not dispute between

Notes.

11val decree-holders regarding attachment or distribution of assets 1936 O.W.N. 559=163 I.C. 175 (2)=1936 O. 277.

Section does not apply where one of the persons was not party to the decree and the question raised should be decided in separate suit and not in execution 143 I.C. 843=1933 O. 146 But where the party to the suit is bound by the decree he cannot evade the rule that disputes in execution must be settled under S. 47, C. P. Code and not by a separate suit, by joining with a stranger 147 I.C. 526=37 L.W. 346=1933 M. 340 Order 21, R. 103 is not restricted by the general provisions of S. 47 52 I.C. 928 Order 21, R. 103 only applies to cases where persons concerned are parties to the suit or their representatives. 63 I.C. 730=41 M.L.J. 54 Application to draw out amount deposited by defendant in settling aside an *ex parte* decree is not an execution application. 54 M.L.J. 452=1928 M. 296 Application under O. 20, R. 12 for enquiry into mesne profits directed by decree is not an execution application and S. 47 does not bar a fresh suit in the absence of such application 57 M.L.J. 515=1929 M. 785 Suit for possession on basis of a barred redemption decree is barred by S. 47. 119 I.C. 225 (1)=1930 L. 74 Applicability to proceedings under Arbitration Act See 115 I.C. 536=1929 L. 228; 151 I.C. 881=1934 L. 49 Section 47 does not apply to a decree of a foreign Court 1913 M.W.N. 605 Nor to a decree which is a nullity, the defendant having been dead at the time of the decree 148 I.C. 418=11 O.W.N. 416=1934 O. 167 Order allowing decree-holder to withdraw execution proceedings is outside the section. 19 I.C. 904=18 C.L.J. 53. Section does not apply to application made by a mere gaishee who is not party to suit or to execution proceedings 13 R. 722 Section no bar to setting up by way of defence matters relating to execution. 41 M.L.J. 261, 27 C.W.N. 280, 56 C. 467=1929 C. 247 But see 33 C.W.N. 795=1929 C. 374 (F.B.), 49 M.L.J. 401, 59 C. 1242=1932 C. 825, 9 R. 305, 130 I.C. 154=1931 N. 27 where plea of judgment-debtor that decree was satisfied prior to sale was held to be barred in defence to a suit for possession by decree-holder auction-purchaser

JURISDICTION AND POWERS OF EXECUTING COURT—A Court which cannot try original case is not competent to execute decree in the suit 151 I.C. 860=1934 Pesh. 107. Executing Court is not entitled to go behind decree and say that on the mortgage the Court had no jurisdiction to pass the decree because the mortgage was invalid 149 I.C. 457 (1)=1934 P. 426 See also 15 Pat L. T. 661 (F.B.), 4 A.W.R. 723; 151 I.C. 730=35 P.L.R. 400=1934 L. 609, 15 L. 772 (Sons objecting that mortgage by father was void as being without necessity and as being immoral) Where, after the death of

a judgment-debtor in a mortgage decree, his sons are brought on record as his legal representatives, it is not open to the latter to attack the validity of the decree itself on the ground that the property was their personal property and was not liable to be sold. Neither S. 47, nor O. 21, R. 58; C. P. Code, will allow such a question to be gone into execution in such a case 37 P.L.R. 123=1935 L. 549. Though executing Court is not entitled to go behind decree, it has nevertheless power to see whether decree is capable of execution 14 L. 230=140 I.C. 533=1933 L. 41 As to whether executing Court can inquire into plea of adjustment of decree, see 37 Bom L.R. 230=1935 B. 303 As to executability of decree after compromise by parties varying terms of the decree and recorded under O. 21, R. 2, see 144 I.C. 721=1933 Pesh. 53 (Case-law discussed). See also 143 I.C. 228=1933 Pesh. 63 As to executability of the scheme decree as regards portion not embodying the scheme, see 1933 M.W.N. 183. The decree-holder need not be a party to the decree. 61 M.L.J. 904. *E.g.*, in a scheme decree, the new trustee can enforce the decree 54 M. 345=60 M.L.J. 173, 61 M.L.J. 904, 60 M.L.J. 178 Executability of decree—Decree declaring charge in respect of unpaid purchase-money—Execution by sale of properties charged—Necessity for separate decree for sale 69 M.L.J. 854 A puisne mortgagee against whom a personal decree has been passed, behind his back, when there was no prayer for a personal decree in the plaint, can in execution take an objection to the executability of such a decree under S. 47 162 I.C. 867=1936 P. 303 Executing Court has no power to discuss validity of terms of the decree which it is ordered to execute 13 P. 17=151 I.C. 368 (2)=1934 P. 203 See also 142 I.C. 487=1933 N. 211, 58 M. 752=41 L.W. 249=1935 M. 236=68 M.L.J. 318 The executing Court has no option but to execute the decree as it stands, however erroneous the decree might be 156 I.C. 145=42 L.W. 254=1935 M. 598 A decree beyond inherent jurisdiction of the Court is a nullity and it cannot be executed and executing Court is competent to decide the question whether decree is or is not a nullity 1934 L. 623. The fact of the Court having no jurisdiction to pass decree ought to appear on the face of the decree or must be capable of being gathered without necessity of an enquiry into facts 142 I.C. 487=1933 N. 211 When there is no want of jurisdiction apparent on face of the decree, party in execution cannot raise a disputed point of fact which, if his contention is true, would have deprived the Court of its jurisdiction to pass a decree in that matter 142 I.C. 643=37 L.W. 358=1933 M. 362 A decree passed by a Court on a compromise and relating to a matter extraneous to the suit is not a nullity and can be executed 1934 L. 623 The objection that

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one of the terms of a compromise decree was "outside the scope of the suit" is therefore not one for the executing Court to consider. If the Court had no power to pass the decree the matter should have been raised either by way of review or by way of appeal, but the executing Court cannot go behind it. 13 P. 17. Where certain persons obtain possession of certain properties on relinquishment by a female limited owner, expressly agreeing to pay certain decretal debt due against her, they are, upon the principles of justice, equity and good conscience, bound to pay the decretal debt in execution of the decree. There is no necessity on the part of the decree-holder to take recourse to a separate suit to establish the contractual liability in view of the scope of S. 47, C. P. Code. They can proceed by way of an application under S. 47. 40 C. W.N. 601=63 C.L.J. 25=1936 C. 67. Section 74, Contract Act, does not apply to a compromise decree and it is open to a Court executing such decree to go behind it so as to interfere with a stipulation by way of penalty contained in the compromise. 55 A. 334=1933 A.L.J. 132=1933 A. 252 (F.B.) (Case-law discussed.) 46 A. 571, Overruled. It is open to the executing Court to which an award is sent for enforcement, to go into the question whether the award could legally be filed and enforced as a decree under S. 15 of the Arbitration Act. 152 I.C. 135 (2)=35 P.L.R. 482=1934 L. 652. A suit for a declaration of right of maintenance and for arrears was filed in *forma pauperis*, and due to oversight no valuation was put. The suit was beyond the pecuniary jurisdiction of the Munsif but no objection was taken by the defendant; and when the decree was sought to be executed, objection was raised that the Munsif had no jurisdiction to pass the decree. *Held*, that it was a case of undervaluation, and as no objection was taken in the trial Court, the objection which was taken at the time of execution should fail. 13 P. 290=150 I.C. 373=1934 P. 240. The executing Court has under S. 47 power to correct a mistake in the final decree in a partition suit in awarding an excess share to one party. 78 I.C. 1039; 41 M.L.J. 120, but not to correct mistake due to negligence of plaintiff. 33 C.W.N. 739=1929 C. 670. No order passed in execution can amount to an amendment of the decree or to an alteration of its terms to the extent of disabling the decree-holder from executing it according to its tenor. 157 I.C. 414=41 L.W. 594=1935 M. 429=68 M.L.J. 593. Where decree for costs is against minor plaintiff, executing Court cannot inquire whether minor was only benamidar for father, who acted as his next friend in the suit, and order costs to be paid by father. 1935 A.L.J. 383=158 I.C. 1113=1935 A.

359. Where a plot of land is described in a decree for possession as a particular survey number, that cannot be altered into a separate number in execution. To do so would be going behind the decree. 60 C.L.J. 286=1935 C. 245. As to power of amendment of decree, see 103 I.C. 673=1927 L. 651. After more than three years from passing of decree 18 Pat.L.T. 18. Where the question of splitting up the mortgage debt as among the several properties is refused by the decree the executing Court has no power to decide the question of rateable distribution. 14 Pat.L.T. 371. A puisne mortgagee who was one of the defendants in a suit in which a mortgage decree was passed cannot in execution proceedings be allowed to attack the decree on the ground of paramount title. 144 I.C. 472=38 L.W. 199=1933 M. 569. An executing Court can entertain a claim to set off, even if the case does not fall under O. 21, R. 19, C. P. Code, it has inherent power to give effect to such a claim. 60 C.L.J. 281=39 C.W. N. 106=1936 C. 409. Under the proviso to O. 21, R. 52, when a dispute as to title or priority arises between the decree-holder and a third party as regards the custody of a Court other than the executing Court, then the custody Court shall determine that dispute. When, however, the dispute is between the decree-holder and the judgment-debtor, the matter has to be decided by the executing Court under S. 47, C. P. Code, and not by the custody Court. 19 N.L.J. 287. Where a preliminary decree for partition is sought to be sold in execution of a money-decree, an objection based on R. 178, Madras Civil Rules of Practice, to the sale of the decree in execution can be validly raised by a party other than the judgment-debtor. 152 I.C. 789=1934 M. 692 (2)=67 M.L.J. 669. The executing Court must consider the question whether the person sought to be proceeded against in execution is or is not a member of Co-operative Society or a person claiming under him, because if he is a stranger, the award of the Registrar of Co-operative Societies is as against him a nullity. 148 I.C. 730=15 Pat.L.T. 111=1934 P. 145 (2). The executing Court cannot ignore the plain provisions of S. 16 of the Punjab Alienation of Land Act and order the sale of the property of a member of the agricultural tribe in execution, even though a decree has been obtained against him. 141 I.C. 634=34 P.L.R. 523=1933 L. 397; 151 I.C. 730=35 P.L.R. 400=1934 L. 609. So also the jurisdiction of the Civil Court being excluded in all matters relating to any valuation, assessment, liability to assessment or taxation by a Cantonment Board, a decree granting an injunction against the Board in respect of any such matter, is wholly without jurisdiction and *ultra vires* and cannot be put into execution. 144 I.C. 1016=1933 A.L.J. 162=1933 A. 163. Where an order

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of injunction is issued to an executing Court restraining the sale of a certain share of a property claimed by the plaintiff in a suit, there is no objection in principle to the executing Court proceeding with the sale of the remaining part of that property. 61 C 568=152 I.C. 35=1934 C. 781. Where a decree declares the plaintiff's right to certain hereditary offices in a temple, and grants an injunction restraining the defendants (trustees) from interfering with the exercise of those rights, though the decree does not specifically say what those rights are, the question whether any particular act or acts of the defendants constitute an interference with the rights declared in the decree is one which has to be dealt with and decided by the executing Court alone and not in a separate suit 156 I.C. 125=1935 M. W N 879=1935 M. 576.

PARTIES TO SUIT, WHO ARE NOT—Questions or disputes between judgment-debtors *inter se* in which the decree-holder has no interest are not questions between the parties to the suit. 31 M.L.J. 44, 70 I.C. 329=32 M.L.T. (H.C.) 118 (2), 6 A. 12; 1929 A. 292. So also disputes between co-decree-holders 70 I.C. 329=32 M.L.T. (H.C.) 118 (2); 8 M. 495; 11 C.W.N. 433, 6 P. 386, 113 I.C. 776; 1932 P. 329=140 I.C. 97. So also where dispute is as to which of two rival claimants to a decree is entitled to execute 137 I.C. 73=37 P.L.R. 145=1935 L. 384; or as regards distribution of assets between rival decree-holders 1936 O.W.N. 559=163 I.C. 175 (2)=1936 O. 277. Also questions between a party to a suit and his own representative. 20 I.C. 329=32 M.L.T. (H.C.) 118 (2), 25 B. 631. See also 37 C.W.N. 909=1933 C. 809. Also questions between persons claiming to be the heirs of the deceased judgment-debtor. 151 I.C. 473=1934 A. 730. Or between representatives of deceased decree-holders. 152 I.C. 776=1934 P. 627. A defendant whose name is struck off the record cannot be said to be a party to the suit 80 I.C. 470; 1933 N. 246. A party to a suit exonerated on the ground of misjoinder ceases to be a party after such exoneration 40 M. 964=32 M.L.J. 532 (F.B.); (40 M. 964, Appr.; 49 M. 494, Disapp.); 54 M. 81 (F.B.); 143 I.C. 476=37 L.W. 582=1933 M. 435 following 54 M. 81 (F.B.). But see 37 I.C. 673=5 L.W. 701; 23 M. 361 (F.B.), 45 I.C. 671; 54 M.L.J. 721; 1932 A.L.J. 1036; 1937 M. 268. As between the plaintiff who succeeded in obtaining a decree for rent against the tenant and defendant 1, a co-sharer landlord who is joined as a party defendant in the suit for rent for satisfying the requirements of law as contained in S. 148-A, B T. Act, there can be no question relating to the execution of the rent decree. 38 C.W.N. 43. A Hindu son who has been impleaded as one of the defendants in a suit for recovery of a sum of money but subsequently excluded from

the suit and exempted from the decree is not a party to the suit. 52 I.C. 187. See 1930 C. 586. A party to a mortgage suit, who sets up a paramount title and is discharged from the suit, no decree being passed either in his favour or against him, is not a party within S. 47 52 I.C. 736. The minor sons of a deceased judgment-debtor brought on record but not properly represented, cannot be considered parties to the proceedings. 67 I.C. 547=1922 L. 447. A bidder at an execution sale is not a party to the suit or his representative within S. 47 42 M. 776=37 M.L.J. 274. A garnishee is not a party to the suit 120 I.C. 565=1929 M. 850.

PARTIES TO SUIT, WHO ARE—Section 47 is not confined only to cases arising between parties who are opposed to each other in the suit 45 M.L.J. 478; 151 I.C. 776=1934 P. 627. Persons may be parties opposed to each other without necessarily being arranged as plaintiff and defendant in the suit. 70 I.C. 329, 24 M.L.J. 477; 5 R. 418. Parties unnecessarily impleaded are still parties to the suit within S. 47. 67 I.C. 6=34 C.L.J. 477. So also one joined as a *pro forma* defendant 148 I.C. 901=1934 L. 105. A person impleaded as a defendant in a suit on a bond on the ground that there had been a partition between him and the plaintiff in which the bond had fallen to the share of the plaintiff and that consequently he had no right to the amount due under the bond, is not a mere *pro forma* defendant but a party within S. 47 1934 A. 699. Where party was impleaded in one capacity and objection (claim) is raised by him in execution in another capacity, it will not fall under this section. 1936 M. 733. The only exception to this rule is the case of a legal representative (*Ibid*) Person dismissed as unnecessary party to suit—Subsequent addition in execution as legal representative of judgment-debtor—Claim in his own right to property sold in execution falls under this section and should be determined by the executing Court. 44 L.W. 698=71 M.L.J. 725. Where a suit is dismissed against a defendant, the plaintiff abandoning his case against him, he is still a party to the suit within S. 47, Expl. The proper course in such a case is to strike out the name of the defendant, instead of dismissing the suit as against him. 41 M. 418=34 M.L.J. 17 (F.B.) See also 78 I.C. 225=1924 A. 313; 98 I.C. 726=1927 M. 253, 5 R. 110, 1928 M.W.N. 601; 8 P. 717, 1929 P. 472; 143 I.C. 476=1933 M. 435; 1934 L. 737; 150 I.C. 703=1934 P. 281; 1933 N. 246. A question which arises between the judgment-debtor and the auction-purchaser, who is also the decree-holder is one which arises between parties to decree. 1935 N. 30=156 I.C. 995=31 N.L.R. 217. A surety for the judgment-debtor should be deemed to be a party by virtue of S. 145. 9 R. 434; 152 I.C. 693=35 P.L.R. 466=1934 L. 538; 1935 N. 30; 155 I.C. 511=1935 R. 39. Decree-

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holder purchaser continues to be party to suit, and his remedy to recover possession of property purchased is only by application under this section and not by separate suit. 1936 Pesh 85.

REPRESENTATIVES, WHO ARE—The expression "representative" has been construed in a wider sense than the expression "legal representative" and includes also representative in interest. The two tests to be applied in determining whether a person is a representative within S. 47 are (i) whether any portion of the interest of the decree-holder or of the judgment-debtor which was originally vested in one of the parties to the suit has by act of the parties or by operation of law vested in the person who is sought to be treated as representative and (ii) if there has been devolution of interest whether so far as such interest is concerned that person is bound by the decree. The purchaser of the equity of redemption is a 'representative' of the judgment-debtor within the meaning of S. 47. 14 L. 591=142 I C 408=1933 L 352=1935 S. 214. Where a person has been a principal party in a suit brought under O 21, R 63 that person too is regarded as representative of the judgment-debtor. 158 I C. 229=1935 L 306. The term includes any transferee of the decree-holder's interest or any transferee of the judgment-debtor's interest who, so far as such interest is concerned, is bound by the decree. 24 C 62; 26 A 447; 151 I C 683=1934 P 413. A purchaser of a portion of non-transferable holding from a rayat is a representative of the judgment-debtor within S. 47 and can apply to set aside a sale of holding in execution of a decree for arrears of rent on the ground of fraud. 42 C 172 (F.B.). Mortgagee who purchases property of mortgagor at a sale in execution of decree on his mortgage is representative of his judgment-debtor; and when he is impleaded as party to proceedings in execution of rent decrees against mortgagor, the order passed in execution is open to appeal and second appeal. 18 N L J. 274. Auction-purchaser in execution of simple money-decree during pendency of mortgage suit is representative of mortgagor. 1936 A.L.J. 541=163 I.C. 926=1936 A. 479. See also 15 P 545=17 P L T 434=162 I.C. 830=1936 P 289. Where undivided interest of judgment-debtor was attached, and the execution fell through but was subsequently revived, the effect of revival would be to render the surviving nephews of the judgment-debtors his legal representatives. 160 I C 119=1936 P. 126 See also 64 I C 124, 27 I C 431. But see 3 P.L. J 579=43 I C 969. A mortgagee of judgment-debtor is his representative for the purposes of S. 47. 56 I.C 646=1 P L T 267. So also a puisne mortgagee. 35 C.W. N. 877=59 C 117. A mortgagee whose mortgage was subsequent to a mortgage decree on property is a representative of the

judgment-debtor. 41 C 418. A transferee of the decree is a representative of the decree-holder. 24 C 62; 26 A 447; 1934 L 328. Whether a person who attaches money lying in Court is a representative of the person entitled to it or not, must be decided on the facts of each case. 1935 S 214. A purchaser of the interest of the judgment-debtor after a decree for sale on a mortgage has been passed against him is a representative of the judgment-debtor. 16 A 286 (private sale), 72 I C 862; 26 A 447; 24 C 62 (execution sale). See also 18 N L J 274. So also a purchaser from a judgment-debtor under O 21, R. 83. 23 A 116. Whether the assignee of interest pending suit can execute decree passed in suit. See 1927 S 78. A transferee pending a foreclosure suit of a mortgagor is a representative of the latter, and any question between him and the mortgagee-decree-holder, is one falling within the scope of S. 47. 55 A. 235=144 I.C 70=1933 A L J 113=1933 A 201. Where a transferee *pendente lite* from a defendant obstructs delivery of possession in execution to the decree-holder and the Court orders it to be removed, the order is one under S. 47, the transferee being the representative of the defendant. 66 I C 722=1921 M W N. 698. See also 22 A. 243; 37 C.W N 1015=58 C L J 229. But see also 151 I C 683=1934 P 413. Purchaser of property prior to the decree in a rent suit is bound by the decree. 54 C. 1064. Transferee from Court auction-purchaser. 36 L. W. 844. Universal donee of judgment-debtor is his representative. 1930 O 268=7 O W.N. 523. Whether Receiver in insolvency of judgment-debtor is or is not representative of the latter for the purposes of S. 47, depends on purpose and nature of the application made by the Receiver. An application by Receiver to have a sale in execution declared null and void, purporting to act as the legal representative of the judgment-debtor and for purpose of having the property escaped from execution, is within S. 47, and an order thereon is subject to second appeal. 62 C 457=157 I C 862=39 C W N 424=1935 C 503.

REPRESENTATIVES, WHO ARE NOT—Purchaser of property prior to attachment is not a representative. 99 I C 989=1927 M. 450. So also purchaser after attachment in pursuance of contract to purchase entered into before attachment. 1936 N 163. Purchase of property not mentioned in and not affected by decree is not representative of the judgment-debtor. 3 L W. 289=33 I C 84=44 L W 444=1936 M. 870=71 M.L.J 385. The purchaser from the decree-holder auction-purchaser is not a representative of the decree-holder *qua* decree-holder. 64 I C 68, see 1930 C 586. Purchaser of entire occupancy holding at a certificate sale under Public Demands Recovery Act for arrears of rent is not representative of occupancy tenant. 15 P. 414=17 P.L T. 650=165 I.

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C. 574=1936 P. 561. Where person impleaded in mortgage suit as attaching creditor of mortgaged property died, and no steps were taken to implead his legal representatives, they cannot be added in execution proceedings. 159 I.C. 1073=1936 P. 110 Benamidar for a party is not his representative within S. 47. 44 B. 352; 46 I.C. 748; 18 C.W.N. 184 That a recognised transferee decree-holder was only a benamidar could not be pleaded 48 M. 553=48 M.L.J. 419 But after the death of the benamidar transferee decree-holder, the real owner will be entitled to plead in execution his right 51 M. 219=53 M.L.J. 568; 1931 R. 24, 55 C.L.J. 82 An interim receiver making an application under S. 52, Provincial Insolvency Act, cannot be said to represent the judgment-debtor and the order passed on such an application cannot be treated as falling within S. 47, C. P. Code, or as amounting to a decree within the meaning of the Code and is therefore not appealable. 56 M. 453=141 I.C. 817=1933 M. 152=64 M.L.J. 119. Person appointed by Court under S. 37, Provincial Insolvency Act and vested with property on annulment of adjudication is not representative of the insolvent 40 C.W.N. 1229=1936 C. 573. A liquidator is not a representative of the judgment-debtor within the meaning of S. 7. 148 I.C. 714=17 N.L.J. 47=1934 N. 07. See also 1930 N. 199. So also a Receiver of Estate of judgment-debtor. 30 S. R. 288

AUCTION PURCHASER, STRANGER, IF REPRESENTATIVE—The rulings on the question whether purchaser is a representative within the meaning of this section and if so whether of the judgment-debtor or of the decree-holder or of both, are conflicting in the different High Courts, and sometimes in the same High Court also. The various rulings on the point are collected hereunder—(A) *the stranger auction-purchaser in execution of simple money-decree is a representative of the judgment-debtor* 24 C. 62=1 C.W. 36 (F.B.), 32 C. 1031=9 C.W.N. 824, 1 C.W.N. 495, 13 C.W.N. 98; 32 C. 332, 1 A. 447 (F.B.), 28 A. 337, 27 A. 155; 1 A. 275, 30 A. 379; 43 M. 107=54 I.C. 19=26 M.L.T. 391=38 M.L.J. 32 (F.B.), 1 L.W. 350=59 I.C. 894; 11 L.W. 349=3 M.L.J. 441, 20 L.W. 864=47 M.L.J. 84=84 I.C. 265, 1 S.L.R. 158; 17 S.L. 73=80 I.C. 1002=1924 S. 101; 1 Pat. R. 139=72 I.C. 862=1924 P. 367. (But *contra* 2 Pat. L.J. 361=39 I.C. 763; 14 C. 89=10 I.C. 722, 3 Luck. 719=1928 C. 442. But see *contra* 5 Oudh L.J. 551 48 I.C. 39, 2 Oudh L.J. 57=27 I.C. 570; 1 I.C. 693=1922 N. 189. But see *contra* 1 I.C. 429=1923 N. 161 (2). *He is a representative of the decree-holder*, 91 I.C. 8=1926 N. 68; 79 I.C. 636=20 N.L.R. 0=1924 N. 328. *He is not representative of either the decree-holder or judgment-*

debtor, 25 Bom.L.R. 147=72 I.C. 256=1923 B. 214; 44 B. 451=22 Bom.L.R. 759=57 I.C. 440; 42 B. 411=20 Bom.L.R. 495=46 I.C. 113; 25 B. 631; 79 I.C. 57=1925 L. 176, 49 I.C. 140 (L.); 4 Bur. L.T. 28=9 I.C. 472; 3 Bur.L.T. 5=3 I.C. 713 (B) *In the case of mortgage decree, stranger auction-purchaser is representative of both mortgagor and mortgagee*, 44 A. 488=20 A.L.J. 337=67 I.C. 29=1922 A. 495, 24 A.L.J. 519=96 I.C. 137=1926 A. 457, 16 M. 121; 20 B. 390, 59 C. 117=35 C.W.N. 877=1932 C. 126 But see *contra*, 12 O.C. 45=2 I.C. 57, 14 L.W. 92=63 I.C. 200=41 M.L.J. 120, 134 I.C. 1=1931 A. 466 (F.B.) *If neither he is to be deemed representative of decree-holder or judgment-debtor depends upon the nature of the dispute* See 26 A. 447; 27 A. 155 (C) *In the case of decree-holder auction-purchaser, he retains his character of a party to the suit*, 3 Luck. 182=110 I.C. 83=1928 O. 199 (F.B.), 31 C. 737, 27 C. 34, 53 C. 781=30 C.W.N. 649=95 I.C. 494=1926 C. 798, 97 I.C. 697=1927 C. 57; 44 I.C. 563; 978 (Nag.); 18 S.L.R. 34, 78 I.C. 930=1925 S. 171; 21 M. 416=8 M.L.J. 54; 25 M. 529=12 M.L.J. 1; 26 M. 740=13 M.L.J. 237, 28 M. 87=14 M.L.J. 474; 28 M.L.J. 642, 23 L.W. 744=69 I.C. 657=1926 M. 857=51 M.L.J. 126, 41 M. 403=45 I.C. 54=22 C.W.N. 553=16 A.L.J. 353=8 L.W. 427=20 Bom.L.R. 580=44 I.C. 855=34 M.L.J. 463 (P.C.). But see *contra* 31 A. 82=6 A.L.J. 71, 47 A. 304=22 A.L.J. 1119=84 I.C. 746, 50 A. 670=26 A.L.J. 498=1928 A. 368; 50 A. 686=26 A.L.J. 716=113 I.C. 725=1928 A. 363, 45 A. 96, 44 B. 352=22 Bom.L.R. 296=56 I.C. 349, 44 B. 977=22 Bom.L.R. 1101=59 I.C. 366; 120 I.C. 593=1930 L. 363, 8 P.R. 1918=44 I.C. 169, 53 I.C. 460 (Lah.); 1 Pat. L.J. 232=20 C.W.N. 829=35 I.C. 468, 9 Pat. 775=11 Pat.L.T. 331=126 I.C. 849=1930 P. 311; 10 P. 670=12 Pat. L.T. 423=133 I.C. 337=1931 P. 241 (F.B.). See however 4 P. 726 See also notes under heading 'Delivery of properties sold in execution, questions relating to.'

OBJECTION TO ATTACHMENT, QUESTIONS RELATING TO.—Objection by the judgment-debtor that the property is not saleable comes under the section. 19 B. 328; 27 C. 187. Also an objection on the ground of want of saleable interest. 1 O.W.N. 857. See also 76 I.C. 316. The question whether the property attached before judgment is attachable or not can be raised in a proceeding under S. 47. 58 C.L.J. 289=37 C.W.N. 978=1933 C. 757. An objection by the judgment-debtor to an attachment of property in his possession on the ground that he is in possession as a shebait of a deity falls under O. 21, Rr. 58 and 60 and not under S. 47. 39 C. 298 (F.B.); 12 I.C. 411, 42 C. 440 But see *contra*, 2 Luck. 145. So also an objection that the property sought to be attached is wakf pro-

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party. 3 Pat L.T. 432=67 I.C. 438. See also 23 M. 195; 23 B. 237; 31 M. 125. An objection by the legal representative of a deceased judgment-debtor that the property attached is his own falls under S. 47 and not under O. 21, R. 58. 3 Pat L.T. 613=68 I.C. 369; 28 A. 51, 26 M. 501; 27 C. 34, 34 B. 546; 2 R. 168; also 54 C. 1064; 5 R. 659; 100 I.C. 786=28 Punj. L.R. 121, 1935 A.W.R. 39=1935 A.L.J. 74, 1929 O. 21; 53 B. 46; 60 C.L.J. 251; 58 B. 513=36 Bom L.R. 608=1934 B. 296; 151 I.C. 227=1934 R. 127; 1934 P. 188, 158 I.C. 410=1935 M. 923. Where a person was added as legal representative and he objected to a certain attachment as being a legatee, the question falls under the section. 5 R. 393, 1931 R. 314. See, however, 9 R. 305. But where the legal representative sets up title on behalf of a third person, the case does not fall within S. 47. 31 I.C. 393 (M.); 23 M. 195, 23 B. 237; 31 M. 125, 39 C. 298, 15 I.C. 353; 1930 N. 293. But see 67 M.L.J. 317=152 I.C. 293=1934 M. 621 (Objection by son that a certain sum of money should not be attached in execution of a decree against him for his father's debt on the ground that it was trust money in which he had a beneficial interest). Objection by a member of a tarwad that a property attached in execution of a decree passed against a karnavan of a tarwad in his representative capacity does not belong to the tarwad but to a separate *javashi* to which the claimant belonged could not be enquired into under this section. 51 M. 46=53 M.L.J. 824 (F.B.) overruling 30 M. 512 and 24 M. 658. If two persons one of whom is a party to the suit and one not a party, prefer a claim under O. 21, R. 58, the party to the suit must proceed by way of appeal by virtue of S. 47 and the non-party by way of suit by virtue of O. 21, R. 63. 57 M. 822=1934 M. 435 (1)=67 M.L.J. 36. Where objection is wrongly filed under O. 21, R. 58 instead of under S. 47, and order is passed, suit under O. 21; R. 63 is barred. 1935 A.L.J. 74=1935 A. 183.

SETTING ASIDE OF EXECUTION SALE, QUESTIONS RELATING TO.—The question of the validity or otherwise of a sale held in execution of a decree is one relating to execution arising between parties to the suit. 13 I.C. 133=1912 M.W.N. 44, 1928 R. 215=144 I.C. 679. The fact that the auction-purchaser is interested in the result, does not matter. 19 C. 683. See also 34 M. 417; 34 B. 546. Section 47 applies to a case where the question raised concerns the auction-purchaser as well as parties to the suit, e.g., an application to set aside the sale for irregularity. 41 M. 403=34 M.L.J. 463 (P.C.). See also 150 I.C. 611=1934 N. 21. But see 149 I.C. 445=35 P.L.R. 375=1934 L. 508, holding that proceedings for setting aside a sale are not proceedings in execution. See also 151 I.C.

244=1934 A.L.J. 859=1934 A. 314. An order made under O. 21, R. 97 between the decree-holder-auction-purchaser and another person who had been impleaded as a defendant in the suit is appealable because the dispute comes under S. 47. 150 I.C. 313=38 C.W.N. 497=1934 C. 541. A petition objecting to the whole execution procedure in a case and not merely to the actual irregularity in conducting or publishing the sale may be dealt with under S. 47 and is not fettered by the 30 days' rule for presentation under O. 21, R. 90. 37 I.C. 827=10 Bur. L.T. 249. See also 145 I.C. 113=1933 L. 570 as to limitation. Where property claimed by a person in his personal capacity is sold in execution of a decree to which he was a party in a representative capacity, he can apply under S. 47 to have the sale set aside and a separate suit will be barred by that section. 46 I.C. 458=27 C.L.J. 572; 1931 R. 314; see also 38 C.W.N. 996, 151 I.C. 227=1934 R. 127, following 2 R. 168. An application to set aside an execution sale as illegal falls under S. 47. 22 A.L.J. 413. So also an application on the ground of want of notice under O. 21, R. 22. 5 Pat L.T. 61; see also 142 I.C. 658=1933 M. 224, or suppression of processes. 27 C.L.J. 528. Where an execution sale is challenged on the ground that no notice was issued under O. 21, R. 22, but the Court finds, that no such notice was necessary the order is not one under S. 47. 2 P. 916. Where notice under O. 21, R. 22 is held necessary but was not issued, see 7 R. 110. A sale in execution of property which is subsequently found not to belong to the judgment-debtor is not void. The only course open to a decree-holder purchaser in such a case is to apply under O. 21, R. 91, C. P. Code to have the sale set aside. If that remedy is barred by limitation, he loses his remedy altogether. The sale cannot be set aside by any other means, and if the sale stands, the order recording satisfaction of the decree also stands and cannot be set aside by the executing Court. 41 L.W. 422=1935 M. 340. An order on an objection that the properties could not be sold subject to encumbrances as notified in the sale proclamation is one relating to execution within S. 47. 72 I.C. 860. An order on an application by a judgment-debtor objecting to the sale of certain property falls under S. 47. 31 I.C. 102 (M.). Such an order is appealable. 17 A.L.J. 802. So also an order declining to proceed with execution for the sale of the property, in view of S. 63. 26 C.L.J. 42=42 I.C. 466. So also where it is objected that the property sold is not liable to attachment and sale under S. 60. 6 A. 448, 8 A. 146; 34 M. 417; 34 B. 546; 148 I.C. 200=1934 N. 28. The objection may be made even after sale and before confirmation. 158 I.C. 202=1935 A.L.J. 1137=1935 A.W.R. 1105=1935 A. 1016; also where it is alleged that before

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sale the decree was adjusted and that consequently the sale was illegal 22 A. 86. See also 33 C.W.N. 795=1929 C. 374 (F.B.). So also an objection that certain lands sold in execution are not saleable being unam lands. 1935 N. 30; 31 N.L.R. 217=156 I.C. 99. The section, however, does not bar a suit to set aside a decree and execution sale thereunder as having been obtained by fraud. 42 C. 244=27 M.L.J. 100 (P.C.) (see also 24 I.C. 695, 26 C. 326; 27 C. 197); or as having been a nullity, the legal representative of the deceased defendant not having been brought on record 21 A. 316. See also 148 I.C. 418=1934 O. 167. The proper remedy for a plaintiff to set aside a sale held in contravention of O. 34, R. 14 is by an application under S. 47 and not by a separate suit 45 B. 174. But an order setting aside confirmation of sale does not fall under the section. 100 I.C. 800=1927 L. 337. Where a mortgage decree is not passed in accordance with law but the properties are purchased by the mortgagee in execution sale, the sale is not void but irregular. The remedy of the aggrieved party is to apply under the section before confirmation of the sale and not by a subsequent suit for redemption treating the execution sale as void. 41 M. 403=34 M.L.J. 463 (P.C.). An application by a Receiver of an insolvent's estate to annul a sale on the ground of a prior adjudication of the debtor is one under S. 47 to which O. 21, R. 90 is not applicable and hence a second appeal lies to the High Court 30 M.L.J. 611. See also 1 R. 533. An objection by a Hindu widow who is a party to the suit to the sale of a certain house without reserving rooms for her residence, can be inquired only under S. 47 and not by a separate suit. 19 I.C. 926 (2) (Pun.).

DELIVERY OF PROPERTY SOLD IN EXECUTION, QUESTIONS AS TO—Proceedings as to delivery of possession of property sold in execution where the auction-purchaser is a stranger are not covered by the section 14 C. 644; 31 M. 177. See also cases cited under the heading "AUCTION-PURCHASER WHETHER A REPRESENTATIVE OF A PARTY". Where on an application for removal of obstruction to delivery, applicant is referred by the final order to a suit, a subsequent suit is maintainable and S. 47 cannot be pleaded in bar. 69 M.L.J. 139. "Where the decree-holder is himself the auction-purchaser, the question is one relating to execution, arising between the parties to the suit, the decree-holder not ceasing to be a party by becoming the auction-purchaser. 35 B. 452; 10 P. 670, 27 C. 34; 31 C. 737; 31 A. 82; 26 M. 740; 13 M. 504; 25 M. 529, 39 M.L.J. 603; 38 P.L.R. 621, 10 I.C. 51=13 C.L.J. 467; 44 I.C. 563; 78 I.C. 930 overruling 35 B. 452; 1935 N. 30. But see 48 B. 550; 5 O.W.N. 108=1928 O. 199 (F.B.) (Contra). Questions relat-

ing to the possession of property after sale has taken place are not questions connected with the execution, etc., of a decree within S. 47 and a separate suit for recovery of possession by the decree-holder auction-purchaser is not barred. 33 I.C. 367; 3 Pat. L.J. 571; 48 B. 550; 53 I.C. 460; 10 P. 670; 1929 P. 559, 1931 P. 296 (Partition suit). Even if they are questions relating to execution, the decree-holder cannot be treated as a party to the suit after he has become the purchaser. 31 A. 82; 6 C.L.J. 749. See also 49 I.C. 137=29 C.L.J. 48; 4 Pat. L.J. 716. The question of delivery of possession arising between the decree-holder and defendant against whom no relief is granted is one under S. 47 29 M.L.J. 629. A suit for possession lies by the decree-holder auction-purchaser who is resisted in obtaining possession of the property by the judgment-debtor as well as by a third person claiming to have an interest in the property. 44 B. 977. But see 28 N.L.R. 250. A suit lies by a decree-holder who purchases his judgment-debtor's rights in joint property, for partition against the judgment-debtor and other co-owners. 28 M.L.J. 642; 1 L. 134; 1927 M. 955. Where the decree was for *has* possession of lands jointly owned with the defendants, a separate suit for partition and possession would be barred 54 C. 524. Where, after sale of the properties in execution of a mortgage decree, a puisne mortgagee who had been impleaded as one of the defendants in the suit applied to the executing Court that he had certain rights in the property by way of easement and as co-sharer and that therefore the possession of the property should not be given, *held*, the application was one under S. 47 and not under O. 21, R. 100. 144 I.C. 472=38 L.W. 199=1933 M. 569. A plaintiff who has obtained a decree for possession on the basis of a lease and obtained delivery through Court, cannot bring a second suit in respect of the same property praying for demolition of a building which had been built during the period of the lease. S. 47 applies to such a case and bars a separate suit. The fact that another person, the son of the judgment-debtor has been impleaded to the subsequent suit does not remove the bar, unless he has got a separate cause of action against that person 155 I.C. 268=1935 P. 222.

ADJUSTMENT OUT OF COURT, QUESTIONS RELATING TO—An application for certifying payments made out of Court falls under S. 47. 1 P. 644. O. 21, R. 2 does not limit the operation of S. 47. 1 Bur.L.J. 43=70 I.C. 859=Uncertified payment—Suit for recovery of—After satisfaction of decree—S. 47 no bar, 7 R. 310; but not where such application is barred by time. 25 I.C. 884. Application by judgment-debtor to have sale set aside on ground of satisfaction of decree by uncertified payment by another judgment-debtor is governed by O. 21, R. 2 and Art. 174, Limitation Act. If application is barred,

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he cannot make S. 47. 15 P. 422=17 P. L.T. 195=162 I.C. 810=1936 P. 270. S. 47 has a suit for a declaration that a decree is satisfied. 3 L. 319, 36 I.C. 988=31 M. L. 1 429; 21 C. 437, 15 M. 302; 31 C. 480, 1933 L. 1051, 157 I.C. 814=1935 R. 225. The question of decree-holder's fraud in not certifying the payment and holding a sale after satisfaction did not fall under O. 21, R. 90 but under S. 47. 10 I.C. 625; 30 C. L.J. 248; 41 A. 443. An application purporting to be under S. 151 and O. 47, R. 1, to set aside an order entering full satisfaction of the decree on the ground of fraud is essentially one under S. 47 relating to the discharge of the decree. 148 I.C. 549=1934 P. 202=167 I.C. 401=1937 O.W.N. 231. Though order recording full satisfaction might be reviewed by the judge who passed it, the question whether the *petition of adjustment* and the order thereon correctly represented the intention of the parties is not one the determination of which falls under S. 47. So, a suit for rectification of a petition for adjustment of a decree and the order thereon, on the ground that the same did not correctly represent the agreement of the parties and that the decree had been recorded by mistake is not barred by S. 47. 39 C.W.N. 966. Agreement by decree-holder limiting methods of execution, if can be recognized by executing Court. 4 A.W.R. 146=1935 A. 364. Where after a decree for possession of a share in an estate, specific lands have been allotted in lieu of the share in partition proceedings, an enquiry as to what are those lands is one relating to execution of the decree. 1 P. 378=43 M.L.J. 124 (P.C.). See also 2 P.L.J. 496. Where after attachment of property decree was adjusted but not certified, and property was mortgaged to another, in a suit on mortgage, S. 47 would not bar the trial Court from recognizing the adjustment. 19 N.L.J. 175.

CASES WHERE SEPARATE SUIT WILL LIE—That which in reality forms the basis of an independent suit cannot be introduced as a question to be tried in execution proceedings. 1 P. 581=43 M.L.J. 589 (P.C.); 49 A. 379; 1929 A. 252=115 I.C. 462. An objection to execution on the ground that the decree is invalid being collusive, can be tried only in a regular suit and not in execution under S. 47. 22 B. 475, 27 M. 118; 28 M. 26; 30 M. 26; 32 C. 265; 21 A. 277 (356), 54 M. 184. So also the question whether a decree was obtained by fraud or collusion. 38 M. 221. See also 9 M. 80; 23 C. 639, 38 M. 1076. A pre-decree compromise which is not embodied in decree cannot be pleaded in execution, but separate suit for declaration of rights on basis of the compromise is maintainable. 39 P.L.R. 29. A separate suit will lie where the existence of the decree itself is denied (1931 A. 490, F.B.), or where the jurisdiction of the Court passing the decree is questioned (1932 L. 601).

Where the final decree was passed after death of the defendant and without substitution of heirs, the real question at issue is the validity and not the satisfaction of the decree, and it can properly be raised in an independent suit by the legal representatives of the deceased defendant who seek to set aside the final decree and the sale in execution. The mere fact that their interests were technically represented by an administrator in execution proceedings cannot prejudice them. 39 C.W.N. 1284. Section 47 does not bar a suit by a person against whom a decree has been passed at a time when he was suffering from unsoundness of mind, to set aside the decree. 50 I.C. 109=17 A.L.J. 257. Where property is claimed not under or in execution of a decree, but the claim is for delivery of property on the ground that the decree is not binding on the claimant the question is one that cannot be tried in execution, and therefore S. 47 has no application. 1937 M. 268. Where a decree-holder under a *bona fide* mistake brought to sale in execution some of his own properties, the remedy is only by a suit under O. 21, R. 103 and not by an application under S. 47. 15 L.W. 272=1922 M. 63. *Contra* 116 I.C. 634. A suit will lie against the auction-purchaser for recovery of property sold in execution of a decree, in which the judgment-debtor has no interest. 75 I.C. 238. But see 1929 M.W.N. 811=123 I.C. 12=1930 M. 12. Prior proceeding for recovery of debt—Question of pledge not in issue—S. 47 not a bar to subsequent suit for redemption by pledge. 30 L.W. 898=1930 M. 36. Where the creditor seeks his remedy against the trustee personally the trustee's right to indemnity from out of the trust estate should be pleaded in the same suit or in a different suit. The question cannot however be investigated in execution. 60 C. 801=1933 C. 668. A suit by the decree-holder for declaration that the assets of the deceased debtor are liable to attachment and sale in execution of the decree, when objections are allowed under O. 21, R. 58 is not barred by the section. 71 I.C. 1012=1923 A. 292. So also where it is claimed that the decree passed against a Hindu widow is not binding on the reversionary inheritance. 30 M. 402. Where a decree is of a purely declaratory nature, a separate suit will lie to enforce the rights declared by such a decree. 22 B. 267. See also 18 N.L.J. 110, 39 C.W.N. 725, 64 C. L.J. 55. Suit to declare title to decree is not barred by S. 47. 1931 R. 24. Where a compromise mortgage decree allowed the relationship of mortgagor and mortgagee to continue and provided execution as the sole remedy, the provision as to execution was only a clog on the equity of redemption and a suit for redemption is not barred under the section. 31 L.W. 44=1930 M. 305. Where in a suit by the prior mortgagee impleading the puisne mortgagee as party, the decree does not provide for the working out

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of the rights of the puisne mortgagee, he can enforce his mortgage by a suit of his own, unaffected by S. 47. 49 I.C. 466=1918 M.W.N. 902. See also 42 M. 90. An alleged agreement between the prior mortgagee decree-holder and a third party who purchased the property in execution of a decree on a subsequent mortgage, subject to the prior mortgage-decree, by which the former consented to be paid off by the latter and not to execute his decree is not a question falling under S. 47 but could only be gone into in independent proceedings. 145 I.C. 528=38 L.W. 728=1933 M. 838 following 57 C. 403 (F.B.). Where a puisne mortgagee impleaded a prior mortgagee decree-holder and obtained a decree, then the prior mortgagee purchased the property in execution of his own decree and objected to the sale by the puisne mortgagee, the order on the puisne mortgagee's application is not appealable. 99 I.C. 658=1927 M. 431. Question of priority of prior mortgagee cannot be gone into in execution of decree on later mortgage. 1930 A. 826 (2)=1930 A.L.J. 1135. In a mortgage suit where some of the defendants claimed paramount title (occupancy rights), the matter cannot be decided in the suit, and S. 47 would not bar the question being raised in subsequent suit. 1936 M. 733. The bar of S. 47 can only apply to cases where there is a duty to raise the question in the earlier proceedings (*Ibid.*) But see 71 M.L.J. 511 (noted *supra*). A dispute as to possession between rival auction-purchasers of the same property in execution of different decrees does not fall within the scope of S. 47. 49 I.C. 629=9 L.W. 81. But see 56 M. 909=65 M.L.J. 407=1933 M. 780. Where two decree-holders are proceeding in execution against the same property and the claim for priority made by one is disallowed by the executing Court, the decision does not bar a regular suit by such decree-holder for establishing his priority. 150 I.C. 964=1934 L. 478. The question of priority as between rival heirs claiming to be entitled to execute the decree by right of succession can be decided in execution proceedings under S. 47. 59 B. 417=157 I.C. 658=37 Bom.L.R. 150=1935 B. 298. Section 47 is a bar to a regular suit if the object of that suit is to decide a question between a decree-holder-purchaser and the judgment-debtor. But where the object of the suit is to settle dispute between decree-holder-purchaser and persons other than the judgment-debtor, S. 47 cannot be a bar, and it is no objection to say that there was no delivery under O. 21, R. 96. 1936 M. 733. A suit lies for contribution by one judgment-debtor against another, for his share of the decree debt, the whole of which has been levied in execution from him. 18 A. 106. Decree-holder auction-purchaser omitting to take possession through Court—His transferee suing judgment-debtor for possession—Application or suit as remedy

—Limitation 1930 C. 586. Decree-holder purchaser omitting to apply under O. 21, R. 91 within limitation—Subsequent application for realisation of purchase-money in execution of original decree—If competent. 1935 A.L.J. 474=1935 A.W.R. 369. Suit by decree-holder auction-purchaser (10 P. 670) or by the purchaser of an undivided interest (1931 M.W.N. 1176) for possession of the properties is not barred. So also a suit for *khas* possession by the plaintiff against his co-sharer landlord on the ground that he had purchased the tenancy in Court auction in a suit for rent against the tenant in which the co-sharer landlord also was a party. 60 C. 1401=149 I.C. 11=1934 C. 277. If the profits are not ascertained, a fresh suit to ascertain their amount is maintainable. 33 I.C. 83. Ascertainment of mesne profits is a matter to be decided in suit and not in execution. 12 P.L.T. 127=1931 P. 1. Section 47 is no bar to a suit for actual possession by a purchaser who obtained symbolical delivery after confirmation of the execution sale. 20 C.W.N. 675=23 C.L.J. 587 (26 M. 740, Diss.). Nor to a suit by purchaser who was dispossessed by judgment-debtor after conclusion of execution proceedings. 164 I.C. 260=1936 R. 298. As to when execution proceedings terminate, see 1936 Pesh. 85. A suit by the decree-holder for rectification of a petition of adjustment, in which a mistake has crept in and upon which an order recording satisfaction of the decree has been passed, is maintainable and not barred by the provisions of S. 47, C.P. Code. 165 I.C. 756=40 C.W.N. 914=1936 C. 400.

CASES WHERE SEPARATE SUIT WILL NOT LIE — Objections by the judgment-debtor to the execution of a decree fall under the section. 46 M.L.J. 240; 22 I.C. 926=12 A.L.J. 12; 151 I.C. 617. If objection to execution is taken by a party to the suit, S. 47 applies and not O. 21, R. 63. 16 I.C. 255 (A.). Whether or not execution of a decree is barred. 2 P.L.R. 222=1924 P. 683. Whether the decree is valid. 54 C.L.J. 593; or is capable of execution, 140 I.C. 533. That the decree was a nullity having been passed against a dead person. 28 Bom.L.R. 1367=98 I.C. 927=1927 B. 53; 38 C.W.N. 1124=60 C.L.J. 102. But see contra, 148 I.C. 418=1934 O. 167, 27 A. 316. The legality of the execution proceedings and jurisdiction of the executing Court to order sale. 120 I.C. 279=1929 L. 449. As to decree which is wholly without jurisdiction as against a Cantonment Board, see 144 I.C. 1016=1933 A.L.J. 162=1933 A. 163. That the Court had no jurisdiction to pass the decree and was against S. 42 of the Co-operative Societies Act. 31 C.W.N. 739=103 I.C. 644=1927 C. 578; or is otherwise a nullity. 103 I.C. 673=1927 L. 651; 1929 L. 449; 1930 R. 337 (2), 60 C.L.J. 572=156 I.C. 405 (2)=1935 C. 396. But see 1929 M. 383. The effect of irregularity or illegality of notice issued under O. 21, R. 16:

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56 I.C. 451. Objection to want or defect of attachment. 1930 M. 414, 34 L.W. 809. An improper seizure of a judgment-debtor's property by the decree-holder in excess of his rights. 38 A. 339. The right of a transferee of a decree to execute the same. 28 I.C. 906 (M.). But see 1929 L. 51. The right of alleged true owner to execute decree obtained by benamidar when questioned by judgment-debtor. 1928 C. 835. Where a scheme decree is executable in itself, a suit to declare invalid acts done under such a decree will be barred, and the remedy of the aggrieved party must be sought in execution proceedings. But when there is no executable decree, a suit is not barred. 18 N.L.J. 110. Whether the decree against a shebait is capable of execution against his successor. 14 C.L.J. 337. Whether time is of the essence of a consent decree for specific performance. 125 I.C. 123=1930 P. 234. An objection by the judgment-debtor that a scheme sanctioned by the Court under S. 153 of the Companies Act has superseded the decree which has, therefore, become incapable of execution, relates to the execution or discharge of the decree and comes within S. 47. 41 C.W.N. 406. An agreement by which the decree-holder agrees not to take out execution against the person of the judgment-debtor and not to attach certain moneys due to the judgment-debtor from a third person should be given effect to by the executing Court. The question as to the mode of execution must be determined in execution proceedings and not in a separate suit. 4 A.W.R. 1446. See also 39 C.W.N. 1036. An agreement for stay of execution of decree before the decree is passed is a matter to be enquired into under S. 47. 40 M. 233=32 M.L.J. 13 (F.B.); 22 B. 463. But see *contra* 31 C. 179; 29 C. 810; 100 I.C. 156=28 Punj L.R. 71; but not so the agreement made prior to decree to execute for lesser sum. 4 R. 118. Pre-decretal arrangements relating to execution fall under S. 47 but not those attaching the decree itself, e.g., credit for pre-decretal payments. 60 M.L.J. 721=54 M. 184. Judgment-debtor's objection about the existence of other legal representatives to the deceased decree-holder who have not joined in the application. 1929 P. 232=119 I.C. 883. The question whether a decree against a Hindu father is capable of execution against the son, the debt being tainted with immorality. 62 I.C. 905=6 P.L.J. 451. But see also 15 L. 772. An objection by the heir of a Hindu judgment-debtor that the debt was not for necessity. 13 I.C. 670 (11 M. 413; 17 M. 122, Dist.; 16 A. 449; 87 P. R. 1887; 147 P.R. 1907, 34 C. 642, Rel on.). But see 15 L. 772. A claim by person added as L.R. of deceased judgment-debtor of ownership or charge in his favour over property sought to be sold in execution. 127 I.C. 12=1929 L. 762; 51 A. 878=1929 A. 602. Decree against legal heir of the de-

ceased—Objection to execution by the executor on the ground that he was not a party to it. 149 I.C. 926=58 C.L.J. 487=1934 C. 258. Defendant against whom suit dismissed—Money of, paid in part satisfaction of a decree under erroneous but final orders of Court—Recovery back from plaintiff of—Defendant's suit fresh for—Maintainability. 58 M.L.J. 275. Also an application for the recovery of the land taken possession of by the decree-holder and either not covered by the decree or in excess of it. 23 C. 483; 2 A. 61, 45 A. 96; 1929 M.W.N. 811=123 I.C. 24, but see 125 I.C. 765. A party to a mortgage decree who does not raise the question of paramount title in the execution proceedings leading up to the sale of the property, is precluded from raising that question afterwards in a separate suit. 163 I.C. 619=43 L.W. 740=1936 M. 675=71 M.L.J. 511. Also a suit for declaration that the sale is not valid and binding on the ground that the mortgagee fraudulently and wrongfully caused to be sold properties which were not included in the mortgage and which could not lawfully be sold in execution, is not maintainable and is barred under S. 47. 40 C.W.N. 428. A suit does not lie for recovery of property included by mistake in the decree and sold in execution, where the sale was not set aside within time. 46 B. 914. An application for refund of excess amount levied in execution. 44 B. 97; 40 M. 780, 33 Bom.L.R. 1557; 144 I.C. 468=1933 A.L.J. 738=1933 A. 429. An application for restitution of property purchased by the auction-purchaser on the ground that certain properties not covered by the decree were sold, is not maintainable under S. 47. 45 A. 96. It is open to a decree-holder to re-open proceedings in execution of his decree, after satisfaction has been entered by an application in Court, on a proper case being made out. 158 I.C. 585=1935 C. 645. Where the sale is set aside, an application for restitution of the property sold may be made under the section and no separate suit lies. 16 M. 287; 22 A. 108. Where a decree is amended after full execution, an application for restitution may be made under the section and no separate suit lies. 27 A. 485; 22 A. 79; 5 C.W.N. 627. As to whether suit lies for personal decree after sale of charged properties, see 62 C. 28=158 I.C. 1074=1935 C. 596. Whether the property underwent deterioration between date of decree and date of delivery of possession. 38 L.W. 714=1933 M. 825=156 I.C. 440=41 L.W. 323=1935 M. 280=68 M.L.J. 277; 158 I.C. 88=1935 L. 170. But see 145 I.C. 117=1933 L. 168, where it was observed that waste committed by defendant after decree cannot relate to execution, discharge or satisfaction of the decree. The right of a judgment-debtor to stay execution on the ground of fraud or negligence of the decree-holder where the execution proceedings are still pending. 22 I.C. 963. An enquiry into administrator's accounts in case of money

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decree against him falls under the section. 5 R. 44 An order in execution adjudicating the claims of an assignee decree-holder and a person claiming a charge over the properties is not appealable as it relates to a question between decree-holders *inter se* 24 L. W. 70=93 I.C. 649=1926 M. 691. The title of a purchaser in execution of a mortgage decree can be determined under this section. 54 C. 419 See also 53 C. 837. As to maintainability of an application for a fresh warrant for possession after dismissal of application for removal of resistance to possession, see 1933 N. 369 Orders under S. 73, C. P. Code, 1931 P. 357; 150 I.C. 970=1934 P. 350; liability to pay interest from date of decree, 1932 P. 237, granting or refusing payment by instalments, 1932 R. 54 Security bonds can be enforced in execution 45 A. 649 See also 56 M. 989=65 M. L. J. 342=1933 M. 691 (Security bond executed to the Court as a condition for the issue of temporary injunction); but see contra, 55 A. 346=1933 A.L.J. 142=1933 A. 269 (F.B.). (Order directing security to be furnished as a condition of stay held to be only declaratory and separate suit held necessary for enforcing the security bond). So also execution can be levied against surety. 143 I.C. 356=56 C.L.J. 576=1933 C. 343 Objection by surety thereto to be decided 1930 L. 399 Compromise decree in money suit creating charge over property not subject-matter of suit is executable and no suit is necessary to enforce charge 1930 N. 17 See also 60 C. 1467=149 I.C. 224=1934 C. 327 No suit lies after objection was considered and decided in execution application under S. 47 31 Punj L.R. 191; 1929 O. 256, 1930 O. 268 See also 60 C.L.J. 257. So also where objection was wrongly filed under O. 21, R. 58, C. P. Code instead of under S. 47. 1935 A.L.J. 74=1935 A. 183.

NO SUIT—No suit lies to set aside compromise or adjustment of decree effected by next friend of minor without sanction of Court during execution against minor. Minor's remedy is by application under this section or by way of review 17 P.L.T. 743=165 I.C. 857=1936 P. 506.

APPEAL ORDERS APPEALABLE UNDER THIS SECTION—Interlocutory orders dealing with mere matters of procedure can hardly be said to be determination of any question within S. 47 and are not appealable. There must be determination of the rights or liabilities of the parties as to the execution, discharge or satisfaction of the decree. 24 C. 725; 34 A. 530, 27 I.C. 444=20 C.L.J. 512; 5 R. 534=104 I.C. 324=1927 R. 317; 1929 L. 815, 1929 M. 718, 1929 A. 85 (1), 151 I.C. 61=1934 Pesh. 43 But an appeal lies against an interlocutory order passed in execution proceedings, where the order has the effect of reviving an application for execution dismissed for default 57 I.C. 905; also against an order on the question of

notice under O. 21, R. 22. 8 P.L.T. 28.

ASSIGNMENT—Where a decree is assigned and the assignee assigns it to another but the second assignee's application for permission to execute the decree and to recognize the assignment is opposed by the first assignee and the application is dismissed, an appeal is competent from the order of dismissal as S. 47 applies 57 M. 457=148 I.C. 55=1934 M. 181 (1)=67 M.L.J. 207. But an appeal by judgment-debtor would not be competent, 37 P.L.R. 305=155 I.C. 974=1935 L. 609. Also against an order allowing execution by an assignee decree-holder. 1934 L. 328.

ARREST—An order on a claim for exemption from arrest is appealable under S. 47. 47 M.L.J. 678. An order refusing to arrest the judgment-debtor in execution of a decree is appealable 4 L.L.J. 266=1922 L. 259 Also an order directing decree to be executed only against the property of the judgment-debtor and not against his person. 1924 L. 604 An order deciding the legality of arrest made in execution of a decree falls under the section. 32 I.C. 731=3 L.W. 35. When objection to the legality of arrest is not made at the time of committal to jail the order is not appealable 7 R. 110 Order to send judgment-debtor to jail on failure to give security is appealable 164 I.C. 459=1936 R. 367 Also an order refusing to make any further effort to apprehend the judgment-debtor 144 I.C. 255=14 P.L.T. 271=1933 P. 248 An order definitely dismissing execution application is an order under S. 47 and is appealable 1933 A. 732. So also an order refusing attachment of pay under O. 21, R. 48. 144 I.C. 927=35 Bom. L.R. 360=1933 B. 185 Order disallowing judgment-debtor's plea of limitation is appealable, 44 L.W. 486=164 I.C. 670=1936 M. 801=71 M.L.J. 388.

ATTACHMENT PROCEEDINGS—Where a judgment-debtor objects to the attachment on the ground that the attached property is *debutter* and that he holds it not in his private or personal capacity, but as *shebait* on behalf of a deity to whom the property has been dedicated in consideration of his performing certain services to that deity, the objection falls under O. 21, R. 58, C. P. Code, and not under S. 47 No appeal therefore lies against the order passed on the objection. 17 P.L.T. 810 Where a decree is passed against the assets of a certain person in the hands of his legal representative, and the legal representative makes an objection that the assets in question belong to her personally, the objection should be treated as one under S. 47, C. P. Code and not as one under O. 21, R. 58 Accordingly, an appeal lies from the order dismissing the objection, but no regular suit is maintainable. 1936 A.W.R. 1270=1937 A.L.J. 13=1937 A. 97 Where the executing Court finally negatives the right of the decree-holders to proceed against the land of the judgment-debtor, the order is appealable under S. 47. 2 L.L.J. 398. An order on an objection

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petition to an attachment put in by a defendant against whom the suit had been dismissed, is one under S. 47 though ostensibly put in under O. 21, R. 58. 1924 L. 589=115 I.C. 691, 150 I.C. 703=1934 P. 281. See also 44 L.W. 460=165 I.C. 59=1936 M. 812=71 M.L.J. 317 Where an objection under S. 47, questioning legality of issue of second warrant of attachment was rejected and no appeal was filed thereon, the question cannot be raised in appeal in the execution case which had nothing to do with that objection 1936 O.W.N. 47=161 I.C. 393=1936 O. 240.

SALE PROCEEDINGS—Where the judgment-debtor himself applies to have an execution sale set aside, a second appeal does lie from the appellate order dismissing an appeal from the lower Court's order dismissing the application as in such a case the provisions of S. 47, C.P. Code, apply 156 I.C. 699=42 L.W. 39=1935 M.W.N. 403=1935 M. 438 A decision of an executing Court as to the order in which properties were to be sold in execution, even though it is a question between judgment-debtors only, is one relating to execution within S. 47 45 M.L.J. 478, 53 A. 391 (mortgage suit) But an order passed on an application under O. 21, R. 64 and 66, C.P. Code, directing that the properties ordered to be sold by a mortgage decree shall be sold in a particular order is not a judicial order and is hence not open to appeal. 156 I.C. 141=42 L.W. 50=1935 M. 714 The order imposing certain conditions on a property being sold last is not appealable 51 A. 752. An order on objection by the judgment-debtor as to the correctness of the area of the land mentioned in the sale proclamation, is appealable as such decision may be said to determine the rights of the judgment-debtor in certain respects 145 I.C. 386=34 P.L.R. 851=1933 L. 383 Order passed in a dispute between the decree-holder, who is also the auction-purchaser and the judgment-debtor relating to the grant of a certificate of sale is appealable. 153 I.C. 85=37 P.L.R. 116=1935 L. 144 (2). An application for setting aside an auction-sale on the ground that the judgment-debtor had no notice of the settling of the proclamation under O. 21, R. 66 falls under S. 47 of the Code and second appeal is open to the parties. 1930 M. 489. But see 153 I.C. 992=1934 C. 761. Order setting aside sale on ground that executing Court had no jurisdiction to sell without attachment 164 I.C. 140=1936 L. 573. Decree-holder purchaser—Order under O. 21, R. 90—Second appeal lies 1930 N. 191 An order rejecting an application by the decree-holder auction-purchaser for possession of the property as being barred by time is appealable 56 C.L.J. 520=1933 C. 311.

RATEABLE DISTRIBUTION—An order under S. 73 rejecting an application for rateable distribution is neither an order under S. 47 determining questions between parties nor

a decree under S. 2 (2) and hence is not appealable. 57 I.C. 421=5 P.L.J. 415. See also 42 C. 1; 1924 M. 97; 55 B. 473; 1931 B. 252 But see 31 M.L.J. 820 Orders under S. 73 are appealable, if they affect parties to the suit under S. 47, especially when the appeal is by the judgment-debtor who cannot avail himself of the right of suit given by S. 73 (2) 39 M. 570=29 M.L.J. 96, 1931 B. 252. See also 150 I.C. 970=1934 P. 350 But where order under S. 73 only determines the rights of decree-holders *inter se*, it will not fall under S. 47 and no appeal will lie. 160 I.C. 892=1936 Pesh. 52; 59 M. 399=43 L.W. 31=160 I.C. 573=1936 M. 136=70 M.L.J. 33. An order not simply refusing rateable distribution but also dismissing execution application *in toto* is appealable. 98 I.C. 884=1927 L. 100; 1931 P. 359. An order of rateable distribution and of sale of the property attached by two creditors to satisfy the claims of the other creditors, after the making of deposit under O. 21, R. 55, of a sum sufficient to discharge the two creditors who made the attachment, relates to a question in execution within S. 47. 36 B. 156 Where order of Court is passed only under S. 73 and not under S. 47, no appeal would lie 162 I.C. 309=1936 L. 181; 160 I.C. 892=1936 Pesh. 52

RESTITUTION—Order for restitution under S. 144 falls under this section and is appealable. 43 L.W. 773=1936 M. 636 And so also order under S. 151 for something analogous to restitution made as between the parties (*ibid.*).

AWARD—The proceedings for enforcement of an award under S. 15, Arbitration Act, are governed by S. 47, C.P. Code, and an appeal is competent from an order rejecting such application 151 I.C. 881=35 P.L.R. 635=1934 L. 49.

STAY OF EXECUTION—An order staying execution proceedings is appealable 75 I.C. 419 An order refusing stay of sale falls under S. 47 and is appealable 75 I.C. 789; 1924 L. 631; 75 I.C. 1001. But see 27 I.C. 444=20 C.L.J. 512, 141 I.C. 841=16 N.L.J. 17=1933 N. 84. See also 39 C.W.N. 313 Whether an order for security to stay execution amounts to a decree or appealable order, see 5 R. 534; 106 I.C. 890 (2). No appeal lies from an order accepting security in execution proceeding. 106 I.C. 866 (2).

SATISFACTION—An order on an objection that a sum paid in part satisfaction of decree has not been given credit to is appealable. 1934 C. 761. So also an order allowing objection by the judgment-debtor that the mortgagee had been in possession of the land and had realised more than the amount due under the decree 142 I.C. 313=34 P.L.R. 373=1933 L. 361. Also an order determining objection under S. 60, C.P. Code to sale. 1929 L. 778 (2); 1931 L. 141. Similarly an order dismissing judgment-debtor's application for time to pay the decree amount. 1929 L. 141. See also 1935

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R. 500 Also an order deciding whether the whole decree amount has become payable in an instalment decree by reason of default in one instalment 1929 L 390.

MISCELLANEOUS—An order directing execution to issue against a judgment-debtor is one under S 47, determining the rights and liabilities of parties with reference to the relief granted 19 C L.J. 581=26 I. C. 866=19 C.W.N 1008. An order refusing to discharge a receiver appointed in an execution proceeding is within S 47. 3 P.L.J 513=46 I.C. 655 Also an order allowing execution of a decree alleged by the defendant to be declaratory in nature. 37 M 29=21 M L.J. 1063. An order requiring a Receiver to deposit in Court money part of which was collected by him as a party to the suit (the party being appointed as Receiver) and prior to his appointment as Receiver, is in substance and effect an order directing a party to make a payment and is one in execution That part of it is appealable under S 47, C. P. Code. It does not fall under O 40, R 3 (c) 156 I.C 886=41 L.W. 763=1935 M. 464=68 M.L.J 628. Though no appeal lies against an order passed wholly and simply under S. 73, an order which decides a matter covered by S. 47 (1) may although it be passed ostensibly under S 73 be the subject of appeal. 16 L 990=156 I.C 845=1935 L 302. Decision of executing Court on application under O 34, R 5, C. P. Code is appealable. 38 P.L.R 259=164 I C 53=1936 L 562 An order directing an applicant to file another execution petition while refusing to execute the decree as asked for is appealable 160 I.C. 812=1936 Pesh 46 An agent of decree-holder competent to execute decree is also competent to file appeal against order refusing to allow execution. 164 I C 463=1936 L 508

APPEAL ORDERS NOT APPEALABLE UNDER THIS SECTION—An order disallowing the objection of a judgment-debtor that a fresh attachment is necessary is not appealable 34 A 530 An order in execution of a mortgage decree that there ought to be rateable reduction in the decretal amount is only an interlocutory order, as the Court has still to determine the market value and rateable liability of each item 1930 A. 638. Order directing restitution following on setting aside of sale is not appealable—If appeal wrongly entertained—Second appeal lies. 1930 P. 280. See also 35 C.W.N 105=1931 C 779 (2). Order overruling Collector's objections to alienability of land and directing him to proceed with the execution sale of the properties is not appealable being merely a direction by the Court to its ministerial officer 1929 L. 391. An order relating solely to jurisdiction does not determine any question relating to the execution, discharge or satisfaction of a decree. 52 I.C. 461=4 P. L.J. 461. No appeal lies against an order dismissing "as informal" a decree-holder's

application to set aside dismissal of a prior execution application 1928 L. 811 (2). Nor against order allowing amendment of execution petition. 44 L.W. 99=164 I.C. 217=1936 M 623=71 M.L.J. 256. No appeal lies from an order staying execution. 100 I C 23=9 L.L.J 193, 9 R 35=1936 O. W.N. 664=164 I C. 424=1936 O 369 See also 80 I C 39=1924 A 794 (Order as to costs in granting stay). No appeal lies against an order refusing to stay execution. 100 I.C 76 (2)=1927 L. 235, nor against an order rejecting security. 102 I.C. 621=1927 L 527. Also 9 L.L.J 189 No appeal lies from an order refusing execution of a decree on the ground that it has been attached. The order does not fall under S 47, C. P. Code 154 I C 678=1935 O W N 331=1935 O. 272. No appeal lies against an order directing respondent to draw out costs on furnishing security. 5 R. 534. Acceptance of sufficiency of surety by lower Court where order for furnishing security to the satisfaction of lower Court was made by High Court is not appealable. 59 M L. J 892 See also 32 P.L.R 806. An order settling sale proclamation is not appealable. 46 M.L.J 192, 27 M. 59=14 M L.J. 57 (F B); 1929 L. 815, 134 I C 833, 1934 C 761 So also an order fixing value of properties to be sold 99 I.C 455=1927 A 208, 6 O W N 1085, 56 M L J 224. Also an order under O. 21, R 99 on application by the decree-holder auction-purchaser. 1930 L 363 So also order refusing payment to decree-holder out of monies deposited under O 21, R 90, C P Code. 58 M 972=1935 M 842=69 M L J. 349 (F B) Also order deciding question of delivery of possession between judgment-debtor and decree-holder auction-purchaser is not appealable. 8 R. 162=126 I.C. 209=1930 R 61 But see 53 C 781 (F B.); 60 C 832=37 C.W.N. 671=1933 C. 680, 56 C L J 520=1933 C. 311 Order directing party to pay Receiver's remuneration is not appealable 1930 L 352 Also an order directing execution against a surety to a receiver ordered to pay up monies 59 I.C. 844=10 L B R. 236 An application by the Official Receiver of an insolvent's estate praying that certain property of the insolvent attached and brought to sale by a creditor should be released from attachment and that the sale should be stayed or that the sale proceeds should be deposited in Court pending determination of the question as to who is entitled to them, is really a claim or objection under O 21, R 58 and no appeal lies against an order dismissing such application 41 L W 28=1935 M 151=68 M L J 78 Where objection filed by a stranger was allowed, no appeal is competent as against the objector but the Court can treat the appeal as an application for revision and disposal of it. 145 I C. 730=1933 L 421 An order passed in execution by Civil Court remitting award made under co-operative Societies Act to arbitrator for rectifica-

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional court-fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

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tion of some errors therein is not appealable, but a revision lies. 164 I.C. 802=40 C. W.N. 89. Orders made in pursuance of a provision in a scheme are not orders under S. 47 and are not appealable. 1930 M. 918=128 I.C. 515, *eg*, an order approving the appointment of a trustee in a scheme decree. 1931 A. 76b; an order relating to the modification of a scheme, 55 B. 414; an order passed by the Court as *persona designata* under the scheme, 1931 B. 388=33 Bom.L.R. 546. An order under O 21, R 99, 58 C. 808; an order directing the mode of taking out execution, 1931 A. 129 (2). But see 1933 B. 185; an order refusing to set aside a sale, 1932 A. 530. An order negating the objections by the judgment-debtor to the execution of a decree and directing execution to proceed. 64 M.L.J. 735=144 I.C. 929=37 L.W. 749=1933 M. 500. Where there is an appeal as from an order under S. 2, C. P. Code, it would be difficult to bring the matter under S. 47 so as to render a second appeal maintainable. 33 C.W.N. 1170. As to appeal against order in delivery proceedings between rival purchasers in execution of a mortgage decree and a decree in suit enforcing a charge created by a security bond, see 56 M. 909=145 I.C. 871=65 M.L.J. 407=1933 M. 780.

Sec. 47 (2).—Power of Court to treat application as suit. See 39 M.L.T. 579; 7 O.W.N. 887. The applicant is not entitled for a conversion as of right. 27 I.C. 570. See also 16 I.C. 543. Where application purporting to be both under S. 47 and O 21, R. 58 was made but was dismissed on merits and thereupon suit was filed by applicant for declaration that attached property was hers and not liable to attachment *Held*, that the suit was incompetent and could not be treated as an application under S. 47. 158 I.C. 410=1935 M. 923. See also 159 I.C. 960=1936 P. 268. A suit can be converted into an application only if the application under S. 47 would not, at the date of suit, be time-barred. 34 I.C. 774=7 L.W. 400; 45 I.C. 608, 35 B. 452, 53 C. 837, 7 O.W.N. 887; 130 I.C. 117; 60 M.L.J. 219, 471, see also 138 C.W.N. 996, 60 C. 1467=1934 C. 327. Also the Court in which the suit is brought must have jurisdiction to execute the decree. 22 A. 121, 26 A. 101, 29 A. 348; 32 M. 425, 54 C. 419. Thus where a party to a Small Cause suit whose objection to an attachment made in execution of the decree in that suit is dismissed, files a declaratory suit in the Munsif's Court, the suit cannot be treated as a petition under

S. 47 as such an application can be made only in execution proceedings in a Small Cause Court. 1934 A. 699. Where a suit is brought for restitution in spite of the provision in S. 144, it is open to the Court to treat the suit as proceeding in execution in the exercise of its powers under Cl (2). 67 I.C. 319=1922 N. 198. For a converse case, see 1930 M.W.N. 1245. A prior order in execution which led up to the suit would not operate as *res judicata*. 4 O.W.N. 1045; 35 L.W. 103. A decree passed in a suit barred under this section would still be upheld as an order passed on an application under the section, if it is otherwise good in law. 14 C. 605, 22 C. 483, 28 M. 64; 32 C. 322; 60 M.L.J. 471. Where the proceedings are treated as a suit in the hearing of any objection to the execution, the objector is in the position of a plaintiff and the burden of paying Court-fee falls upon him and not on the decree-holder. 149 I.C. 1003=1934 P. 9. The bar of S. 47 can be pleaded for first time in second appeal and the suit converted into an application at that stage. 1928 M.W.N. 601. As to whether sub-S (2) applies to preceeding on Original Side of High Court, see 40 C.W.N. 428.

Sec. 47 (3).—See 82 I.C. 604. The question whether certain persons are legal representatives of judgment-debtor is one which executing Court is bound to decide. The decision on such a question is open to appeal. 39 C.W.N. 313. Sub-S (3) of S. 47 must be read as ancillary to sub-S (1) and only comes into operation where there is a question arising between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree and it does not apply to a case where the question is between rival representatives of one party the other party having throughout disclaimed any interest. 57 B. 641=146 I.C. 336=35 Bom.L.R. 609=1933 B. 396. The question of the representative character of a party can be determined only for a limited purpose under S. 47. 43 I.C. 165=11 S.L.R. 74, 117 I.C. 122. Where a person applies to be brought on record as the representative of the judgment-debtor so that he may raise a question to be decided under S. 47, the proper Court to entertain the application is the Court executing the decree. 55 I.C. 812=11 L.W. 173. Under S. 47 (3), a statutory obligation is laid on the Court seized of execution proceedings to determine the question whether a particular person is or is not the representative of a party to the decree. When such a question arises in the appellate stage of the proceedings under S. 47, the question must be decided by the

Explanation.—For the purpose of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Limit of time for execution.

48. [S. 230, paras. 3 and 4] (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

Notes.

Court of appeal 150 I.C. 425=11 O W N. 917=1934 O. 337.

COURT-FEE FOR APPEALS—*Ad valorem* fee not payable 113 I.C. 270.

LIMITATION—Application under S. 47 is governed by Art. 181 and not by Art. 166 of the Limitation Act. 1928 C. 865; 1930 C. 586.

PLEA AS TO BAR OF SUIT—A plea that a suit is barred by S. 47, C. P. Code, not raised either in the pleadings or in either of the lower Courts cannot be entertained in second appeal 9 Luck. 365=147 I.C. 910=11 O W.N. 193=1934 O. 55

Sec 48 SCOPE AND OPERATION OF THE SECTION.—Saving decrees granting injunctions, S. 48 applies to all decrees. 26 I.C. 244 Section 48 deals with the maximum limit of time prescribed for execution and not period for each application 46 A. 73 Section 48 does not strictly provide a period of limitation but merely bars the execution after 12 years 40 A 198 Sections 19 and 20 of the Limitation Act cannot be applied to S. 48, C. P. Code, because that would render the provisions of S. 48 nugatory. The question of their applicability to S. 48 must be decided without reference to the provisions of S. 29, Limitation Act, because S. 29 does not include the Code in its scope, as a "special law". So acknowledgments and payment by the judgment-debtor cannot operate to extend the period of 12 years fixed by S. 48 151 I.C. 541=11 O W.N. 1103=1934 O. 465. As to the effect of Art. 182 of the Limitation Act, see 1932 O. 220=9 O W N. 430, 60 C.L.J. 123 The section does not apply to decrees passed by Chartered High Courts on account of sub-S. (2), cl. (b). See 6 B. 258; 7 M. 541, nor to orders in Council made on appeal to the Privy Council. 20 C. 551. S. 48 has a retrospective effect and governs an application for the execution of mortgage decree passed before the Code came into force. 45 B. 365; 19 I.C. 899; 40 C. 704; 20 C. W.N. 952, 1 Pat L.J. 214; 27 I.C. 969=11 N.L.R. 25 But see 32 A. 499 (*contra*). The period begins to run only from the date on which the decree is in all parts ripe and

capable of execution. 36 B. 368 See also 43 A. 405; 48 A. 377, 34 C. 874. Section does not apply until the decree becomes executable. 33 Bom L.R. 1082. Section does not preclude an order for execution being made after 12 years if application is made within that period. 44 L.W. 805=71 M. L.J. 808 Section is governed by S. 78 (2) of the Provincial Insolvency Act. 8 O.W. N. 1186=1932 O. 69. See also 54 I.C. 924. S. 48 covers compromise decrees. 39 B. 256 See also 14 P. 816=156 I.C. 297=16 Pat L.T. 506=1935 P. 380 The executing Court cannot extend the period prescribed by the section under S. 15, Limitation Act 45 M. 785=43 M.L.J. 168. See also 54 I.C. 279, 1931 L. 125=131 I.C. 345, 1931 O. 351; 9 O.W.N. 513=1932 O. 246. An agreement to desist from execution does not attract the provisions of S. 15 of the Limitation Act 52 M.L. 137. S. 6 of the Limitation Act does not extend period provided by S. 48 in favour of minors 27 I.C. 865=13 A.L.J. 166; 36 B. 498, 37 M. 186=24 M.L.J. 96; 1929 M. 394=30 L.W. 361 But see 32 Bom L.R. 1093 The period prescribed in S. 48 begins to run from the date of the appellate decree, even when it is held that no appeal lies. 43 A. 405; 34 C. 874 See *contra* 48 A. 377. See also 32 A. 136 (Second appeal). It is so even when a portion only of the original decree was appealed against. 21 M.L.J. 1020. See also 26 M. 91. But where an appeal is dismissed for default, the period runs from the date of the original decree. 47 I.C. 125=5 O.L.J. 252 Where a decree is amended, the date of the amendment is date of the decree. 60 I.C. 318. Pendency of appeal by judgment-debtor does not cause suspension of execution where there is no fraud or force. 32 I.C. 931=20 C.W.N. 686. Decree-holder cannot by binding himself not to execute a decree allow himself more time than the law gives him. 13 I.C. 88=15 C.L.J. 678. The time spent in obtaining the Conciliator's certificate under S. 48 of the Deccan Agriculturists' Relief Act can be deducted. 42 B. 367. A mortgage decree-holder will have 12 years to perfect the preliminary decree into an order absolute under S. 89, T. P. Act and another

(a) the date of the decree sought to be executed, or

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

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12 years for executing the order absolute. 39 M. 544. But see 46 B. 761 (a case of decree under the Decan Agriculturists' Relief Act). 15 P. 439=1936 P. 615 (Decree under Chota Nagpur Tenancy Act). Where execution of a suit is barred, a fresh suit on the basis of the decree is barred 43 A. 170. See also 38 A. 509. But see 28 I.C. 85 (11 C. 93, Ref.). Nor can a fresh suit on the same cause of action be instituted. 41 M. 641=34 M.L.J. 167. See also 43 B. 703. As to whether an action can be maintained on a judgment, see 20 C.W.N. 58=20 C.L.J. 272. Mere passing of a preliminary decree in any foreclosure suit does not put an end to relationship of the mortgagor and mortgagee. If the mortgagor fails to redeem within six months and no final decree is passed, he can bring a fresh suit for redemption. 39 B. 41. Plea of twelve years' bar cannot be allowed for first time in appeal. 1929 M. 826=123 I.C. 23. As to whether this section applies to decrees of Presidency Small Cause Courts, see 26 S.L.R. 85 and 91.

WHEN AN APPLICATION MADE OUT OF TIME MAY BE TREATED AS CONTINUATION OF A PREVIOUS APPLICATION MADE WITHIN TIME—See 21 I.C. 923 (C.); 16 I.C. 541 (C.), 41 M.L.J. 378; 38 I.C. 411; 54 A. 419; 33 Bom. L.R. 1082; 1931 B. 492; 148 I.C. 1017=1934 A. 481 (F.B.). Prior execution application assigned to record-room—Subsequent application is only continuation thereof and is not affected by S. 48. 123 I.C. 113=1930 L. 647. See also 1935 L. 918. Decree-holder attaching agricultural land and applying for temporary alienation—Subsequent appointment of Receiver—Not one in continuation of previous application. 1936 Pesh. 209. See also 1937 P. 43, 1937 N. 92. In order that an application may be treated as a continuation of another application within time, it is necessary that the two applications must be of same nature. 34 A. 396. See also 52 M.L.J. 137=1927 M. 347. It is also a necessary condition that the previous application should not have been dismissed for default on the part of the decree-holder. 72 I.C. 862. The execution of a decree is not barred merely because the application for restoration of an execution petition made within 12 years but struck off on account of insufficient process-fees, is made after 12 years. 33 A. 57. See also 3 Pat.L.J. 103=44 I.C. 560. If on an application for execution by issue of a precept, the Court

issues, instead, prohibitory orders, which are illegal, all these orders must be ignored and it must be assumed that the application for execution is still pending in Court and no proper order has been passed thereon. The Court is, therefore, competent to pass a proper order by issue of a precept on the basis of the original application, even after the expiry of 12 years from the date of decree. 152 I.C. 685=1934 L. 610 (2). See also 161 I.C. 960=1936 L. 843 (Release of property from attachment on objection—Application for re-attachment after dismissal of objection is no fresh application for execution). See also 1937 N. 92; 166 I.C. 950=18 Pat. L. T. 90=1937 P. 43. Section applies only to fresh execution application and not to amendment of pending execution petitions. It does not matter that the application or order for amendment was made after the prescribed 12 years. Amendments which in substance create a new execution application should not be allowed. 1928 M. 1154. See also 59 M.L.J. 579, 134 I.C. 730=1931 B. 425 (2). Applications, which are only ancillary to the main application are not barred under this section. 1937 N. 92. The period of 12 years prescribed by S. 48, ought to be taken to run from the date of the original decree. The period so fixed is final and cannot be extended by any amendment of the decree, an amendment of the decree does not give a new date for starting a period of limitation. 151 I.C. 541=11 O.W.N. 1103=1934 O. 465. See also 1935 L. 292. An application to transfer a decree to another Court for execution is not an application to execute within this section. 20 A. 78, 16 C. 744, 22 C. 921; 35 B. 103, 34 A. 396; 95 I.C. 96 (2)=1926 A. 660. Application for execution to transferee Court—If a continuation of prior application before transferring Court. See 1935 L. 508, 1937 N. 92. Rent decree against *daipatindar*—First application for execution of, on footing that decree created a charge on tenure—Three subsequent applications on footing that decree was a mere money decree—Fifth application on footing that decree created a charge on tenure—If a continuation of first. 57 M.L.J. 184=33 C.W.N. 977 (P.C.).

Sec. 48 (1) (b) —Under S. 48 (1) (b) the subsequent order must be an order in the suit in which decree is made and an order which directs payment by the debtor or the surety of money in respect of the judgment-debt. Where order was made at

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of

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a time when some of the property which was believed to be the property of the debtors was the subject of some suit in the nature of an administration suit in which the receiver was appointed and application for order against the Receiver was made in the absence of judgment-debtor and surety, *held*, that it did not fall within S. 48 (1) (b). 60 I.A. 43=12 P. 195=141 I.C. 760=1933 P.C. 52=64 M.L.J. 599 (P.C.). To render the clause applicable there must be an order of Court directing the payment of money on a certain date. Arrangement made between the parties out of Court is of no avail. 72 I.C. 477. Where Court accepted the compromise that decretal amount should be paid by instalments, it would operate to extend the period. 73 I.C. 671=1923 L. 381. *See also* 34 I.C. 393 (M.). Order under S. 48 (1) (b) must be made by the Court which passed the decree. 73 I.C. 794=1923 L. 678, 40 A. 198; 2 P.L.T. 80=58 I.C. 393. But *see* 95 I.C. 243=1926 L. 463. Order of executing Court granting time to the judgment-debtor is not a subsequent order directing payment of money within the clause, and does not operate to extend the period. 40 A. 198. *See* 57 C. 789=1929 C. 687. Order of executing Court regarding *realization of the decretal amount by instalments* does not amount to a "subsequent order" within the meaning of S. 48, cl. (1) (b). 162 I.C. 715=1936 O.W.N. 517=1936 O. 266, 54 A. 573 (F.B.), nor a subsequent compromise order made in execution proceedings. 14 P. 816=156 I.C. 297=1935 P. 380. If an *instalment decree* provides for payment of whole sum on default of any instalment, time runs from the date of the first default, in respect of the whole claim. 49 I.C. 497; 24 C. 281. *See also* 162 I.C. 673=1936 L. 159; 1928 A. 629. *See* 33 Bom.L.R. 459=1931 B. 263; 1932 L. 564=132 I.C. 255. Where some defendants only appealed and the others were not made parties to appeal, limitation for the non-appealing defendants starts from date of first Court's decree. 30 C.W.N. 306=95 I.C. 257=1926 C. 664. Decree directing money to be recovered from one party—On default money to be recovered from another—If barred 12 years from date of decree. *See* 48 M. 846=49 M.L.J. 498=1926 M. 20. Where mortgage decree directed sale of mortgage property and the balance to be realised from other properties and the persons of the defendants, limitation for execu-

tion of the latter part of the decree runs from date of the decree. 45 I.C. 436=22 C.W.N. 145 (P.C.), in effect overruling 40 M. 989=31 M.L.J. 513 (F.B.). *See also* 43 I.C. 122, 29 I.C. 556 (M.). Mortgage suit—Compromise decree—Other properties offered as security—Default in abiding by terms of compromise decree—Suit on the basis of compromise decree—Application for personal decree—Limitation. 114 I.C. 792. Whether time runs from date of decree or date of sale for execution against person in a case where a combined decree against the person and property of mortgagor, *see* 50 M. 5=52 M.L.J. 256. Where mesne profits are ascertained in execution, application for its recovery should be made within 12 years from date of decree and not from date of its ascertainment. 53 M.L.J. 440. If a decree compromises different items, decree-holder is entitled to a period of 12 years to execute his decree regarding each item commencing from the time each becomes recoverable by him. 152 I.C. 685=35 P.L.R. 548=1934 L. 610 (2). As to execution by Collector, *see* 151 I.C. 541=11 O.W.N. 1103=1934 O. 465.

FRAUD.—Fraud or force need not have occurred within 3 years of the application. 53 I.C. 862=10 L.W. 566. Nor is it necessary to show that it extended continuously for 12 years. It is sufficient if it is shown that the judgment-debtor on various occasions prevented the execution by fraud. 12 I.C. 793=14 O.C. 238. *See also* 22 M. 320, 35 M. 670=22 M.L.J. 35. S. 48 (2) (b) extends the period to 12 years from the time when the decree-holder was prevented by fraud of the judgment-debtor, from executing the decree. 34 A. 20=11 I.C. 672=8 A.L.J. 1020. (7 C. 566, Dist.) To claim exemption under S. 48 (2) (a), it is enough if the decree-holder merely proves a fraud having been committed by the judgment-debtor. It is not necessary for him to prove further by evidence that because of that fraud he was actually prevented from executing the decree within 12 years. 40 L.W. 694=67 M.L.J. 751. 'Fraud' should be understood in a large and liberal sense. 44 A. 319; 24 M.L.J. 270. *See also* 35 M. 670=22 M.L.J. 35; 54 A. 513. The term should be interpreted in a wider sense than that in which it is generally used in English law. 13 I.C. 88=15 C.L.J. 678, 6 M. 365; 80 I.C. 905. It includes, except with reference to contract, circumvention. 25 A.L.J. 842=103 I.C. 277=1927 A. 668. Delaying execu-

the decree at some time within twelve years immediately before the date of the application; or

(b) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877.

Transferees and legal representatives.

49. [S. 233.] Every transferee of a decree shall hold the same subject to

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tion by frivolous, futile and dishonest objections on the part of the judgment-debtors amounts to fraud 44 A. 319; 1930 M.W.N. 729=128 I.C. 455 But see 53 A. 419. But objection which ultimately proves unsuccessful will not amount to fraud The fraud should be such as to prevent decree-holder from executing the decree. 13 I.C. 88=15 C.L.J. 678, 53 A. 419 The mere raising of objections so as to prolong execution proceedings beyond the period of limitation cannot, in all cases, be regarded as fraud for the purposes of S. 48. If the objections are patently frivolous, they can ordinarily and ought to be disposed of speedily by the Court if the decree-holders are diligent. An objection by a person to the attachment on the ground that the Executing Court had no jurisdiction to adjudicate on the question whether he was or was not a partner of the judgment-debtor firm cannot be regarded as dishonest. But where his objection that he was not a partner of the judgment-debtor firm is false and was adopted as a trick by which the decree-holders were forced by no fault of their own to delay execution proceedings until the period of 12 years had expired, his conduct in raising the plea is fraudulent and has the effect of enlarging the period of limitation 161 I.C. 960=1936 L. 843. "Fraud" is used in S. 48 (2) (a) in the ordinary juridical sense of the word; and what is contemplated is some action on the part of the judgment-debtor preventing the decree-holder from taking out execution proceedings and thus allowing time to run against him, or some action of the judgment-debtor which entices the decree-holder to hold his hand. Where the judgment-debtor only takes advantage of the procedure allowed by the law, he cannot be held to have prevented the decree-holder from executing his decree by "fraud", however obstructive he may be. To so hold would be stretching the language of the section beyond what is legitimate. 14 P. 816=156 I.C. 297=16 Pat. L.T. 506=1935 P. 380 An intentional avoiding by the judgment-debtor of arrest under a warrant by the decree-holder to avoid payment of decretal amount amounts to fraud 12 L.W. 710=60 I.C. 630; 47 M.L.J. 428; 6 M. 365. Also locking up the house to prevent attachment of moveable property.

9 B. 318, 22 M. 320. But keeping doors closed is *per se* no evidence at all of fraudulent conduct on the part of a paidanashim lady. 40 I.C. 399=4 O.L.J. 345. A fictitious transfer of property made in order to defeat or delay execution amounts to fraud. 4 M. 292; 80 I.C. 905. Also a deliberate evasion of the process of Court to defeat execution. 35 M. 670=22 M.L.J. 35. See also 13 I.C. 929=9 A.L.J. 17. Where execution of decree is prevented by the fraud of one of several judgment-debtors, extension of time will be allowed only against such judgment-debtor. 38 M. 419 [on appeal from 35 M. 670]; 1930 M.W.N. 729, 1930 S. 218. Court's refusal to allow execution to proceed against properties in Receiver's hands will not make S. 48 (2) applicable, when decree-holder failed to proceed within the 12 years against judgment-debtor's other available properties or against surety 1929 P. 597. Court sale—Auction-purchaser's right subsequently found against—Suit against decree-holder for recovering purchase-money—Payment by decree-holder and fresh application after 12 years of decree—Fraud alleged—Limitation ran from payment by decree-holder—Because of fraud S. 48 does not apply. 107 I.C. 653=1928 M. 152 The fraud proved against judgment-debtor can be availed of by decree-holder against legal representative of judgment-debtor, where decree is sought to be attached against assets of the deceased defendant in hands of legal representative 40 L.W. 694=67 M.L.J. 751. As to application to continue execution against legal representatives of judgment-debtor, see 31 Bom L.R. 858=1931 B. 425 (2).

RES JUDICATA.—The Court has jurisdiction to decide rightly or wrongly. Executing Court can determine whether application for execution is barred under S. 48. It may arrive at a wrong conclusion. The wrong decision is binding on parties unless it is corrected at their instance in appeal or revision. But so long as it stands it cannot be attacked collaterally in another proceeding, on the ground of want of jurisdiction in the executing Court. 61 C. 234=38 C.W.N. 348=151 I.C. 253=59 C.L.J. 35=1934 C. 282.

Sec 49.—S. 49 relates only to the stage of execution and has no application to a

Transferee.

the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

50. [S. 234.] (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

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suit for damages. 42 M. 338=36 M.L.J. 376. Judgment-debtor can attach the money deposited by him in Court towards a decree against him, which is assigned to one against whom he has a decree. 19 N.L.R. 164=1924 N. 46. For purpose of S 49 the equities have to be enforced even though the assignee might in fact have been one without notice. Otherwise the very object of S 49 would be in effect frustrated and its provisions rendered nugatory. So a right of set-off available to a judgment-debtor against the assignor decree-holder is also available against the assignee of the decree, though the latter had no notice 145 I.C. 767=1933 M. 215. The principle embodied in S 49 is the same as that enacted in S. 132, T P. Act, the right of set-off being an equitable right. If judgment-debtor has right to set up a cross-decree under O 21, R 18 he has that right also against the transferee of the decree-holder. The right is not however available where there is no cross-decree on the date when the decree is assigned. 37 C.W.N. 758=1933 C 865. Code does not contemplate any specific application to bring on record the legal representative of the judgment-debtor though in ordinary practice such a prayer is usually added in an execution petition. Hence an application for execution against the legal representative is valid and saves limitation even though it does not contain an express prayer for adding him 143 I.C. 844=38 L.W. 224=1933 M. 568.

Sec. 49 and O 21, R. 18 —Applicability and scope—Execution by assignee—Claim to set-off—Principles. 1937 A.L.J. 258=1937 A.W.R. 191=1937 A. 351. There is no inconsistency between S. 49 and O. 21, R. 18. If there be any, S. 49 will prevail. (*Ibid*)

Sec 50—"Dies"—Civil death is not contemplated 53 A. 529=1931 A. 306; 159 I.C. 390=1935 C 713. Execution may be had not only against the legal representatives of the judgment-debtor but also against the transferee who purchased the property pending execution proceedings 51 B. 37=29 Bom L.R. 60. See also 14 P. 732. Where the judgment-debtor dies in the course of the execution proceedings, there is no necessity for having the names of his legal representatives substituted. If the decree-holder executes his decree, it would only be necessary for him to proceed against the legal re-

presentatives after due notice had been given to them. 158 I.C. 419=1935 O.W.N. 1087. If a judgment-debtor dies during execution, it is irregular for the Court which has not passed the decree to proceed with the execution against the representatives of the deceased judgment-debtor, without fresh orders from the Court which passed the decree; under S 50, the application for such execution is to be made to the Court which passed the decree 168 I.C. 346=1937 P. 239. Where a decree is transferred to another Court for execution subsequent to the death of judgment-debtor an application to bring his legal representatives on record must be made to Court which passed decree and not to Court to which decree is transferred for execution (18 Bom 224, Fol; 55 I.A. 227, Dist) 36 Bom L.R. 443=1934 B. 215. A purely personal decree such as an injunction can be so executed. 1931 B. 280=133 I.C. 244; 1931 B. 482=55 B. 709. Duty of Court which passed decree to decide who are the legal representatives before transfer of decree. 1926 M. 411. Where wrong legal representatives were brought on record and real heirs having knowledge of the same did not object, decree is binding on them also or on any subsequent purchaser from them. 51 B. 125. Plaintiff must be diligent and implead all ordinary legal representatives under the law applicable if he wishes to bind them, but where he impleaded a person who was apparently the legal representative and there was no fraud or collusion, the estate would still be bound, if other persons turn out to be the actual legal representatives, provided that the plaintiff was ignorant of, or had no means of knowing the facts or circumstances by reason of which the proper legal representatives were other than those impleaded by him. 141 I.C. 580=34 P.L.R. 511=1933 L. 380. See also 144 I.C. 30=1933 M. 508. Where a judgment debtor died after proclamation of sale, and his legal representatives were not brought on record before sale actually took place, *held*, the sale was not a nullity and was not liable to be set aside 32 C.W.N. 418. Where, after the attachment of the immovable properties of the judgment-debtor in execution of a decree against him, and after the Court has passed an order for sale, the judgment-debtor dies and the sale is held without impleading the judgment-debtor's legal representatives, the sale is null and void and not merely irregular. 59 M. 461=43 L.W. 238=1936 M. 205=70 M.L.J. 162.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

Procedure in execution.

Powers of Court to enforce execution

51. Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

- (a) by delivery of any property specifically decreed;
- (b) by attachment and sale or by sale without attachment of any property;

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(F.B.) Death of party pending appeal to Privy Council does not nullify decree and it is executable 11 P 445=1932 P 261. Insolvency of judgment-debtor pending execution—Official Receiver necessary to be brought on record—Sale without notice to him invalid. 120 I C 889=1929 M.W.N. 168. Reversioner, to whom the life-estate holder has surrendered her estate, if legal representative of judgment debtor See 159 I C 370=1935 C. 713. Legal representative of a Hindu is liable to the extent of property coming to him without any distinction as to ancestral or self acquired property of deceased. 118 I C 396=38 Bom.L.R. 977 "Property of judgment-debtor"—Person governed by Dekkan Agriculturists' Relief Act—Liability for debt of deceased judgment-debtor 32 Bom.L.R. 320=1930 B 238 Suit against legal representative of deceased debtor should not be dismissed on the finding that defendant is not in possession of any estate of the deceased. It is a matter for determination in execution. 120 I C 333 The transferee Court can also substitute legal representatives. 1931 A L J. 166=1931 A 320 (2) But the proper Court for the purpose is that which passed the decree. The getting of an order of substitution is only a matter of procedure and if the application is erroneously made to the transferee Court, the defect may be waived 11 P. 445.

Sec 50 (2)—Once it is admitted or proved that the man sought to be made liable under a decree obtained against a deceased person has come into possession of assets belonging to the estate of the deceased judgment debtor, it is for him to satisfy the Court as to the extent of the assets received by him and to account for them 1933 R. 309. See also 71 M.L.J. 385 Where the decree-holder has any complaint against the legal representative for not properly administering the estate of deceased although he (decree holder) might have a remedy against him by filing a separate suit, he can deal with this point in execution of the decree itself. 1933

R. 309 Where step-sons are in enjoyment of income on account of property, though non-transferable (e.g., occupancy fields which belonged to their father), it is equitable that they should be legally bound to devote a due proportion of that income to the maintenance of the step-mother or the dependants of their father. In such circumstances a personal decree should be passed against the step-sons 142 I C 274 (1)=29 N L R 103=1933 N 57. See also 30 Bom. L R 977

Sec. 51. EXECUTION SALE.—S. 51 lays down the mode in which a Court may execute a decree. It does not give the Court any discretion to choose one particular mode of execution as against another. The Court has therefore no jurisdiction to direct a decree-holder to proceed against the property of the judgment-debtor when he desires to proceed against the person. (1926 L 110, 1934 N 140, Foll; 48 M. 494 and 11 I C 848, Dist., 29 I C 152, Diss.) 160 I C 812=1936 Pesh 46 Sale of property not belonging to judgment-debtor—Void or valid—Distinction in cases where property is *bona fide* believed to belong to judgment-debtor 52 M L J 148 Executing Court has power to order mortgage of judgment debtor's land, when the decree is against agriculturist 119 I C 231 (Lah) The power to grant a temporary alienation under S. 51 is derived from the power of sale and if the power of sale is taken away by the legislature all powers derived therefrom are similarly taken away. 161 I C 628=1936 Pesh 90 Decree holder asking for arrest is not bound to accept instalments 1930 L 220 Execution applications filed by decree-holder enure for benefit of receiver subsequently appointed for execution of decree 1929 B. 279=31 Bom L R. 320

Sec 51 (b)—Though a decree as being saleable property under S 60, is liable to be sold in execution, yet, High Court has power to make rule prohibiting the sale of a decree

- (c) by arrest and detention in prison;
- (d) by appointing a receiver; or
- (e) in such other manner as the nature of the relief granted may require:

1[Provided that where the decree is for the payment of money execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property; or

(b) that the judgment-debtor has, or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same; or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

Leg. Ref.

¹ Proviso added by Act XXI of 1936

Notes.

in execution of another decree. That having been done under R 178, Civil Rules of Practice, the rule being within the powers of the High Court under Ss 51 and 122, C. P. Code, a preliminary decree for partition cannot be sold in execution of a money decree 152 I.C. 789=1934 M. 692=67 M.L.J. 669

Sec 51 (c)—Under S 51 (c), it is not open to the Court, in absence of special circumstances, to say that decree-holder must proceed against the properties of the defendant before applying for his arrest. But there may be circumstances which would not only justify refusal of a warrant of arrest, but would even demand such refusal. Where properties of judgment-debtor are under attachment at instance of the decree-holder or such properties are the subject-matter of a decree on a mortgage at the decree holder's instance, and the judgment-debtor is precluded from raising money on the properties by reason of the decree-holder's action, a refusal of arrest would be justified 38 C.W.N. 1085. Receiver appointed in execution of one decree, other decree-holders need not apply for appointment of receiver for the same property—Status and duties of receiver. 1930 M 4 The High Court can on equitable grounds appoint receiver in execution for property in the mofussil. 57 C 964=34 C. W.N. 238=1930 C 502. The Court has no doubt jurisdiction to appoint a receiver of immovable properties in execution of a decree although such properties be situate outside the jurisdiction of the Court. But if the judgment-debtor objects to the appointment of a receiver in execution and if there is a reasonable chance of the decree-holder being able to satisfy his decree by attachment

and sale, he should be relegated to that remedy. In a case, however, where the properties of the judgment-debtor prove to be saleable, the Court is entitled to appoint a receiver in execution of properties outside the jurisdiction notwithstanding the judgment-debtor's objection thereto. 40 C.W.N. 1065 Decree—Execution by receiver mortgagee as against decree-holder—Capacity of receiver need not be mentioned in final mortgage decree—Receiver not affected by attachment before judgment or by parties entering into consent decree 31 Bom L.R. 320=1929 B 279. As regards the grounds for appointing receiver, see 8 O.W.N. 677, 35 C.W.N. 1066=1932 C 189=59 C 225, 1936 N 288, 71 M.L.J. 87 A person applying for appointment of receiver in execution of a decree must make out reasonable ground for the appointment. The mere fact that the judgment debtor presses the applicant to accept a smaller amount than the sum decreed or applies to Manager, Sind Encumbered Estates, for his aid does not constitute a valid ground for appointing a receiver, more especially when there is no danger of waste or destruction of the property 1933 S. 231=150 I.C. 473 An appointment of receiver by way of execution cannot be obtained where the decree-holders can execute the decree in the ordinary manner. (*Ibid.*) A Court has no power to appoint a receiver in respect of property which is not the subject of any suit or of any execution application. (*Ibid.*)

Sec. 51 and O 40, R 1. APPOINTMENT OF RECEIVER—DISCRETION OF COURT.—No doubt S. 51, C. P. Code, prescribes the appointment of a receiver as one of the modes in which a decree can be executed but the appointment of a receiver in all cases is subject to the provisions of O 40, R 1 of the Code and no receiver can be appointed in any case unless it appears to the Court that it is just and convenient that a receiver should be appointed.

Explanation.—In the calculation of the means of the judgment-debtor for the purposes of clause (b), there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.]

52 [S. 252.] (1) Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

Notes.

167 I.C. 302=1937 O.W.N. 243=1937 O. 232

Sec. 52: SCOPE OF SECTION.—As a general rule a decree must be against a person and not merely against something which is not a person, for example, the estate of a deceased person, though it may operate upon such estate by force of a direction to a person, who has the estate in his hands, to discharge the judgment debt out of it. This is what S. 52 provides for. A decree which merely states that the money could be recovered from the assets of a deceased person, without adding in whose hands these assets were to be found, is defective and inexecutable; the proper course is to apply to the Court which passed it to amend it. 151 I.C. 617=1934 M. 562 (2) Where the debtor dies before the suit and a defendant is sued as representing the deceased person's estate, the defendant, in order to bind the estate and the rightful owner, must substantially represent the estate, and where he does not substantially represent the estate, the Court has no jurisdiction to sell the estate and the decree would not bind the real heir. But where a debtor himself is a party to a suit and dies either in the course of the suit or in the course of execution proceedings and the Court by a judicial decision brings a person on the record as the legal representative of the deceased debtor, the decision however wrong will bind the estate of the deceased person, and the rightful heir cannot subsequently come and dispute the correctness of the decision or the jurisdiction of the Court to sell the deceased debtor's estate. 150 I.C. 323=1934 A. 474 Section does not provide for reservation of property to satisfy debts. 30 I.C. 256=18 M.L.T. 147. Liability of legal representative under this section and under S. 50 are the same. 7 M. 257. See also 89 I.C. 534=1925 O. 515. Where property in the hands of a son is sought to be proceeded for debts of the father, if it is proved that the son has received certain assets from father, onus is on son to give detailed information regarding the property received. 1933 L. 447. See also 148 I.C. 930=1934 L. 101 Section does not contemplate the insolvency of the deceased party. 22 C. 259. Written statement in the suit that no assets are available—Suit if to be dismissed. 49 A. 645=1927 A. 459, 25 A.L.J. 359. Suit on promissory note—Defendant's father and sons of deceased executant admit jointness of family—Proper course is to pass decree against assets and leave the liability of the proper-

ties under Hindu Law to be determined in execution. 116 I.C. 86 (1). A person holding a decree against assets of a deceased person can obtain satisfaction by attachment and sale of only such property as is shown to have formed part of the assets of the deceased. The onus is on the decree-holder. When there is a partition in the family and the properties in dispute are not dealt with at the partition, it is for the decree-holder to establish that the property attached formed part of the joint family property. There is no presumption that any particular property is joint family property. 148 I.C. 1113=1934 A. 249.

ASSETS—MEANING OF.—"Assets" include also property acquired after decree. On this point, see also 89 I.C. 477=1925 N. 449. "Assets" include rents and profits. 9 O.W.N. 315, 1932 L. 383. "Property" includes rents from immovable property. 2 Luck. 408. It includes share of temple offerings. 58 A. 457. Investigation as to assets may be made either in suit or in execution. 85 I.C. 768=1925 N. 380. Whether executing Court has power to inquire into administrator's accounts where a money decree is passed against him. See 5 R. 44. Arrears of maintenance due to a Hindu widow at her death are assets. 11 B. 528, but not maintenance paid under an arrangement in lieu of surrender. 129 I.C. 374=1931 A. 368. As regards partners, see 1931 S. 84=25 S.L.R. 374. Where the estate in the hands of the heirs of the original debtor against whose estate the decree was passed is liable for the satisfaction of the decree, then even the produce and income of that estate which has accrued after the death of the original debtor is liable to attachment and sale in satisfaction of such decree. 165 I.C. 802=1936 L. 236.

LEGAL REPRESENTATIVE—MEANING OF.—See 50 I.C. 951 (*Executor de son tort* is legal representative). See also 38 Bom.L.R. 977.

DECREE AGAINST PARTY AS LEGAL REPRESENTATIVE.—A legal representative can be sued without proving that assets have come into his hands, if there are assets of which he may become possessed. 8 B. 309. See also 13 B. 653; 33 A. 414=8 A.L.J. 199; 56 I.C. 962, 89 I.C. 235; 131 I.C. 862=1931 N. 173. If in a suit on a bond instituted after the death of the executant against his personal representatives, the Court is satisfied that at the time when the suit was brought the defendants had received no part of the assets of the deceased, the only course open to it is to dismiss the suit. 1936 A.W.R. 32. A

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

53. For the purposes of section 50 and section 52, property in the hands of

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creditor of a deceased coparcener is entitled to a decree against a surviving brother of the deceased without giving any proof that he has got possession over any property belonging to the deceased and held by the deceased separately apart from the joint family estate. When he applies for the execution of his decree then the question will come up for consideration whether the deceased has left any such separate assets. If the decree-holder can prove that the surviving coparcener has got any such assets, then he would be entitled to execute his decree against the surviving coparceners. 157 I.C. 51=1935 A.L.J. 293=1935 A. 390 S. 52 shows that there may be a decree passed against legal representative of a deceased person without showing that the deceased left any property and legal representative got that property. 49 A. 645=1927 A. 459.

Per *Ashworth*—S. 52 provides for the due application of the assets, i.e., of '*plene administravi*' being taken in execution proceedings. Therefore it must be inferred that it cannot be taken at an earlier stage. In English law the plea of '*plene administravi*' can certainly be raised by a legal representative sued on a debt due from the deceased. (*Ibid*) The fact that the estate is not in the hands of the legal representative, but in the hands of third parties, is no bar to a decree against him. 22 C. 259 Plaintiff must prove assets had or ought to have come to the hands of the defendant. 3 M.H.C.R. 161. See also 4 C.W.N. 151, 89 I.C. 477=1925 N. 449. A personal decree may be passed against the legal representative if it is proved that he has received sufficient assets. 20 M. 446 As to effect of obtaining decree against a wrong person as legal representative, see 15 Bom.L.R. 41; 34 A. 79, 1928 M. 243 When a wrong person is sued as representative and property is sold, the proper representative can sue. 9 B. 86. See also 11 M. 408; 11 C. 45. A decree against one representative does not bind the other representatives. 4 C. 142 See also 7 A. 822 (F.B.), 8 C. 370; 24 I.C. 280. Legal representative should account for mesne profits in the shape of rent or interest. 15 W.R. 285, 30 M.L.J. 391. Also liable for the assets realized by sale of the properties of the deceased. 12 W.R. 177. In case he fails to account for the assets come into his hands, he can be arrested in execution. 12 W.R. 117. Delay in bringing him on record does not absolve him from liability to account, though it may affect the quantum of proof. 129 I.C. 885=1930 L. 332 Absence of assets—Effect of. 1926 N. 170. Right of creditor to follow the assets in the

hands of the legatee should be exercised by suit. It cannot be exercised by levying execution against the assets in the hands of the legatee under a judgment against the legal representative. 34 C.W.N. 761=58 C. 170.

Sec. 52 (2).—S. 52 (2) does not apply so long as there are sufficient assets to meet the decree—Meaning of the words "such property". 1930 L. 354. See also 41 L.W. 350=1935 M. 298 Jurisdiction of Registrar of Presidency Small Cause Court to pass order under S. 52 (2). The creditors of the ancestor have a general lien upon the assets of the ancestor's estate for the payment of their debts and can follow such assets in hands of the heirs but not in the hands of other persons. If the heir has disposed of ancestor's property to other persons, who took the property without notice of the creditors' claims, then the creditors' right to follow the property is lost. That right cannot be revived to them by the fact that the heir has been adjudicated insolvent, and that his transfer of the property inherited by him has been set aside under the provisions of the bankruptcy law so that it now becomes available for distribution among his creditors. (22 B. 1, Rel. on) 12 R. 603=152 I.C. 558=1934 R. 162. Once it is admitted or proved that the legal representative of a deceased person had come into possession of assets belonging to the estate of the deceased, it is for him to satisfy the Court as to the extent of the assets received by him and to account for them. In such cases the *onus* is, in the first instance, on the decree-holder to prove that some assets had come into the hands of legal representative and when this is done the *onus* is shifted on to the latter to show the extent of the assets received by him and also to satisfy the Court as to how they had been applied. 148 I.C. 980=1934 L. 106. An heir of the deceased is for the purpose of S. 52 a legal representative of the deceased, and the property which he obtains as a result of an administration suit comes into his possession as legal representative. Therefore it is his duty under S. 52 (2) to satisfy the Court that he has duly applied this property. But where such heir disposes of the property so obtained before the passing of a decree against the deceased, his personal property is not liable to attachment in execution of the decree under S. 52 (2). 148 I.C. 1092=1934 R. 93 Rents and profits of property of a deceased person must be deemed as his assets. 137 I.C. 632.

Sec. 53.—This section is new, and gives effect to the rulings under the old Code in 34 C. 642 and 20 B. 385. The law laid down in 31 C. 224; 27 M. 243 and 28 M. 26 are not now good law.

Liability of ancestral property

a son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed,

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SCOPE OF SECTION.—See 20 Bom.L.R. 660=46 I.C. 745. See also 24 A.L.J. 273=40 A. 245=1926 A. 220. S. 53 is only meant to cover the case of a son or other descendant who under the section is to be deemed the legal representative of his ancestor with respect to property which was liable under Hindu Law for the payment of the debt of the deceased ancestor, in respect of which a decree had been passed. It does not apply where a share of a brother of the father has come to the son and no decree has been passed against the father's brother. Hence such share cannot be attached in execution of decree obtained against father. 159 I.C. 233=1935 L. 650. S. 53 deals with the liability of ancestral property in the hands of a son or other descendant for the payment of the debts of a deceased ancestor in respect of which a decree has been passed. Where the ancestor against whom a decree is passed is still alive, there is no question of enforcement of the decree against his legal representatives or against ancestral property in the hands of such legal representatives, and the entire family property is, therefore, not liable to attachment and sale under the section 158 I.C. 490=1935 O.W.N. 1113. S. 53 was not intended in any way to alter the liability of the property under the Hindu Law; the object of the section was to make it clear that the same remedy which might have been available by a separate suit is equally applicable in the execution department and that although strictly speaking it cannot be said that the joint family property in the hands of a son of a deceased Hindu owner is property which has come into his hands as the legal representative of the deceased, it must be deemed to have so come into his hands within the meaning of Ss 51 and 52 of the Code. The word "property" used in S. 53 does not mean any tangible property which is necessarily capable of being seized or possessed physically but must include proprietary interest in such property. Nor does the expression "in the hands of a son" necessarily mean property which is exclusively in the hands of a son without any partner or coparcener. 150 I.C. 411=1934 A.L.J. 483=1934 A. 590 (F.B.) See also 157 I.C. 945=1935 O.W.N. 1005=1935 O. 510; 41 L.W. 61=68 M.L.J. 104. S. 53 provides that a question as to what property would be liable in execution, is to be determined in execution proceedings and not by a separate suit. 16 I.C. 970=16 C.L.J. 85. On this section, see also 23 A.L.J. 467, 28 Bom.L.R. 1322, 41 L.W. 61=68 M.L.J. 104, 14 P. 732=16 Pat.L.T. 393=1935 P. 275 (F.B.). S. 53 was enacted to settle a question, on which there was a conflict of judicial decisions, namely, whether coparcenary property surviving to Hindu sons after the father's death can be proceeded against in execution of a decree against

the father. Section makes it clear that such property can be followed by the decree-holder in execution of his decree without obtaining a decree that the property is liable for the debts of the deceased. The section is not intended to allow the representative of a judgment-debtor in a mortgage decree to resist proceedings in the executing Court on the plea that the decree itself ought not to have been passed 1934 L. 438=15 L. 772. To make this section operative there should be a decree against the son as the legal representative of the deceased. 103 I.C. 338=1927 A. 683. But see 1930 N. 134. Decree against Hindu father—Attachment of joint family property—Insolvency and death of father—Application for execution against sons—If affected by insolvency of father See 38 Bom.L.R. 977. Decree against member of joint Hindu family—Execution against shares of other members except sons—Rights of creditor—Other members—If legal representatives. See (1937) 1 M.L.J. 224.

ILLUSTRATIVE CASES.—Grandson's liability as "other descendant" 1932 B. 522=34 Bom.L.R. 1005. See also 144 I.C. 397=1933 O. 309. It is only the son or lineal descendant of a deceased Hindu that comes within the scope of S. 53 45 A. 455. (42 B. 504, R.); 24 I.C. 280=1914 M.W.N. 354. A son is liable for the decree debts of his father to the extent of the ancestral properties unless the debt was for an illegal or immoral purpose. This is so even if the son was a party to the decree against the father. 20 A.L.J. 969=1923 A. 124, 15 L. 772=19 I.C. 252, 9 I.C. 631. The whole of the ancestral property and not merely that part of it in the hands of a Mitakshara son is liable for satisfaction of the judgment-debt. 16 I.C. 970=16 C.L.J. 85; 32 Bom.L.R. 919. A Hindu son can, under S. 47, have the question whether the debt had been contracted for immoral purposes, tried. 33 C. 676. See also 20 M. 385, 3 Pat.L.T. 43=1923 P. 142. Ancestral property of a deceased judgment-debtor is not an asset in the hands of his heirs. 11 I.C. 376=80 P.W.R. 1911. *Watan* property owned by a *watandar* is not after his death liable for his debts in the hands of his heirs under S. 53. A money decree obtained against a *watandar* during his lifetime cannot be executed against the *watan* property in the hands of his son 58 B. 218=151 I. C. 151=36 Bom.L.R. 169=1934 B. 116. A gratuity granted to the heirs of a deceased employee by a railway administration is not assets in the hands of his heirs 26 O.C. 53=1923 O. 21. Where a suit is instituted against the heirs of a deceased member of a joint Hindu family, for loan advanced to the latter, the actual existence of assets of the deceased need not be proved for passing of decree against the heirs. Decree can be passed against them to the extent of the assets of

shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative.

54. [S. 265] Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the [Crown]¹, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates.

Arrest and detention.

55. [S. 336.] (1) A judgment-debtor may be arrested in execution of a

Arrest and detention.

decree at any hour and on any day, and shall, as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the [Provincial] Government may appoint for the detention of persons ordered by the Courts of such district to be detained:

Leg. Ref.

¹ Substituted by Govt of India, Adap. of Indian Laws Order, 1937

² For the word "Local" the word "Provincial" has been substituted by Government of India, Adap. of Ind. Laws Order, 1937.

Notes.

the deceased that may be found in their possession. If no assets can be found, it is clear that nothing can be realised from them, but that is no ground for dismissing the suit 147 I C 138=1933 P 605. See also 1934 R 196

Sec 54 SCOP OF SECTION.—In case the Collector contravenes the direction in the decree or acts *ultra vires*, his action is subject to the control and correction of the Court 19 B 435, 28 B 238. The primary object of the section is to prevent the annulment of joint responsibility for the payment of land revenue. See 16 C. at p 205 and 24 C. at p 734 (F.B.). Section only applies to case of estates assessed to revenue in lump and not to those assessed at acre rates 95 I C. 39 (1)=1926 R 80. Nor to partition of a particular *moana* in undivided estate 1931 C 104=34 C.W.N. 895. Section does not apply to a suit for partition of a revenue paying estate when no separate allotment of revenue is asked for. [24 C 725 (F.B.), Foll.] 13 P 637=150 I.C 608=1934 P. 365. See also 146 I C 201=1933 Pesh 101. Where a Civil Court has passed a decree for partition of a revenue paying estate, a subsequent partition obtained from the Collector does not supersede the Civil Court decrees 13 P. 637=150 I.C. 608=1934 P 365. Section applies only to a case where decree comprehends the partition of the whole of the estate paying revenue to Government. It does not apply where decree is for separate possession of a share of a portion of an undivided estate 64 M L J 63=56 M 443. Per *Venkatasubba Rao, J*—What S. 54 refers to is the partition of the estate assessed to the payment of revenue and not the partition of the estate as well as the revenue. 56 M 443=141 I.C. 181=1933

M. 259=64 M.L.J. 63. For meaning of the words "for the separate possession of such an estate," see 34 C.W.N. 892=1931 C. 93=58 C 122; 64 M L J. 63=56 M 443

POWERS OF THE COLLECTOR.—A Collector cannot refuse to carry out a partition 14 B 450. A Civil Court cannot appoint a Commissioner to make a partition under this section. 23 C. 679. Collector's duty is not confined to mere division of the lands but includes the delivery of the shares to the respective allottees. 11 B. 662. Also 103 I. C. 231=1927 N. 300 (along with the crops attached to the land). He no doubt acts ministerially, but when a certain discretion is allowed to him, and so long as he keeps within bounds the Civil Court has no right to interfere 12 B 376. See also 15 B 527, 19 B. 435, 28 B 238. The Collector can do nothing which contravenes the command of the Court 14 B 450, 28 B 238. See also 1935 S. 192.

POWERS OF CIVIL COURT.—A Civil Court has no power to interfere with the Collector's proceedings under S. 54 42 B. 689=20 Bom L.R. 411. A Civil Court is not competent to make a division of revenue-paying land even with the consent of the parties. 30 I C. 209.

FINAL ORDER.—MEANING OF.—35 M. 26=12 I C. 775. The decree of a Court is final and a final decree in a partition suit cannot be re-opened unless by way of review 4 P. L J 29=45 I C 895. See also 38 I C 593. Partition of a revenue-paying estate—If allowable. 2 P.L.J. 221=39 I C. 173.

ESTATE.—A ryotwari holding is not an estate. 7 M. 382 (F.B.). But see 16 B. 528. The word 'estate' is used in its ordinary sense 10 C 400. Section only applies to cases where revenue is assessed in lump and not at acre rates. 5 R. 206.

Sec. 55. ARRESTED IN EXECUTION OF A DECREE.—Provision of the sec is mandatory. 154 I C. 782=1928 C. 62. As to what is meant by the word 'arrest,' see 11 C 451 (458). In the execution of a decree payable by instal-

Provided, firstly, that, for the purpose of making an arrest under this section no dwelling-house shall be entered after sunset and before sunrise:

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw, and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest:

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The ¹[Provincial] Government may, by notification in the ²[Official Gazette], declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the ³[Provincial] Government in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he [may]³ be discharged if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

Leg. Ref.

¹ For the word 'local' the word 'Provincial' has been substituted, by Government of India Adap. of Ind Laws Order, 1937

² Word 'local' omitted by *ibid.*

³ Substituted for word 'will' by Act III of 1921.

Notes.

ments the judgment-debtor cannot be arrested for default in the payment of each instalment. 7 B 106. An undischarged insolvent can be arrested for a debt not included in the schedule, and for which a decree has been subsequently obtained. 16 C. 85. A warrant of arrest may be issued even when a writ of attachment has already issued. 7 B. 301. An arrest on a Sunday is legal. 4 M H C.R. 12.

"AS SOON AS PRACTICABLE"—See 30 M 179. When a warrant orders a debtor to be imprisoned in a particular civil jail, his confinement in another jail would be unlawful. 11 C 527. An arrest is illegal if officer has not warrant with him at time of arrest. 5 A 318. See also 27 A. 258. An irregular endorsement on the warrant does not invalidate the arrest. 6 A 385. See also 7 A. 507.

ENTRY INTO PLAINTIFF'S HOUSE TO ARREST HIS BROTHER—TRESPASS—DAMAGES.—Defendant had a decree against plaintiff's brother and the latter though residing outside usually came and lived with his brother. In execution of the decree, defendant entered the *basthak* of plaintiff's house with the

bailiff and *naisb* sheriff believing that the judgment-debtor was there as usual, with the object of effecting his arrest. The judgment debtor was not there and on the plaintiff's remonstrating, the defendant apologised. Subsequently the plaintiff sued for damages. *Held*, that the bailiff and *naisb* sheriff acted lawfully in entering the house *bona fide* for arresting the judgment debtor, that the defendant accompanied them to point out the person to be arrested, that no trespass was committed and that plaintiff was not entitled to any damages. 146 I.C. 543=1933 L. 723.

PROVISO 3.—It is not necessary that a special order of the Court should be made, empowering an officer authorized to arrest a *purda* lady, to enter the zenana house in which she resides. 7 C 19.

PROVISO 4.—This proviso applies only when the arrest is made in execution of a "decree for the payment of money". 24 C. 766. A decree for the enforcement of a mortgage or charge will not be such a decree. See 24 C. 766, 21 M. 364; 19 A. 174, 29 M 65.

Sec. 55 (3) and (4).—The provisions apply only to judgment-debtors who are under arrest and not already committed to jail. 8 M. 503. S 55 (3) does not entitle the debtor to be adjudged insolvent on an application except in conformity with the provisions of the Insolvency Law. 21 I.C. 293=25 M. L.J. 545. The provisions apply to small cause debtors. 2 M. 9. But see also 22 B.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court [may]¹ release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree.

Leg. Ref.

¹ Substituted for word "will" by Act III of 1921.

Notes.

731. When application of judgment-debtor to be declared an insolvent has been dismissed and he is re-arrested in execution, he cannot claim the benefit of S. 55 (3) and (4) so long as the previous dismissal is not set aside. 9 I.C. 121 Where insolvency petition is filed one day too late, delay cannot be excused, and surety becomes liable. 1926 M 285=86 I.C. 304 When judgment-debtor furnishes security under S. 55 (4) the security should be directed to continue until final order is made. 46 B 702=1922 B 340 Mere filing of insolvency petition by debtor or dismissal of an execution petition does not absolve the surety. 34 I.C. 407=(1916) 2 M W.N. 273 (14 C 757, Dist.) See also 22 I.C. 953; 5 P.L.J. 417=57 I.C. 303 The liability of surety is now clearly laid down in S. 145. Surety is liable to a transferee decree-holder. 26 M 258 Surety is not liable when judgment-debtor dies. 29 A 466; 41 C. 50 See also 1924 B 428 (Judgment-debtor not applying within time, dying subsequently—Liability of surety) Application to set aside order of arrest abates on death of the person against whom the order is made. 22 I.C. 953 Covenants in surety bond as to what is to happen in case the application to be declared an insolvent is refused, do not come within the purview of the section. 16 A. 37. See also 23 A L.J. 59

Sec 55 (4).—A bond executed by a surety under S. 55 (4) cannot be made to contain conditions not covered by the section. 30 S.L.R. 177=1936 S 244. An order made under S 55 (4) rejecting an application for forfeiture of security bond is appealable and therefore no revision lies. 34 I.C. 247. (15 A 183, Dist.) Liability of a surety when arises—Interpretation of section. 101 I.C. 525=52 M L.J. 523. Delay by one day—If excusable. 86 I.C. 304=1926 M. 286. See also 1926 M. 689=50 M L.J. 477=95 I.C. 444. Surety undertaking to produce judgment-debtor until discharge from insolvency.—Debtor obtaining protection order does not absolve surety of his duty to do so. 97 I.C. 413=1926 M. 958 (2) See also 145 I.C. 531=1933 M 360. Surety for producing judgment-debtor on a particular date, which turns out to be a holiday—Subsequent production though after some delay is substantial compliance with the bond. 1928 M W.N. 871. Where a surety for the appearance of the judgment-debtor who was arrested in execution of a decree, produces the judgment-debtor in Court and requests to be absolved from further liability under the

surety bond, the Court should not refuse to grant the prayer. It is open to the decree-holder to apply to the Court for the arrest of the judgment-debtor until he furnishes a fresh security. 151 I.C. 154=1934 L 962 (1). When a surety gives security in the course of execution proceedings for the appearance of a judgment-debtor and for satisfaction of the decree against him in the event of his failure to produce him when required, the security bond in the absence of any indication to the contrary does not enure after the dismissal of the application for execution in default. The surety would naturally consider himself absolved from his liability on the dismissal of the application in the proceedings relating to which his bond was taken. The Court has no justification for summoning the surety at the stage of restoration application and the mere fact that the surety failed to raise the point as regards the validity of the bond at the time cannot estop him from raising it later. 148 I.C. 570=1934 L. 92 See also 55 A 548=144 I.C. 731=1933 A 382, 14 R 190=162 I.C. 251=1936 R. 168 (Surety bond—Breach—Condition that judgment-debtor would appear on all days fixed for hearing of his insolvency petition—Petition adjourned for mention as to arrangement between him and his creditors—Failure of judgment-debtor to appear on adjourned date—Liability of surety enforceable) Where judgment-debtor fails to apply for insolvency within a month of his release, the option to commit him to prison or to realise the security lies with Court and not with decree-holder. 1927 A 377=100 I.C. 626, Court cannot proceed both against judgment-debtor and his surety. 117 I.C. 910=1929 L. 479 If the Court at the request of the decree-holder commits the judgment-debtor to the civil prison the surety is discharged automatically. The judgment-debtor once having been committed to prison, the Court cannot concurrently proceed against the surety. 144 I.C. 239=29 N.L.R. 83=1933 N. 38 In enforcing a bond executed by a surety under S. 55 (4), the Court has no power to reduce the amount for which the bond is executed. The security in such a case is not forfeited by way of penalty. It is part of the fruits of the decree obtained by the decree-holder, and the Court is not entitled to deprive the decree-holder of the fruits of his decree. 30 S.L.R. 177=1936 S. 244 Liability of surety—Previous execution proceedings against judgment-debtor consigned to record—Effect of. See 1935 L 918. See also 123 I.C. 113=1930 L 647

Sec 55 (4).—The application referred to in this clause need not necessarily be an application containing all the particulars

Prohibition of arrest or detention of judgment-debtor in execution of decree for money

56. [S. 245-A]. Notwithstanding anything in this part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money.

57. [S 538.] The [Provincial]¹ Government may fix scales, graduated according to rank, race and nationality, of monthly allowances payable for the subsistence of judgment-debtor.

Detention and release.

58. [S. 342.] (1) Every person detained in the civil prison in execution of a decree shall be so detained,—

Leg. Ref.

¹ Substituted for 'local' by Government of India Act, Adap. of Indian Laws Order, 1937.

Notes.

required by the Provincial Insolvency Act 134 I.C. 718=1931 B. 444=33 Bom L.R. 820. The judgment creditor's remedies are alternative and not concurrent. (*Ibid*) See also 1933 N. 38. Dismissal of execution application for default does not discharge the surety 138 I.C. 198=1932 L. 492. An order under this clause against the surety after notice to him is appealable. 135 I.C. 812=1932 B. 77=33 Bom.L.R. 1593 A surety bond under this clause need only be stamped with a Court-fee of eight annas under Art 6, Sch II, Court-Fees Act 141 I.C. 301=1933 L. 89 (S.B.). See also 143 I.C. 12=34 P.L.R. 480=1934 L. 228. Undertaking by the surety that the judgment-debtor "would continue the insolvency proceedings" extends up to adjudication only 1933 N. 40=144 I.C. 615=29 N. L.R. 28. See also 144 I.C. 731=1936 A. 382, 165 I.C. 864=41 L.W. 647=1936 M. 963=71 M.L.J. 646; 156 I.C. 113=1935 M. 543 (Failure of judgment-debtor to apply in insolvency—Liability of surety.) See also 1935 L. 918.

APPEAL—REVISION—An order passed on an application by the surety for cancellation of the surety bond is not a decree within the meaning of the Code, and is not appealable by the decree-holder. His remedy is only by way of revision. (1928 A. 527 and 43 M. 325, R.) 144 I.C. 731=1933 A. 382

Sec 56—A money decree does not necessarily carry with it a right to execute it by arrest of the judgment debtor, *e.g.*, minor or a female, or a legal representative 18 N.L.R. 145=1922 N. 98.

Sec. 58—Section does not apply to the case of a person imprisoned for contempt 4 C. 655. The Court has no power to fix shorter terms of detention than those prescribed 13 M. 141. Imprisonment on arrest before judgment becomes, after decree, imprisonment in execution of a decree, and the imprisonment suffered must be taken into consideration in calculating the period provided by this section 7 B. 431. In execution of a decree payable by instalments the debtor cannot be detained separately for default in the payment of each instalment. 7 B. 106 The language of sub-S (2) indicates that immunity from re-arrest arises only when there has been release after "detention in the civil prison". See 8 M. 21.

See also 23 C. 128. When a warrant of committal to jail has been made out the discharge of the debtor whilst in confinement in the Court-house for non-payment of subsistence allowance must be regarded as discharge from jail 9 B. 151. But see 8 M. 21; 1929 L. 361=118 I.C. 531. Code contemplates as immaterial the circumstances under which the debtor obtains his release. 20 C. 878. See also 12 C. 652. Code does not forbid re-taking of a person who has been released under S. 13 of the Indian Insolvency Act. 26 B. 652 at 659. A debtor who has been discharged for non-payment of subsistence money cannot be re-arrested. 4 M.H.C.R. 76 Cost of clothing, etc., required under S. 33, Prisons Act, is not subsistence allowance under S. 58. 17 I.C. 911. When a debtor who has been committed to a particular jail is detained in another jail, he is entitled to his release 11 C. 527. While calculating the period of imprisonment under a new warrant, the time of imprisonment suffered by him under the former warrant should be deducted. 17 I.C. 911. A payment is not made to the officer until the officer actually receives the money. 22 I.C. 25.

JOINT DECREE—The only effect of a release under S. 58, is to protect from re-arrest the judgment-debtor who has been released from prison. The incarceration of one judgment-debtor out of eight judgment-debtors in execution of a joint decree for arrears of rent and his release before the expiry of 6 months cannot discharge his debt, nor can it clear the liabilities of the other seven. Crops raised by all the judgment-debtors are consequently attachable in execution of the decree notwithstanding the imprisonment and release of one of the judgment debtors 1937 R.D. 13.

'DETENTION'—MEANING OF—IF INCLUDES DETENTION IN COURT-HOUSE.—Words 'such detention' in proviso (1) and 'detention' under this section' in proviso (2), S. 58, refer to and mean 'detention in civil prison'. Civil prison means civil jail and not Court-house. Detention therefore in the Court-house cannot be said to be detention in a civil prison. A judgment-debtor was committed to the civil prison in execution of a decree but was released during the pendency of the appeal by him against the decree. Decree-holder withdrew the balance of the subsistence allowance deposited by him on release of the judgment-debtor. On dismissal of his appeal he was detained by the appellate Court for the whole day but was released as

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and

(b) in any other case, for a period of six weeks:

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be—

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained, to pay subsistence allowance:

[S. 341.] Provided also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

59. [S. 653.] (1) At any time after a warrant for the arrest of a judgment-debtor has been issued the Court may cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(a) by the [Provincial]¹ Government, on the ground of the existence of any infectious or contagious disease, or

(b) by the Committing Court, or any Court to which that Court is subordinate on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

Attachment.

60. [S. 266] (1) The following property is liable to attachment and sale

Leg. Ref.

¹ Substituted for word 'local' by Govt of India Act, Adap. of Indian Laws Order, 1937.

Notes.

no subsistence allowance was deposited by the decree-holder. He was ordered to appear before the lower Court on a fixed date and on appearance it was contended by the judgment-debtor that he could not be re-arrested in view of proviso (2), S 58. *Held*, that as at the time of the decree-holder's omission to pay the subsistence allowance the judgment-debtor was not detained in the civil prison but in the Court-house, S 58 did not apply. The judgment-debtor was not therefore exempt from being committed to the civil prison to undergo the remaining term of imprisonment. 1937 L 253

Sec. 59.—The provisions of S. 59 are self-contained and are not controlled by the provisions of S. 55 (3) and (4) and are based on purely humanitarian grounds. If a judgment-debtor is suffering from serious illness

the Courts of justice would be well advised in ordering his release so as to escape the moral responsibility if anything happens to him in the event of his being sent to jail. 152 I.C. 427=36 P.L.R. 72=1934 L. 807 (2) The adoption of either or both courses specified in Cls (1) and (2) of S. 59 lies entirely within the discretion of the Court. Asthma and indigestion do not constitute serious illness. And where a Court refused to cancel the warrant of arrest, the appellate Court will not interfere unless the discretion is wrongly exercised. 145 I.C. 709=34 P.L.R. 856=1933 L. 307

Sec 60 CONSTRUCTION OF SECTION.—The provisions of S. 60, which restrict the right of the decree holder to realise the decretal amount from the property of the debtor should be strictly construed. 39 I.C. 375

SCOPE OF SECTION.—Exemption under S. 60 can only be claimed by the judgment-debtor. If for some reason or the other, the judgment-debtor chooses to waive that privilege, his son cannot complain of his action. 145 I.

Property liable to attachment and sale in execution of decree

in execution of a decree, namely, lands, houses, or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundries, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-

Notes.

C. 169=1933 L. 251; 102 I.C. 616=1927 P. 233; 52 A. 1027 S. 60 is a prohibition against forcible attachment or sale. There is nothing in this enactment to prevent an agriculturist voluntarily selling or otherwise alienating his house. Where an agriculturist voluntarily agrees to mortgage his house, S. 60 does not apply. 1935 L. 164. See also 1935 L. 942. Section does not apply to sales where there is no attachment, as in mortgage decrees. 23 A.L.J. 841 =89 I.C. 364. See also 47 A. 900, 1929 R. 275 (1). A decree holder can attach all the properties of the judgment-debtor as S. 60 does not limit the extent of properties to be attached. He can also attach property for mesne profits even before they are assessed 16 I.C. 708. The articles given in section as liable to attachment are given only by way of illustration. Per *Mukerji, J.*, in 26 A.L.J. 253=108 I.C. 229=1928 A. 193. Damages resulting from wrong attachment may be recovered from the decree holder though he acts in good faith. 8 N.L.J. 170=1925 N. 390. Provisions whether applicable to attachment under Co-operative Societies Act. 23 N.L.R. 66. Objection under this section not taken by party—Court must give effect if it otherwise becomes cognizance of the exemption 1930 A. 727. But see 1930 L. 106. It is a matter of doubt whether a Court has power to grant any form of equitable execution over property which is not liable to attachment under S. 60. 1935 S. 21=154 I. C. 580.

EXEMPTION FROM ATTACHMENT—MODE OF RAISING PLEA.—Where a judgment-debtor is aware of the proclamation of sale and his property has been attached but does not make any objection prior to the sale, he cannot, after the sale, be allowed to raise an objection under S. 60 that the property proclaimed to be sold is not liable to attachment and sale under that section. An objection or application by a judgment-debtor that his property is not liable to attachment and sale under S. 60 is an objection under S. 47 and is governed by Art. 166, Limitation Act. 30 N. L.R. 135=148 I.C. 200=1934 N. 82. See also 58 B. 564=36 Bom L.R. 681=1934 B. 348. A mere right to give a lease is not property which can be transferred. So it is not attachable under S. 60. 161 I.C. 628=1936 Pesh 90.

"DEBT."—It is not necessary that the exact amount due should be ascertained prior to attachment 16 A. 286. See also 16 I.C. 708. So also the interest of an heir in the hands of the administrator holding as trustee though such interest is not determined and allowed to him 117 I.C. 76=1929 L. 600, 33 C.W.N. 282=1929 C. 352. (Accrued debt can

be attached—Not one where the debt and its payment rest in the future 1925 C. 561=78 I.C. 881.) The word 'debts' in S. 60, includes share of debts. A debt due to the judgment-debtor and other persons jointly can, therefore, be attached and sold in execution. 41 C.W.N. 410=1937 C. 199. Purchase-money due to a judgment-debtor on certain contingencies is no 'debt'. 133 I.C. 248=33 Bom L. R. 396=1931 B. 288. On this point, see 86 I. C. 626=5 Pat L.T. 504. Prospective rent cannot be attached. 3 R. 235=89 I.C. 794. Nor rent in respect of a period still in existence 26 A.L.J. 253=108 I.C. 229=1928 A. 193. A decree for money if debt. 6 M. 418. Money not immediately payable, if debt 56 I.C. 948. *Contingent interest*, if attachable. See 1936 C. 802, 163 I.C. .06=30 S.L.R. 50=1926 S. 65. A decree of a Revenue Court is a debt 21 A. 406; 21 M. 293. Money deposited with a Railway Company by one of its servants as guarantee for due performance of his duties can be attached. 9 M. 203. See also 11 R. 116=142 I.C. 360=1933 R. 23 (F. B.). A monthly allowance given in payment of an antecedent debt and acknowledged by the debtor as such, is attachable in execution as debt. 9 C.W.N. 703. Insolvent furnishing security for costs of Privy Council appeal—Same can be attached subject to result of appeal 8 P. 478, 1930 A. 225 (F.B.). Money payable under a life insurance can be attached for the debts of the heirs of the deceased. 1928 C. 518. Unpaid balance of mortgage-money payable to third person is "debt" due to mortgagor 17 L. 270, 1935 L. 141. Money left by a judgment-debtor with a vendee to whom he had sold some immovable property for payment to his creditors but which was not so paid within a reasonable time, can be looked upon as a debt due to the judgment-debtor and attached and sold in execution of a decree against him, even though no time-limit had been fixed for its payment to the creditors 39 P.L.R. 201. *Arrears of maintenance* payable under an order of a Criminal Court under S. 488 of the Cr. P. Code, are neither a "debt" nor "saleable property" within the meaning of S. 60, and are not therefore liable to attachment. 62 C. 404=39 C.W.N. 281=1935 C. 578.

SALEABLE PROPERTY.—What is 28 M. 84, 15 M.L.J. 7, 6 C.W.N. 796, 7 B.L.R. 186 (P.C.) and 30 M. 378. Decision of trial Court as to whether property is saleable or not, cannot be questioned in execution 23 A.L.J. 841. "Saleable" means saleable by auction at a compulsory sale under the order of the Court and not transferable by act of parties. 19 C.W.N. 1182. A judgment-debtor retains his interest in properties after Court-sale but before confirmation and such interest can be attached. 34 L.W. 531=131 I.C. 14=1931

debtor, or over which or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf:

Provided that the following particulars shall not be liable to such attachment or sale, namely:—

(a) the necessary wearing-appeal, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman;

(b) tools of artizans, and, where the judgment-debtor is an agriculturist, his implements of husbandry and such cattle and seed-grain as may, in the

Notes.

M. 511. A claim which may accrue under a pending award cannot be sold 7 B.L.R. 186 (P.C.). All decrees, except money decrees, are both attachable and saleable. 16 B. 522. An occupier of state lands possesses the right of cultivating them and of reaping and selling the crops, which gives him a disposing power over the profits. As the right of occupancy of state lands has value and as the Government expressly permits the right to be transferred, the occupier has a saleable interest in the property which can be attached and brought to sale in execution of a decree against him. The fact that the Government may step in and deprive the transferee of the benefit of the purchase does not alter the position 167 I.C. 920=1937 R. 74=14 R. 619 (See also 149 I.C. 815=1934 R. 263.) The share of a partner in a partnership business is saleable property. 20 C. 693. Also his unascertained interest in partnership business 13 M. 447. An interest in the income of immovable property assigned by way of maintenance to a Hindu widow, cannot be attached 15 A. 371. The equity of redemption of the mortgagor is saleable property. 21 B. 226. Also the interest of a person in ancestral property governed by the Mitakshar Law 5 A. 430. Also property revertible to the donor after donee's death. 17 B. 503. Whether interest of a Burmese Buddhist husband in property of marriage saleable 5 R. 478. Also an actionable claim 14 C. 241. The doors and window-shutters of a pucca building cannot be separately attached and sold 11 C. 164. Future *melwaram* rents of an inalienable *shrotriem nam* cannot be attached. 4 M.L.J. 13. Nor can a non-transferable lease 7 L.R. 33 (Rev.). After a cheque for the payment of money is delivered to the payee, it cannot be attached by giving notice to the payer 3 B. 49. A debt due to a judgment-debtor under a promissory note standing in the name of a third person who holds it in trust for or on behalf of the judgment-debtor is attachable under S. 60 (1) 41 L.W. 15=1935 M. 181=153 I.C. 94=68 M.L.J. 81 (F.B.). Where by custom the pala of an endowment was transferable among a limited class of heirs. Held, that the palas were attachable in execution. 58 C.L.J. 289=37 C.W.N. 978=1933 C. 757. Where the *Khadims'* share in the offerings of the shrine was by custom allowed to be

sold among the *khadims* themselves. Held, that a right to such share was liable to attachment and sale in execution of a decree but that such a right should be sold only to a *khadim*. 15 L. 136=148 I.C. 246 (2)=56 P.L.R. 446=1934 L. 57. See also 58 A. 459. Earnings derived from offerings made by pilgrims are not saleable. 19 C. 730. "He has a disposing power"—Meaning of. See 26 M. 222. Where a statute prohibits the voluntary alienation by a person of his property it cannot be attached and made the subject of a Court-sale 10 P. 582=1932 I.C. 868=1931 P. 364. Power of voluntary transfer is the measure of liability to involuntary alienation. (*Ibid*) See also 58 I.A. 215=61 M.L.J. 208=132 I.C. 727=1931 P.C. 160 (P.C.). The whole or any portion of property dedicated to a trust cannot be attached, even although after the due performance of the trust, a balance remains, which goes into the pockets of the trustee 15 C. 329 (P.C.) See also 1936 P. 88. (Decree against real owner—Attachment of property in the hands of benamidar—Validity) Monies vested under the Rules of a Benefit Fund in Trustees and payable to the children of a deceased employee over which the employee had no disposing power cannot be attached for the employee's debt. 134 I.C. 558=33 Bom L.R. 720=1931 B. 300. See also 1933 R. 23 (F.B.). So also *bona fide* assignment by debtor for benefit of creditors 1 B.H.C.R. 233. Letters in a Post Office addressed to judgment-debtors, are held in trust for them by the Postmaster. 13 M. 242. When a decree expressly directs that property of the kind specified in this section is to be sold, the Court executing it cannot go behind its terms 8 B. 185.

Sec 60 (a) Proviso.—The words "and such personal ornaments, etc." give effect to the decision in 9 B. 106. The expression "cooking vessels" ought to receive a liberal interpretation. It does not mean only vessels in which food is actually cooked but includes vessels necessary for cooking operations. 54 A. 399=136 I.C. 280=1932 A. 344.

Sec 60 (b). TOOLS OF ARTIZANS.—Musicians and washermen are not artisans. 5 L.W. 596=38 I.C. 415. Sewing machine owned by a tailor is a tool of an artisan and therefore exempt 65 I.C. 416. A soap maker is an "artisan". 54 A. 399. The word 'artisan' implies a handicraftsman, i.e., one who makes certain things as part of his trade or calling.

opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section;

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their (enjoy-

Notes.

The term does not include the instruments of a professional man, like a surgeon or a doctor. 144 I.C. 848=34 P.L.R. 809=1933 L. 936 (1). An artisan is not merely a person who is engaged in mechanical employment but a person who works in the production of some commodity and whatever he uses for the production of the commodity may be considered as his tools. Hence the utensils used by a sweet-meat vendor for preparation of sweet-meats are tools even though he is employed by another to make them 158 I.C. 623=1935 A.L.J. 1011=1935 A. 848

Sec 60 (c) : SCOPE OF SUB-CL (c) —The term 'agriculturist' does not include persons who are agriculturists by virtue of a Government Notification. 106 I.C. 45. For the purpose of exemption from attachment under Provision (c), S. 60 (1), the occupation by an agriculturist of a house belonging to him must be in good faith for the purpose of agriculture 11 R. 372=145 I.C. 326=1933 R. 227 (F.B.). See also 147 I.C. 676=35 P.L.R. 185. An 'agriculturist' includes a person who gains a substantial portion of his livelihood, not necessarily the whole of it, by agriculture. In order to enable the judgment-debtor to claim the benefit of the exemption in S. 60 (1) (c), he must prove the circumstances qualifying for exemption and his *bona fides*. It is not necessary for him to demonstrate that each square foot of the premises is required for his agriculture. He has to show that the property is occupied by him for purposes of agriculture, i.e., to enable the owner or occupier to cultivate the land. 17 N.L.J. 271 See also 1937 L. 200. A person relied for his livelihood upon trade and contractor's work. He had no agricultural land except a *pleasure garden* appurtenant to his house nor was this garden used as a source of livelihood. *Held*, that neither the house nor the garden was exempt from attachment under S. 60. 163 I.C. 621=1936 P. 151. The term "agriculturist" in S. 60 (1) (c) refers to an occupation and a man is an agriculturist who engages in the cultivation of land, that is, who ploughs land, sows the crop and attends to it. The cultivation of land by hired labourers by a person who has a different occupation cannot constitute that person an agriculturist 153 I.C. 511=1935 A.L.J. 306=1935 A. 292. S. 60 (c) is intended to protect agriculturists who are the owners of the houses and in occupation thereof as such owners. If an agriculturist mortgages his house with possession and is occupying a portion of it on rent from the usufructuary mortgagee, his occupation is merely as a tenant and not as owner and such occupation

is not protected by this clause 156 I.C. 759=1935 O.W.N. 793. The test applicable in deciding whether a person is an "agriculturist" within S. 60 (c), is whether his main source of income is derived from cultivation or not. The term "agriculturist" is used in the sense of a person who is an agriculturist by profession, that is, a person whose main source of livelihood is cultivation. 157 I.C. 986=1935 A.L.J. 507=1935 A. 448. While there is no justification in the wording of S. 60, for holding that for the purpose of that section the term 'agriculturist' excludes a large land owner or a person who does not depend solely or mainly on cultivation for his livelihood, there is no doubt that a person who does not himself till land and earn his living thereby wholly or partly is not an agriculturist within the meaning of the section 164 I.C. 690=38 P.L.R. 333=1936 L. 737. A man who has been cultivating for many years and who has his cattle tethered beneath his house and a granary at the back of it has all the insignia of a cultivator. Where he occupies the house sought to be attached, and uses it directly for agricultural purposes in housing his cattle, his implements and his seed, paddy and his labourers, he must be regarded as occupying the house as an agriculturist, and is entitled to exemption from attachment. The mere fact that the judgment-debtor owns 150 acres of land makes no difference when there is evidence to the effect that he cultivates only 25 acres, while the rest of the land is cultivated by his son who devotes all the profits to paying off his father's debts; that does not render the judgment-debtor a zamindar or a rent receiving landlord. 162 I.C. 694=1936 R. 215. The judgment-debtor can waive the privilege provided by the section. The judgment-debtor will be estopped from pleading protection under the section, if he mortgages the house 6 P. 254=102 I.C. 616=1927 P. 233. See also 52 A. 1027=133 I.C. 478=1931 A. 112, 1933 L. 251. S. 60 is only intended for the benefit of the indigent agriculturists and not when the judgment-debtor suffers no material inconvenience. 25 I.C. 117=1 L.W. 519. The word 'occupation' does not mean residence only 99 I.C. 376=1927 A. 214. See also 102 I.C. 712 (2). Where agriculturist judgment debtor agreed under a compromise to have immovable property attached in execution, he cannot at the time of execution be protected by saying that the property is non-transferable. 57 I.C. 249=24 C.W.N. 575. S. 60 (c) exempts all the houses and other buildings which form the premises occupied by an agriculturist even if a portion would

ment) belonging to an agriculturist and occupied by him;

Notes.

enable the judgment-debtor to earn his livelihood as an agriculturist. (51 I.C. 129; 130 I.C. 81, Ref.) 141 I.C. 824=29 N.L.R. 106=1933 N. 80 Where two houses of an agriculturist are attached and it is found that one is quite sufficient for occupation by him *bona fide* for purposes of agriculture, *ey*, tying cattle and stacking fodder the release of that house alone is justified. 1934 L. 168. In the case of an agriculturist insolvent, according to the provisions of S. 60, the house of an agriculturist does not vest in the Official Receiver and therefore he cannot sell it. This is so even with respect to a house wherein the agriculturist insolvent is residing not as an owner but as a lessee, for the word used in S. 60 is "occupied" which seems to be a physical fact and not "possessed". 1933 L. 1010. The words "occupied by" in S. 60 (1) (c), C. P. Code, mean "lived in by" or "used for agricultural purposes by". Therefore, if the agriculturist proves either of those conditions, his case can come within Cl. (c) of sub-S. (1) of S. 60 (65 P.R. 1909, Approved.) 149 I.C. 428=35 P.L.R. 509=1934 L. 680 Where a house has not been occupied by a person as an agriculturist and it is not denied that he has other residential premises, it is not exempt from attachment. 35 P.L.R. 520=1934 L. 614 (2) An objection under S. 60 (c), on the ground that the house of the judgment-debtor could not be attached and sold in execution, as he was an agriculturist, is one which ought to be taken before the sale, and could not be raised after the sale as a ground for setting it aside. S. 60 (c) further relates to a house in the actual occupation of an agriculturist. 58 B. 564=36 Bom L.R. 681=1934 B. 348

WHO IS AGRICULTURIST.—A judgment-debtor is not an agriculturist under S. 60 (1) (c) of the Code, where his only source of living is not by cultivation. 63 I.C. 681, 35 I.C. 343=20 C.W.N. 834. See also 87 I.C. 564, 7 L.L.J. 95=88 I.C. 543, 20 C.W.N. 874. A person does not cease to be an agriculturist merely because he transfers his land by lease or mortgage. 55 I.C. 481, 4 B. 25. The protection afforded by this clause was intended for agriculturist in the strictest sense, and for an agriculturist in that sole character. 12 B. 363; 7 B. 530 Chief means, and not one means, determines profession. 92 I.C. 416=1927 M. 342. See also 105 I.C. 129, 132 I.C. 809=1931 A. 20 A zamindar is not 8 L.R. 229 (Rev.)=1927 A. 601. But see also 162 I.C. 694=1936 R. 215

WHAT IS EXEMPT FROM ATTACHMENT.—A house of an agriculturist is exempt from attachment and sale in execution of a decree. 39 A. 120, 38 I.C. 171; 40 I.C. 544; 35 A. 307=11 A.L.J. 437=19 I.C. 125 House to be attached occupied by sons of deceased debtor as agriculturists—They need not prove that it was so occupied by their deceased father. 116 I.C. 20. See also 138 I.C. 685 (1)=1932 A. 508 The phrase "houses and other buildings" does not include a vacant site used for

storing manure and fodder and with no structure over it. 39 I.C. 375. The house must be a building; if in ruins without doors or roof it is not a building. 99 I.C. 376=1927 A. 214. But see also 105 I.C. 129 The clause refers only to a house occupied by an agriculturist, and does not refer to his town residence. 7 Bom L.R. 685; 45 I.C. 546. But see 1926 L. 230. See also 49 M. 227=92 I.C. 328=50 M.L.J. 90 1929 L. 181. Where a house has been used by the judgment-debtor for tethering his agricultural cattle, the mere fact that he has an other residential house and two open sites where he might build a shed and tether his cattle is no justification for not exempting the house, when it has been used *bona fide* for purposes of agriculture. 1930 L. 1034; 5 P.R. 1897 and 11 R. 372 (F.B.), Rel., 1935 L. 894. A house in town occupied by a *bani*, who has ceased to do any shop keeping business, but who owns and cultivates two parcels of land, one about eight miles away and the other about two miles away from his house, the bullocks used for cultivation being tied up in the house of labourers in the neighbourhood of the lands and not in the house occupied by him, cannot be held to be the house of an agriculturist, so as to be exempt from attachment under S. 60 (1) (c). 158 I.C. 59 (1)=1935 P. 496 A decree for money was executed against the deceased debtor during his lifetime and his non-ancestral house was attached. The judgment-debtor was not an agriculturist. Subsequently his legal representative inherited it and occupied it as an agriculturist and claimed exemption from attachment. *Held*, that in deciding the question whether the house is or is not exempt from sale under S. 60, it was not the profession of the legal representative but that of the deceased debtor against whom the decree was and against whom it was being executed, that should be taken into consideration. 1936 L. 895. As S. 60 forbids the sale of materials of a dwelling-house occupied by an agriculturist, a decree for the sale of such a house is bad even though it be a mortgage decree. 33 A. 136, 34 A. 25; 41 B. 475; 39 I.C. 639=19 Bom L.R. 281. In the case of attachment of the cattle of an agriculturist, the Court has to see whether the cattle are necessary to enable an agriculturist to earn his livelihood. 56 I.C. 69, 61 I.C. 777 The right (for improvements) of a mulgani tenant in South Kanara to compensation cannot be attached nor sold in execution. 48 I.C. 705=36 M.L.J. 92

BURDEN OF PROOF.—The party alleging that he is an agriculturist must prove it. 1923 B. 12; 100 I.C. 104, 98 I.C. 857=1927 L. 66 (2); 161 I.C. 16=1936 L. 532 Occupation *bona fide* for purposes of agriculture must also be proved. 12 L. 367=130 I.C. 419=1931 L. 1034. See also 13 I.C. 335=1932 O. 76 (following 49 M. 227). Where crops are grown on a tenancy by the heir of deceased tenant after his death, such crops cannot be said to be his crops and cannot be as such liable to attachment and sale in the hands of the he-

(d) books of accounts;
 (e) a mere right to sue for damages;
 (f) any right of personal service;
 (g) stipends and gratuities allowed to pensioners of the ¹[Crown] or payable out of any service family pension fund notified in the ¹[Official Gazette] by the ¹[Central Government or the Provincial Government] in this behalf, and political pensions;

Leg. Ref.

¹ In Cl (g) for word 'Government' the word 'Crown', for words 'Governor-General in Council' the words 'Central Government or the Provincial Government' and for words 'Gazette of India' the words 'Official Gazette' have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937

Notes

under S. 60, C P. Code. 69 I C. 520.

OBJECTION UNDER SECTION DELATED—IF CAN BE ENTERTAINED—Objections under S.60, even if belated could be entertained, and where, therefore, objections under S. 60 (1) (c) were raised two days prior to the sale, the Court ought not to dismiss them on that ground 38 P.L.R. 669

Sec 60 (e) —A right to sue for *mesne profits* cannot be attached. 9 C 605. Also the right to appeal 3 W.R. Mis. 16. The right to *claw compensation* being a mere right to sue cannot be attached in execution 31 N.L.R. 235 = 1935 N 135. The right of a co-sharer to *village profits* does not accrue till the end of the agricultural year. The rights are not ascertainable until the year has ended and consequently any attachment of the share of a co-sharer in village profits before the first day of the agricultural year next following that to which the village profits refer, is an attachment of a mere right to sue and of no effect. 1936 N. 218

Sec. 60 (f) —A "*virithi*" is a right of personal service. 23 B.131. See also 12 B. 366 and 10 B. 395. But see *contra* 29 Bom.L.R. 102 = 100 I.C. 1008 = 1927 B 143 (*virithi* could be sold). The right to officiate at funeral ceremonies cannot be attached 16 W.R. 171. Also the right of a shebait of Hindu idol 5 B.L.R. 617; also the right of managing a temple. Right of a Gangaputra to receive offerings cannot be attached but his right to occupy specific portions of the river can 1929 O. 444; 4 A 81. An *inam* of land granted to do *swathiwachakam* service is always burdened with service and is not liable to attachment and sale in execution. 42 M.L.J. 477 = 45 M. 620. The rights of personal service within the meaning of proviso (f) to S. 60, cannot be either heritable or partible or transferable 160 I. C. 355 = 17 Pat.L.T. 77 = 1936 P. 10. The birth of a Mahabrahman is a right to personal service and cannot be sold in execution of a money decree. 41 A. 656. Offerings made at the temple by the worshippers being the personal property of the priest are not liable to be attached. 42 I.C. 390. A future perquisite on account of offering or bhog to the deity will be an uncertain and indefinite income which cannot be attached. 55 I.C. 175 = 1

Pat.L.T. 75; 29 C 70, 1 C.W.N. 493; 1 M 235, 23 M 274; 44 A 81. If it is once shown that there is a custom to transfer by private treaty *palas for worship* of certain deities, there will be no objection to transfer by execution limiting the class of persons entitled to bid and eventually to purchase the property to the class of persons who would be entitled so perform the services 154 I.C. 944 = 1935 P. 131. As to whether and when a religious office can be sold, see 6 M 76 and 6 B. 296.

Sec. 60 (g) —The bar to the attachment of gratuities is not limited to such gratuities as are allowed to "pensioners", but applies to a gratuity granted in consideration of past services 6 A 173. A political pension is not transferable 50 M 711 = 52 M.L.J. 622. The Code makes all political pensions exempt in whatever form they are granted by the Government, that is to say, an allowance granted by the Government in the form of remission of land revenue or assignment of land revenue would be a pension, and if the grounds for grant of pension are political it would be exempt from attachment 38 P.L.R. 531. No distinction can be drawn between the right of a jagirdar, who has been granted the income as jagir of certain water mills, to recover a certain sum per year as revenue, jagir or royalty and his right to recover rent from the lessee to whom he has granted lease of the water mills. The only right he has in the water mills is the right to recover rent from the occupants of the water mills and the rent is really the royalty for the use of water. The occupation of the water mills is merely a subsidiary right to the principal right and the principal right is conferred upon him as a jagir by the Government. Consequently his income from the lease cannot be attached 1937 L. 211. A gratuity granted to the heirs of a deceased employee by a Railway administration is not assets of the employee in the hands of his heirs and cannot be attached in execution of a decree against him 69 I.C. 893. The word 'pension' means the same thing as in S. 11, Pensions Act 4 B 432, 31 A. 382, Foll., 24 I C 805, and implies periodical payments of money by Government to the pensioner 58 I.A. 215 = 1931 P.C. 160 = 61 M.L.J. 208 (P.C.). The word 'pension' as used in S. 60 (1) (g), is wide enough to cover all sorts of periodical payments in whatever shape they are made by the Government. A *jagir* that is realised in the shape of an assignment of land revenue is a pension within that clause, and is, therefore, exempt from attachment in execution of a decree. 39 P.L.R. 80 = 1937 L. 178. A *Malikhana* allowance is in the nature

1[(h) the wages of labourers and domestic servants, whether payable in money or in kind; and salary, to the extent of the first hundred rupees and one-half the remainder of such salary;

(i) the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary:

Provided that, where the whole or any part of the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree;]

(j) the pay and allowances of persons; to whom the 2[Indian Army Act, 1911, or the Burma Army Act] apply 3[or of persons other than commissioned officers to whom the Naval Discipline Act as modified by the Indian Navy (Discipline) Act, 1934 applies];

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 4[1925], for the time being applies in so far

Leg. Ref.

¹ Substituted by Act IX of 1937.

² For words "Indian Articles of War" the words "Indian Army Act, 1911, or the Burma Army Act" have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937

³ Added by Act XXXV of 1934

⁴ Substituted by Act IX of 1937

Notes.

of a pension and so cannot be attached in execution of a money decree. 13 I.C. 194=8 A.L.J. 126 Grant of land revenue in a *jagir* is not exempt from attachment 137 I.C. 799=35 L.W. 395=1932 M. 417 In deciding whether a particular *jagir* is a political pension within S. 60 (1) (g), the test to be applied is whether it is in the nature of a fixed periodical allowance or stipend granted, not in respect of any right, privilege, perquisite, or office, but on account of past services or particular merits, or as compensation to dethroned princes, their families and dependants A *jagir* assigned by the British Government to an independent Ruler who was exercising sovereign rights is a clear example of compensation to a dethroned prince for the loss of his sovereign rights 36 P.L.R. 105=1934 L. 881. A bonus sanctioned by a Railway Company to one of its servants, and which has not been paid over to the payee, cannot be attached. 6 A. 634; 11 P. 584=140 I.C. 561=1932 P. 311. Arrears of pension due to the estate of a deceased cannot be attached. 5 M.H.C.R. 371. Also 47 A. 900. The stipend of a Carnatic stipendiary cannot be attached. 4 M.H.C.R. 277 Also one allowed to a member of the Mysore family. 7 W.R. 169. A zemindari granted revenue free, as a reward for services rendered is not a pension. 1902 A.W.N. 161 An executing Court cannot question the decision of the trial Court regarding saleability of a pension. 47 A. 900=23 A.L.J. 841=89 I.C. 364.

Sec. 60(h).—The words "allowances being less than salary of" have been added to supersede the ruling in 6 M. 179.

Sec 60 (i).—A khot is not a public officer, and percentage received by him for collecting the assessment on dhara lands is not "salary". 13 B. 673. An officer of the Indian Staff Corps is a 'Public Officer'. An officer in the regular forces is not such an officer. 24 C. 102. Civil Courts can attach one moiety of the salary of an officer in the Indian Staff Corps 25 M. 402 Part of the pay of an officer of the Indian army while serving in this country can be attached. 39 A. 308; 39 I.C. 92, 15 A.L.J. 264. See also 50 I.C. 683; 21 Bom.L.R. 143. An attachment by a Civil Court, of a moiety of the monthly salary of a debtor, subject to Military Law not exceeding Rs 20, is legal. 9 M. 170 Under S. 15 (2), Provincial Insolvency Act, read with S. 60, C.P. Code, the insolvent's salary vests in the receiver 38 I.C. 410. A direction as to payment of a portion of salary into Court in a conditional order of adjudication in insolvency is void as opposed to S. 60 (1), C.P. Code. 9 P. 304.

Sec. 60(j).—[See also Notes under Cl (i)] Salary of an officer in Indian army could not be attached. 38 B. 667, 23 I.C. 575; 16 Bom. L.R. 233, 146 I.C. 494=1933 A. 153. The pay of a Staff Sergeant in the Army is not attachable under a decree of the Civil Court. 35 Bom.L.R. 1112. The pay of the First Class Warrant Officer to whom the Army Act applies is not attachable under a decree of a Civil Court even to the extent contained in S. 60 (1) 144 I.C. 897=35 Bom.L.R. 360=1933 B. 185 If a soldier, to whom the Army Act applies, is a public officer as defined in S. 2 (17), his salary is exempt from attachment to the extent mentioned in Cl. (i) of the proviso to S. 60 (1) and if he is not such a public officer, it is not exempt from attachment to any extent (Case-law referred) 55 A. 648=1933 A.L.J. 1468=1933 A. 597. The pay of an Assistant Surgeon of the Indian Medical Department is not liable to attachment in execution of an order for maintenance and alimony passed by a Civil Court. 1936 A.L.J. 1291=167 I.C. 179=1937 A. 129 (F.B.).

Sec. 60(k).—This clause is new. The depo-

as they are declared by the said Act not to be liable to attachment;

1[(1) any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority which the Governor-General in Council may by notification in the *Gazette of India* declare to be exempt

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"In cl. (2) of the said proviso for 'Governor-General in Council' substitute 'appropriate Government',

(Government of India, Adaptation of the Indian Laws Supplementary Order), 1937.

¹ Subst

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sit which a Railway servant makes towards a provident fund is a compulsory deposit, and does not cease to be so when he leaves the service 6 Bom.L.R. 921 But see 5 Bom.L.R. 454 Compulsory deposits made in a State Railway Provident Fund by an officer of the Railway during his employment are not liable to attachment in execution of money decree even if he has ceased to serve 50 C. 347=27 C.W.N. 472. Deposit under Provident Funds Act—Not attachable. 21 A.L.J. 454=74 I.C. 746=45 A. 554 See also 92 I.C. 673; 150 I.C. 213=36 P.L.R. 145=1934 L. 153. A Provident Fund maintained by the authorities of an aided college, provided it is constituted by the authority of Government is a Government Provident Fund as defined by the Provident Funds Act, and as long as the money remains in the fund it is immune from attachment under S. 60 (1) (k). The fact that a Provident Fund has been in existence before the Government issued a Notification introducing a Provident Fund makes no difference, when the Fund is constituted under the authority of the Government, the entire amount of the Fund,—both the amounts subscribed before and the amounts subscribed after the notification—becomes consolidated into one Fund, and the whole deposit is exempt from attachment *Quære*—Whether the immunity from attachment lasts only as long as the money is in the Fund and whether it comes to an end when it reaches the depositor 15 P. 779=166 I.C. 499=17 Pat.L.T. 731=1937 P. 22 Under S. 60 (k), the amount standing to the credit of an employee of the Imperial Bank of India in the Provident Fund established by that Bank for the benefit of its employees is exempt from attachment. 165 I.C. 767=38 P.L.R. 1155=1936 L. 694. Provident Fund—Deposit in—Attachability after payment to subscriber. 37 Bom.L.R. 494=1935 B. 396 A debt for the purpose of attachment must be a debt that is payable to the judgment-debtor or to his estate, but a sum, which a person may or may not pay in his uncontrolled discretion is not a debt A sum standing to the credit of the deceased judgment-debtor in the benefit fund of the Irawaddy Flotilla Mills, Limited, is not a debt within S. 60, and cannot be attached. 11 R. 116=142 I.C. 360=1933 R. 23 (F.B.).

Sec. 60(1).—The wages of a private servant

and to receive a certain amount of money or a certain quantity of cotton spun by them are labourers, and their remuneration is wages. 5 B. 132.

Sec. 60 (m).—What in English Law would be termed a vested remainder, is capable of attachment and sale during the lifetime of the person in possession. 17 B. 503, e.g., residuary legatee's interest under a will 130 I.C. 163=1931 P. 70 [32 C. 198 (P.C.) and 1923 C. 21, Rel. on]. The interest of an heir under the Hindu Law, expectant on the death of a widow in possession, cannot be attached 7 Bom.L.R. 341 See also 5 A. 430 Hindu widow—Life interest in lands—Maintenance. 47 B. 597 The right of a son to succeed by right of survivorship to his father's specific share cannot be attached 8 W.R. 253 The reversionary right of a grantor under a deed of maintenance can be attached 10 A. 462 An expectancy of succession by survivorship is not attachable 22 B. 984 The right of a judgment-debtor to get by division a quantity of land which had been reserved by him for his own use in a deed of gift, can be attached. 14 C. 241. See also 17 B. 503 Future rents and profits that may become due to a *ghatwal* cannot, as such, be attached 28 C. 483 Also a claim which may accrue under a pending award 14 M.I.A. 40 See 3 A. 12 and 21 M. 293 Possible right or interest to be determined by a Court in future can't be attached and sold 134 I.C. 602=1931 O. 398=8 O.W.N. 927

Sec. 60 (n).—A mere right to maintenance cannot be attached and sold in execution of a decree. 51 C. 879=7 I.C. 80, Foll.; 40 M. 302; 34 I.C. 381; 30 M.L.J. 361 But see also 85 I.C. 477=23 A.L.J. 149, Maintenance decree is attachable in so far as it relates to the arrears of maintenance 148 I.C. 196=1934 N. 83. The annuity payable under a will is not "a right to future maintenance" as contemplated by S. 60 (i) (n) and is, therefore, not exempt from attachment. 159 I.C. 644 (1)=37 P.L.R. 261=1935 L. 811. Where a right of maintenance is sought to be attached, the true test to lay down is whether such a right is purely personal, non-heritable and non-assignable, or it is an alienable and heritable right which takes the shape of an annuity or has been granted in lieu of a share in an estate. If it is the former, it will be protected under the provisions of the Code, but if

(o) any allowance declared by 1[any Indian Law] to be exempt from liability to attachment or sale in execution of a decree; and

Leg Ref.

¹ For words "any law passed under the Indian Council Acts, 1861 and 1892" the words "any Indian Law" have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

it is the latter, it will not be exempt from attachment 17 L 378=163 I.C. 103=1936 L. 55 Hindu impartible estate—Junior member's right to profits in lieu of maintenance—Attachability 1935 N. 133=31 N.L.R. 239=156 I.C. 65 See also 17 L 378=1936 L. 55. Property which consists of no more than a reservation of a right to receive maintenance but no interest in which is created, can be attached 14 L.R. 371 (Rev)=17 R.D. 505 Arrears of maintenance payable under an order of a Criminal Court under S. 488 of the Cr. P. Code, are neither a "debt" nor "saleable property" within the meaning of S. 60, and are not therefore liable to attachment in execution of a decree for money The right created by the order under S. 488, Cr. P. Code, is a personal right and not assignable 39 C.W.N. 281=62 C. 404=1935 C. 578 Interest in property in lieu of maintenance not attachable. 30 M 266; 7 I.C. 80, 29 I.C. 578 Right to maintenance—Property granted under a compromise can be attached 43 A 617 Right to maintenance of a widow—Standing crops on land in her possession—If can be attached 22 M.L.J. 204. (See also 15 M.L.J. 7, 10 B 342, Dist.) A heritable right to receive a certain monthly allowance in lieu of a share of landed property is not a mere right to maintenance 10 C 521 See 27 C. 38 and 10 B 342, 15 A 371 The right to future maintenance as contemplated by the Legislature means a personal right for the maintenance or personal enjoyment of the grantee. It does not cover a heritable but non transferable interest in land 158 I. C 710=1935 O.W.N. 1134 The expression "right to future maintenance" means the right of one person to receive from another food, lodging, clothing and other necessities of life A periodical money payment to which a judgment-debtor is entitled under an agreement and with which he has to procure for himself the necessities of life is alienable and subject to attachment A monthly allowance reserved to a mortgagor towards his maintenance under a deed of usufructuary mortgage of all his properties is not exempt from attachment under S. 60 (n) 158 I.C. 170=1935 M.W.N. 776=42 L.W. 345=1935 M. 815=69 M.L.J. 264 A hereditary grant of an allowance of paddy out of the melwaram of certain land, is not a right to future maintenance 30 M 279. Also an annuity granted by a will 10 C.W. N. 1102 See 15 M.L.J. 7. Although a Jahagir for maintenance is inalienable and therefore unattachable in execution of the decree, a receiver can be appointed to manage

the Jahagir for the benefit of the decree-holders subject to a suitable allowance for the maintenance being made in favour of the judgment-debtor The executing Court need not fix the suitable allowance when making the order of the appointment of a receiver. It will have to be fixed on the amount of profits which come into the hands of the receiver and not upon any estimated income of the property. 150 I.C. 635=1933 N. 266 Where a widow sued in *forma pauperis* to recover from her co widow possession of certain property and the suit ended in a compromise by which the defendant agreed to pay to the plaintiff a certain monthly allowance by way of maintenance and the same was charged on the house and the Government sued to recover the Court-fees by attachment of the house out of which the maintenance was recoverable, held, that the Court had no power to order equitable execution against the property, because that would be frustrating the order for maintenance which was exempt from attachment under S. 60. 57 B. 507=146 I.C. 340=35 Bom.L.R. 615=1933 B. 350

ALLOWANCE TO DISINHERITED SON—EXEMPTION FROM ATTACHMENT—A wealthy father disinherited his son in the sense that he did not give him any share in his property under his will, but provided for his food and lodging The testator further provided that out of the income of his property his son should get Rs 100 per month as his pocket money On a construction of the will, held, that the sum of Rs 100 which was described as pocket money of the son might be treated as his "future maintenance" out of which he was to supply himself with such necessities of life as, having regard to his position in life, would be required for his sustenance and physical well being, and was, therefore, exempt from attachment under S. 60 (1) (n). 38 P.L.R. 702=1936 L. 944 The right of a widow under the Hindu Law to reside in her husband's family house is a "right restricted in its enjoyment to her personally" within the meaning of S. 6 (d), T. P. Act, and cannot therefore be attached and sold in execution of a decree against her under S. 60, C. P. Code, read with S. 6 (d), T. P. Act. 42 L.W. 763=1935 M. 848=69 M.L.J. 317 Although the right of residence enjoyed by a judgment-debtor in certain landed property, is not attachable and saleable, such right is, in a proper case, liable to be dealt with in execution of a decree by adopting the remedy of equitable execution, namely, the appointment of a receiver who would act under the orders and supervision of the Court, and realize the income of the property, and after defraying the incidental expenses and his own remuneration would devote the proceeds towards the satisfaction of the decretal amount 165 I.C. 519=1936 L. 830

Sec. 60 (o).—See 28 M. 84 and 21 B. 588 (F.B.).

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any moveable property which, under any law for the time being applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

Explanation 1—The particulars mentioned in clauses (a) (b) (c) (d)

(1) and (2) are actual officer or tition there

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After Explanation 2 to sub-S (1) insert—

'Explanation 3.—In cl (b) "appropriate Government" means—

(i) as respects any public officer in the service of the Central Government or any servant of a Federal Railway or of a cantonment authority or of the port authority of a major port, the Central Government,

(ii) as respects any public officer employed in connection with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative, and

(iii) as respects any other public officer or a servant of any other railway or local authority, the Provincial Government'.

(Government of India, Adaptation of the Indian Laws Supplementary Order), 1937.

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61. The 4[Provincial] Government. 5[* * * * *]

Partial exemption of agricultural produce.

order published in the 4[* *] Official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the 4[Provincial] Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

62. [S. 271] (1) No person executing any process under this Code

Seizure of property in dwelling-houses.

directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunrise.

Leg. Ref.

¹ Added by Act IX of 1937

² Explanation 2 added by Act IX of 1937

N.B.—The amendments made by section 2 of Act IX of 1937 shall not have effect in respect of any proceedings arising out of any suit instituted before the first day of June, nineteen hundred and thirty-seven (Act IX of 1937, S. 3).

³ Original Cl (b) was omitted by Act X of 1914

⁴ The word 'Provincial' has been substituted for word 'local', and the word 'local' before the words Official Gazette has been omitted by Government of India (Adaptation of Indian Laws) Order, 1937

⁵ Words 'with the previous sanction of the Governor-General in Council' omitted by Act XXXVIII of 1920.

Notes.

Sec. 60 (2)—Schedule II, S 60, C. P. Code, does not encroach on the provisions of Army Act. 37 B 26=14 Bom.L.R. 777. Deduction of the pay of an officer of His Majesty's forces 1 O.L.J. 127=23 I.C. 935 =17 O.C. 99 (33 A. 529; 37 B. 26, Diss.).

Salary of officer of the Regular Forces. 37 B 26=17 I C 13=14 Bom.L.R. 777 (33 A 529, Foll.) S. 60 does not apply to the case of an officer of His Majesty's Regular Forces and his salary is not liable to attachment under S. 60 33 A 529. But see also 43 B 368; 50 I.C. 427; 21 Bom L.R. 137 Military Assistant Surgeons in Indian Subordinate Service are warrant officers and so soldiers and therefore their pay is altogether exempt from attachment. 10 I C 719

MISCELLANEOUS.—According to the Buddhist law, the wife ceases to have any interest in the joint property of her husband and herself, from the time of divorce and so attachment of the property after divorce is futile. 33 I.C. 118=9 Bur.L.T. 74. Insurance Policy—Wife named as beneficiary—Attachment. 37 B.471. Moveable property—Belonging to judgment-debtor in the hands of another—Attachment. 4 Pat L.J. 141=48 I.C. 943.

Sec 62.—A bailiff can break open the outer door of a shop in order to execute a writ of attachment. 3 B. 89. On this section, see also 1925 A. 140.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

63. [S. 285.] (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof

Notes.

Sec. 62 (3)—When a warrant was being executed at the instance of the applicant (judgment-creditor) the judgment-debtor was not in the house; but his *pardanashin* lady was. The applicant was warned that she would resent intrusion. In spite of it the applicant pushed open the door and the lady who was behind the door fell down and received injuries. *Held*, that the applicant being merely a person executing a decree accompanying the person executing process and not being himself, the person executing process, was not entitled to push open the door, it was for the bailiff to take such action as was necessary under S. 62 and so the applicant was guilty of an offence under S. 352 of the Penal Code. 145 I.C. 259

Per *Mehta, A.I.C.*—Even if the applicant thought he was justified in considering himself as a person executing the warrant, S. 79 of the Penal Code could not avail him since he did not give the notice to the lady required by Cl. (3) of S. 62. 145 I.C. 259=34 Cr.L.J. 963. In sub-S. (3) of S. 62 which deals with entering parda quarters, there is no limitation, as there is in sub-S. (2) that the rooms should be in the occupancy of the judgment-debtor. The Code apparently contemplates that it is sufficient that the decree-holder or the person making the attachment should consider that there may be property of the judgment-debtor in those rooms. 154 I.C. 631=1935 A.L.J. 367=1935 A. 490

Sec. 63 [N.B. —See also Notes under S. 73, *infra*]—OBJECT OF SECTION is to prevent confusion in execution proceedings. 18 B. 458

SCOPE OF SECTION.—This section refers to attachments and has no relationship with the sections relating to sale and delivery of the property. 3 A. 353 (359). On this section, see also 22 A. 182; 18 B. 458; 25 C. 46; 21 C. 200, 6 M. 357, 16 B. 683; 49 B. 655, 27 Bom. L.R. 363

SECTION EXPLAINED.—S. 63 contemplates a case where attachments of the same property have been made by different Courts at

the instance of different decree-holders of the common judgment-debtor, and provides for the distribution among them of the proceeds of the attached property by one of such Courts only. The distribution is to be made by the superior Court but if all the Courts are of the same grade, the distribution is to be made by the Court which first attached the property. In such a case a sale by an inferior Court of the property under attachment by a superior Court or by the Court of the same grade, which attached later in point of time, sale under later attachment pending an earlier attachment is valid; but it is the duty of the Court which sells the property to send the sale proceeds to the Court of superior grade or the Court which attached the property first, as the case may be. When the assets are not so sent by the Court selling the property, the procedure according to the view of the Calcutta High Court is to move the District Judge for asking the Court holding the sale to send the sale-proceeds to the proper Court for distribution. 40 C.W.N. 1307=1936 C. 723.

APPLICATION OF SECTION.—Section applies only as between Civil Courts. 43 A. 612. There must be subsisting attachments of property in execution of decrees of more Courts than one at the same time under execution. 6 A. 255 (258). Where property is under attachment by two Courts of different grades and is sold by the Court of lower grade the sale is not invalid. 38 C.L.J. 266, 32 I.C. 41; 32 I.C. 927; 1924 M. 889. See also 153 I.C. 853=11 O.W.N. 1618=1935 O. 154; 1935 M.W.N. 1300=69 M.L.J. 908; 42 L.W. 783=1935 M.W.N. 1046=1935 M. 938; 33 M.L.J. 217; 46 C. 64. The fact that the several decrees under execution by different Courts are passed by the same Court does not make S. 63 inapplicable. S. 63 would still apply to the case; the words "of more Courts than one" in the section must be read as qualifying the word "attachment" and not the word "decrees". The object of the section is to deal with several attachments no matter whether the decrees are passed by the same Court or by different

shall be the Court of highest grade, or where there is no difference in grade

Notes.

Courts. The phrase "in execution of decrees" is explanatory of the word "attachment." 59 M. 1028=44 L.W. 358=1936 M.W.N. 655 =1936 M. 797=71 M.L.J. 328. The word "proceeding" in cl. (2) is wide enough to include an order of the inferior Court allowing a set-off which cannot be recalled or cancelled by the superior Court. 35 B. 473. Where property of the judgment-debtor is attached by more Courts than one, the Court of the superior grade is alone entitled to realise such property and determine all claims thereto. 144 I.C. 252=37 L.W. 366=1933 M. 342 (2)=65 M.L.J. 347. When the same property is sold in an execution by two different Courts the sale by the Court which attached later but sold first is valid unless it was done with the knowledge of the prior attachment. When a property has been sold by a Court having jurisdiction to do so, there is nothing left, which can be sold again by another Court. The second purchaser has therefore absolutely no title to the property 152 I.C. 902=1934 P. 511. An attachment by the High Court and one by the Small Cause Court stand on the same footing and the fact that the Small Cause Court decrees have not been transferred to the High Court and that the money is lying in the High Court is of no consequence. In other words, S. 73 of the C.P. Code, must be read subject to S. 63. (21 C. 200 and 6 R. 131, F.) 61 C. 240 =152 I.C. 69=1934 C. 559. See also 37 Bom. L.R. 78; 11 O.W.N. 1618; 69 M.L.J. 908, 1935 M. 938=41 L.W. 783=1935 M.W.N. 1046, 59 B. 310=159 I.C. 505=37 Bom. L.R. 78=1935 B. 176.

COURT OF HIGHEST GRADE—The grade of a Court depends upon the pecuniary or other limitations of the jurisdiction of the particular Court. 19 B. 127, 134 I.C. 273=1931 N. 127. In the North-Western Provinces, the Court of a Munsiff is of higher grade than a Court of Small Causes 16 A. 11 (F.B.). A Small Cause Court, which has a higher pecuniary jurisdiction than the Additional Small Cause Court in the same area, is a Court of higher grade within the meaning of S. 63, C.P. Code, and the additional Court has no jurisdiction to deal with an application for a share in the assets realised by the former Court 1936 N. 270. Assets held by Court of inferior grade transferred to superior Court—Rateable distribution—Inferior Court not agent of superior Court 29 Bom. L.R. 319. Application for rateable distribution under S. 73 must be made to the superior Court. 53 A. 759=1933 A. 2=133 I.C. 426 (51 M.L.J. 661, F.). See also 55 B. 473=1933 B. 350=133 I.C. 817. An attaching creditor in the inferior Court need not have his decree transferred to the superior Court for execution before he applies for rateable distribution in the latter Court. 132 I.C. 832=1931 R. 111 (2).

MEANING OF WORDS.—The words "of property not in the custody of any Court" seem to be more applicable to moveable than to

immovable property. 7 C. 410. But see 7 M. 47. "Realise" means "realize" by sale. 3 A. 356, at 54. Rights of attaching decree-holders of different Courts. 29 I.C. 21. See also 26 M.L.J. 406, 6 P.L.J. 332. Money attached before judgment is liable to rateable distribution in execution of decrees against the same defendant. 26 I.C. 941. An attachment of immovable property in execution of a money decree followed by order for sale does not confer on the judgment-creditor any charge on the land. 27 M.L.J. 150 (P.C.) (Reversing 15 I.C. 288). See also 15 C. 202 (210); 37 L.W. 366.

SECS. 63 AND 73—S. 73, C.P. Code, is not to be regarded as the only section for rateable distribution in the Code. The section must be read in conjunction with S. 63. While both Ss. 63 and 73 aim at the fair distribution of the proceeds of sale among the judgment-creditors of the common judgment-debtor, there is a fundamental distinction between the two sections. The fund available for distribution under S. 73 is the entire fund realised or received by the executing Court, leaving out of consideration the proviso to the section. On the other hand the funds available for distribution under S. 63 are the proceeds of common property attached by the judgment creditors. It is the fact of attachment, and attachment of the identical properties by the several decree-holders that brings S. 63 into operation. Where one of several decree-holders executes his decree against the judgment-debtor in a particular Court and sells his properties, if other persons holding decrees against the same judgment-debtor apply for execution to the same Court before the receipt of the proceeds of sale, the whole sale proceeds will have to be rateably distributed among all the decree-holders under S. 73. The latter decree-holders need not take any further steps beyond applying for execution to the Court which sells and realises the assets. 40 C.W.N. 1307=1936 C. 723. S. 73 cannot be regarded as a self-contained rule. To so read the section would defeat and render nugatory the provisions of S. 63. S. 63 must be treated as constituting an exception to S. 73. Where, as stated in S. 73, the property is under attachment in execution of decrees of more Courts than one, if the other conditions specified in S. 73 are fulfilled, the right to rateable distribution arises. 59 M. 1028=44 L.W. 358=1936 M. 797=71 M.L.J. 328. Ss. 63 and 73 must be read together and since the Court of highest grade has been empowered to determine 'any claim' in respect of property, it must include claims for rateable distribution under S. 73. Consequently there is no need for second application for execution in the Court of the highest grade by the decree-holder applying for rateable distribution in that Court. 1937 N. 80. Prior attachment of the property is not essential under S. 63. Under S. 73 also prior attachment is not necessary so far as

between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

64. [S. 276.] Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other moneys contrary to such attachment, shall be void as against all claims

Private alienation of property after attachment to be void.

Notes.

the creditors seeking rateable distribution are concerned. All that is required is an application for execution before the assets are received by the Court entitled to receive them 1937 N 80. Where several decrees, some in favour of one decree-holder and others in favour of another, are passed by the same Court and sent for execution to different Courts, one of which is a superior and the other an inferior Court, and both those executing Courts attach the same properties, each decree-holder acting in ignorance of the proceedings taken by the other, the fact that the inferior Court holds the sale in pursuance of its attachment and allows the decree-holder to set-off the purchase price against the decree amount before the date fixed for sale by the superior Court will not deprive the decree-holder in the superior Court of his right to apply to the superior Court under S 63, on his becoming aware of the sale, to call for the proceeds of the sale from the inferior Court and to distribute them rateably. In such a case the decree-holder purchaser in the inferior Court may properly be given a choice either to elect to have a re-sale, or to pay into Court so much of the price as may become due to the rival decree holder on rateable distribution 59 M 1028=44 L W. 358=1936 M. 797=71 M.L.J. 328. Where property is sold in execution of a decree by a superior Court, and decree-holders, who have obtained decrees against same judgment-debtor in an inferior Court and applied for execution to that Court before the date of sale, apply after the sale to the superior Court for rateable distribution, the superior Court which realises the assets is under a duty to distribute the assets which are realised by the sale and thereby to execute not only its own decree but also those of the inferior Court. The applications made to the inferior Court for execution of the decrees passed by it are in order and valid. Where the right to rateable distribution has to be determined by a Court under S 63, an application for execution made to the Court which passed the decree before the realisation of assets is quite sufficient for the purposes of S. 73; and it is not necessary that such application should be made to the Court holding the assets. The words "application to the Court for the execution, etc." mean application to the appropriate Court including an inferior Court which granted the decree sought to be executed 59 B. 310 =37 Bom.L R. 78=1935 B. 176.

Secs 63 and 73 and O. 21, R 72—The right of set off under O 21, R 72 is subject to the provisions of S 73. The application under S. 73 must be made before the sale and it is not enough to say that it should be made before the entire sale proceeds are paid. If there is no application to the Court which holds sale and the Court allows set-off, the order of the Court is not improper, although in contravention of S 63 41 C.W. N. 350=1937 C. 55

Sec. 64—There cannot be a partial raising of attachment by consent of parties out of Court. Section being absolute in its terms a sale by consent or connivance of the decree-holder is not excepted by it. 101 I.C. 591 (1) =1927 M 648 But see 1934 R. 313, *infra*. Where the form which the decree takes is entirely dependent on the agreement of the parties and it is by private agreement between them that particular properties are transferred to one of them the transfer is definitely a private transfer although it is embodied in the decree of the Court. 1934 R 313. The object of section is to prevent fraud on decree-holders. 30 B 337; 33 I C 492, and also to preserve intact the rights of attaching creditors against attached property by prohibiting private alienations pending litigation 29 C. 154. This section avoids only private transfers and not awards by arbitrators 35 M.L.J. 441, 63 M.L.J. 664 (P.C.). S 64 does not invalidate a sale of the attached property in pursuance of an agreement to sell made prior to the attachment. But the attachment holds good in respect of such right as the vendor had in the property at the time of the attachment, and if there is an unpaid balance of the purchase-money the attachment fastens to the judgment-debtor's right to recover that money, that is to say, to the unpaid vendor's charge under S. 55 (4) of the T P Act. But the property having passed by sale from the judgment-debtor cannot be sold in execution of the decree in pursuance of the attachment 1935 M 872=69 M.L.J 678. See also 1936 N. 163. S 64, which declares private alienation of property after attachment to be void, does not cover the enforced execution of a conveyance in obedience to a decree of a Court 1936 N. 163. In the case of attachment before judgment as in the case of attachment in execution of a decree any private alienation of property during the continuance of attachment is void. 26 C 531. Purchase made during pendency of attachment is void and purchaser does not obtain a lien 34 I C 34. S 64 avoids an alienation

enforceable under the attachment.

Notes.

made while an attachment remained subsisting and enforceable. 4 Pat L. T. 409, 20 S. L. R. 111, 1927 L. 103. A private sale of property pending an attachment by decree holder which has subsequently been raised is valid as against a non-attaching decree-holder who had applied for rateable distribution during the continuance of the attachment. 49 I. C. 134=5 P. R. 1919 (32 M. L. J. 707, Foll.). See also 39 C. W. N. 1076 (claims enforceable under the attachment). No doubt a person claiming rateable distribution of assets cannot get the benefit of the Explanation to S. 64, unless he has himself got an attachment on the assets from which he seeks to benefit. But such a person would be entitled to the benefit of S. 64, if he had obtained an order directing the attachment of the property of the judgment-debtor before he mortgaged the property in favour of a third person as the effect of the order of attachment under O. 21, R. 54 (3) is that it should be deemed that there had been an attachment of the property from the very date of the order. 152 I. C. 364=1934 A. L. J. 1091=1934 A. 1069. Alienation pending attachment is inoperative only as regards the attaching creditor. 144 I. C. 681=1933 N. 230. Obligations touching the property attached incurred by the debtor prior to the attachment are not affected by the section. 23 C. L. J. 115=34 I. C. 953=21 C. W. N. 158. See also 1 L. W. 977; 36 M. 348. If a mortgage deed is executed during the continuance of an attachment in execution of a decree, it is no doubt void as against all claims enforceable under the attachment. Where however a portion of the amount advanced under the deed is paid to prior encumbrancers who have a charge on the property at the time of the attachment, the deed is valid to the extent of the amount thus paid. The mortgagor's equity of redemption as it is on the date of attachment should alone be considered to have been attached. The interest in the property vested in the prior mortgagees is not affected by the attachment and so far as that interest passes to the new mortgagee, the mortgage is not contrary to the attachment within S. 64. 154 I. C. 437=1935 A. L. J. 749=1935 A. 391. Sale deed of property executed prior to attachment but registered after attachment. 1937 N. 143. A judgment-debtor sold his property on the day it was attached but after the attachment. That attachment was irregular as it did not conform with the provisions of O. 21, R. 54 (2) and (3). The transferee obtained the transfer for consideration in good faith and without knowledge of the attachment. Held, that the attachment was ineffective as against the transferee. 146 I. C. 693=1933 R. 198 (2). If a mortgage deed is executed during the continuance of an attachment in execution of a decree, it is no doubt void as against all claims enforceable under the attachment. Where however a portion of the amount advanced under the deed is paid to prior en-

cumbrancers who have a charge on the property at the time of the attachment, the deed is valid to the extent of the amount thus paid. The mortgagor's equity of redemption as it is on the date of attachment should alone be considered to have been attached. The interest in the property vested in the prior mortgagees is not affected by the attachment and so far as that interest passes to the new mortgagee, the mortgage is not contrary to the attachment within S. 64. 1935 A. W. R. 169. Where a purchaser has entered into possession and paid the price without a registered deed of sale attachment of land in execution of decree against vendor is not effectual against the purchaser. 4 Bur. L. J. 166=1925 R. 382. A private transfer does not avoid transactions which in no way prejudice the execution creditor. 29 C. 154 (166) (P. C.). See also 1931 M. 573. An alienation is not altogether void but only subject to sale that may be effected pursuant to attachment. 24 L. W. 836=99 I. C. 656=1927 M. 190. See also 39 C. W. N. 1076, 1937 N. 1. It must be strictly construed, and before property can be subjected to the restriction imposed, there must be a perfected attachment. 7 C. 702. See also 2 A. 58; 3 A. 698. The mere order to make an attachment does not amount to an actual attachment. The attachment is not complete until it has been effected in the manner prescribed by the rules, i. e., a copy of the order prohibiting the debtor from making payment of the debt until the further order of the Court has been sent to the debtor and duly served upon him. If this requirement has not been fulfilled there is in fact no attachment of the debt and the provisions of S. 64 are not applicable. 152 I. C. 795=1934 P. 619. See also [51 M. 349 (P. C.), Rel.] 1933 A. L. J. 1501=1934 A. 165=147 I. C. 509. No property can be declared to be attached unless, first, the order for attachment has been issued, and secondly, in execution of that order the other things prescribed by the rules in the Code have been done. Hence where a copy of the warrant of attachment is not affixed the attachment is invalid and S. 64 can have no application. 145 I. C. 813=1933 R. 267. The attachment does not affect subsisting equitable rights which could be enforced against the property at the date of the attachment. 8 M. L. J. 261. It does not create in favour of the attaching creditor, any interest in, or charge upon the property, as against other creditors. 15 C. 202, at p. 210. See also 144 I. C. 252=37 L. W. 366=1933 M. 342=65 M. L. J. 347; 27 M. L. J. 150 (P. C.). Effect of attachment—If creates right in attaching creditor. 25 I. C. 759 [15 C. 202; 25 C. 179 (P. C.), Foll.]; 1936 N. 209. A private alienation of property after an order for attachment which has not been effected, is valid unless proof is given that all the requirements of O. 21, R. 54 C. P. Code have been complied with and the proclamations have been made. 26 I. C. 204; 1 O. L. J. 549. See also 36 I. C. 732, 19 N. L. J. 94; 3 O. L. J.

Notes.

422; 42 M 565=36 M.L.J. 284. The words, "private transfer" mean a voluntary sale, gift or mortgage, in contravention of the attachment order, and not the enforced execution of a conveyance or assignment in obedience to the decree of a Court qualified to pass it. 4 A. at p. 225 (F.B.). Where the alienation is made with the consent of the judgment-creditor and the money is applied towards the discharge of the judgment debt, it is not void. 7 W.R. 430. An adjustment of the attaching creditor's claim whereby the debt of the garnishee is made over to the creditor is valid. 1931 M 573. A private transfer of property under attachment is not absolutely void but is void only as against claims enforceable under attachment. 63 I.C. 108. Partition is not alienation and so is not affected by the pending attachment. 1929 A 726. As to *wavier of right* conferred by the section, see 13 P 446=1934 P 685.

PRIVATE TRANSFERS—ILLUSTRATIVE CASES.—An agricultural lease made by a judgment-debtor of attached property, is an alienation. 18 A. 123. Purchaser of land in possession—Execution and registration of conveyance only after attachment—Effect. 92 I.C. 777=1925 R. 382. A renewal of a mortgage already existing on the property is not an alienation. 4 M 417. But a mortgage created for the first time is. 9 W.R. 544. Consent given by the heirs of a Mahomedan who by his will bequeaths more than one-third of his property, does not amount to an alienation. 26 B 496. Where an alienation is effected by operation of law, as in the case of a vesting order under the Insolvent Act, the attachment cannot prevent the operation of the statute. 8 M. 556. See also 17 M. 180, 33 C 666. A subsequent vesting order by a competent Court in favour of the Official Receiver prevails over a prior attachment. 54 M 727=61 M.L.J. 774. Attachment by British Indian Court is not avoided by the subsequent adjudication of a foreign Court. 60 I.A. 167 (P.C.). *Quære*, as to the effect a British Indian adjudication order would have had on the prior attachment and whether under the Code an attachment creates a lien or charge or confers title. See 60 I.A. 167=1933 P.C. 134=56 M. 405=64 M.L.J. 562 (P.C.), 39 C.W.N. 1076. When the adjudication is made, the insolvent's property, vests in the Receivers and the Receiver's rights are not affected by the prior attachment, whether the attachment is before judgment, or after the decree. The attachment by itself does not give the attaching creditor any charge or lien on the property, nor does it give him any priority in respect of the property attached as against the Official Assignee or Receiver, the only effect of the attachment is to prevent private alienation. The attaching decree-holders therefore are not entitled to execute their decree under the provisions of O. 21, R. 53. 145 I.C. 695=29 N.L.R. 303=1933 N 229. Where during the pendency of a suit the defendant agreed and paid a certain amount

into the hands of the plaintiff's pleader in part satisfaction of the money to which the plaintiff may become entitled and the plaintiff subsequently obtained a decree but meanwhile another creditor filed an application in insolvency and the defendant was adjudged insolvent after the decree in the earlier suit had been made, *held*, that the money deposited with the plaintiff's pleader in the earlier suit did not form part of the assets of the insolvent and the original plaintiff was entitled to appropriate the same towards his decree. 145 I.C. 826=37 C.W.N. 475=1933 C. 625. Decree creating a mortgage during a subsisting attachment is not void against attaching decree-holder. 41 M.L.J. 557=45 M. 103. But see 41 M.L.J. 393=45 M. 84. As to effect of attachment under Court's permission, see 67 M.L.J. 741. An alienation in compliance with a decree for specific performance prior in date does not contravene this section. 139 I.C. 610=34 Bom L.R. 117=1932 B 301. If there is valid attachment of a debt, the satisfaction of the decree in which the debt might have been merged would be void under S. 64, against all claims and objections under the attachment. 152 I.C. 795=1934 P. 619. Under S. 64 it was to be shown that the transfer was "contrary to the attachment" which is the same thing as saying that it must be prejudicial to the interests of the attaching creditor or the auction-purchaser. Letting land to statutory tenants on a smaller rent basis, held to be prejudicial to the creditor. 152 I.C. 757=1934 A 902. Rival attachments—Private transfer to satisfy one decree if void. 13 Bom L.R. 1189. But see also 37 B 138.

ATTACHMENT WHEN EFFECTIVE.—See 30 I.C. 857. Effect of attachment—An attachment of property does not confer title therein, but merely prohibits its transfer. 39 P.R. 1915=29 I.C. 572, nor creates a charge. 1930 M 4. See also 60 I.A. 167 (P.C.), 39 C.W.N. 1076. Attaching creditor must be classed with unsecured creditors in insolvency proceedings. 1929 C. 524. See also 42 L.W. 834=69 M.L.J. 799. An order of attachment takes effect only from the date of its actual promulgation under O. 21, R. 54, and not from the date of the Court's order. 32 I.C. 276, 42 M. 365, 41 M. 161, 39 I.C. 857; 39 I.C. 562; 42 M. 844=37 M.L.J. 375, 51 M. 349 (P.C.); but also see 33 I.C. 492. Knowledge of purchaser of the order immaterial. 1929 B 395. A prohibitory order restraining the payee of a promissory note from receiving the money has not the effect of an attachment. Such attachment is invalid and S. 64 does not apply. 46 M. 415=44 M.L.J. 206. Section does not apply to alienations in contravention of *ad interim* injunction. 1960 L. 858. The Court can make an order striking off an execution proceeding, and at the same time continuing an attachment. 11 C.W.N. 163. For instances which might tend to show that an attachment has expired, see 22 C 909 (P.C.). Attachment before judgment—Subsequent sale of property in execution of another decree—Application for sale

Explanation.—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

Notes.

by person who attached before judgment 38 M.L.J. 441. See also 166 I.C. 873=17 Pat.L.T. 847=1937 P. 50. When a suit is dismissed an attachment before judgment terminates without any order of Court and if the judgment is reversed on appeal or annulled on review the judgment does not revive it so as to affect alienations made before the date of such reversal. Even where the plaintiff on the reversal of the decree of the first Court dismissing his suit appeals and on appeal gets a decree in his favour and re-attaches the property in suit, his claim is not one enforceable under the original attachment 147 I.C. 509=1933 A.L.J. 1501. Where property is attached before judgment and the order of attachment is set aside but the attachment is restored the parties are restored to the position they occupied when the property was originally attached. A private sale of the property in the interval is void 42 A. 39. See also 1933 A. 953, 40 C. 598 (P.C.). An *interim* order of attachment before judgment passed when the minor defendant is not properly represented will operate for the purpose of preventing alienation though the order cannot be made absolute without a proper guardian. A purchaser of the property in the interval can intervene in the proceedings and show that the order should not be made absolute. 106 I.C. 142=1928 M. 1. A re-attachment in execution as a matter of greater caution, of certain immoveable properties which had been attached before judgment does not amount to an abandonment of the original attachment. 26 I.C. 81=1 L.W. 932. Nor will mention in the sale proclamation of a mortgage executed after the attachment amount to a waiver of plea under S. 64. 1928 B. 44. Attachment ceasing under O. 21, R. 57. Re-attachment—Alienation during interval is valid 97 I.C. 547, 7 R. 20. An alienation which is void by reason of its being made contrary to an attachment cannot revive or be validated by reason of the attachment ceasing as a result of the execution being struck off 39 C.W.N. 733. When an execution application is struck off, the attachment made under it cannot be treated as subsisting 18 A. 49. See also 6 A. 33; 7 A. 617; 19 A. 482, 23 C. 829. The assignee of a decree need not apply for a fresh attachment 16 A. 132; 17 M. 58. The death of the judgment-debtor does not cause the attachment to cease 12 A. 440. When a judicial sale takes place all previous attachments effected on the property sold cease 12 C. 317. What are "claims enforceable under the attachment". See 20 A. 421; 23 M. 478; 14 M.I.A. 543; 6 A. 33, 2 A.L.J. 265, 167 I.C. 48=1937 N. 1. See also 10 W.R. 99. Objections under this section are available only to those having claims enforceable under the attachment 1929 P. 1.

EXPLANATION.—This explanation is new

and supersedes 16 B. 91 at p. 100; 15 C. 771 and 25 A. at p. 434. Object of explanation. 93 I.C. 366=1926 S. 177. Explanation gives priority to claims under S. 72, C.P. Code, only in connection with the attachment under which they are enforceable. If an attachment is withdrawn or ceases to exist there is no right to rateable distribution 66 I.C. 642=8 O.L.J. 358. The combined effect of S. 64, and the explanation which has been added thereto is to extend the protection of that section to the claimants for rateable distribution against private alienations of property after attachment, just as much as to the decree-holder at whose instance the attachment is made 164 I.C. 1031=1936 O.W.N. 861. One of the objects of S. 64 is to prevent an alienation which might defeat the claim of the attaching creditor. Where, therefore, an alienation has been made after the attachment and the judgment-debtor satisfies the debt of the attaching creditor out of the sale proceeds, then such an alienation cannot be said to be 'contrary to such attachment'. And other creditors who have not applied for attachment but have applied for rateable distribution are not entitled to the benefit under S. 64. The explanation to S. 64 does not apply unless the claim of the subsequent decree-holders can be said to be a claim for rateable distribution within S. 73 and the essential condition of enforcement of such claim is that there should be assets held by the Court. 4 A.W.R. 1236=1934 A. 1057. See also 1933 N. 349. Under S. 64, an applicant for rateable distribution is placed on the same footing as the attaching decree-holder. But if the attachment were to cease, the position of the person who merely applied for rateable distribution might become precarious and he would be unable to proceed further to realise his decree debt. But under the amendment of O. 21, R. 55 by the Allahabad High Court, even if the attaching decree holder is satisfied or withdraws his claim, that would not affect the rights of one who had already applied for rateable distribution. Under the rule, the amount decreed is deemed to include the amount of any decree against the judgment-debtor, notice of which had been given to the sale officer. Consequently a private transferee of the attached property cannot, by satisfying the claim of the attaching decree holder, claim a paramount right so as to override the claims of a decree holder who had prior to such transfer, applied for rateable distribution. 150 I.C. 770=1934 A. 896. Meaning of "enforceable" in explanation 49 M. 38, "Claims enforceable under the attachment", meaning of. 1937 N. 1, 39 C.W.N. 1876. Attachment before judgment—Alienation pending attachment—Subsequent insolvency of defendant and discharge—Right of attaching creditor to proceed against attached property. 42 L.W. 834=69 M.L.J. 799.

Sale.

65. Where immoveable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

66. (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

Notes.

Sec 65—Execution sale—What passes under. 1930 L. 937. Title of purchaser when accrues, liability to Government revenue, *see* 40 C. 89=28 M. L. J. 311 (P. C.). As to when title vests in the purchaser, *see* 88 I. C. 693, 1926 N. 17 Under S. 65, C. P. Code, and S. 8, T. P. Act, a purchaser in a Court sale is entitled to the property from the date of the sale and not from the date of the confirmation thereof [40 C. 89 (P. C.), Ref.] 145 I. C. 174=1933 M. 482. The auction-purchaser in execution of a rent decree and not the judgment-debtor is liable for rents accruing between the date of the sale and its confirmation, as under S. 65 the title of the former dates from the date of the sale. 23 I. C. 101=18 C. W. N. 136, 140 I. C. 560=9 O. W. N. 948 *See* O. 21, R. 92. The right of an auction-purchaser of a share in a village to mesne profits dates from the date of sale and not from the date of mutation of names in the Revenue Register. 45 I. C. 248=5 O. L. J. 31 *See also* 24 A. 475, 1936 R. D. 49. Standing crops go with the sale of land, unless otherwise provided for. 13 M. 15. Failure to obtain sale certificate from court, does not vitiate title of the auction-purchaser. 25 I. C. 8 *See also* 95 I. C. 965. Gift by auction-purchaser before confirmation takes effect if he authorises donee to take possession. 2 Luck. 496=102 I. C. 72=1927 O. 261. As to effect of reversal of decree before grant of sale certificate, *see* 29 A. 591. *See also* 56 M. 808=1933 M. 598=65 M. L. J. 253. On a sale being held (but not confirmed) the attachment does not *ipso facto* come to an end. The Judge executing the decree is not therefore divested of his jurisdiction to deal with the application under O. 21, R. 58, in consequence of the sale having been held and his order raising the attachment cannot be challenged for want of jurisdiction. 145 I. C. 142=1933 S. 198.

Sec 66: SCOPE OF SECTION—As to whether the section has retrospective operation, *see* 36 C. L. J. 396=27 C. W. N. 305 *See also* 43 A. 416, 47 C. 1108, 1925 N. 41; 30 C. W. N. 160, 40 C. W. N. 470. A suit for a declaration of title brought after the present Code of 1908 came into force against the transferee from the heir of the certified purchaser, where the sale took place and was confirmed before its enactment, is governed by S. 317 of the old Code, and not by S. 66 of the present Code, and is, therefore, maintainable. 39 P. L. R. 152. Section should be

strictly construed. 34 P. L. R. 487=146 I. C. 932=1933 L. 636 *See also* 1937 M. 362. S. 66 applies only where plaintiff's claim is based on auction-purchase and not where it is prior to and independent of the sale. 36 I. C. 681; 1931 B. 578=33 Bom. L. R. 1296. S. 66 applies only when the plaintiff attempts to enforce his secret title *as against* the certificated purchaser. It has no application if the heirs of the ostensible purchaser do not appear in the case and deny plaintiff's 'benami' purchase. (75 I. C. 197, Foll.) 165 I. C. 709 (2)=1936 A. L. J. 1169=1936 A. 750. It may be that where the auction purchaser is no party and is indifferent as to which of the two contending parties is held to be entitled to the property purchased by him he being admittedly a mere stake-holder, S. 66 does not apply. Such a proposition does not apply to a case where the defendant is a transferee under a valid title-deed from the auction-purchaser. S. 66 applies not only to cases in which the property is claimed against an auction-purchaser himself but also where it is claimed against his representative in interest. 157 I. C. 615=1935 A. 143. The primary object of S. 66, C. P. Code, is that the certified purchase should be deemed to be conclusive and no one should be allowed to challenge it, unless he comes within the exceptions mentioned in the section itself, and those exceptions are contained in sub s. (2) under which a wrong insertion of the name of the purchaser in the sale certificate made fraudulently or without the consent of the real purchaser can be rectified and under which third persons are absolutely protected. It is immaterial whether the plaintiff claims the whole of the property purchased at the auction or only a share in that property. Where, therefore, the plaintiff brings a suit claiming joint possession over one-half of the property on the ground that it was purchased by the auction-purchaser on his own behalf and on behalf of the plaintiff, the suit is not maintainable. 167 I. C. 683=1937 A. L. J. 52=1936 A. W. R. 1254=1937 A. 176. As to applicability of section, *see* 90 I. C. 116 (Section not applicable to sale by receiver with permission of Court which appointed him); 83 I. C. 382=1924 O. 218 (Title of persons beneficially interested in the purchase not affected); 84 I. C. 98=1925 O. 20; 8 P. 585. (Section does not exclude evidence as to auction-purchase being benami when such evidence is relevant.) 133 I. C. 551. *See also* 162 I. C. 553=17 Pat. L. T. 591=1936 P. 429. Claim based on agreement to

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate

Notes.

re-convey made before and after sale is enforceable 62 C.L.J. 88. A suit based on the ground that the plaintiff was the real purchaser at a Court-sale and that the certified purchaser was not really so, is barred by S. 66. It is immaterial whether the plaintiff is in possession and seeks confirmation of possession or whether he is out of possession and seeks to recover it. But if the real owner is in possession of the property and the certified purchaser wants to take advantage of his name being in the sale certificate and brings the suit on that basis the real owner can successfully defend it on the ground of his being the real purchaser. But if the plaintiff bases his suit on some other title subsequently acquired, *e.g.*, adverse possession, the suit does not come under S. 66. 12 P. 616=14 Pat. L.T. 208=1933 P. 264. S. 66, raises an irrebuttable presumption in favour of the auction-purchasers. But there is nothing to prevent him from creating a trust in favour of, and constituting himself a trustee for, the person who supplies the purchase money. Even if there be no registered instrument, twelve years' enjoyment by the beneficiary will confer a prescriptive right in him. 4 A.W.R. 676=1934 A. 990. The auction-purchaser's right arising from the sale cannot, by reason of S. 66, be questioned in suit. But a plaintiff can claim title to the property covered by the purchase not on the ground of the purchaser being benamidar for himself, but on the ground that the purchaser subsequently transferred or agreed to transfer his title to himself or that he acquired the same otherwise, for example by prescription. 4 A.W.R. 676=1934 A. 990, 62 C.L.J. 88; 1937 M. 362. S. 66 (1) has to be strictly applied. Its object is to prohibit on grounds of public policy a suit against the certified purchaser on the ground specified in the section. It does not render benami transactions illegal. If the cause of action is not based on the benami purchase but on a contract or title acquired subsequent thereto, S. 66 is not a bar. 1937 M. 362. In the absence of anything definite to show the contrary, the purchase made by a joint decree holder, though in his own name, would undoubtedly enure for the benefit of all the persons interested in the joint fund which has been utilized in the acquisition of the property. Other persons would be beneficially interested in the purchase, and would be "entitled to recover a share of the properties purchased at auction," conditional on the payment of a proportionate share of the costs incurred in the litigation. And this right can be relinquished without a written instrument, as such right is short of ownership. 1933 A. 854 (2)=148 I.C. 502=1934 A. L.J. 107. A suit for execution of a sale-deed and for recovery of possession on the ground that defendant's father purchased the properties as benamidar for the plaintiff falls within S. 66, and is barred. 29 I.C. 138; 54

M.L.J. 462 (P.C.) S. 66 applies not only to cases in which the property is claimed against an auction-purchaser himself but also where it is claimed against his representative in interest as, for example, a transferee from him under a valid title-deed. 4 A.W.R. 974=1935 A. 143. The section provides that no suit shall lie against the certified purchaser on the ground that the purchase was on behalf of the plaintiff. 44 I.A. 201=44 A. 159 (P.C.) Cases of suits by certified purchasers are beyond the letter and scope of this section. 21 A. at p. 40. The section protects the certified purchaser only so long as he retains the possession given by Court. When he parts with it to the true owner he cannot sue for possession. If he ousts the true owner in possession for more than 12 years the true owner's suit for possession is based upon adverse possession under the limitation and is not barred by this section. 56 I.A. 330=51 A. 675=57 M.L.J. 177 (P.C.). A benami certified purchaser can sue in his own name even when the true owner's name is disclosed. See 22 B. at p. 679. The object of S. 66 is to put an end to benami purchases at Court sales in execution. 43 M. 643=39 M.L.J. 11 (P.C.), 12 Beng. L.R. 317. An agreement subsequent to a purchase is not affected by the section and is specifically enforceable. 43 M. 643=39 M.L.J. 11 (P.C.); 42 M. 615 (F.B.), 31 Bom. L.R. 1271. But see 54 I.C. 726=24 C.W.N. 27; 42 M. 616 (F.B.). But an agreement made prior to the execution sale is affected by the section and a claim to enforce it will be barred. 35 C.W.N. 940=54 C.L.J. 147 [43 M. 643 (P.C.) Dist.]. A suit by a judgment-debtor against an auction-purchaser to enforce an agreement before the sale to reconvey the properties to the judgment-debtor is barred. 50 I.C. 546. The section is intended to prevent fraud, and cannot apply to cases in which its application would promote fraud. 12 C. 204. But see 16 M. at pp. 292-93. The section has no application where it is found that the certified purchaser was, at the date of the purchase, managing the plaintiff's family as its agent, and that he bought the lands as such. 17 M. at p. 286, 287. See also 18 M. 436. But see 22 A. 434. A person is entitled to be regarded as the certified purchaser at any time after the acceptance of his bid at the sale, even though a sale certificate has not issued to him. 25 W.R. 493; 19 I.C. 909=19 C.L.J. 330, 29 I.C. 716; 53 I.C. 961. Section is no bar when the certified purchaser does not contest plaintiff's claim. 82 I.C. 344=1925 A. 47. The section should be construed strictly. 5 Bom. L.R. 329; 2 L.L.J. 358, and literally. 2 I.A. 154; 1923 C. 228.

APPLICABILITY OF SECTION.—A plaintiff purchaser, at a Court-sale, is not entitled to recover the property from the defendant of whom he was found to be the benamidar, and the benami transaction was found to be free from fraud. 36 B. 116. See also 56 I.A. 330; 108 I.C. 130=26 A.L.J. 245. Th

fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold

Notes.

section applies only to sales in execution of decrees of Civil Courts, held under the Code. 14 C at p 585 S 66 has no application in a case where the benamidar himself does not claim under the sale certificate. 27 C.W.N. 208=1923 C 302 A cause of action against the benamidar which arose under the old Code, 1882, is not affected by the new Code. 50 I C. 335=23 C.W.N. 604 See also 18 C.L.J. 616=8 C.W.N. 1331. Section applies to the case of a purchaser at a sale in enforcement and execution of certificate under S. 2 of the Public Demands Recovery Act. 16 C.W.N. 973=16 C.L.J. 412. Where at an auction, a person purchased property in the name of one and it was alleged by another that it was in trust for him, a suit between these two claimants is not within the prohibition contemplated by S. 66. 33 I C. 1000 Section does not apply to cases where a plaintiff who purchases property in the name of another, has been in adverse possession for over 12 years. 19 C. 199. The section applies whether the ostensible purchaser at an auction-sale purchases the whole or part of the property sold. 57 I C. 684 Benami purchaser attesting sale by true owner, effect of—Whether operates as estoppel. See 36 M. 564=23 M.L.J. 301 A manager guilty of fraud cannot take advantage of the section as against the ward. 30 I.C. 212. As to fraud, see also 36 B 116 Joint decree-holders—Co-decree-holders purchasing at execution sale—Rights of others. See 37 A. 545 (P.C.) (affirming 32 A. 541=6 I C. 364). 29 I C. 447 is not now good law. See also 29 A. 557 Section 66 has no application to cases where the manager of a Hindu family or a tenant-in common purchases with funds belonging to the joint family or to all the tenants-in-common. 17 I C. 434=1912 M.W. N 1071 See also 43 M.L.J. 363=45 M. 856, 37 I C. 111. S 66 is intended to discourage *benami* purchases at execution sales held by the Court by penalising the person who purchases *benami* in the name of another. The penalty applies equally to any one claiming through him. It does not apply where the name of the *benamidar* has been inserted in the sale deed fraudulently or without consent of the real purchaser. The section refers to private agreements or understandings between the *benamidar* and the person who employs him. It has, therefore, no application to a case where the plaintiff says that he and first defendant, the *Bara*, purchased certain property with joint family funds; that the latter allowed the property to be sold for arrears of rent; that in the auction the property was purchased by second defendant, son of the first defendant, that however was only *benami*; it was really purchased by the first defendant and that it continued to be the partible property of the joint family. The plaintiff is an innocent person and no party to

the fraud, he is not hit by S. 66. 61 C. 440=150 I.C. 1051=38 C.W.N. 494=1934 C. 567. Where properties sold in execution of a decree were purchased with the funds of the manager of a joint Hindu family in the name of his son-in-law, S 317 of the C. P. Code, 1882, bars the claim of the members of the joint Hindu family to the properties as being really joint family acquisitions. 44 I A 201=33 M.L.J. 180=40 A 159 (P.C.) See also 35 A. 80=40 I A. 40=24 M.L.J. 345 (P.C.). Purchase at Court-auction by two persons with joint funds—Sale certificate in the name of one—It is a joint transaction constituting the parties co-purchasers and not a *benami* transaction and this section does not apply to it. 50 B. 660 But see 1934 C 322. Some persons purchased a property in execution sale in the name of one of them. They had contracted themselves that they shall be the owners of the property in shares proportionate to their contribution. The *benamidar* sold away more than his share of the property. One of the contributors filed the suit for declaration of his share in the property. Held, that S. 66 was a bar to such a suit. The operation of S 66 could not be ousted by the existence of any private agreement or undertaking. 61 C 371=150 I.C. 77=1934 C 322

SUIT FOR REPRESENTATIVES OF REAL PURCHASER.—S 66 is intended to bar the institution of a suit against the certified purchaser by the beneficial owner or one standing as successor-in-title of the beneficial owner. 16 I C 480=10 A.L.J. 97 Also see 25 I C 821=12 A.L.J. 1145 157 I.C. 615=1935 A 143 S 66, C P Code, applies to the successor-in-title of the certified purchaser. 55 I C 499=16 N.L.R. 87 (31 B. 61, 35 B 342, Ref.) Also see 19 I.C. 909=19 C.L.J. 330. Third parties—S 317 of the old Code did not apply to persons claiming through the certified purchaser. 46 I C 216 Third parties—Suit by beneficiary against the *benami* certificated purchaser. See 54 I.C. 127=24 C.W.N. 51. Third parties—Property mortgaged by judgment-debtor—Sale in execution—Suit by mortgagee against the judgment-debtor and execution purchaser. 54 I.C. 967=37 M.L.J. 586 [37 A. 545 (P.C.), Ref.].

SUIT FOR POSSESSION.—A plaintiff at a Court-sale is not entitled to recover the property from the defendant of whom he was found to be the *benamidar* and the *benami* transaction was found to be free from fraud. 36 B 116 Also see 35 A 138, 29 I C 787; 40 C. 20, 28 M.L.J. 251 (Auction-purchaser not trustee for real purchaser). S 66 is no bar to a suit brought by the principal against the agent for the recovery of properties purchased by the agent in his own name but with the principal's money and for the principal's benefit in a Court-auction though without the knowledge of the prin-

to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

67. ²[S. 327] (1) The ¹[Provincial] Government, ³[* * *]

Power for ¹[Provincial] Government to make rules as to sale of land in execution of decrees for payment of money

may, by notification in the ⁴[* *] Official Gazette, make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the ¹[Provincial] Government, to make

it impossible to fix their value.

²[(2) When, on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the ¹[Provincial] Government may, by notification in the ⁴[* *] Official Gazette, declare such rules to be in force, or may, ³[* * *] by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out rules so continued or modified.]

Delegation to Collector of powers to execute decrees against immoveable property.

68. [S. 320.] The ¹[Provincial] Government may, ³[* * *]

Power to prescribe rules for transferring to Collector executions of certain decrees

declare, by notification in the ⁴[* *] Official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees

Leg. Ref.

¹Substituted for the word 'local' by Government of India (Adaptation of Indian Laws) Order, 1937

²Section 67 was re-numbered as (1) and to the same section sub-S (2) was added by Act I of 1914, S 3

³The words "with the previous sanction of the Governor-General in Council" were repealed by Act XXXVIII of 1920

⁴The word 'local' omitted by Government of India (Adaptation of Indian Laws) Order, 1937

Notes.

Principal 49 I.C. 734=9 L.W. 276 [19 W.R. 356 (P.C.), 37 A. 545, Foll.]

SUIT FOR DECLARATION—A suit by a son, member of a joint Hindu family, for a declaration that a Court auction-purchase in the name of his mother, made out of family funds is benami, is barred under this section 43 A 711. But it has, however, been held that the real purchaser in a benami sale who remains in possession is not precluded by S. 66, from suing for declaration that he is the owner 25 I.C. 810, nor from remaining in possession of the property till the certified purchaser pays him a binding mortgage debt which he paid off *bona fide* on the basis of his supposed title 133 I.C. 536=1932 A. 32=1931 A.L.J. 601

PLEADINGS—The plea of bar under the section may be put forward and given effect

to at any stage of the suit, even in appeal for the first time if it does not depend upon disputed facts 37 I.C. 111; 35 C.W.N. 940=34 C.L.J. 147=136 I.C. 538

Sec 67.—The rules framed are not retrospective in their operation 15 B. 322, and may provide for an appeal from the Collector's orders 12 A. 564. Sanction of Commissioner to sale of agricultural land in execution—Unnecessary. 19 I.C. 479=89 P.R. 1913, 66 I.C. 893=3 L.L.J. 5.

Sec 68. SCOPE OF SECTION—Under S. 68, only those decrees can be transferred for execution to the Collector which direct the sale of any immovable property or such decrees in execution of which any property could be attached and sold. It is only when the property attached is capable of being sold and is a revenue-paying estate that the Civil Court can transfer the decree to the Collector with a clear direction to sell the property. If the property is non-transferable, the Civil Court is not competent to transfer the decree to the Collector. If the Civil Court is not competent to order the sale of the property, the Collector can have no jurisdiction over such property. 31 N.L.R. 239=156 I.C. 65=1935 N. 133. See also 162 I.C. 362=1936 O. 280. The Collector is bound to carry out the decree, subject to the discretion given to him by S. 1 of Sch. III and the following sections and subject to the provisions contained in Ss. 4, 5 and 6 of Sch. III, 11 A. at p. 95 (F.B.);

ordering the sale of any particular kind of, or, interest in immovable property, shall be transferred to the Collector.

Notes

See also 7 B 332. All that the executing Court has to see is whether it is a case in which a decree-holder asks for the sale of the agricultural property and if that is the case, the decree has to be transferred to the Collector for execution as soon as the Court orders that the property should be sold. 147 I.C. 1201=3 A.W.R. 579=1934 A 253. Under the provisions of S. 68, the Local Government has no power to transfer to the Collector an execution case pending in a Civil Court in which that Court has already sold the property but the sale has not been confirmed. The power of the Local Government is confined only to those cases in which the property has not been sold but only an order for sale has been passed. 148 I.C. 464=1934 O. 138=11 O.W.N. 411. If it is declared by notification that a decree for sale of a particular kind of property should be transferred to the Collector for execution, a sale of the property, if made by a Civil Court, is void as such a notification ousts the jurisdiction of the Court so far as regards the execution of the decree. 151 I.C. 244=1934 A.L.J. 859=1934 A 314. The functions of the Court under O. 21, R. 2, cannot be delegated to the Collector or his subordinates, though the decree has been transferred to the Collector for execution. 37 Bom. L.R. 93=1935 B 158. Rules framed under R. 17 as to transfer of decrees for execution. 45 B 1132. Collector—Power of, to execute decree transferred. 61 I.C. 579=18 N.L.R. 131. The functions of the Court under O. 21, R. 2, C. P. Code, cannot be delegated to the Collector or his subordinates, though the decree has been transferred to the Collector for execution. 59 B 345=37 Bom. L.R. 93=1935 B 158. The Collector executing a decree transferred to him, under S. 68, is not a Court, and he has no power to certify an adjustment of the decree under O. 21, R. 2. An adjustment recorded by the Collector during execution cannot consequently be treated as certification under O. 21, R. 2. 19 N.L.J. 175, 60 B 729=164 I.C. 9=38 Bom. L.R. 505=1936 B. 277. As to powers of Civil Court and Collector, see also 38 Bom. L.R. 221. When execution proceedings are transferred to the Collector under S. 68, for sale of immovable property, and the judgment-debtor is a minor, the Civil Court, and not the Collector has the power to give permission to the decree-holder to bid at the sale, which is required under O. 21, R. 72. 60 B. 688=38 Bom. L.R. 276=1936 B 189. A Court has authority to re-call its own record transmitted to the Collector for execution. 7 B. at p. 336; and can control the proceedings of the Collector. 8 B 301; 11 B at p. 482; 7 A. 407. See 9 A. 43 and 11 A. 94. The Collector does not become the Court executing the decree by the mere fact of the execution of the decree having been transferred to him

133 I.C. 609=1931 A. 320 (2)=1931 A.L.J. 166. See also 1933 S 112=142 I.C. 579. After transfer to Collector no new process of attachment can be issued against the same property. 92 I.C. 906=1926 O. 318. As to jurisdiction of Civil Court to interfere with the powers of the Collector, see 2 O.W.N. 73=1925 O. 448. See also 50 A. 827=1928 A 558=26 A.L.J. 769. A Civil Court can order the temporary alienation of the land of an agricultural tribe in satisfaction of a money decree. 74 I.C. 194=4 Lah. L.J. 476. Alienation of land by judgment-debtor without permission is void. 153 I.C. 612=11 O.W.N. 1626=1935 O. 156; 11 O.W.N. 1571=1935 O. 121. The Collector must decide the best method of satisfying the decree whether by management by the Collector himself or by sale or by letting. But he has not got the discretion to decide whether the decree has been satisfied. 37 B. 32. But see 16 A. 228. All that is delegated to the Collector is to consider the proper mode in which a decree may be satisfied by an agriculturist debtor so as to save, if possible, the sale of his property and the Court passing the decree can enquire into the question whether the decree-amount is satisfied or not and order a further execution when the Collector has returned the papers under an erroneous belief that the whole amount had been liquidated. 142 I.C. 579=26 S.L.R. 506=1933 S 112. When a decree has been transferred for execution to a Collector, an application to record satisfaction under O. 21, R. 2 should be made to him. 16 A. 228. But see 37 B. 32. Decree transferred to Collector for execution—Decree-holder certifying payment through mistake or fraud of judgment-debtor—Collector entering satisfaction—Jurisdiction of trial Court. 167 I.C. 401=1937 O.W.N. 231. A suit lies in a Civil Court for confirmation of a sale held by a Collector and to set aside an order passed by him cancelling it. 25 A. 355. In view of S. 68 and Allahabad Government Notification No. 1887-1-238, dated 7-10-1911 which authorises the Collector and Collector alone to sell ancestral property a sale of it by the Civil Court is without jurisdiction. 143 I.C. 522=1933 A 192=1932 A.L.J. 1118. See also 154 I.C. 933=1935 A.W.R. 249=1935 A. 468, 8 Luck. 504=10 O.W.N. 517=145 I.C. 363=1933 O. 274. As to U.P. Notification, see 148 I.C. 464=11 O.W.N. 411=1934 O. 143. See also 1936 R.D. 197. An ancestral grove with a house which has been assessed by Government can be sold in execution by the Collector only. 36 A. 33. Execution sale—Ancestral property sold as non-ancestral property whether can be set aside. 24 A.L.J. 281=44 A. 380. "Ancestral land" as defined in (All.) General Rules, Ch. IV, R. 8 (a) means property owned continuously from 1—1860 by the proprietor. Land gifted to the judgment-debtor after

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| Provisions of Third Schedule to 1914 | 69. The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section. |
| Rules of procedure. | 70. [S. 320, paras. 2 and 3]. (1) The [Provincial] Government may make rules consistent with the aforesaid provisions— |

Leg. Ref.

¹ Substituted for the word 'local' by Government of India (Adaptation of Indian Laws) Order, 1937.

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that date is not, therefore, "ancestral land" and the sale thereof need not be by the Collector 1933 A.L.J. 91=1933 A. 138. Where a certain land is saleable under the Bundelkand Land Alienation Act, this section cannot be invoked to transfer the decree to the Collector. 48 A. 392=1926 A. 339=24 A.L.J. 397. Where the mortgaged property is ancestral, the Civil Court is bound under S. 68, to transfer the proceedings in execution of the mortgage decree to the Collector 162 I.C. 362=1936 O. 280.

APPEAL.—No appeal lies to the High Court from an order passed by the Collector in an execution proceeding transferred to him 7 Bom L.R. 682; 5 A. 314 (F.B.).

Secs 68 to 72 and O. 21.—S. 72 must be read as alternative to S. 68 and so read it only indicates the source of the authority of the Collector to exercise powers under Sch. III in local areas where the Local Government has not issued a notification under S. 68. The Civil Court has under S. 72 power to authorize the Collector exactly as the Local Government has it under S. 68. The Civil Court cannot under S. 72 exercise the powers of Collector under Sch. III due to the express provisions of Ss 72 (2) and 70 (2). 167 I.C. 807=1937 N. 41. The rules in Ch. 40 of the Revenue Manual do not apply to the execution of decrees of Revenue Courts, because Ss 68 to 72, C.P. Code, have been specifically excluded by the Second Schedule to the Agra Tenancy Act. Decrees of the Revenue Courts passed under the Agra Tenancy Act must be executed in the manner laid down in O. 21, C.P. Code. 1937 R.D. 37.

Sec. 70—A Collector acting under the section is a Revenue Court and can pass order under S. 476, Cr. P. Code 14 A.L.J. 1077=38 I.C. 419. After a sale is confirmed by the Collector and retransmitted to the Civil Court, he has no power left to interfere with the sale. 48 A. 568. The function of the Collector on receipt of a C Form issued by the Civil Court according to the rules prescribed under the C.P. Code and in the C.P. Revenue Book Circular, Vol. 2—III 8, is either to execute it by sale of the land attached or to realise the amount due under the decree by a lease or similar arrangement. It is beyond his function, when the sale is closed and the auction confirmed, to entertain a compromise relating to the sale 26 N.L.J. 93. But see 1935 A.L.J. 919. A

Collector, who is empowered by rules framed by the Local Government under S. 70 (1) to set aside the sale of immovable property held in execution of a decree transferred to him by the Civil Court, has jurisdiction to set aside such sale even after the sale has been confirmed by him and the record of the execution case has been retransmitted to the Civil Court, if he is satisfied that the decree-holder, by the exercise of fraud, kept the judgment-debtor ignorant of the execution proceedings culminating in the sale of the property and of the confirmation of sale, and that as a consequence of his fraud the decree-holder succeeded in purchasing the property of the judgment-debtor for much less than its real value. An order passed by a Collector confirming a sale is a judicial order and he has inherent power to recall and cancel his order if he is satisfied that it is necessary to do so for the ends of justice or to prevent an abuse of the proceedings held by him. The retransmission of the decree to the Civil Court no doubt puts an end to the jurisdiction of the Collector to take further proceedings in execution of the decree, but it cannot divest him of the inherent jurisdiction possessed by him to correct his judicial orders or to review the same. 158 I.C. 753=1935 A.L.J. 919=1935 A. 868. No suit lies to set aside sale by Collector 3 O.W.N. 739=97 I.C. 1036=1926 O. 612. An order of the Commissioner passed on appeal from the Collector setting aside the objections of the judgment-debtor or auction-purchaser cannot be questioned in a Civil Court 139 I.C. 498=1932 O. 273 (6 O.W.N. 1214, Foll.). Where a decree for sale under a mortgage has been transferred for execution to the Collector under S. 68, C.P. Code, a mortgage of the property comprised in the decree by the judgment-debtor without the written permission of the Collector is absolutely void under para. 11, Sch. III, C.P. Code 153 I.C. 612=11 O.W.N. 1626. See also 11 O.W.N. 1571, 162 I.C. 362=1936 O.W.N. 489=1936 O. 280. A subdivisional officer conducting a sale cannot depute the Nazir to hold the sale, as it is contrary to the imperative provisions of R. 10 (11) of the C.P. Revenue Book Circular framed under S. 70 (1), C.P. Code. It is also illegal to continue a sale already commenced for about 9 days without directing the bidders to be present on the days on which it might be recommenced. A bid made by a prospective purchaser on a previous day cannot also be accepted behind his back several days later, so as to make him liable for loss on re-sale on his failure to pay the price. That is neither proper nor equitable. 18 N.L.J. 11.

(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court;

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector;

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

[S. 320, para 4.] (2) A power conferred by rules made under sub-section

Jurisdiction of Civil Courts barred.

(1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

Collector deemed to be acting judicially. 71. [S. 320, para. 5.] In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.

72. [S. 326] (1) Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the

Where Court may authorize Collector to stay public sale of land.

Leg Ref

¹ For rules providing for appeals in the Punjab from the orders of a Collector or the gazetted subordinate of a Collector in certain cases, *see* Punjab Gazette, 1909, Pt I, p. 12.

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EXECUTION—Objections to sale of property—Court, power of, to amend application—Date of application 37 I C 78=3 O L J. 529. Execution transferred to Collector—Judgment-debtor a minor—Permission to bid at sale to decree-holder is to be given by the Civil Court not Collector. 60 B 688=38 Bom L.R. 276=1936 B. 189. Rules framed by C. P. Government under S. 70—Collector deputing Nazir to conduct sale not legal—Bid on one day—Acceptance several days later not proper. Bidder not liable for loss on resale 18 N.L.J. 11

Sec. 70, (2).—Where a decree is transferred to the Collector for execution, a Civil Court cannot entertain an application under O. 21, R. 72 inasmuch as that power has been conferred on the Collector. 42 B. 621=20 Bom.L.R. 708

Sec. 72 [See also NOTES UNDER S. 68] SCOPE AND APPLICABILITY OF SECTION.—On this section, *see* 103 I.C. 884 (1)=1927 N. 324, 1937 N. 1. The intervention of the Col-

lector contemplated by S. 72 is a preliminary requisite to the application of that section. S. 72, however, can only be applied in cases where the land is saleable. Where the land is protected from sale by a special enactment, S. 72 can have no application. 161 I C 628=1936 Pesh 90 Section does not apply to decree directing sale of land, in pursuance of contract affecting the same, 2 A. 856. *See also* 9 C 290 at p. 293 Action of Collector under section is administrative. 1 L. 192=58 I C 603 (F B) The sanction of the Revenue authorities not necessary for sale of revenue-paying land, in execution. 69 P.L.R. 1918=46 I C 864, *See also* 1 P.R. 1919=52 I.C. 356 Under S. 72 the Collector is empowered to represent to the Court that the public sale of land is objectionable and that a temporary alienation of land would satisfy the decree. He has however no authority to represent that a temporary alienation is objectionable and even if he represents that a public sale is objectionable, it is for the Court to decide whether his objection should be maintained. 157 I C. 953=1935 Pesh. 113. The Collector has no authority to suggest satisfaction of the decree in part by transfer of certain debts from the judgment-debtors to the decree-holders, or that mortgagee rights should

decree may be made within a reasonable period by a temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

Distribution of Assets.

73. [S. 295.] (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction

Proceeds of execution sale to be rateably distributed among decree-holders

Leg. Ref.

In sub-section (3) for the word 'Government' the word 'Crown' has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937

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similarly be transferred to the decree-holder. He has also no right to compel the decree-holder himself to take the lands on lease at a valuation fixed by the Collector. 160 I.C. 571=1936 Pesh 14. A District Judge executing a decree is not bound to accept the recommendation of a sub-divisional officer to the Collector to arrange to have the decree satisfied by a temporary alienation. 9 P.L.R. 1915=27 I.C. 630. The object of section is to save land by temporary alienation and the Court executing decree cannot vary its terms by authorising satisfaction in instalments. 2 N.W.P. 347. See also 6 N.W.P. 39. A Civil Court is competent in execution proceedings to grant a farm of the land of a judgment-debtor belonging to an agricultural tribe. If the Court in granting such a lease makes the lease money payable by instalments, it might be said that the Court has acted in an unwise or indiscreet manner by not demanding the entire lease money at once but it cannot be said that the Court has passed an order which it had no jurisdiction to pass. Such an order is not illegal or without jurisdiction and the provisions of S. 36 apply to the case and the Court can enforce payment of the lease money by applying the provisions of the Code relating to execution of decrees. (1920 L. 456, Foll.) 38 P.L.R. 936=1936 L. 696. Regarding suit to set aside sale by Collector, see 1 Luck. 558; 1926 O. 612=3 O.W.N. 739. Collector reporting inability to execute. Executing Court should not file execution application but should proceed with the execution. 96 I.C. 199 (1)=1926 L. 632.

CONCURRENT APPLICATIONS FOR EXECUTION OF DECREE—FORM OF EXECUTION TO BE ADOPTED.—When several applications for execution are pending against the same judgment-debtor, and all the applications have been made within the time required to give them a right to share in any realizations, it is obviously inequitable to adopt a form of execution which will favour one of the decree-holders at the expense of the rest. 1935 L. 964. Where more applications than one are pending, and the Collector has repre-

sented that the public sale of the property under attachment is objectionable, the correct procedure would seem to be for the Court to give the Collector details of the pending applications and to ask the Collector to suggest a method of temporary alienation which will provide as far as possible for the satisfaction of these decrees. 1935 L. 964.

FARM OF LAND IN FAVOUR OF DECREE-HOLDER.—NATURE AND EFFECT.—A farm of land in favour of a decree-holder is more in the nature of an adjustment of a decree the decree-holder receiving a tenure of the land in satisfaction of his decree as a whole and it stands on a different footing from a lease which is given out either on payment of an initial lump sum, or of rent at stated intervals. A decree-holder may be prepared to surrender his rights under the decree in return for receiving a limited tenure of the land rather than face a continuation of the execution proceedings. 1935 L. 964.

Sec 73: [See also NOTES UNDER S. 63] SCOPE AND APPLICABILITY OF SECTION.—Conditions as to the applicability of the section, and right to rateable distribution. See 30 I.C. 49=21 C.L.J. 624, 19 I.C. 226=19 C.W.N. 535, 42 M.L.J. 473, 48 M.L.J. 459; 42 I.C. 897=1917 M.W.N. 859; 1929 R. 198. Court has power to order rateable distribution in suitable cases even apart from S. 73. 1936 C. 390. S. 146 cannot enlarge the scope of S. 73 as it is expressly made subject to the other provisions of the Code. 159 I.C. 575=40 C.W.N. 26=1935 C. 738. This section must be read with S. 63 *supra*. See the cases cited on the point under S. 63. S. 73 has been so worded as to include cases in which it is possible that the purchase-money may not be actually deposited. 1933 A.L.J. 1102=1933 A. 666. S. 73 is applicable not only where sale is made by the Court, but also to cases in which execution of a decree is transferred to the Collector and sale is made by him, whether the Collector receives the purchase-money in cash or the decree-holder is declared to be the purchaser and the purchase-money is to be set-off against the decretal amount. 1933 A.L.J. 1102=1933 A. 666. Where an execution sale held by the Collector was set aside and the purchasers having obtained order for refund of their purchase-money applied for rateable distribution of the assets realised by the sale of property in execution of a decree against the decree-holder. Held, that S. 73 did not

thereof, the assets, after deducting the costs of realization, shall be rateably

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apply as the applicants had not made applications to the Civil Court in execution 151 I.C. 1027=1934 N. 243. S 73 does not take into account at all whether payment orders have been passed for the different decree-holders who have decrees against the same judgment-debtor. All that the section considers necessary are that assets should be held by a Court and that more persons than one have made applications to the Court for the execution of decrees. The mere fact that the Court has passed a payment order in favour of one of the decree-holders is no consideration which should bar the right of rival decree-holders to rateable distribution. The principle of S. 73 is that as long as the assets are still held by a Court there should be rateable distribution 151 I.C. 266=1934 A. 652. Where the assets are not liable to be rateably distributed, S 73 (2) has no application 42 M.L.J. 473. See also 1933 P. 277. A decree against the judgment-debtor for assets of his father gives no priority over the decrees against him personally 42 I.C. 897=1917 M.W.N. 859. See also 60 C. 923, *infra*. Scope of the section has been purposely broadened under the new Code of 1908. 70 I.C. 541=35 C.L.J. 327. Execution application praying for a relief which the Court could not grant is no ground for rejecting decree holder's application for rateable distribution. 49 M.L.J. 753=1926 M. 179=91 I.C. 11. An order under this section affects only interests existing at the time. The insolvency of the debtor introduces a new state of things from the date of the insolvency 27 C. 351. A judgment-creditor has no priority over the Official Assignee in respect of property attached by him previous to the vesting order 29 C. 428. Applicability to a Solicitor's claim for costs. 29 Bom.L.R. 1196=1927 B. 542=51 B. 855. The section applies to cases where a District Court transfers execution proceedings in a Small Cause Court to the Court of a Sub-Judge 18 B. 61. See also 15 M. 345. The section applies to cases where property has been attached in execution of a decree of a Presidency Small Cause Court, and the same property has been attached in execution by the High Court 20 B. 377. Nature of proceedings under the section is one of non-judicial character, and the Court cannot enquire into the validity or otherwise of the decrees under which payments are claimed. 19 N.L.R. 172=1924 N. 39=6 R. 582. Under S 73, all the judgment-debtors need not be identical, and if one or more of the judgment-debtors be the same, rateable distribution can be got as regards their share of the property. 156 I.C. 631=41 L.W. 490=1935 M. 399; 4 Pat.L.T. 373=74 I.C. 626, 5 R. 757. See also 9 C. 920; 30 C. 583. But the holders of decrees against one of the brothers in a joint family are not entitled to rateable distribution from out of the sale proceeds of the property pertaining to the share of another brother realised in execution of decrees against both the

brothers. 54 M.L.J. 278=1928 M. 362. A decree was obtained by one against party R whilst the decree obtained by the other party was against the sons of R. Held, that the two decrees were not passed against the same judgment-debtor. 159 I.C. 575=40 C. W.N. 26=1935 C. 738, 25 B. 494, 33 M. 465; 1930 C. 454, Foll. The words "same judgment-debtor" in S 73, must be construed liberally. A strict literal construction cannot be adopted in the sense that the decree must be against the same person *eo nomine*. A decree passed against a deceased person during his lifetime and sought to be executed against his legal representatives and a decree passed against the legal representatives of the deceased after his death, in respect of a claim against the deceased, are both decrees against the "same judgment-debtor" for the purposes of S 73. 42 L.W. 835=69 M.L.J. 711 (F.B.). A literal interpretation should not be given to the word "judgment debtor" in S 73. Where therefore a person is sued as family manager it must be taken that he represents all the members of the family (even if consisting of father and sons) and they are constructively parties to the suit and hence must be deemed to be judgment-debtors for the purpose of the suit 168 I.C. 559=43 L.W. 624=1936 M. 123, 1936 M. 40, Foll. A decree obtained against a Hindu father and a decree against the father and his sons are decrees against the same judgment-debtor for purposes of S 73. 44 L.W. 615=1936 M. 948=71 M.L.J. 541. See also 41 L.W. 490=1935 M. 399, where the question was raised but not decided. But see (1937) 1 M.L.J. 180. If a decree is obtained against a man as heir of a deceased person and another decree is obtained against him in his personal capacity, the two decrees are against the same judgment-debtor within the meaning of S 73. Consequently, if one of the two decree-holders takes out execution and assets are realised, the other is entitled to rateable distribution 63 C. 923=40 C.W.N. 570=1936 C. 210. Claims under this section are claims enforceable by attachment, against which assignments made under S 64 are void. 7 C. 34. Section does not apply to deposits by judgment-debtor for a particular decree 81 I.C. 7=1925 N. 157. Set-off claimed under O. 21, R. 72 is subject to rights of persons who are entitled to rateable distribution. If no such person is in existence on the date of sale or fifteen days thereafter set-off takes effect 1931 M. 103=130 I.C. 458=1930 M.W.N. 568. But see 1925 O. 287. In the pendency of an application under this section, set-off under O. 21, R. 72 cannot be ordered 52 C.L.J. 19. Proviso to S. 73 (1) (b) applies also when the decree-holder and mortgagee are the same provided the decree debt and mortgage debt are distinct. Where they are the same proviso does not apply. Money-decree passed in mortgage suit—Title to mortgaged property held to be in third person—Mortgagor subsequently acquiring title. Decree-holder:

distributed among all such persons :

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first applied for execution of money decree and later for sale of the properties. *Held*, S 73 (1) (b) not applicable—Remedy against property is by suit 53 M. 670=122 I.C. 366=1930 M. 138. Judgment-debtor's property attached and placed in charge of Superatdar—Failure to produce property—Warrant issued—Payment made to avoid attachment *Held*, the amount was liable for rateable distribution among the other creditors *Held also*, that the amount realized from the Superatdar was, in the eye of the law, the sale proceeds of the judgment-debtor's property which was admittedly attached in execution of the decree against him. Simply because the Superatdar failed to restore the property which was entrusted to him, the nature of the execution case was not changed; for all practical purposes the Superatdar represented the judgment debtor 148 I.C. 944=1934 N. 62.

JURISDICTION—Under S. 73, a Court acts in an administrative capacity. It cannot therefore inquire into the validity of a decree, any order to that purpose is entirely without jurisdiction. 152 I.C. 482=1934 P. 545. An application for rateable distribution can be entertained by the original Court even when the petition for execution is transferred from that Court under O. 21, R. 6. 35 P.L.R. 305=1934 L. 113 (1). A custody Court has no authority to make any rateable distribution unless it be the attaching Court as well. Under O. 21, R. 52 it can only determine the question of priority and thereafter act under the instructions of the attaching Court. 146 I.C. 791 (1)=37 C.W. N. 820=1933 C. 814.

RATEABLE DISTRIBUTION—FORMAL APPLICATION, IF NECESSARY.—Per *Sulaman, C.J.*—Section 73 does not make it necessary for a decree holder to make any formal application for a rateable share in the assets. All that is necessary is that he should have made an application to that Court for the execution of his decree for payment of money. 4 A.W.R. 1236=1934 A. 1057.

WHO CAN APPLY—See 20 S.L.R. 111. Only *bona fide* decree-holders can apply for rateable distribution, and a Court is bound to ascertain this fact. 11 C. at p. 44. See also 13 B. 154. Application for rateable distribution is not an application for execution. 64 I.C. 53=17 N.L.R. 143. Application for execution is necessary to entitle decree-holder to rateable distribution. Mere petition for rateable distribution is not enough. 87 I.C. 1025=1925 N. 382. The application must be to the Court holding the assets. It is not necessary to have the decree transferred for execution to the Court holding the assets. 132 I.C. 832=1931 R. 111 (2) (5 R. 757 held overruled by 6 R. 131). Attachment, not sufficient. 90 I.C. 527=1926 C. 249. But see 1936 C. 390 holding that the Court has power to allow rateable distribution apart from S. 73 in such cases. A person by simply obtaining an

order for attachment before judgment is not entitled to rateable distribution. 30 I.C. 38=28 C.L.J. 614, 12 B. 400. Section 73 only permits "application to the Court for the execution of decrees for the payment of money" and not by persons who have obtained orders for payment of money which are capable of being executed. The definition of decree in S. 2 (2) does not include an order which is defined in S. 2 (14). Therefore a person holding an order for refund of purchase money is not entitled to put in his application for rateable distribution, even though the order in his favour is capable of execution as a decree under S. 36, C.P. Code 17 N.L.J. 146. The holder of a decree for unascertained mesne profits, who has applied to the Court to ascertain the amount thereof comes within the purview of this section. 5 M. 123. On this point, see also 40 L.W. 291=151 I.C. 609=1934 M. 604=67 M. L.J. 303, 23 A. 106, 4 B. 429. Where money due to a judgment-debtor is attached in the hands of this debtor and paid by him into Court, a rival decree-holder attaching it in Court is entitled to rateable distribution. 5 M.L.J. 151. See also 5 L.L.J. 279=1924 L. 132 (*Sale postponed to enable judgment-debtor to raise money by private alienation*). A mortgage decree-holder who will be entitled to realize the balance by personal decree can apply for rateable distribution under this section. 152 I.C. 770=60 C.L.J. 22=38 C.W. N. 850=1934 C. 764.

WHEN SHOULD APPLICATION BE MADE "BEFORE THE RECEIPT OF SUCH ASSETS."—As to cases bearing on this point, see 13 C. 225; 21 C. at p. 817; 6 B. 588, 28 M. 380, 6 Bom.L.R. 376, 87 I.C. 783=1925 C. 966, 37 L.W. 366=65 M.L.J. 347 (44 M. 100, Ref.) "Receipt" means receipt of the whole of the assets realised by one order for sale. 95 I.C. 205=1926 N. 380. The bringing in of the purchase money realised by execution sale does not constitute "realisation" or "receipt" within S. 73 and in cases where the decree holder purchaser is allowed to set off the purchase-money towards his decree amount, the assets are realised within the meaning of S. 73 on the date of the sale itself and not on the last day of the period of 15 days allowed to a purchaser to deposit the amounts. 159 I.C. 228=42 L.W. 564=1935 M. 893. See also 1937 C. 55. For purposes of rateable distribution of assets under S. 73, C.P. Code, in cases of execution by the Collector, the assets must be deemed to have been received by the Court on the date when they were received by the Collector. 1937 N. 16. Until the Court has received a decree it has no jurisdiction to entertain an application for execution. Where the decree was received by the executing Court the next day after the application for execution was filed, the application is not sustainable in law so as to be the basis of a claim for rateable distribution. 27 L.W. 423; 101 I.C. 908=1927 P. 252. Attachment by different Courts—Mode of distribution. See 29 Bom.L.R. 689; 37 Bom.L.R. 78. Assets held by inferior Court—Superior Court can

Provided as follows:—

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale;

Notes.

call for them before they are paid out by the inferior Court—The call made after payment—Inferior Court cannot rectify error *ex debito justitiæ* 123 I.C. 193 (M) As to rateable distribution where attachments are made by a superior Court and inferior Court and the property is sold by either Court, see the cases cited under S. 63 To determine the question of priority the material point of time is not the date of sale of the mortgaged property but the date of receipt of assets by the Court 62 I.C. 167=33 C.L.J. 7 See also 44 C. 1072, 1932 B. 622 The creditors are not entitled to preferential treatment by reason of priority of attachment. The Court will apply the rules of justice, equity and good conscience in the determination of the relative claims of the creditors 44 C. 1072; 65 M.L.J. 317=144 I.C. 252=37 L.W. 366 Where assets held by a Court of inferior grade is transferred to a superior Court, rateable distribution is to be made as on the date of receipt of assets by the superior Court 29 Bom L.R. 319=101 I.C. 411=1927 B. 247. Where a property was sold in execution by a Collector during Civil Court vacation, an application by another decree-holder made on the reopening day of the Court cannot be deemed to have been made before the realization of the assets in the vacation, S. 10 General Clauses Act, being not applicable to the case. 1937 N. 16 As to effect of private sale to one of the decree-holders, see 1933 N. 349

NATURE OF APPLICATION MADE—"APPLICATION FOR EXECUTION"—A decree-holder who has obtained attachment before judgment is not entitled to rateable distribution in case he has not applied under O. 21, R. 10 to execute his decree 33 C. 639, 12 B. 400; 30 I.C. 38=28 C.L.J. 614 See also 159 I.C. 228=42 L.W. 564=1935 M. 893. Fresh attachment is not necessary when attachment already exists 53 A. 125=1931 A. 92 The word 'application' in S. 73 cannot be unqualified. It must mean an application made in accordance with law, not barred by limitation, not yet satisfied, and capable of being satisfied and it must also mean an application still subsisting and pending, and not already disposed of, whether on the merits or by default 13 R. 514=158 I.C. 515=1935 R. 135 An application for execution of a decree presented before the sale proceeds are deposited in Court will entitle the applicant to rateable distribution under S. 73, C.P. Code, though the application, being defective, is returned, and re-presented only after the deposit of sale-proceeds, because on re-presentation, it must be deemed to be a valid presentation on the date of the original presentation 1935 M.W.N. 1300=69 M.L.J. 908 But see 1929 N. 148=25 N.L.R. 94 The application for execution must be on the file

and undisposed of, when the assets are received 4 M. 383, 1937 N. 16 The date on which the application is required to be pending is the date on which the assets are received. The fact that an execution application filed before the receipt of the assets is dismissed for default later, i.e., before the rateable distribution is actually effected is immaterial 17 Pat L.T. 855=1937 P. 92 Merely because a Court after dismissing the application, orders the attachment to continue, it cannot be said that the application is pending, for purpose of claiming rateable distribution 1936 N. 277. Where in pursuance of an execution application the judgment-debtor is arrested and brought to Court, but is released at his request for the grant of time to pay off the decree amount on furnishing security, a formal order dismissing the execution petition cannot be taken to be a judicial order legally or validly disposing of the execution application, but has to be regarded only as an order for administrative or statistical purposes. The execution application must therefore be deemed to be still pending for purposes of S. 73, in spite of the grant of time to the judgment debtor and in spite of the dismissal order. The decree holder would therefore be entitled to claim rateable distribution on the basis of that application in the case of a sale and realisation of assets at the instance of another decree-holder brought about subsequent to the dismissal 43 L.W. 703=1936 M. 437=70 M.L.J. 683 Application for attachment of fund in Court though defective in form by not conforming to O. 21, R. 11 is sufficient for entitling creditor to rateable distribution 52 M. 760=57 M.L.J. 97=1929 M. 703 (F.B.) An informal letter asking the Judge to pay the money, sent by a Collector in respect of a decree for the Government is not an execution application 8 R. 294 Necessity for execution application See 95 I.C. 151=1926 L. 538, 90 I.C. 527=1926 C. 249, 20 S.L.R. 111=1926 S. 177 Execution application praying for relief which Court could not grant, if disentitles applicant to rateable distribution 49 M.L.J. 753=91 I.C. 11=1926 M. 179 Where a decree-holder who has obtained a decree against the same judgment-debtor and attached the same property in a Court of lower grade has the execution proceedings transferred to the Court of superior grade in which the assets are realised, he is entitled to a rateable share in the assets realised by the latter Court without a fresh application for execution or even for grant of a rateable share 163 I.C. 59=38 P.L.R. 281=1936 L. 519

"DECREES FOR PAYMENT OF MONEY."—A decree does not lose the character of being a money decree against one judgment-debtor because, under it, a sale of the property of the other judgment-debtor is also decreed.

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10 A 34 at p. 36 It is essential that the decree should have been obtained against the same judgment-debtor 42 C. 1, 25 B 91 47 I C 293, 27 C L J 100; 14 C L J. 50 It is not necessary that all the judgment-debtors in the several decrees should be identical 4 P L J. 373, 9 C. 920; 30 C. 583, 22 M. 241 A person who holds a decree against a Hindu father, and a person who holds a decree against the father and son holds a decree against the same judgment-debtor in case the property is the ancestral property of the family. 26 M 179 (181). See also 29 B. 528 Clause (a) and the second proviso have reference only to sales in execution of simple money decrees, and to the mode in which sale proceeds are to be rateably distributed among simple money decree-holders 5 A at p 568 Neither this section nor O. 34, R. 13 is applicable to a case where the question is whether the surplus amount can be paid to a subsequent encumbrancer 25 A L J. 190=1927 A 467=49 A 636 A composite mortgage decree, i.e., a decree for sale containing a direction that if the sale proceeds are insufficient to satisfy the decretal amount the decree-holder will be entitled to realise the balance by personal decree, is a "decree for the payment of money" within the meaning of S 73 of C. P. Code, and the holder of such a decree is entitled to claim rateable distribution, when it is found that the mortgaged properties had been sold and exhausted and found insufficient to satisfy the decree. 152 I C. 770=60 C L J 22=38 C.W.N. 850=1934 C. 764 The words "an encumbrance" cannot be read as "an incumbrance or incumbrances". 12 A. 546 See also 7 A. 378. When in execution of a mortgage decree a sale proceeds in lots, the sale need not be stopped as soon as the sum due under the decree is realized, if several other decree-holders have applied for rateable distribution 17 M.L.J. 80. The right to claim a refund of assets arises only after such assets have been actually paid to a person not entitled to receive the same A suit for a declaration that another decree-holder is not entitled to rateable distribution is not maintainable 7 M.L.J 277; 3 C.L.J. 385 See also 15 B. 438. The words "assets liable to be rateably distributed" mean assets reduced to a form in which they are available for immediate application towards the satisfaction of the decree which is being executed. 16 B. at p. 98 A debt due by a third party to the judgment-debtor, when paid into Court, is available for distribution. 19 M. 72 Rents of property under attachment, which have been realized by a Receiver appointed at the instance of one decree-holder, are available for distribution 26 C 772. But rent taken in lieu of interest, by a mortgagee, does not fall within the scope of the section. 9 M. 57. The 25 per cent. deposited by the purchaser at the date of sale would not be available for distribution until the balance is paid 18 C. 242 The fact that under certain circumstances it is possible for the Court to set aside

the sale and to return the purchase-money to the purchaser, does not render the purchase-money not available for distribution. 16 B 16 When property has been ordered to be sold in several lots, and only some of the lots have been sold, the sale proceeds of those lots alone, are available for distribution before the remaining lots are sold 26 M. 179

NOTICE—Notice of an application for rateable distribution need not be given to the other decree-holders 27 A 132

PRESUMPTION—Where payment of assets into Court and application for rateable distribution are made on the same day, there is no presumption as to the order of events and the officer distributing the assets should ascertain which act was prior in time. 47 I C 296=1918 M.W.N. 520

ASSETS—This term means all a man's property of whatever kind which may be used to satisfy debts or demands against him 16 B at p 98, 16 I C. 640=14 Rom L R 633, 26 C.W.N. 169=70 I C. 539=1922 C. 19. It also means proceeds of execution sale 26 M. at p 181 Assets must be realized in execution under process of Court or in one of the modes prescribed by the Code. 13 I C 907=15 A L J 49, 36 B 156 But see also 70 I C. 541=35 C L J 327; 14 L W 582=70 I C. 20=1921 M W N. 817; 1937 N 80. It has however been held that the language of the section is wide enough to cover cases where moneys are in the hands of the Courts by whatever process the same has been realised. 41 M. 616=35 M L J 150 But see also 30 C 262 A decree-holder who has attached a property can follow the money realised by sale of it for arrears of revenue over and above the arrears due and is entitled to rateable distribution along with another decree-holder who has attached such money 1937 N 80 All money paid by a judgment-debtor into Court under stress of execution before sale, whether to avoid attachment or whether made at an earlier later stage, should be treated as assets held by the Court liable to rateable distribution under S 73 Money paid into Court under O. 21, R 89 ought not to be exempted from this category 12 P. 772=14 Pat L T 357=1933 P. 303 Even where the attaching Court and the custody Court are the same, the assets would not reach the attaching Court under S 73 until it has been actually ordered to be credited to the decree in question (44 M 100, Ref.) 144 I C 252=37 L W 366=1933 M 342 (2)=65 M L J 347. Any money belonging to a person other than the judgment-debtor or any money paid into Court by a third party under a misapprehension cannot be described as 'assets' under S 73 A fund or sum of money cannot be regarded as "assets" unless it is in some sense the property of the judgment-debtor and can be legitimately applied to the payment of his debt 13 P. 446=1934 P. 685

Quære—Whether a payment under O. 21, R. 55, C.P. Code, can be regarded as "assets" held by the Court under S. 73, 13 P. 446=1934 P. 685. The following are assets liable to rateable distribution—(1) Salary of Government servant when attached 76.

Notes.

I C 640=14 Bom.L.R. 633. (2) Money deposited by surety for release of an attachment before judgment. 26 C.W.N. 169=70 I C 539=1922 C. 19 (3) Money paid to sheriff in execution of decree. 47 C. 515, 40 C 619 or in garnishee proceedings. 1930 C. 623. But see 36 B. 156; 53 I.C. 599=21 Bom. L.R. 975 (4) Sale proceeds in the hands of decree-holder purchaser. 43 I.C. 715; 44 C 789 (5) Sale proceeds of moveables realised by Nazir. 45 I.C. 108=33 P.R. 1918 (6) Money paid into Court under a prohibitory order. 42 I.C. 436=167 P.W.R. 1917 (7) Money paid into Court by judgment-debtor, though no process is issued. 54 A. 516, 140 I.C. 293=1932 N. 156, 23 I.C. 241=1914 M.W.N. 309, 1930 S. 300=25 S.L.R. 178. (8) Money realized in execution of personal decree. 15 I.C. 406=1912 M.W.N. 407 (9) Rents realised by receiver. 52 I.C. 305=22 O.C. 194 (10) Deposit by a defaulting purchaser. 49 M. 570=97 I.C. 86 (11) Land acquisition compensation deposited in Court for apportionment. 49 M. 38=97 I.C. 496. (12) Moneys paid by judgment-debtor under O 21, R. 43. 28 Bom.L.R. 237=93 I.C. 852 (2)=1926 B. 242, purchase-money due from a decree-holder in respect of which a set off has been allowed for appropriation towards the decree amount. 133 I.C. 737=1931 B. 252=33 Bom.L.R. 503 The following are not assets liable to rateable distribution—(1) Money paid privately by judgment-debtor to decree-holder. 13 I.C. 907=15 A.L.J. 49 (2) Money paid into Court under O 21, R. 55. 36 B. 156, 53 I.C. 599 But see *contra* 17 C. 515. (3) Money paid to bailiff to avert levy of attachment of movables. 53 I.C. 599=28 B.L.R. 975 (36 B. 156, Foll., 28 M. 380, 22 B. 264, 38 M. 221, 27 M. 346, Ref.). But see *contra* 47 C. 515, 40 C. 619 (4) Money paid by judgment-debtor on arrest to bailiff to get himself released. 39 I.C. 623=19 Bom.L.R. 274 (5) Amount deposited under O 21, R. 89 to set aside sale. 14 C.L.J. 50=10 I.C. 527=15 C.W.N. 872, 42 I.C. 507, 1916 M.W.N. 195; 45 I.C. 782=7 L.W. 573, 30 C. 262. (6) Money not paid into Court. 3 P.W.R. 1920=54 I.C. 41=11 P.L.R. 1920 (7) Money paid as security under O 41, R. 5. 36 P.L.R. 1916=29 I.C. 791 (8) Money paid for a specific purpose, as money paid to avoid arrest or arrest before judgment. 29 I.C. 714=8 Bur.L.T. 22; 61 I.C. 424=14 S.L.R. 164 (9) Money realized under attachment before judgment. 32 A. 578, i.e., such attachment confers no special right or priority on the party who obtains the order (*Ibid*) See also 32 I.C. 944

FUND IN COURT—If a fund in Court has been attached by several creditors, none can claim preferential treatment owing to priority of attachment. 33 C.L.J. 7=62 I.C. 167 No book entry transferring the money to the credit of any execution, is necessary to treat the money as receipts for purpose of section 156 I.C. 409=1935 P. 201 When a Court in execution of a decree attaches a fund in the Court the latter Court holds the fund subject to the direction of the execution

Court and to transfer it to that Court. The fund as soon as it is transferred to the execution Court becomes "assets held by that Court" within S. 73. All decree-holders who have applied are entitled to rateable distribution. 44 M. 100=39 M.L.J. 608 (F. B.) See also 42 M. 692; 42 M.L.J. 361; 31 I.C. 616=19 C.W.N. 345 Where the fund in Court was the surplus sale proceeds payable to the defendant mortgagor after sale under a mortgage decree, the fund was not available for rateable distribution and the attaching decree-holders were to be paid fully in the order of their attachment. 26 M.L.J. 364. See also 38 M. 221, 158 I.C. 201=1935 M. 713=69 M.L.J. 121 The proceeds of a sale held in pursuance of an attachment of a company before its liquidation, must be distributed in accordance with the provisions of C.P. Code. 43 C. 586 When certain property belonging to the judgment-debtor was in the hands of the Tahsildar, two creditors obtained decrees against him, one of them in a Munsif's Court and the other in a Sub-Court within the same district. The former obtained an order for attachment earlier in date than the latter but before the money could be received from the Tahsildar, the latter also applied for attachment. Held, that the property could not be deemed to be "assets held by a Court" on the date when the attachment order was issued by the Munsif to the Tahsildar or even when it was received by the Tahsildar, and that therefore the decree-holder in the Munsif's Court was not entitled to priority merely on the ground of his being the first attaching decree-holder. 144 I.C. 252=37 L.W. 366=1933 M. 342 (2)=65 M.L.J. 347 The position is made very clear by the addition of Proviso (ii) to R. 52 of O 21 in Madras according to which the receipt by a Court which has attached first shall be deemed to be on behalf of all the Courts in which there have been attachments of the property prior to the receipt of such assets. (*Vide* amendment of rule by Madras High Court)

RIGHT TO RATEABLE DISTRIBUTION—Execution before Collector. 36 B. 519. Right to rateable distribution—Conditions to be satisfied. 46 M. 506=44 M.L.J. 413. (On appeal from 42 M.L.J. 350), See also 18 I.C. 55, 14 C.L.J. 50=15 C.W.N. 872 When there are two decree-holders of one judgment-debtor and the objection of the judgment-debtor that the property was non-transferable against one is disallowed and against the other it is allowed, the latter is entitled to rateable distribution of the sale proceeds on execution by the former. 30 I.C. 49=21 C.L.J. 624 Where there are several attachments before judgment and the moneys are realised before any of the plaintiffs obtains a decree, the money should be held to the credit of all the suits and distributed between all the attaching creditors who subsequently obtained decrees. 15 L.W. 531=68 I.C. 714=1922 V. 236. If more persons than one holding a decree against the same judgment-debtor attach one and the same decree obtained by the

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judgment-debtor against another before the money due under the attached decree is deposited in Court by the judgment debtor of the attached decree, i.e., before the assets are paid into Court, the provisions of S. 73, C.P. Code, are attracted, and the assets after the deduction of the costs of realisation are to be rateably distributed among the several decree-holders. The decree-holder who starts the first execution cannot claim the benefit of the entire amount deposited by reason of O. 21, R. 53 (2), which rule contemplates only cases where a decree for money is attached by a sole decree-holder. 40 C.W.N. 1249 If the order for rateable distribution is set aside on appeal, there is no power to order restitution under S. 144 42 M.L.J. 473.

PERMISSION TO SET-OFF granted to the other decree-holder would not affect the right to such distribution 59 I.C. 80=12 L.W. 328. The right of the decree holder to have, and the power of the Code to allow set-off of the purchase money against the decretal amount where the decree-holder himself is the auction purchaser is subject to the right of any other decree-holder who may be entitled to rateable distribution. 1933 A.L.J. 1102=1933 A. 666 See also 1935 M. 904; 1937 C. 55; 17 Pat.L.T. 847 Under O. 21, R. 72, leave to set off can be given before the sale has been held. Thus it can be given at the same time as the permission to bid is granted to the decree-holder. When a decree-holder has been given permission to bid at an auction-sale and to set-off the amount of his bid, if successful, against the amount due to him under his decree and when the successful bid is less than the decree amount, the whole of the set-off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realised *eo instanti* the sale is made. In such a case, S. 73 will give no benefit to other decree-holders who apply for rateable distribution after the conclusion of the sale, however soon after its conclusion their application may be made. 145 I.C. 975=38 L.W. 579=1933 M. 804=65 M.L.J. 569; 42 L.W. 564=159 I.C. 228=1935 M. 893, 1937 C. 55 But see 164 I.C. 568=1936 Pesh. 164 where the date of confirmation of sale was considered the date on which the assets were received. Whenever there is a pending application for execution, the applicant in which would be entitled to rateable distribution, there cannot be any receipt of assets or realisation of assets by the Court unless the decree-holder purchaser's rateable share (when the purchase is by him) is determined and the balance is deposited by him into Court. The rule under which, in an ordinary case, where no question of rateable distribution can arise and a set-off has been allowed to a decree-holder purchaser, the date of sale is to be regarded as the date of realisation of assets, cannot apply to a case where there is a valid claim to rateable distribution. There can be no set off except

subject to the right of rateable distribution and in such cases the assets cannot be deemed to have been realised by the Court till the amount has actually been deposited under orders of the Court. 43 L.W. 703=1936 M. 437=70 M.L.J. 683. Rival decree-holders—Permission to one to bid and to set-off—Right of the other decree-holders to rateable distribution not affected 59 I.C. 86=12 L.W. 328; 134 I.C. 616=1931 P. 405. Decree against two persons—Assets realised in execution—Right of holder of another decree against one of these persons alone to rateable distribution confined to assets of the common judgment-debtor. 28 Bom L.R. 78=93 I.C. 222=1926 B. 150

RIVAL DECREE-HOLDERS.—Application for rateable distribution whether maintainable after realization of assets by executing Court. 62 I.C. 857. Right of one decree-holder to impeach decree of rival decree-holder—Fraud and collusion—Suit for declaration and injunction before distribution of assets. 43 M. 381=38 M.L.J. 108. Rival decree-holders—Assets held by Munsiff—Power to order rateable distribution—Small causes decree. 25 M.L.J. 601. Mortgage decrees which provide for recovery of the deficiency of the decree after sale of hypotheca from the person and other properties of the mortgagor are decrees "for the payment of money" within the meaning of S. 73 and entitle the mortgagee to apply for rateable distribution. 39 M. 570=29 M.L.J. 96. See also 74 I.C. 140, 160 I.C. 892=1936 Pesh. 52 As between two attaching decree-holders one executing his own decree and the other executing the attached decree, the one who had applied for execution of the attached decree was entitled to rateable distribution since in effect he was executing his own decree 1913 M.W.N. 1021=21 I.C. 611=14 M.L.T. 533

DISMISSAL OR WITHDRAWAL OF EXECUTION APPLICATION.—A decree-holder is not entitled to rateable distribution if the application for execution is dismissed or time-barred or the decree is satisfied. 30 I.C. 49=21 C.L.J. 624, 24 I.C. 83=18 C.W.N. 1311 Claims enforceable under the attachment cease to have effect on withdrawal of attachment 66 I.C. 642=8 O.L.J. 358. The section only requires that application for execution should be made before the assets have been received and that the decree-holder at the time the assets are to be distributed has not obtained satisfaction. There is no warrant in the section for the view that the application should be pending 143 I.C. 87=1933 Pesh. 52.

ENQUIRY INTO RIVAL CLAIMS.—Suit by one decree-holder for refund of moneys awarded to others before actual distribution does not lie 46 I.C. 101=16 A.L.J. 530. The inquiry by the Court under this section is non-judicial. A Court under this section cannot inquire into the validity or *bona fides* of a decree on the strength of which rateable distribution is claimed. 62 C. 715=39 C.W.N. 490=1935 C. 290 (F.B.), 40 M. 431=32 M.L.J. 553. See also 5 P. 445=1926 P.

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;

(c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale;

secondly, in discharging the amount due under the decree,

thirdly, in discharging the interest and principal moneys due on subsequent incumbrances (if any); and

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

Notes.

497 Under S 73, when rival decree-holders apply for rateable distribution of assets the Court can investigate whether any of the decree holders is a *bona fide* decree-holder or is a benamidar for the judgment-debtor 17 CWN 326=16 CLJ 582=16 IC 795 (11 C 42, 13 B 154, Foll.) See also 23 M. LJ 699 As to whether an executing Court can inquire into the validity of a decree under any circumstances, see 1934 P 545=152 IC 482 Also 40 M 341=32 M L J. 553, 104 IC 735=1927 M 944

FRAUD AND COLLUSION—The Court will not grant rateable distribution if collusion or corrupt bargain is proved A decree-holder can show that a decree obtained by another decree-holder was obtained by collusion with the judgment-debtor. 23 M. LJ 699 See also 17 CWN 326=16 CLJ 582=15 IC 795, 43 M. 381=38 M L J. 108. But see 1926 P. 497 An executing Court when rateably distributing the proceeds of a sale in execution, cannot go into the question whether the decree has been obtained by fraud. 46 B 635 (13 B 154, overruled) See also 43 M. 381=38 M L J 108.

Sec. 73 (1), proviso (b)—There were three decrees against the same judgment-debtors, one, a simple money decree and the other, two decrees for sale based on mortgage. In the course of execution proceedings, the money decree-holder and one of the mortgage decree-holders agreed as follows.—“Sale proceedings be carried out in the execution case of money decree and in the remaining two executions, at the time when sale takes place, rateable distribution be made” Held, that the reasonable interpretation to be placed upon the agreement was that when the sale took place in execution of the money decree, the mortgage decree-holder would be entitled to the same interest in the proceeds of the sale of the property mortgaged with him as he had in the property sold, in accordance with S 73 (1), proviso (b). 166 IC 714=1937 O.W.N.

127.

Sec. 73 (2)—S. 73 (2) applies only where the assets liable to be rateably distributed are paid to persons not entitled to receive the same. Where the sum in dispute is no part of the assets liable to rateable distribution the section has no application. 145 IC. 362=14 Pat L T 287=1933 P. 277. See also 42 M L J 473. Although R 89, specifically mentions payment to the decree-holder, that is only an injunction to the judgment-debtor as to what amount he has to pay for the purpose of getting the sales set aside The sale may be held at the instance of one of the execution creditors, but any amount received from the judgment-debtor in Court under pressure of the sale (e.g., under O 21, R 89) must enure for the benefit of all the execution creditors who have acquired a claim to rateable distribution under S. 73 1933 N. 347 A suit to recover money wrongly paid to a defendant under S 73 is a suit for money paid to him for plaintiff's use and must be brought within three years from the date of payment and not within six years under Art 120 of Limitation Act. 39 M 62=27 M L J 640 (37 M. 381, Foll.) Application for rateable distribution—Death of applicant—Substitution of legal representatives—Application for rateable distribution by legal representatives—Dismissal—Suit by legal representatives not maintainable 30 C W.N. 735=96 IC 378=1926 C 967.

APPEAL—No appeal lies against an order passed under this section 14 A 210; 5 P. LJ 415=57 IC. 421, 134 IC 195=1932 L 96 (42 C. 1, Foll.); 162 IC 349=1936 A. LJ. 559=1936 A 626. An order refusing to execute an order allowing an application for rateable distribution is appealable. 133 IC. 166=1931 P. 359 (1 Pat L.T. 296, Dist.) But an order determining a question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest is not appealable as it does not fall under S. 47. 55 B. 473, 134 IC. 195 (42 C 1, Foll.).

(3) Nothing in this section affects any right of the 1[Crown].

Resistance to Execution.

74. [S. 330.] Where the Court is satisfied that the holder of a decree for

Leg. Ref.

¹In sub-S (3) for the word "Government" the word "Crown" has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937

Notes.

But see 133 I C 737=1931 B. 252=33 Bom L R 503, where the question arises between the judgment-debtor on the one hand and the decree-holders on the other in which case the order would fall under S 47. See also 1935 L. 302 cited under S 47, *supra*

REVISION.—Neither can the High Court revise the order. 4 M L J 87. But see 4 M. 383. See also 5 P. L. J. 415=57 I C. 421; except in very exceptional circumstances. See 60 I C 371; 17 I C. 254=176 P. L. R. 1912; 33 P. L. R. 975. Taking a wrong view of S. 73 in an application for rateable distribution is not declining to exercise jurisdiction. Hence no revision is competent from the order. 156 I C. 409=1935 P. 201 (2). An order under S 73 is not merely a ministerial order, it is a judicial order. But the order cannot be interfered with in revision as the party has another remedy by way of suit 27 S. L. R. 190=1933 S. 329. Revision is not proper remedy, but a regular suit. See 25 I C. 592=1914 M. W. N. 738, 1926 M. 179, 1928 M. 362; 14 L. 243. Also 41 L. W. 490=1935 M. 399, cited under S. 115.

RIGHT OF SUIT.—Revision lies in the case of obvious mistake. 104 I C. 735=1927 M. 944. A suit lies to recover money paid to a wrong person under a valid judgment or equitable distribution under S. 73. 39 A. 322. A rival decree-holder need not wait for the distribution of the assets before bringing a suit for a declaration that the decree of one of the decree-holders was obtained by fraud and collusion and that he was not entitled to share in the rateable distribution. 43 M. 381=38 M. L. J. 108. Petition under S. 115 is not the best way to settle questions coming under S. 73 where money is paid to third parties after the application and they are not parties to the application. Regular suit is proper remedy. 25 I C. 592=1914 M. W. N. 738. See also 65 I C. 230; 106 I C. 258=1927 M. W. N. 795, 104 I C. 735=1927 M. 944. The omission by the person claiming rateable distribution to invite the attention of the Collector to his own right of rateable distribution does not deprive him of his right to claim rateable distribution in a regular suit. The fact that the decree which is noted to be satisfied will have to be reopened does not affect the question. 1933 A. L. J. 1102=1933 A. 666. Unless it is ascertained, or definitely alleged on substantial grounds, that the assets realised or to be realised in execution of decrees of rival decree-holders would be insufficient to discharge in full the claims of all the decree-holders under S. 73. No

decree-holder has a right to maintain a suit to have the decree of his rival declared void on the ground that it was fraudulently obtained and to ask the Court to grant an injunction restraining the defendant from executing his decree against the common judgment-debtor or his property. (43 M. 381, Dist.) 145 I C. 206=1933 N. 214.

PRACTICE AND PROCEDURE.—In the case of decrees against several persons money realised from judgment-debtors who are common to both decrees is alone liable for distribution among the decree-holders, but S. 73 does not permit rateable distribution of money paid by one judgment-debtor to a decree holder who has no claim against him. 145 I C. 362=14 Pat L. T. 287=1933 P. 277. Where money due to the judgment-debtor is already under attachment by an order obtained by the decree-holder, there is no necessity for him to have it again attached when the application for execution and rateable distribution is transferred to another Court and the money is received by such Court. 147 I C. 1071=11 O. W. N. 161=1934 O. 110. Rateable distribution can be allowed in favour of a decree-holder who has obtained a decree against the same judgment-debtor and attached the same property in a Court of lower grade although the decree is transferred to the Court in which the assets are realised and there is no application for execution of the decree in that Court. 55 A. 622=146 I C. 575=1933 A. L. J. 921=1933 A. 563. Decree against two sets of defendants.—Satisfaction of decree.—Subsequent decree-holder against one judgment-debtor.—Adjustment of rights. 151 I C. 170=1934 M. 426=66 M. L. J. 699.

Sec 73 (3) PRIORITY OF CROWN DEBTS.—The enactment of S. 73 (3) gives a statutory recognition to the doctrine of priority of Crown debts which has been laid down so long ago as (1866) 5 B. H. C. R. 23. In the context, it can refer only to cases in which the Government is in the same position as any other decree-holder, and not to cases where it has a first charge, and its intention obviously is to say that in such circumstances the Secretary of State will not really be governed by the provisions of Cls (1) and (2) but will be entitled to the benefit of the doctrine of priority. 59 M. 872=1936 M. 802=70 M. L. J. 601 (33 C. 1040 and 69 M. L. J. 832, Rel. on). See also 147 I C. 863=1933 S. 368. S. 73 (3) does not confer any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any decree in support of it. The sub-section only saves the rights of the Government, independent of the section, such as they might be, and merely appears to have reference to the right of priority which can be ordinarily claimed in respect of debts due to the Crown. 156 I C. 826=1935 L. 319 (2).

Sec. 74.—A decree for partition is a

Resistance to execution. the possession of immovable property or that the purchaser of immovable property sold in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

PART III.

INCIDENTAL PROCEEDINGS

Commissions.

Power of Court to issue commissions 75. Subject to such conditions and limitations as may be prescribed, the Court may issue a commission—

- (a) to examine any person;
- (b) to make a local investigation;
- (c) to examine or adjust accounts; or
- (d) to make a partition.

76. [S 386] (1) A commission for the examination of any person may be issued to any court (not being a High Court) situate in a province other than the province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

[Ss 388, 389] (2) Every Court receiving a commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order

77. In lieu of issuing a commission, the Court may issue a letter of request to examine a witness residing at any place not within

Letter of request British India.

78. [S. 391.] ¹[Subject to such conditions and limitations as may be prescribed] the provisions as to the execution and return of commissions for the examination of witnesses shall apply to commissions issued by ²[or at the instance of]—

Leg Ref.

¹ Inserted by Act X of 1932.

² The words in brackets were inserted by C P Code Amendment Act X of 1932

Notes.

decree for the possession of property. 16 M. 127 Possession is not limited to actual possession 25 B 478 Detention in civil prison can be ordered only at the instance of the decree-holder or purchaser and the Court cannot order it of its own motion. 26 M 494. The "resistance" or "obstruction" is the resistance to or obstruction of the officer charged with the execution of the warrant 14 A 417 (419).

Sec. 75 —Order 26 does not in any way amplify the scope of S. 75 3 L 209 S. 75 does not authorize a Court to delegate to a Commissioner the trial of any material issue which the Judge is bound to try 3 L 209 (16 M. 350, Foll.). See also 1925 P 576, 7 P L T. 161=1925 P. 576; 129 I.C. 416=1930 C. 764

=53 C L J. 229 The judicial functions of a Court cannot be delegated to a Commissioner and the powers of Court to issue a commission is strictly defined in S 75. 15 C L J. 17 =13 I.C. 440=17 C W N 369. See also 30 Bom L.R. 131; 31 Bom.L.R. 108. Section does not contemplate a succession of commissions all covering the same ground Issue of commission to two persons to render proper account of improvements is irregular and of doubtful legality 1929 M 681 An appellate Court has power to issue a commission for a local investigation without recording its reasons. 135 I.C. 243=1932 A 270 Purposes for which a Court could issue a commission are confined to those specified in the section 139 I C 804=1932 A 264 The issue of commission is a matter in the discretion of the Court, and if the discretion is wrongly exercised the question ought to be raised before the Court of first appeal. It cannot be agitated for the first time in second appeal. 1933 P. 542

(a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of the ¹[the Central Government or of the Crown Representative], or

(b) Courts situate in any part of the British Empire other than British India, or

(c) Courts of any foreign country. ²[* *].

PART IV.

SUITS IN PARTICULAR CASES.

Suits by or against the ³[Crown] or Public Officers in their official capacity.

79. [S. 416] (New).—⁴[Subject to the provisions of sections 179 and 185 of the Government of India Act, 1935, in a suit by or against the Crown the authority to be named as plaintiff or defendant, as the case may be, shall be—

Suits by or against Government

(a) in the case of a suit by or against the Central Government, the Governor-General in Council before the establishment of the Federation of India, and thereafter, the Federation;

(b) in the case of a suit by or against a Provincial Government, the Province; and

(c) in the case of a suit by or against the Crown Representative, the Secretary of State.]

80. [S. 424.] No suit shall be instituted against the ⁵[Crown] or against a public officer in respect of any act purporting to be done by such public officer in his official capacity,

Notice.

Leg. Ref.

¹ Substituted for the words "Governor-General in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

² The words 'for the time being in alliance with His Majesty' have been omitted by Act X of 1932.

³ In the heading of this part, the word 'Crown' has been substituted for the word 'Government' by the Government of India (Adaptation of Indian Laws) Order, 1937.

⁴ This section is new and has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, in place of the old section which ran as follows:—

"79 (1) Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council.

(2) Nothing in this section shall be deemed to limit or otherwise affect any information exhibited by the Advocate-General in exercise of the power declared by S. 111 of the East India Company Act, 1813."

⁵ Substituted for the words "Secretary of State for India in Council" by the Government of India (Adaptation of Indian Laws) Order, 1937.

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Sec. 79.—FORM OF SUIT against the "Secretary of State" must be under the designation "The Secretary of State for India in Council." 1 C. 14; 40 I.A. 48 (51 and 52) For applicability to land acquisition proceedings, see 1929 L. 10 Suit lies when the Secretary of State acts under colour of legal title and not as a sovereign authority. When property comes to him under a decree of Court, it is not taken by an act of sovereignty but under colour of legal title. 5 P.

539=1926 P. 321. In all suits against Government, the Court should see that the defendant is properly described. 7 M. 478. The section gives no cause of action but only declares the mode of procedure when a cause of action has arisen. 6 Bom L.R. 131, 27 B. 189. The head of a Government department is not liable for wrongful acts of officials in that department unless it can be shown that the act complained of was substantially the act of the head of the department himself. 51 B 749. A suit against a state-administered or a state-owned Railway should be instituted against the Secretary of State for India in Council. 10 P 466, 1931 P 393; 52 B 548, 1932 A.L.J. 1033 In a suit against a State Railway Company, unless the Secretary of State is made a party, the Railway Company is not liable. 1933 P. 630

Sec 80.—The object of the section in providing for notice is to afford the Secretary of State or the Public Officer concerned an opportunity to reconsider his legal position, and to make amends, if so advised, without litigation. 40 B. 392; 24 M 279; 7 C. 499, 6 C 8 (F.B.), 54 C. 969 (1023), 23 L W. 464=91 I C. 368=1926 M 408; 58 C. 850 See also 156 I C 591=37 Bom L.R 341=1935 B 229. S 80 is clear and peremptory that notice must be served on the Secretary of State as a condition precedent to the institution of a suit against him, although he is impleaded only as a *pro forma* defendant and although no relief is claimed as against him. The section applies to all suits in which the Secretary of State is made a party defendant, whether or not any relief is claimed against him 15 P 353=161 I C. 690=17 Pat.L T. 152=1936 P. 339. S. 80 is express, explicit, mandatory and admits of no implications or exceptions. Where there are two plaintiffs

until the expiration of two months next after notice in writing has been ¹[delivered to or left at the office of—

(a) in the case of a suit against the Central Government, a Secretary to that Government;

(b) in the case of a suit against the Crown Representative, the Political Secretary;

Leg. Ref.

¹ For words "in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district" the words within brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

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notice by one is not sufficient notice within the meaning of S. 80, it is not sufficient compliance with its provisions and the suit as a whole is bad. (1935 B 229 and 1935 M 389, Foll.) 159 I C 33=1935 S 206, 14 L 330=34 P.L.R. 975=1933 L 203. See also 156 I C 591=37 Bom L.R. 341=1935 B. 229, 156 I C 333=41 L.W. 591=1935 M. 389.

CONSTRUCTION—ENGLISH DECISIONS—VALUE OF.—In interpreting S. 80 cases in the English Courts decided under statutes passed in England for the protection of public authorities (*e.g.*, the Public Authorities Protection Act, 1893) are not, as a rule, a safe guide, inasmuch as the English Statutes are not *in pari materia* with S 80 of the Indian Code 61 I A 171=61 C 470=148 I C 482=38 C.W.N. 517=11 O.W.N. 463=1934 P C 96=66 M.L.J. 506 (P.C.)

SCOPE OF SECTION.—A Public Officer who is sued in respect of an act of bad faith is not entitled to notice under S 80 16 C.W.N. 145, 26 A 220, 32 C 1130, 8 B 421 A Public Officer is entitled to notice under S 80 before suit, though he acts *mala fide* in the discharge of his duties 41 M 792=34 M.L.J. 494 (F. B.); 35 B 421 Section applies also to acts purporting to be done in public capacity though not strictly according to law Seizure of goods by Official Assignee—Suit to recover damages—Notice is necessary 1930 M. 458 The section is not limited to cases of what might be called torts or wrongs. 34 C 257 (282) A Public Officer against whom a suit is filed, in respect of an act done by him in his official capacity is entitled to notice under S 80, even though he has acted *mala fide* (1918 M 62, 1924 C 145 and 1924 A 851, Ref.) 1934 P. 14 Defendants' interest devolving on Government during suit—No notice necessary 24 A.L.J. 726=96 I.C. 351 (1)=1926 A 585 Notice under S 80, C.P. Code, is necessary in every case instituted against the Secretary of State including one arising on a contract. 37 M. 113, 27 I C 232=18 C.W.N. 1340 But see 20 B 697; 27 B. 450, as also a suit for an injunction 105 I C 756 (2)=29 Bom L.R. 1427. See also 105 I C. 729; 51 B. 725 (P.C.). Suit against a State Railway must be brought against the Secretary of State—Notice under S. 80 essential—Notice under S 77 and S. 140 of

the Railway Act not enough. 52 B. 548 See also 156 I.C. 541=1935 A. 900 For a suit even for temporary injunction against the Agent, N.W.Ry, notice under S 80 is necessary as S. 80 is express, explicit and mandatory and it admits of no implications or exceptions 14 L 330=34 P.L.R. 975=1933 L. 203. Section applies to declaratory suits against Government, 1930 L 708. Application under para 17 of the Second Schedule is not a suit for purposes of this section. 13 L. 672. A suit brought pursuant to an undertaking given under s 14, Bombay Land Revenue Act, within 30 days from the Collector's decision is not a suit which falls within S 80, C.P. Code, it is a suit on account of land revenue brought under the special provisions of the special Act, and the general provisions of S. 80 do not apply to such a suit. 36 Bom. L.R. 297=1934 B 162

ANY ACT PURPORTING TO BE DONE IN HIS OFFICIAL CAPACITY.—The notice contemplated is notice for an act which has been done, and does not relate to some act which is only threatened and which may or may not be done in the future. 28 A. 603, 51 M.L.J. 671. When in a suit to set aside a sale under Bengal Act I of 1895, on the ground of fraud, the Secretary of State is made a party, and no relief is claimed against him, no notice is needed. 32 C 1130 There must be a distinct act of the "Public Officer" which is complained of, to entitle him to notice 13 B 347, 30 C 36 Where plaintiff does not allege any act or omission by Official Receiver but he is made a party because he is in possession of property, no notice is necessary. 48 A. 821. See also 50 M 239, 31 Bom L.R. 1199 Notice given by two out of three joint plaintiffs is enough 24 M. 279. When a person who has given notice dies before suit, his representative must give a fresh notice before suing 25 A 187. In case of an amendment necessitated by the alleged discovery of facts previously unknown to the plaintiff, no further notice need be given. 30 C. 36 But when one notice has been given specifying a particular cause of action, no amendment should be allowed so as to introduce a new cause of action not specified in the notice given. 34 C. 257 (281), 38 C 797 There is nothing to prevent defendant from waiving notice or from being estopped by his conduct from pleading want of notice at the trial. 130 I C 894=1934 C 175 (34 C 257 and 40 C. 503, Ref.). 34 C. 257 (282). A notice though invalid may be waived by the Secretary of State and would be deemed to have been waived if no issue is joined at the time of settlement of issues. 40 C. 503. No other defendant than the Government and persons mentioned in this

(c) in the case of a suit against a Provincial Government, a Secretary to that Government or the Collector of the District; and

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section can raise the question of validity of notice under S 80 40 C. 503, 136 I.C. 445. Notice—When dispensed with. 15 I.C. 539=14 Bom.L.R. 353. Plea as to want of notice can be raised at the final hearing. 47 A. 291. The person who gives the notice and he who brings the suit must be identical. 59 M.L.J. 923

NOTICE—ADEQUACY OF—A notice which says that the cause of action and reliefs are described in the annexed copy of plaint which forms part of the notice, though defective in form, is substantial compliance of S. 80 151 I.C. 1076=38 C.W.N. 409=59 C.L.J. 295=1934 C. 187.

NOTICE—REQUIREMENTS OF—S 80 is imperative and imposes a statutory and unqualified obligation upon the Court to see that its terms are strictly complied with. The object of the section is to give the Secretary of State an opportunity of settling the claim without litigation, or to enable him to have an opportunity to investigate the alleged cause of complaint and to make amends, if he thought fit, before he was impleaded in the suit. A notice which gives only the names, descriptions and places of residence of some only of the plaintiffs is not a sufficient notice under the section 156 I.C. 591=37 Bom.L.R. 341=1935 B. 229 But see also 41 C.W.N. 92. All that a notice under S 80, C.P. Code, should contain is a statement of the cause of action, meaning thereby the bundle of facts on which the claim of the plaintiff or plaintiffs is founded. Where a claim is made in the notice for a larger amount of money as due from the defendant, the fact that in the suit the claim is reduced to a smaller amount does not change the cause of action for the suit or render the notice invalid, especially when the notice recites the circumstances under which the claim is made and when the reduction does not operate to the prejudice of the defendant but operates to his benefit. Though the notice should in every case state with precision the cause of action, the mere reduction of the claim does not make the notice defective 41 C.W.N. 92. What S. 80 requires is that the notice should contain the cause of action, etc., and the relief claimed. The notice need not be practically a copy of the plaint. The notice should be such as to give substantial information to the Government of the basis of the claim and the relief which the plaintiffs seek. Where it is obvious from the notice taken as a whole that the assessment of cess on their zemindari on the income of the *hat* was *ultra vires* and that the relief which they wanted to seek was that they should be relieved of that assessment it is not incumbent upon the plaintiffs to give in detail all the forms in which they would seek the relief 1934 P. 701.

JOINT NOTICE FOR SEVERAL SUITS—A joint notice given by all the plaintiffs of the different suits mentioning the total amount payable by the Secretary of State is proper

when the sum-total demanded in the separate suit does not exceed the amount mentioned in the notice. There is no particular form of notice prescribed anywhere and so long as the notice served satisfies the condition provided in S. 80; the mere splitting up of the notified claim into different suits, does not render the suits non-maintainable for want of notice. (27 B. 189, 1926 M. 408 and 54 C. 969, Rel. on) 150 I.C. 1131=1934 P. 346

SUIT BY TWO PLAINTIFFS—NOTICE BY ONE ONLY NOT SUFFICIENT.—A suit brought by two plaintiffs is not maintainable when the notice required by S. 80, C.P. Code, is given only by one of them. Such a notice is not a sufficient compliance with the section. The whole suit is bad and even the plaintiff who has given the notice cannot proceed with it. 156 I.C. 333=41 L.W. 591=1935 M. 389; 159 I.C. 33=1935 S. 206

WANT OF NOTICE—PLEA OF—WAIVER OF.—The plea of want of notice under S 80 taken by the defendant was a plea which had never been raised before in the history of the case and further having regard to the fact that at the time of the hearing before the Judge more than two years had elapsed since the arising of the cause of action, it was impossible for the plaintiff to bring another suit, further no issue had been raised at any time in the case as to whether or not notice had been served and the defendant had not at any time taken any point on the subject of notice to him. *Held*, that the want of notice had been waived (1931 C. 175, Rel. on and 1927 P.C. 176, Dist.) 150 I.C. 590=1934 P. 354 See also 1933 M. 917

INCLUSION OF ADDITIONAL RELIEF IN PLAINT—The addition in the plaint of a relief which was not covered by the notice does not entail the dismissal of entire suit of the plaintiffs. It is open to the plaintiffs to amend their plaint at any stage and proceed with the suit without that relief. 1934 P. 701.

SUIT BEFORE EXPIRY OF NOTICE—WITHDRAWAL—FRESH NOTICE—FRESH SUIT—A plaintiff who gives a notice of suit under S 80, and institutes a suit against the Secretary of State for India before the expiry of two months prescribed in the section, but withdraws the same with liberty to institute a fresh suit, is entitled to so institute a fresh suit without a fresh notice. When a suit is withdrawn, the legal position is the same as if no suit had been instituted, and the original notice is sufficient for the fresh suit under S. 80 36 Bom.L.R. 1106.

SUITS FOR INJUNCTION—Notice is necessary in all suits against the Secretary of State including suits for injunction. 37 M. 113=23 M.L.J. 181 (25 C. 239 R.); 25 A. 187, 35 B. 362, (14 Bom.L.R. 353, Foll.); 39 M.L.J. 151, 105 I.C. 756=29 Bom.L.R. 1427. Injunction suits against public officers also require previous notice. 58 C. 1288; 12 L. 260; 1933 L. 203 But see 59 C. 961. Also 51 B. 725=53 M.L.J. 81 (P.C.) Bombay rulings expressing

(d) in the case of a suit against the Secretary of State, a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government of the Province where the suit is instituted]

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the

Notes.

contra opinion disapproved. 40 B 392; 34 I.C. 535, 37 B. 243; 35 B. 362 are not now good law

SUIT FOR DECLARATION OF TITLE.—Where plaintiff sues for a declaration of title to land which he claims as part of permanently settled estate from defendant on ground of dispossession but the defendant claims settlement under Secretary of State, there is a cause of action for the plaintiff against the Secretary of State for impleading him in the suit 151 I.C. 1076=38 C.W.N. 409=59 C.L.J. 295=1934 C 187

ON WHOM NOTICE IS TO BE SERVED.—The term "District" in S 80 means the district in which the suit is instituted and the notice must be served on the Collector or one of the Collectors of that district and not on the Collector of another district where the cause of action partly arises 27 I.C. 232=18 C.W.N. 1340 Service on son of public officer not compliance with section. 58 C. 850

WHO IS A PUBLIC OFFICER.—A Collector when acting as the agent of the Court of Wards is a "Public Officer" 3 A 20 See also 1928 S 762=22 S.L.R. 63=105 I.C. 729 But see 11 M 317, 13 B. 343. As to the position of a person appointed by District Judge to collect rents of wakf property in a dispute among mutwallis, see 1936 A.L.J. 1112 An Official Receiver is a public officer and notice under S 80 is necessary before filing a suit against him 46 A 16, 47 A 291, 51 M.L.J. 671, 1930 L 708, 139 I.C. 701=1932 A 575, also in the case of a Receiver appointed by Court. 34 C.W.N. 673, 58 C. 856, 36 L.W. 694 *Costello, I*, doubting in 130 I.C. 894=1934 C 175 Suit against Official Assignee—Notice not necessary 25 Bom.L.R. 378=1923 B 392 Although a receiver is a public officer, in the case of a suit against him it is only where the plaintiff complains of some act purporting to have been done by him in his official capacity that notice to him under S 80, C.P. Code, is enjoined Where the plaintiff makes no such complaint but simply impleads him in the suit in his capacity as a receiver in possession of some of the properties in suit, no notice need be given to him under S 80 41 C.W.N. 322 No notice to the Official Trustee is necessary, when the question to be decided relates to the rights of the *cestui que trust* in the trust fund 7 C 499 The Official Liquidator, like the Official Receiver appointed in insolvency cases, is an official of the Court and has got definite powers conferred upon him under Act VII of 1913 and as such he is a public servant within the meaning of the term and to such a public officer notice under S 80 is necessary. 148 I.C. 448=11 O.W.N. 398=1934 O. 158 (2) A liquidator is a public officer within the meaning of S. 2 (17) and

S 80 would apply to him Where, however, the liquidator has acted through the Deputy Commissioner, notice to the Deputy Commissioner would be sufficient and no separate notice to the liquidator is necessary. 30 N.L.R. 240=148 I.C. 714=17 N.L.J. 47=1934 N 201 A Deputy Magistrate who has been appointed as the returning officer by the District Magistrate for the purposes of an election and who is doing the election work of the municipality at the time cannot be said to be a public officer who is acting in that connection in his official capacity as such public officer, and therefore S. 80, C.P. Code, is inapplicable to him 152 I.C. 817=1935 A.L.J. 139=1935 A 106 Village sanitation board—Not a public officer. 1929 N 70, nor a municipal council 1930 M.W.N. 821, 61 M.L.J. 642. Notice is necessary when a Government servant's services are lent to a Municipal Committee and he retains a lien on his original service 104 I.C. 762. Assessment by Municipality—Supersession of Municipality and public officer appointed to perform duties—Suit for declaring assessment illegal and *ultra vires*—Notice not necessary 159 I.C. 542=1935 C 726 A Sub-Inspector of Police who is sued for the recovery of account-books seized at a search, is entitled to notice 29 A 567 A notice is necessary, before suing a police officer for damages when he acts under the powers conferred by Cr.P. Code and S 42 of the Police Act will not apply 30 I.C. 175=13 A.L.J. 788 See also 1930 A 742 No action for damages can lie against a village headman for an act done in his official capacity unless the requirements of S 80 are fulfilled. A report to the Sub-Divisional Officer or Deputy Commissioner is not notice 2 Bur. L.J. 29=1923 R 250 See also 142 I.C. 501=1933 S 1 (Manager of encumbered estates taking charge of estate) No suit can be brought against a Bench Clerk for damages resulting from the loss of a record in Court through his negligence without giving notice 40 I.C. 677=11 Bur. L.T. 95 Notice under S 80 of the C.P. Code is necessary for suits under S. 104 H of the Bengal Tenancy Act 22 J. C 36=18 C.L.J. 566 See also 46 I.C. 899

COMMON MANAGER UNDER BENGAL TENANCY ACT.—Under S 80, in the case of a suit against a public officer, it is only where the plaintiff complains of some act purporting to have been done by such public officer in his official capacity that notice is enjoined A claim based upon a breach of a contract by a public officer, may, in appropriate cases, entitle him to notice of suit under S 80, but the mere omission by the common manager of an estate (appointed under the Bengal Tenancy Act) to pay off a mortgage debt is not such a breach. His failure to pay either interest or principal is not such a breach.

plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

81. [Ss 425, 428.] In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

Exemption from arrest and personal appearance

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

82. [S. 429.] (1) Where the decree is against the ¹[Crown] or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the ²[Provincial] Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

Suits by aliens and by or against ³[Foreign Rulers and Rulers of Indian States].

83. [S 430] (1) Alien enemies residing in British India with the per-

Leg. Ref.

¹ & ² Substituted for words 'Secretary of State for India in Council' and 'Local' respectively by Government of India (Adaptation of Indian Laws) Order, 1937

³ In the heading above S 83, for words 'Foreign and Native States' the words 'Foreign Rulers and Rulers of Indian States', substituted by *ibid*

Notes.

ing to be done by him in his official capacity. *Held*, accordingly (assuming that the common manager is a public "officer" within the meaning of S 80), that notice under the section is not required when, in a suit to enforce a mortgage by sale of the property mortgaged, the manager is impleaded as a co-defendant merely as representing the estate of which the sale is sought and no personal relief is sought against him 61 L. A. 171=61 C. 470=148 I C 482=1934 P C. 96=66 M L J 506 (P.C.)

CONTENTS AND CONSTRUCTION OF NOTICES.—The notice should state the relief which the plaintiff claims, it should be absolute in terms and not conditional. 6 Bom LR 132 The notice must mention the name and place of abode of the intending plaintiff. 14 M 386. See also 27 P. 206; 57 C 1127 A notice which does not contain all the names, descriptions and places of residence of the plaintiffs in a suit is an invalid notice 40 C. 503 A notice under S. 80 is not a proper notice if the case set up in the plaint is different from the case stated in the notice. A suit instituted upon such a notice cannot be maintained. 32 I C 235 Notice by a plaintiff under the section cannot constitute a cause of action. The right to sue can accrue when the order of the Collector interfering with the plaintiff's right is passed. 19 I. C. 565. The term "cause of action" in the section should not be too narrowly construed,

the object of the section being merely to inform the defendant of the grounds of the complaint 8 C W.N. 913 See also 24 M 279; 54 C. 969 (1023) Where plots mentioned in the notice comprised all the plots mentioned in the plaint, the variance between the notice and the plaint does not justify dismissal of the suit. 32 I C 752=20 C W N 636

LIMITATION.—Where notice to Government is necessary under S 80, the period of two months is excluded from the prescribed limitation 52 P.R. 1917=38 I C. 600=42 P W R. 1917. Where a special law of limitation applies a party is not entitled to deduct the period of two months for service of notice under S 80 66 I C 287=34 C.L.J. 205. The dismissal of a suit filed within two months from the date of notice under S 80, on the ground of the insufficiency of the notice is no bar to the maintainability of a fresh suit brought after the expiry of two months from the date of the notice The second suit would be maintainable on the same notice 41 C W.N. 92.

NON-COMPLIANCE—PROCEDURE.—On a non-compliance with the section regarding notice the Court ought to reject the plaint and not dismiss the suit. 58 C 850.

WAIVER.—The notice required under S 80 of the C. P. Code can be waived (34 C. 257 and 40 C 503, Foll.) 146 I C. 699=38 L W. 891=1933 M. 917 See also 150 I C. 590=1934 P 354.

Sec 83.—Whether the cause of action arose before or after war, an alien enemy can be sued in British Indian Courts and would have every right to prosecute his case before the Courts in accordance with the law of procedure, and it makes no difference that he was interned at the time. 40 C 1140 A British subject voluntarily residing or carrying on business in enemy country will be treated as an alien enemy and cannot sue in

When aliens may sue. mission of the ¹[Central Government] and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

Explanation.—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a licence in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the ¹[Central Government] shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country.

When foreign States may sue 84 [S. 431.] (1) A foreign State may sue in any Court of British India:

Provided that such State has been recognized by His Majesty or by the ¹[Central Government]:

Provided, also, that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognised by His Majesty or by the ¹[Central Government].

85. [S. 432.] (1) Person specially appointed by order of the Government

Persons specially appointed by Government to prosecute or defend for Princes or Chiefs

at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

²[*Explanation.*—For the purposes of this sub-section the expression "the Government" means—

(a) in the case of any Indian State, the Crown Representative, and

(b) in any other case, the ¹[Central Government].]

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

Leg. Ref.

¹ For words 'Governor-General in Council' and 'Government of India', the words 'Central Government' have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

² Explanation to Sub S. (1) has been inserted by *ibid*

Notes.

British India. 1 L. 276 Alien enemy who has been licensed to trade in British India has a right to sue in Indian Courts. 31 I.C. 888—9 Bur. L.T. 51

Sec 84—See 11 C. 17 (24) Foreign State—Attributes of sovereignty. 59 M.L.J. 548.

Secs. 84 to 87—When the Ruler of the State has severed his connexion with the State, the Government can appoint a person

to prosecute or institute suit in British Indian Courts and such person has *locus standi* to continue or file suits, and the fact that such an appointment is made after a plaint has been put into Court will not render it ineffective provided that it is put into Court within the period of limitation (25 A. 635, Ref.) 143 I.C. 348—34 P.L.R. 470—1933 L. 456.

Sec 85—[See also Notes under S. 84, *supra*] This section does not prevent institution by an independent Prince of a suit in a Court in British India, in his own name, and through a recognized agent other than one appointed under the section. 10 C. 136; 19 A. 510 The Desai of Paradi is a Ruling Chief. 8 B. 415 Also the Raja of Hill Tipperah. 9 C. 535. The section applies to suits filed in a Revenue Court. 25 A. 635.

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

86 [S. 433] (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, ¹[in the case of the Ruling Chief of an Indian State with the consent of the Crown Representative, certified by the signature of the political secretary, and in any other case with the consent of the Central Government, certified by the signature of a secretary to that Government] but not without such consent, be sued in any competent Court.

Suits against Prince,
Chiefs, ambassadors and
envoys.

Leg. Ref.

*¹ Substituted for words "with the consent of the Governor-General in Council, certified by the signature of a Secretary to the Government of India" by the Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

Sec 86 SCOPE OF SECTION—Section 86 is exhaustive and lays down the cases where a prince or chief can be brought on record whether he is suing or sued as such or in any other capacity 38 M. 635=25 M.L.J. 621. See also 39 M. 661=29 M.L.J. 667. A suit against a foreign prince or chief without the sanction of the Governor-General is not maintainable as it contravenes S. 86, when permission has been applied for and refused by the Governor-General, it is not open to the Court to question the propriety of the order refusing consent. Once the plaintiff fails to obtain the requisite consent, the Court has no authority to proceed with the suit 11 O.W.N. 1426=153 I.C. 856=1935 O. 1426.

APPLICABILITY—SUIT AGAINST BUSINESS CONCERN RUN BY STATE OF RULING PRINCE.—The provisions of S. 86 do not apply to a suit instituted not against the Prince himself, but against a business concern run by the State of a Ruling Prince 1934 A.L.J. 1093=1934 A. 740. Applicability of section—Proceedings under Ss 184, 186 and 187 of Companies Act. S. 86, C.P. Code, does not apply to the proceedings under S. 184 but applies to all the proceedings under Ss 186 and 187 of the Companies Act. If the Court makes an order under S. 184 of the Companies Act and places the name of a Native Prince or a Regent of an independent State upon the list of contributors, it does not thereby enforce a jurisdiction against that Native Prince or against the Regent or President of the independent State. The proceedings under Ss 186 and 187, however, stand on a different footing. An order under S. 186 for payment of money due from a person can be made by the Court only in cases where a suit to recover the amount would be maintainable and the Court cannot override the provisions of S. 86, by making an order under S. 186 of the Companies Act. No order under S. 187 can be made against the Sovereign Prince or the Ruling Chief at all, and no question of any consent of the Governor-General in Council can

arise, because such a case does not fall in any of the three classes mentioned in sub-S. (2) of S. 86 1936 A.L.J. 1134=1936 A. 826 (F.B.)

PRIVILEGE UNDER—IF CAN BE WAIVED—It is open to a Ruling Prince to plead want of jurisdiction because of the provisions of S. 86, or to waive the privilege by defending the suit on merits and producing evidence and taking the chance of getting a judgment in his favour 1934 A.L.J. 1093=1934 A. 740.

SUIT AGAINST RULING PRINCE—EXTENT OF PRIVILEGE.—In India a Ruling Prince can be sued in British Court. The rule of International Law which is based on the principle of "absolute independence of the Sovereign to recognise any superior authority" cannot be applied to Princes in India for the simple reason that they are subordinate to the authority of the British Crown. The rule of International Law has been modified by the provisions of S. 86, under which alone the Princes can claim exemption and not on the ground of their absolute sovereignty. Under S. 86, a Ruling Prince cannot be sued without the sanction of the Governor-General in Council and no execution can be issued against him without such sanction. Beyond these two points, no other privilege can be claimed by him under C.P. Code. There is nothing in the Code which prevents a plaintiff from making an indirect attempt to reach the property of a Ruling Prince. 1934 A.L.J. 1093=1934 A. 740.

SECS 86 AND 87—A suit will not lie against a sovereign Prince without the consent of the Governor-General in Council. A State cannot be sued apart from its Ruling Chief 23 M.L.J. 605 (9 C. 535, Foll.) Time spent in getting Government of India's consent cannot be deducted in computing limitation. 53 B. 12.

APPLICATION OF SECTION—The section does not apply to a defence put forth (as set-off). Such a defence can be put forward in answer to a claim by a Ruling Chief without the consent of the Governor-General 62 I.C. 778.

RULING CHIEFS—The Khurndward Jagirdars are Ruling Chiefs who cannot be sued without the consent of the Governor-General under S. 86 of the C.P. Code. 51 I.C. 228=21 Bom. L.R. 376.

CONSENT OF GOVERNOR GENERAL—A suit against a Ruling Chief cannot be maintained without the consent of the Governor-

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to ¹[the consenting authority] that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, Ambassador or envoy shall be arrested under this Code, and, except with ²[such consent as is mentioned in sub-section (1)] certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) ³[The Central Government or the Crown Representative, as the case may be, may by notification in the *Gazette of India* authorize a Provincial Government and any Secretary to that Government to exercise with respect to any Prince, Chief, ambassador or envoy named in the notification the functions assigned by the foregoing sub-sections to the consenting authority and a certifying officer respectively]

(5) A person may, as a tenant of immovable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.

87 [S 434.] A Sovereign Prince or Ruling Prince or Ruling Chief may sue, and shall be sued, in the name of his State:
Style of Princes and Chiefs as parties to suits

Provided that in giving the consent referred to in the foregoing section the ⁴[Central Government, the Crown Representative or the Provincial Government] as the case may be, may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

Leg. Ref.

¹ Substituted for words 'the Government' by the Government of India (Adaptation of Indian Laws) Order, 1937

² Substituted for words "the consent of the Governor-General in Council", by *ibid.*

³ For old Sub-S (4) the words within brackets have been substituted by *ibid.*

The old Sub-S (4) ran as follows—"The Governor General in Council may, by notification in the *Gazette of India*, authorize a Local Government and any Secretary to that Government to exercise with respect of any Prince, Chief, ambassador or envoy named in the notification, the functions assigned by the foregoing sub-sections to the Governor-General in Council and a Secretary to the Government of India, respectively."

⁴ For words 'Governor-General in Council or the Local Government' the words in brackets have been substituted by *ibid.*

Notes.

General in Council, 25 I.C. 271 The consent must be given before the commencement of the suit. 21 B. 351 Even when leave is granted by the Governor-General in Council, the Court in which the suit is filed can question the leave in case the conditions mentioned in the section are not fulfilled. 29 A. 379.

SUBMISSION TO JURISDICTION.—Where a Ruling Prince having sovereign powers submits to the jurisdiction of a British Court, no objection can be raised by him, in the Appellate Court on the ground that the consent of the Governor General had not been obtained prior to the institution of the suit. 46 I.C. 558. No suit can be maintained against a Ruling Chief without the consent of a Governor-General in Council. The mere fact that the defendant after claiming the privilege pleaded also on the merits, does not amount to a waiver of privilege and submission to jurisdiction. 39 M. 661=29 M.L.J. 667. The recognition of cases of waiver as excepted from the ordinary provision of International Law as understood in England cannot be imported into the clear language of the C.P. Code. 39 M. 661=29 M.L.J. 667. Acquiescence by defendant bars him from questioning validity of decree. 2 Pat. L.T. 180=6 P.L.J. 185 See also 58 I.C. 912.

Sec. 86 (3) and (5) RELATIVE SCOPE OF.—Sub-S (5), S. 86, is entirely distinct from sub-S (3). The two sub-sections are really dealing with two quite distinct matters. 159 I.C. 637=39 C.W.N. 1206=1935 C. 664

Sec. 87.—See Notes under S. 84 and S. 86.

Interpleader.

88. [S. 470.] Where two or more persons claim adversely to one another

Where interpleader suit may be instituted.

the same debt, sum of money or other property, movable or immovable, from another person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining in indemnity for himself:

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

PART V.

SPECIAL PROCEEDINGS.

Arbitration.

89. (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in

Arbitration.

force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

Notes.

Sec. 88.—The law of interpleaders as set out in C. P. Code is the same as that of England. The applicant should satisfy the Court that he has no interest in the subject-matter of the suit except for charges and costs, otherwise he is disentitled to sue 4 R. 465. An interpleader suit is not improperly constituted merely because one of the defendants does not claim the whole of the subject-matter. 1 M.H.C.R. 361. See also 14 B. 489. In an interpleader suit all contesting defendants are in the position of plaintiffs 48 M. 1. Where the defendants do not claim adversely to one another, nor is the plaintiff admitting the title of one of the defendants or is willing to pay or deliver the property to him, the suit is not an interpleader suit. 1922 C. 138. When in a suit for rent the defendant pays the money into Court with the request that it be paid over to the party entitled to it, such suit may be treated as in the nature of an interpleader proceeding. 17 M. 85.

Sec. 89.—S. 89 excepts the procedure of the Code from being applicable to arbitrations under the Arbitration Act and S. 4 does the same generally. 5 Bur.L.T. 155=17 I.C. 902 S. 89 covers all references to arbitration whether the reference is or is not made without the intervention of the Court, and whether an award does or does not follow 160 I.C. 287=38 P.L.R. 102=1936 L. 374. The object of the section is to give effect to the provisions of Sch. II as if they had been enacted in the body of the Code. 47 A. 637. Arbitration without Court's order. 40 B. 386. Award without intervention during pendency of suit cannot be recorded as adjustment. 67 I.C.

123=3 L.L.J. 162; 55 C. 538, *contra* 51 M. 800 (F.B.), where "any other law" is held to include the provisions of C. P. Code 131 I.C. 443=1931 O. 127, 9 R. 39. Per *Courtney-Terrell, C.J.*—S. 89, C. P. Code, is clear and specific. The words "*any other law for the time being in force*," in that section must clearly be read *ejusdem generis* with reference to a specific enactment, the Arbitration Act of 1899; the section contemplated that further legislation may take place or that there may be already in existence a specific piece of legislation dealing with arbitration. The legislature did not intend to override either the Arbitration Act or any other specific enactments, the intention was that all references to arbitration of whatsoever kind, if they are to have a binding effect, must be instituted and conducted according to the provisions of Sch. II of the Code. S. 89 does not also take into contemplation O. 23, R. 3, C. P. Code, at all as being one of the proceedings by way of arbitration to which the section and the schedule are not to apply. The proceeding under O. 23, R. 3 for the recording of a compromise is not an exception to S. 89. Per *Agarwala, J.*—S. 89, C. P. Code, is mandatory, and when a suit is pending, the matter in dispute may be referred to arbitration only in accordance with Sch. II. The words "any other law" in S. 89 do not include O. 23, R. 3, C. P. Code. To take "other laws" as referring to the Code itself would be contrary to all canons of construction of statutes. It is not open to the Court to substitute for the words "any other law" in S. 89, the words "except as provided in this Act or by any other law" 14 P. 799=156 I.C. 1050=16 Pat.L.T. 280=1935 P. 243. The words "by any other law

Special Case.

90. [S. 527] Where any persons agree in writing to state a case for the
 Power to state case for opinion of the Court, then the Court shall try and
 opinion of Court determine the same in the manner prescribed.

Suits relating to public matters.

91. (1) In the case of a public nuisance the Advocate-General, or two or
 Public nuisances more persons having obtained the consent in writing
 of the Advocate-General, may institute a suit, though
 no special damage has been caused, for a declaration and injunction or for
 such other relief as may be appropriate to the circumstances of the case.

- (2) Nothing in this section shall be deemed to limit or otherwise affect
 any right of suit which may exist independently of its provisions.

Notes.

for the time being in force" in S 89, C P. Code, refer to some law extraneous to the Code and cannot be legitimately held to cover O. 23, R. 3. In other words, once S 89 is held to apply, no reliance can be placed for any purpose on O 23, R 3. The only remedy left is either to proceed with the arbitration, or if the Court supersedes the arbitration, to proceed with the hearing of the suit or the appeal, as the case may be, on the merits, as required by para 8 of the Second Schedule read with para 19. 160 I.C. 287=38 P.L.R. 102=1936 L. 374. A Court is competent on an application under Sch II, C P. Code, to pass a decree on an award as modified by a lawful compromise filed by the parties 25 O.C. 213=1922 O. 189. The words "save in....in force" in S 89 do not let in O 23, R 3 of the Code and the words "any other law for the time being in force" refer to amendments of, or substitutions for, the Arbitration Act or other pieces of legislation on that subject-matter 47 C. 6. Whether an award in a pending suit without intervention of Court is an adjustment under O 23, R 3, C. P. Code 53 M.L.J. 444.

AGREEMENT TO ABIDE BY STATEMENT OF WITNESS—LEGALITY OF.—The parties to a suit can validly agree, even apart from the Indian Oaths Act, that they will abide by the statement of a witness, including one who is a party to the suit, and they can leave the decision of all points including costs arising in the case to be made according to the statement. Such an agreement does not amount to a reference to an arbitrator and does not contravene the provisions of the Arbitration Act or the C. P. Code relating to arbitration. 146 I.C. 84=1933 A.L.J. 1127=1933 A. 861 (F.B.).

Sec 89 and Sch II, Para 22.—S 89 (1), C. P. Code, read with Sch II, para 22, makes the concluding provision of S. 21 of the Specific Relief Act inapplicable to all arbitration agreements and awards governed by Sch. II 46 C. 1041

Sec. 90. SCOPE.—Not applicable where more efficacious remedy is open under special Act. 1930 B. 232

Sec 91. SCOPE OF SECTION.—S. 91 (1), C. P. Code, authorises two or more persons to sue with the previous consent of the Advocate-General in respect of a public nuisance, but it does not compel them to do

so nor is there anything in S 91, which confers a new right. If a right exists independently of that section, that right is not taken away. Therefore, a representative suit brought not on behalf of the public of a place but of one particular community forming part of it, for a declaration of its right to take out their processions, along a particular route and for removal of certain obstructions, is not defective because a previous consent of the Advocate-General had not been taken 151 I.C. 263=1934 A. 941 S. 91 deals with the case of a public nuisance. Therefore, a suit relating to an encroachment on a private easement is not barred by that section. 153 I.C. 704=1935 A.W.R. 92=1935 A. 789. Relief not claimed in respect of public nuisance cannot be granted. 73 I.C. 616=1923 L. 546. See also 85 I.C. 304=1924 A. 599. Village pathway—Obstruction not public nuisance. 46 I.C. 970. See also 85 I.C. 304=1925 A. 399; 1929 A. 790. In view of S. 3, Cl (44) of the General Clauses Act, the definition of "public nuisance" given in S 268, I.P. Code, must be held to apply to the Code of Civil Procedure 157 I.C. 638=1935 O.W.N. 899. In the case of a public highway sanction under the section is necessary for establishing the right of the public. 53 B. 187. S 33 of Calcutta Municipal Act, if controls S 91, see 40 I.C. 74=21 C.W.N. 595. S. 91 does not control the provisions of O. 1, R. 8. 88 I.C. 505=1925 C. 1233. Nuisance—Public and private—Difference between—Right of suit—Obstruction to procession of Hindu idol by Mahomedans—Individual's right of suit. 36 I.C. 634=12 N.L.R. 130. See also 27 Bom L.R. 421=1925 Bom. 367; 1935 Pesh. 190; 157 I.C. 638=1935 O.W.N. 899. Obstruction of a way without any special damage can afford no cause of action to a member of the public 23 M.L.J. 539. See also 27 Bom L.R. 421=1925 B. 367. In a suit by a private person for the removal of public nuisance he must prove special damage to himself. Special degree of inconvenience suffered by him cannot be said to cause him damages. 48 I.C. 88 (Nag.) See also 91 I.C. 728=1926 C. 549 Per *Sundara Aiyar, J.*—Special damage need not always be only pecuniary. 23 M.L.J. 539. Special damage should be something substantial and not pecuniary damage to the extent of four annas or eight annas. 23 M.L.J. 539.

92. [S. 535.] (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the

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Sec 91 and O. 1, R. 8.—A village pathway, or lane is of the class of a public highway and has its origin in dedication. It is not a private way or way of a class over which only certain classes of persons or certain portions of the public have rights which have their origin in custom. An *osara* built on such a village path or lane is a public nuisance within the meaning of S. 91, C. P. Code. A suit in respect of such an *osara* can only be brought by observing the conditions laid down in the section—consent in some form as required by the section is necessary. Even if the pathway or lane be treated as a private pathway or one over which only limited persons have a right, notice and leave of Court under O. 1, R. 8, C. P. Code, is necessary. A suit by a private person without sanction under S. 91, or without leave under O. 1, R. 8, or without allegation or proof of special damage is not maintainable. 166 I.C. 538=17 Pat L.T. 842=1937 P. 54.

Sec. 92: SCOPE OF SECTION.—S. 92 is intended to be an exhaustive statement of the law applicable to suits based upon any alleged breach of any express or constructive trust, created for public purposes of a charitable or religious nature. 44 A. 622; 135 I.C. 806=1932 B. 65=33 Bom L.R. 1575. See also 30 S.L.R. 104=165 I.C. 158=1936 S. 179. The requirement of the section as to sanction cannot be evaded by asking for a bare declaration under the Specific Relief Act. 24 L.W. 286=97 I.C. 630=1926 M. 1029. Section not confined to what may be called in the English law sense of "express or constructive trust"—at all events as regards "constructive trust." 60 M. 567=52 M.L.J. 415. The provisions of S. 92 are imperative, and the consent in writing of the Advocate-General, or the Legal Remembrancer as the case may be, has to be secured as a pre-requisite and *sine qua non* before the plaintiff can file a suit under the section. 152 I.C. 861=11 O.W.N. 1435=1935 O. 96. S. 92 is mandatory and a suit claiming any of the reliefs therein mentioned must be brought in conformity with its provisions or not at all. 41 A. 1, 49 I.C. 530. The question whether S. 92 of the C. P. Code has to be applied to suit must depend upon the prayers in the plaint at the date when the suit is instituted, and the section cannot be evaded by an amendment of the plaint at a later date. A suit which, as originally instituted, is obnoxious to S. 92 cannot, by amendments in the plaint, be altered and rendered not obnoxious to the section. 165 I.C. 1001=38 Bom L.R. 808=1936 B. 412. Though the section has to be construed strictly, it should not be construed in such a way that a fraud is perpetrated on the section itself. 30 S.L.R. 104=1936 S. 179. A suit for removal of a trustee and for settling a scheme is governed by S. 92, C. P.

Code, and not by the Religious Endowment Act. 24 M.L.J. 658. The plaintiffs are entitled to proceed either under S. 18, Religious Endowments Act or under S. 92, C. P. Code. See also 37 I.C. 688=4 L.W. 444=1934 P. 443. Court has very wide powers under S. 92 and the circumstances under which those powers should be exercised are clearly stated by the Privy Council in 43 C. 1085 (1101) (P.C.). A Court should not frame a scheme when there is no mismanagement or misappropriation. 106 I.C. 375 (M). S. 92 deals with completed trusts and is inapplicable where that stage has not yet been reached. 70 I.C. 903=16 L.W. 922. A suit for the administration of the trusts of a will which contained disposition for charitable purposes is maintainable though it is not brought under S. 92. 70 I.C. 903=16 L.W. 922. A suit by an idol in his juristic capacity against persons who are interfering unlawfully with his property or with his income is not governed by S. 92. 45 A. 215. A dispute between rival claimants to the office of trustee does not fall within the section. 44 A. 721. See also 134 I.C. 857=1931 N. 198. In order to bring a case within S. 92 the suit must be a representative one, brought for the benefit of the public and to enforce a public right in respect of an express or constructive trust (*Ibid*). The section does not bar a suit for declaration that the plaintiff is a duly constituted mohant. 34 I.C. 502; 52 C.L.J. 153. A suit for declaration that defendants are not properly appointed trustees of a temple and for an injunction appropriate to that declaration does not fall within the purview of S. 92. 46 B. 101; 9 R. 459. A suit to establish a personal right as hereditary trustee does not fall within this section. 61 M. L. J. 815 [45 M. 113 (F.B.), Rel.] A suit by co-trustee to declare joint right of management needs no sanction. 39 M.L.T. 214=105 I.C. 194=1927 M. 948. See also 103 I.C. 134=1927 M. 820, 1927 M. 338; 97 I.C. 480; 35 I.C. 806=1932 B. 65=33 Bom L.R. 1575 [55 C. 519 (P.C.), Ref.] But if it is for a declaration of individual rights and also prays for a scheme for management by rotation, it is not maintainable without previous sanction required by this section so far as such relief is concerned. 63 M.L.J. 703. A suit is not taken out of the scope of S. 92 because the defendant denies the trust and claims to be the owner of the property. 9 I.C. 358=13 Bom L.R. 49. See also 53 M.L.J. 183; 11 P. 288; 30 S.L.R. 104=165 I.C. 158=1936 S. 179. But a decree cannot be passed against him to deliver possession of the properties in his possession. S. 92 need not be resorted to where a suit for a declaration of public right of way is filed with the permission of Court obtained under O. 1, R. 8. 69 I.C. 910=26 C.W.N. 587. Suit for declara-

Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute

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tion that certain property is wakf and not the private property of the defendant does not fall under the section. 8 L 111; 160 I.C. 289 = 1936 L 283. In a suit under S 92, when the defendants deny that the property is a public trust and claim it as their private property, it is open to the Court to decide the question whether the trust in respect of which the suit is brought is a public charitable trust or not so as to attract the application of S 92. A separate suit for declaration that the property is trust property is not necessary. An issue may be raised in the suit as to whether the trust is a public trust contemplated by S 92. 39 C.W.N. 1103 = 1935 C 805, 152 I.C. 50 = 36 Bom L.R. 526 = 1934 B. 257. The real intention and meaning of S 92, is that by virtue of the specific categories of relief mentioned in paras (a) to (g) and the general relief mentioned in para. (h), it intends and is effective to catch all those cases in which any declaration, order or other relief is asked for by way of carrying into execution and administering a trust for public purposes of a charitable or religious nature as opposed to relief claimed adversely to the trust altogether, as for example, a claim that no valid wakf exists or that certain property does not form part of the trust property. 14 R 575. Where the defendant denies the trust, he cannot be held to be a trustee and must therefore be a trespasser or third party. Against such a trespasser or third party a suit can be brought without sanction. Under S 92 it is presupposed that an express or constructive trust created for public purposes of a charitable or religious nature exists, but where the nature or existence of such a trust is in dispute, S. 92 will not apply and a suit for a declaration without a further relief for possession with regard to the trust may be brought and that too without any sanction. 1934 N 277. Nor suit by worshippers for declaration as to prior compromise decree in scheme suit being invalid and for declaring property to belong to wakf. 55 I.A. 96 = 55 C. 519 (P.C.). Nor for declaration that plaintiff has got right to appoint trustees. 49 A. 435, nor a suit to establish the existence of a trust, 5 P 539, 1929 L 740, nor a suit to establish right to office of mutawalli. 7 Pat L T 4 = 1925 P 544. S 92 (2) saves the special jurisdiction of the District court under Religious Endowments Act. 37 I.C. 688 = 4 L.W. 444 (27 M.L.J. 266 28 M.L.J. 326, Foll). Suit to enforce rights of worshippers is not one under S 92. 35 I.C. 88 = 3 L.W. 512. Suit filed in private capacity to recover possession from alleged trespasser is not one under S 92. 31 Bom. L. R. 349 = 1929 Bom. 193; nor suit for recovery of arrears from holder of a fund for charity. 31 Bom. L.R. 192 = 1929 B 153. A suit under S 92 is a representative suit. 40 M. 110 = 31 M.L.J. 279 S 92, C. P. Code, and S 14,

Religious Endowments Act (XX of 1863) in so far as the forms of relief to which they relate are the same appear to offer a choice of proceeding under either of the sections, but they are not bound to proceed under both. 37 M. 184 = 24 M.L.J. 697. A suit under S 92 does not concern the private rights of the parties thereto and cannot be referred to arbitration. 72 I.C. 1016. S. 92 debars persons from unrestricted access to Courts and hence must be strictly construed. A suit to restrain interference with plaintiff's right to exclusion is not within S 92. 50 I.C. 509; nor a suit for damages for misconduct of trustee. 92 I.C. 526 = 1926 M. 509.

SCOPE OF SCHEME BY COURT.—Scheme can be made only under this section. 7 Pat L.T. 4 = 1925 P. 544. In settling a scheme of management the Court has a wide discretion. The wishes of the founder with regard to management, if conformable to the changed conditions and circumstances of the present day, as well as the past might be taken into consideration, but the primary duty of the Court is to consider the general interests of the body of the public for whose benefit the trust is created and the Court might vary any rule of management which it finds to be impracticable or unsuited to the best interests of the institution. 43 C 1085 = 31 M.L.J. 290 (P.C.). See also 38 C.W.N. 452 = 147 I.C. 982 = 1934 P.C. 53 = 66 M.L.J. 333 = 51 M.L.J. 454 (P.C.). In settling a scheme due consideration should be paid to the established practice of the institution and to the position of the persons connected with it. 8 Bom L.R. 756. As also the interest of the beneficiaries. 114 I.C. 10 = 1929 P.C. 27 (P.C.). The Court can uphold a scheme settled by the co-trustees of an institution under which each of them was to manage the trust in rotation. 13 M.L.J. 341. The High Court has a large discretion in the matter of sanctioning a scheme for the management of a temple and of its funds. 24 M.L.J. 199 (P.C.). Even when a will directs that members of the testator's family are to be appointed members of the committee if suitable persons are not available, the Court has power to appoint strangers. 58 I.C. 566 = 17 A.L.J. 957. Where a Court has sanctioned a scheme for the administration of a religious or charitable trust the Court can vary the scheme from time to time according to the exigencies of the case. 43 C 467. Successive scheme suits—Maintainability of. See 1922 M.W.N. 477 = 70 I.C. 579. Trustee appointed under a tentative scheme can only be removed by regular suit. 94 I.C. 610 = 1926 M. 799, 58 A. 538. Whether Courts have inherent powers to alter schemes without a fresh suit being brought for the purpose when there is no provision for alteration in the scheme, see 1922 M. 413 = 70 I.C. 579, 91 I.C. 794 = 1926 M. 659, 36 M. 464; 37 C. 871, 59 M 751. Outside the scheme decree, the Court has no general power to deal with matters arising

a suit whether contentious or not in the principal Civil Court of original

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under it, *e.g.*, trustee's failure to comply with scheme 1929 M 300 Provision in scheme for filling up vacancies in office of trustees by application to Court valid 1930 M 918. Reservation of permission to apply to Court, for the proper management of an institution is bad in a scheme decree. See 95 I.C. 5=1926 M 655, 50 M.L.J. 409. See also 51 M 31=54 M.L.J. 792 (F.B.). Provision for enforcing scheme so as to disqualify particular person holding office as trustee is *ultra vires*—Independent suit the remedy. 1929 M.W.N. 744 A scheme decree may be in general declaratory but in particular circumstances provision may be made for execution of parts of the scheme. 107 I.C. 136=1928 M 61. A provision in a scheme decree to the effect that "the trustees of the respective kattalais shall hand over all the cash proceeds of their property to the treasurer," is inexecutable Neither S 51 nor O 21, R. 32, C. P. Code, can be applied to such a clause in the decree. No receiver can be appointed to execute it by way of equitable execution. Per *Cornish, J.*—There is no short cut of a remedy by application to the Court where a trustee refuses to carry out his duties under the scheme. The only remedy available is a suit to remove him or to have the scheme modified. 59 M. 751=1936 M 581=71 M.L.J. 87. See also 157 I.C. 486=41 L.W. 597=1935 M 174 But see 38 Bom.L.R. 1137. Provision in the decree for its alteration in execution is *ultra vires*; changes can be made only in a fresh suit 49 M. 580. But see 58 A 538 where it was held that such a provision is within the power of Court to frame a scheme and apart from such a provision, a scheme may be modified under the inherent power of Court where it is necessary to prevent abuse of the process of the Court or where the ends of justice demand it A provision in a scheme giving the Court authority to appoint a successor in place of a deceased trustee, is not a provision which can be regarded as constituting a modification of the original scheme and is not, therefore *ultra vires*. 166 I.C. 215=1937 O.W.N. 39 Rules framed by temple committee under scheme decree can be altered by Court 28 Bom.L.R. 309=94 I.C. 47; 1926 B 179 Where a suit is brought by plaintiffs not in assertion of their individual rights but on behalf of the general public who are interested in the institution for the settlement of a proper scheme of management of the charities and for other relief there is no bar of limitation 43 M.L.J. 448 Scheme giving liberty to Board of Trustees to apply to Court for directions—Individual member of the board cannot apply 1929 M 625 See also 1929 M.W.N. 744 Application for direction is maintainable only as regards matters left open by the Court for future determination—Consideration of the powers of a Temple Committee after the passing of Act II of 1927 is not one of them. 1929

M. 625.

REVISION OF SCHEME.—District Judge has jurisdiction to revise a scheme once framed under proper circumstances 153 I.C. 294=1935 P. 88. See also 58 A. 538

SELECTION OF TRUSTEES.—Appointment from plaintiff's community on the ground that the trust had largely benefited by its endowment 54 I.C. 263=10 L.W. 494. It is competent to the Court in framing a scheme for a Hindu religious or charitable endowment to sanction a cypres application of the funds of the endowment if the objects of the trust are not suited to modern conditions and if there is a general charitable intention in the terms of the endowment The trustee himself cannot apply the income cypres without the sanction of the Court 37 M.L.J. 489. Court's jurisdiction to frame a scheme under S. 92 is not excluded by the fact that the temple is one subject to a Temple Committee, but in framing the scheme the Court should not unduly interfere with the power entrusted by the statute to the Committee. *e.g.*, by appointing a Board of Control between the trustees and the Temple Committee. 39 Mad. 700=30 M.L.J. 29 When a decree directs a trustee of a Hindu temple to perform festival, a Court has no jurisdiction to give certain directions for the same. 30 I.C. 771=2 L.W. 607 Hereditary trustee—Appointment of treasurer—Necessity for, 28 I.C. 479 A Court in framing a scheme regarding a temple is bound to have regard to the existing rights of individuals to the trusteeship of the temple 23 M.L.J. 134; 28 M. 319; 21 M.L.J. 784 Where a trustee is removed, it is desirable that the Judge should issue notice to the parties interested and also give public notice in such a way as to enable claimants to the office to come forward and put in their respective claims But when this procedure is not observed and a new trustee is appointed by consent of parties without any enquiry, the order will not operate as *res judicata* barring the claim of any claimant in future. 41 C.W.N. 298. Indian Courts have the same powers as the Courts of Chancery in England to appoint additional trustees even where there are hereditary trustees 23 M.L.J. 134. See also 51 M.L.J. 457 Scheme—Effect of—Private rights lost—Alteration of scheme 36 Mad. 364=21 M.L.J. 952. Even apart from any question of mismanagement and misappropriation, a Court can settle a scheme if it can conduce to the better management of the trust property 45 I.C. 213 Appointment of trustee—Founder not providing for—Office reverts to heirs—Court's duty 1929 B 193=31 Bom.L.R. 349 In making an appointment of a trustee in a suit under S 92, C. P. Code, although regard must be paid to the line of devolution that may have been prescribed in the deed of endowment, it is permissible to the Court, in peculiar circumstances having regard to the exigency of the case, to make an appointment which may involve a departure from the arrangement

jurisdiction or in any other Court empowered in that behalf by the [Provincial]

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contemplated by the deed of trust itself. 41 C.W.N. 298.

OBJECT OF SECTION—The object of S 92 is to make it clear that the provisions of section are mandatory and object of the saving clause is to make it clear that Rel End Act is still in force. 24 M.L.J. 658. The object of S 92 is not to encourage abuse of the process of the Court by vexatious or improper suits. 37 I.C. 897.

APPLICATION OF SECTION—Test of applicability 97 I.C. 480. The question whether a suit falls within S. 92, C.P. Code, depends not upon the character in which the plaintiff sues but upon the nature of the reliefs sought. A suit by an idol of a temple represented by its manager against the trustee of a fund established for meeting the expenses of a public worship and other duties including repairs connected with that temple alleging breach of trust and claiming an account from the defendant trustee is a suit falling under S. 92 (1), C.P. Code, and is not maintainable without the previous sanction of the Advocate General 58 M. 988=158 I.C. 63=1935 M.W.N. 895=42 L.W. 304=1935 M. 825=69 M.L.J. 291 (F.B.). The section does not apply to the case of an endowment for purposes religious as well as charitable 5 M. 383, 11 A. 18 (22) (F.B.); 25 A. 631. In the case of a trust for public purposes of a charitable and religious nature, the Court is not fettered by the wishes of the founder. The primary duty of the Civil Court is to consider the interest of the public, or that part of the public, for whose benefit the trust is created and the Court is justified having regard to the previous management, in deciding, in the exercise of its discretion, that the defendant mutawallis should be removed on account of their insolvency and mismanagement and keeping the charity in a deplorable condition 43 C. 1085 (P.C.), Rel. on. 147 I.C. 882=1934 P.C. 53=66 M.L.J. 333 (P.C.). The allegation that a person is entitled to the office of a trustee of a fund brings the reliefs to that declaration sought within the purview of S. 92 (1) and the proper remedy is a suit properly instituted under that section and not an application under S. 34 or S. 74, Trusts Act 150 I.C. 193=11 O.W.N. 323=1934 O. 118. The mere fact that the plaintiffs in a suit are in a sense trustees will not necessarily preclude the application of S. 92, if the reliefs sought relate not to the vindication of the personal rights of the trustees, but to the advancement of the interests of the institution itself by securing more efficient management. A suit whose avowed object is the furtherance of the interests of the institution itself is a suit falling under S. 92 and its provisions must therefore be complied with. 42 L.W. 264=1935 M. 855=69 M.L.J. 300. The section does not apply to a case where the suit is by the whole body of persons who are legally authorised to ad-

minister the trust to which it relates. 29 A. 27. S. 92 applies to an action for removal of a person appointed a trustee under a trust deed. S. 92 applies as much to the removal of a trustee *de son tort* as to the removal of an ordinary trustee. 151 I.C. 138=1934 P. 321. A suit for the recovery of trust property improperly alienated by a trustee does not lie under this section. 8 B. 365; 28 A. 112, 55 M. 549=62 M.L.J. 180. But see 24 C. 418. Nor a suit by a trustee to recover possession of property from a trespasser 25 A.L.J. 902; 129 I.C. 741=1931 B. 170=32 Bom.L.R. 1687. A suit to compel trustees to make good the loss sustained by the charity in consequence of their default falls, within the scope of the section 21 B. 48. The section was intended to apply to persons who, before its enactment, had or were believed to have no right to take proceedings for purposes mentioned in it. 21 M. 406. The section does not apply to application for modification provided for in a scheme 133 I.C. 823=1931 Bom. 388=33 Bom.L.R. 546. See also 55 B. 414. Where a society wants immovable properties bequeathed to it to be converted into money and invested in G.P. notes the proper procedure is by way of suit under this section. 53 A. 422. A relief asked in a suit for declaration that a certain property is public property to which the entire Hindu community is entitled to go and worship does not come under S. 92 145 I.C. 294=14 P.L. T. 768=1933 P. 246.

RELIEFS UNDER THE SECTION.—A Court has inherent power to pass a decree in a suit relating to trust, under S. 92 (h) appointing new trustees and directing old ones to deliver the properties to them 58 I.C. 566=17 A.L.J. 957. The discretion which is conferred upon a Court by the terms of S. 92, is very wide and the law does not make it obligatory upon a Court in a suit under that section to make all the orders that are contemplated by the different clauses of that sub-section. It is quite open to the court not to frame a detailed scheme, if it thinks that certain directions given by it to the newly appointed trustee for the proper carrying out of the endowment would be quite enough. 41 C.W.N. 298. In framing schemes the superintendence over temples should not be vested in Courts but in temple committees 1927 M.W.N. 759=26 L.W. 581, 1927 M. 1033. In S. 92 the words "such further relief as the nature of the case may require" cover every subsidiary order or direction on any matter of detail necessary for carrying out the main purposes of the section 40 I.C. 182, 24 C. 418, 11 P. 288. The expression must be taken to mean relief of the same nature as clauses (a) to (g) and so the section does not apply to a suit by certain worshippers for a declaration that a prior scheme suit had been fraudulently compromised and for a declaration that the properties belonged to a wakf and no sanction is necessary 55 C. 519=55 I.A. 96=54 M.L.J. 669 (P.C.). It would be of no avail

Government within the local limits of whose jurisdiction the whole or any part

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to pass a decree removing the trustee and appointing a new trustee if the old trustee is allowed to remain in possession of the property. To render the decree operative, possession must be delivered to the newly appointed trustee. A relief for the delivery of possession would fall under Cl (h) of S 92 and be within the competence of the Court to grant. But no order can be made "for such amounts as may be due from the old trustees after accounts are taken 144 I.C. 506=1931 N. 48. A prayer asking that the trustees be restrained from alienating the trust property is one which may well be included under S. 92 (h) 30 S.L.R. 104=165 I.C. 158=1936 S. 179. A decree cannot be passed against the defendant who sets up title adverse to a trust, to deliver possession of properties in his possession, in a suit under this section 53 M.L.J. 183. There is much which is common between S 14 of the Religious Endowments Act and S 92 of the C. P. Code, but the latter is substantially the wider and provides for settling a scheme which is a jurisdiction of a very wide and beneficial nature 42 B. 742. See also 1925 P. 544. Where none of the reliefs specified in S 92 is claimed and the plaintiff does not ask the Court to appoint him a mutawalli, the suit is competent under S 92 29 I.C. 423=20 C.W.N. 604. A suit for a declaration that the property in the suit is a public charitable property and that neither the defendant nor any one else is entitled to alienate the same and for an injunction restraining the defendant from alienating the same or any portion of it to any person, is a suit to which S 92 applies, because the relief prayed for falls within Cl (h) of the section, consequently sanction under the section is necessary 30 S.L.R. 104=165 I.C. 158=1936 S. 179. Though in a suit properly framed under S. 92 a relief amounting ultimately to an injunction may be granted to the plaintiff, the relief for a permanent injunction to restrain the defendant from obstructing general public in going to the place for puja is not contemplated by S 92 and there is no bar to the grant of such relief on account of absence of consent of Advocate-General 145 I.C. 294=14 Pat L.T. 768=1933 P. 246. A prayer for ejectment cannot be entertained by the Court in a suit instituted under S 92 144 I.C. 168=1933 L. 395.

ACCOUNTS, DIRECTION AS TO—S 22, C P Code, is quite wide enough to entitle the Court to direct an account against a trustee and to order him to pay the amount found due upon taking those accounts 28 I.C. 886. A decree directing trustee to pay amount due on taking accounts is executable and not merely declaratory 52 M.L.J. 182; 54 M. 345; 60 M.L.J. 173 (178). See also 1928 M. 61=107 I.C. 136. Such an order is appealable as a decree. 54 M. 337=60 M.L.J. 167. It is not obligatory on the court to pass a decree directing accounts on the removal of a trustee in a suit under S. 92, C. P. Code. If upon a

consideration of the facts and circumstances of the case, when the income of the endowment is quite small and the expenditure does not leave much in the shape of balance, the Court comes to the conclusion that it would not be profitable to make an order for accounts, it is very difficult for the appellate Court to say that that order is not justifiable or that it would be interfered with 41 C. W.N. 298. When the Court removes a trustee for mismanagement and breach of trust under S 92, C. P. Code, it will not pass an order against him for rendition of accounts, if it is found that the usufruct of the properties has all along been held by in the hands of the trustee for the time being to be applied at his discretion, and also when such an order would be infructuous in the sense that it would lead merely to an expensive and laborious inquiry leading to no tangible result. 14 P. 379=16 Pat L.T. 35=1935 P. 111. Suits merely to recover money found due by the defendant on the taking of accounts and to recover property belonging to the trust but in the possession of the defendant and to recover damages for a tort committed by the defendant would always be maintainable under the general law and may not fall under S 92, C.P. Code. 1934 M. 126=57 M. 362=66 M.L.J. 98. Directory clauses outside the scheme portion in a decree are executable; but those within it are *prima facie* inexecutable 1933 M.W.N. 183.

SANCTION—Sanction obtained from Advocate General without disclosing rejection by the Collector of a prior application for sanction, is not invalid. But the *bona fides* of the applicant will be taken into consideration. 1928 M. 401. Notice to trustee desirable before sanction 53 M. 223. Sanction by Collector without notice to defendants is valid. Court can direct suit to stand over for obtaining sanction against other defendants, where sanction had been obtained only as against one defendant 1930 M.W.N. 456. A sanction granted for a suit under S. 92 means any suit which may be laid under that section and it is not confined to one of the species of suits that could be raised on the application 48 C. 493, 21 B. 257. The limitation requiring previous sanction is necessary to prevent an abuse of the powers conferred by the section. 21 M. 406. The suit must be limited to matters included in the consent and it is not competent to the Court to enlarge the scope of the suit. 21 B. 257. But see 48 C. 493 (P. C.). Variance between sanction and plaint is not fatal to the suit unless there is any material omission 107 I.C. 130=1928 M. 205. The duties imposed upon a Collector by Government Resolution under S 93 of the C. P. Code are of a very special nature, and cannot be discharged by his subordinates 35 B. 243. But there is no harm in an order being signed by the sheristadar for the Collector. 107 I.C. 130=1928 M. 205. Consent obtained as against persons not real trustees is invalid as against the real trustees 24 L. W. 419=97 I.C. 462=1926 M. 970. Such an

of the subject-matter of the trust is situate to obtain a decree—

Notes.

objection cannot be waived by real trustee. (*Ibid*). The "consent in writing" must be a specific permission given to two or more persons by name. A permission given to one applicant by name "and another" is not sufficient. 26 A 162. But see 10 M 185, 9 I.C. 358. Sanction is necessary for a suit, by individual worshippers against trustees for infringement of right common to them and other worshippers. 52 M L J. 541.

FORM OF SANCTION.—The plaintiffs who are seeking to obtain the Court's assistance to enforce the management of the trust property are not to be defeated because the Collector elected to name only one of the petitioners and to refer to the others merely as the other applicants. 9 I.C. 358=13 Bom. L R 49. But see 26 A 162 (*contra*). The suit for declaration and injunction as to pathway is one to which O 1, R 8 is appropriate if the Court's permission is taken, the recourse to the Advocate-General being unnecessary. 69 I.C. 910=26 C W N 537. Where the object of suit is to secure certain advantages to a trust, any two persons can sue in that behalf with the sanction of the Advocate-General or the Collector of the District concerned. 35 I.C. 88=3 L W 512. See also 60 I.C. 570. No sanction is required for a plaintiff suing as a trustee for obtaining a decree for an account against his co-trustee. 41 M L J 608=45 M. 113. But see 66 I.C. 837=16 L.W. 155; also for a suit by a co-trustee for joint right of management. 105 I.C. 191=1927 M 948. Where a sanction under S 92 is granted to more than two persons interested in the trust, all must join in the suit, and not any two of them. 29 M L J 331. A suit for appointment of new trustee requires a sanction. 21 M L J 450. No relief can be prayed for, to which no sanction has been obtained. 26 L.W. 581=1927 M 1033. But see 9 O W. N 966.

"TWO OR MORE PERSONS"—When a suit is instituted by one plaintiff only with the consent of the Advocate-General, and the plaint is subsequently amended by the addition of a second plaintiff, and the Advocate-General consents to it, the suit is bad in its inception and should be dismissed. 30 B 603. But see 1929 M 63. Reservation by a Court to a person or persons to apply for a relief *ultra vires*. 51 M 31=53 M L J 792 (F B). The power to file suit granted by the sanction must be exercised by all the grantees joining as plaintiffs. Where some of them were plaintiffs and the others were joined as defendants defect is not cured by transposition of the defendants to plaintiff's side. 53 M 223.

"INTERESTED"—The interest must be an existing one, and not a mere contingency; the mere possibility of an interest is not sufficient. 20 C 810 (816)=1930 L 1. The interest need not be a direct interest. 24 I.C. 712. The interest need not be personal. A *worshipper* has such an interest in the temple management to see not only that he himself is in the

voters' list but also to see that the list is properly revised and the election is held as per rules. 50 M 726=53 M L J 545. Where the evidence shows that the temple is a public temple, the right to worship in the temple gives the plaintiff a right to sue under S 92. 1933 S 213. *Residents of the locality* in which a religious institution such as a mosque is situated and for which it was originally founded and the persons authorized by law to use it and the worshippers of the mosque are persons interested under the section. 152 I.C. 323=1934 Pesh. 57. The *descendants of the founder* of a trust have an interest in the trust over and above that which the public generally have or might have in a public trust and any one of them has a *locus standi* to sue the trustees and beneficiaries colluding to misappropriate trust property if according to him provisions of the trust have not been carried out or have been rendered impossible of being carried out. The provisions of S. 92 do not cover a suit of this nature. 47 M 884 (P.C.), Rel. 1933 L 670. "Interest" what is, see 91 I.C. 924=1926 M 267, 23 L.W. 240=92 I.C. 950=1926 M. 466, 40 M 16; 1932 A 708. *Persons in whom right of control is vested* by founder.—Not the only persons competent to bring the suit—*Collaterals of founder* have right of suit as persons interested. 1929 L 423=116 I.C. 451. See also cases cited under the heading "Right of suit" *infra*.

PRIVATE TRUST.—S 92 is not applicable to private trust. 43 M L J 116=49 C 459 (P.C.); 25 I.C. 661, 56 I.C. 707, 101 I.C. 54. The Court should pause before interfering under S 92 with a matter which is more a family matter than of a public nature. 28 I.C. 116. The essential ingredient which constitutes a gift of movable or immovable property in the Hindu Law is the *Sankalp* and the *Samarpan* whereby the property is completely given away and the owner completely divests himself of the ownership of the property. The fact that a *dharmshala* was built by a person in pursuance with the will of his predecessor and proof of public user is not sufficient proof of dedication, where on the other hand, the evidence was to the effect that the owner kept the keys of the building and permission to use it was obtained from him, it must be held to be a private institution. 141 I.C. 523=34 P.L.R. 105=1933 L. 189. See also 148 I.C. 882=1934 A 315. A trust for the benefit of the poor members of a particular testator's family is not a trust "for a public purpose of a charitable nature" within the meaning of S 92. Accordingly a suit relating to such a trust does not require for its commencement the sanction of the Government Advocate, even though the suit is for relief of one of the kinds mentioned in that section. 14 R. 575. See also 1935 S. 235.

PUBLIC TRUST.—A suit to remove a duly appointed mutawalli of a trust created for a public purpose of a religious or charitable nature cannot be instituted save in confor-

(a) removing any trustee;

Notes.

muty with S. 92, C. P. Code, 35 A. 98 Public trust—Test. of, 58 I C 800, 45 I C 213; 11 I C 166, 1928 M 879 Unless a trust is expressly created for a public purpose of a charitable nature, the mere fact that the income of certain property has been for long spent in feeding an idol and in maintaining and taking care of pilgrims will not by itself constitute a trust of such a nature. 11 I C. 308=8 A.L.J. 1120 A public trust must be proved by strong evidence, the mere fact that the income of certain property has for a long time been spent to support fakirs and visitors is not sufficient evidence of such a public trust 11 I C 166 See also 141 I C 523=1933 L. 189, 1934 A 315 There must also be clear proof of dedication 141 I C. 523=1933 L. 189 It is for the plaintiff to prove that there is an endowment or trust for public or charitable or religious nature. But the question of onus is immaterial when evidence on both sides is adduced 64 C.L. J. 341=1937 C 67 The section should be applied to Mutts and the public, the Advocate-General and the Courts of Justice should have the power to stop the wholesale misuse of the income of a charitable and religious institution like a matam. 38 M 256=25 M. L. J. 393. The head of mutt is not a trustee of mutt property and no suit lies for his removal under S. 92, C P Code 32 M L J. 271 affirmed on appeal in 39 M.L.J. 98 (P.C.) But see also 37 M.L.J. 231=40 M. 745, 43 C. 707; 43 M. 253. Though a caste or a section thereof can own a temple, a temple which is merely managed by certain caste is the subject of a charitable trust and a scheme can be framed for it. 34 I C 551=4 L.W. 228. Public includes a section of the public 11 P 288 A District Court cannot, even with the consent of parties, delegate the decision whether a trust is or is not a public trust to a Subordinate Court. 130 I C 299 (1) =1931 A. 332

RELIGIOUS TRUST—The head of a mutt may be answerable as a trustee for maladministration 50 M. 297=52 M.L.J. 405 Where a person was put in charge as pujari of an idol in a Dharmasala, he is a servant and not a trustee and a suit under S. 92 is not maintainable against him. 21 A.L.J. 310 =1923 A 247 Although a District Judge has the powers of a Khazi under the Mahomedan Law to deal with an application for appointment of a mutwalli, he may relegate the petitioner to a suit under S. 92 49 I C 799 =23 C.W.N. 138. A suit by a temple trustee to recover the amount due by a defendant under the terms of the trust cannot be maintained without leave as the suit is not exempt from S. 92 or S. 18, Religious Endowments Act 62 I C 911=14 L.W. 238 Where the origin and founder of a temple are unknown, the facts that members of public are freely admitted, festivals are celebrated in a certain manner, and the like lead to the inference that the temple is a public one, and the inference is not rebutted by the fact that

a particular mode of worship is followed, that management follows a particular line of descent in the pujari family 40 M.L.J. 289 S. 92, C. P. Code, is not confined to cases where there is definite evidence as to the creation of the trust and of dedication to purposes of charitable and religious nature. The section will apply even in the absence of such evidence. The matter has to be decided not merely on the terms of the grants in respect of the particular institution but also on the usage and custom of the institution. The fact that the income of the properties has all along been applied to religious and charitable purposes is strong reason for holding that those purposes are the purposes for which the institution exists 14 P. 379=16 Pat L.T. 35=1935 P. 111.

CO-TRUSTEES—S. 92 has no application to a suit for a declaration that the plaintiff and the defendant are co-mutwallis of wakf property and are entitled to manage it jointly. 52 I C 628 (A). See also 97 I.C. 480 A trustee of a public charity can sue his co-trustee for an account without the sanction of the Advocate-General or the Collector. 41 M.L.J. 608=45 M. 113 See also 25 Bom L.R. 747=1924 B 198 S. 92 does not cover suits relating to disputes between parties as to who is to be a mutwalli on the ground of family relationship. 37 A 86. See also 40 B. 439

CO-SHARER.—Suit by co-sharer pujari for declaration of his right to share of income and for injunction from obstruction—Section applicable 148 I C. 1153=35 Bom L.R. 1119 =1934 B. 26

DE FACTO TRUSTEE.—A *de facto* trustee or a trustee *de son tort* is subject to the same liabilities as a *de jure* trustee and suit under S. 92 is maintainable against the former 27 I C. 389 See also 33 C 789, 22 B 759, 15 C. 329, 26 M 450, 1931 M W N 898

CONSTRUCTIVE TRUSTEES.—Different from the English Law sense. See 50 M 567=52 M.L.J. 415. A constructive trustee within the meaning of S. 92 would include a person who holds a particular fiduciary position and whose obligation as such can be enforced in a Court of law. 25 Bom L.R. 747 (22 Bom L.R. 457, 11 M.L.A. 405, 20 Bom.L.R. 1088, 54 Bom L.R. 629, (Rel.) (Archaka of temple) A stranger to a trust who receives money or property from the trustee, which he knows to be part of the trust estate, and to be paid or handed to him in breach of the trust is a constructive trustee, and the cases of a constructive trustee, or *de jure* trustee, or trustee *de son tort* are covered by S. 92 They are not strangers to the trust and a suit against them is maintainable under S. 92 In such a suit it is not necessary for the plaintiff to pay *ad valorem* Court-fee on a prayer for declaration of trust 39 C.W.N. 1103=1935 C 805

NEW TRUSTEES.—A suit lies for the appointment of new trustees on the ground that the defendants are not the lawful trustees and that the trusteeships are therefore

.(b) appointing a new trustee ;

Notes.

vacant The new trustees so appointed can demand possession from the defendants. 26 M. 450 (453). A fresh suit under the section is necessary to appoint additional trustees 1927 S. 1=97 I.C. 398

REMOVAL OF TRUSTEE—The Dharmakarta holds the position of trustee and as such on assertion of private ownership in trust property and falsification of accounts, he is liable to be removed. 45 M. 565=43 M.L.J. 536; 47 I.C. 850, 47 C. 866 If any relief is to be granted in a suit under S. 92, ordering the removal or interfering with the rights of the shebait and trustees as founders, something substantial must be shown justifying their removal or interference. 64 C.L.J. 341=1937 C. 67 Where a clear case is made out for the Court's interference under S. 92, by proving that the mahant or trustee has frustrated the whole purpose of the trust, has alienated the properties of the trust unlawfully, and has been guilty of wasteful and extravagant management, the final order of the Court should be governed by what appears to be in the interest of the institution. It is necessary in such cases that the Court should remove the mahant or trustee and appoint a new trustee and make arrangements which will prevent mismanagement in future and provide for future succession. 14 P. 379=156 I.C. 1099=16 Pat.L.T. 35=1935 P. 111 In framing a scheme the Court need not remove trustees already holding office when no misconduct is proved against them. 34 I.C. 551=4 L.W. 228 Under S. 92 a person in charge of a mosque who claims its property as his own is removable from office. 152 I.C. 323=1934 Pesh. 57 See also 148 I.C. 882=1934 A.L.J. 531=1934 A. 315 In a suit to remove the Sajjadanashin and for settlement of scheme, the death of the Sajjadanashin renders his removal unnecessary but the cause of action which necessitated the settlement of a scheme survives. 1934 P. 443. There is nothing in S. 92 to prevent the inclusion in a scheme framed under that section of a provision empowering the Court in specified contingencies to reduce the powers of the "managing trustee or Sajjadanashin mutwalli," temporarily or otherwise or even to remove him altogether. 1934 P. 443 See also 37 P.L.R. 85 In a suit under S. 92 the Court has power to appoint a receiver and take the management of the Temple out of the hands of the trustees appointed by the Temple Committee pending the disposal of the suit even though there is no prayer for his removal and though he cannot be removed except on a proper enquiry. 41 M.L.J. 545 Removal of trustee—Hereditary trustee—Trustee spending money not required by terms of endowment—Right to reimbursement. 48 I.C. 897=1918 M.W.N. 555. See also 42 M. 668, 1929 A. 433 A person without instituting a suit under S. 92 cannot seek to oust from possession persons who claim to hold as trustees. A Court can appoint a mutwalli to fill up a vacancy in the

office. 29 I.C. 849=18 M.L.T. 48; 25 M.L.J. 273 The Court cannot remove a trustee from his office for alleged misconduct on a mere application made to it for his removal, when it is impossible for it to entertain the application conformably with the provisions of the Scheme The remedy of the persons interested in the trust is to institute a suit under S. 92, with the permission of the Legal Remembrancer, for his removal No action can be taken by the Court on a miscellaneous application for tracing the funds misappropriated by him, nor can it give any directions in respect of the proper management of the affairs of the trust. 58 A. 538; 157 I.C. 202=1935 A.L.J. 311=1935 A. 273. See also 59 M. 751=71 M.L.J. 87=1936 M. 589; 159 I.C. 296=1935 S. 210. It is not competent to the framers of a scheme to provide that where the ordinary law requires a suit to be brought, an application may be substituted for it. Where the allegations amount to charges of breaches of trust such an application would run counter to the terms of S. 92, C.P. Code, and a provision to that effect is therefore *ultra vires*. Merely because the scheme is incorporated in a decree, it does not require any greater validity so far as binding the Court is concerned. 157 I.C. 486=41 L.W. 597=1935 M. 474 But see 38 Bom.L.R. 1137 cited below. S. 92 does not say that a trustee guilty of a breach of trust can only be removed only by a suit. A suit may be brought to remove him in the manner prescribed by the section. But if a suit has once been brought under the section and a scheme has been framed, which provides for the removal of trustees for unfitness, the exercise of that power in the course of proceedings arising out of the scheme, is not contrary to S. 92, even though the trustee be found unfit by reason of a breach of trust. 38 Bom.L.R. 1137 A clause in a scheme providing for removal of a trustee on an application is invalid. 131 I.C. 423=1931 N. 82 (1). See also 1935 A.W.R. 118, 16 Pat.L.T. 35; 37 P.L.R. 85 Removal of trustee, grounds for—*De facto* trustee—Long management—No misconduct—Scheme—Additional trustee when appointed. 48 I.C. 833=1918 M.W.N. 786 Suit to remove defendant Pandara Sann'dhi and to frame scheme—Death of the defendant—Cause of action in respect of framing of scheme if survives. See 48 M. 688=49 M.L.J. 324.

ALIENATION OF TRUST PROPERTY.—A declaration regarding the validity of an alienation by a trustee comes within S. 92 (h). 44 A. 622 See also 26 L.W. 274=1927 M. 886 The transferee of a wakf property who is made a party to a suit under S. 92 is bound by decision in the suit and is barred from going behind it, in a subsequent suit. 33 A. 752; 23 C.W.N. 115 Suits against strangers to a trust whether alienees from trustee or trespassers are not governed by S. 92. 40 M. 212=31 M.L.J. 777, 50 M.L.J. 42. The expression "granting further or more relief" must be read along with the specified reliefs

(c) *Testing any property in a trustee:***Notes.**

and those that should be granted under this clause should be of the character as those expressly mentioned. 40 M 212=31 M.L.J. 777.

ADJUDICATION OF SCHEME SUIT—A suit under this section is prosecuted by individuals not for their own interest but as representing general public and so it does not abate on the death of the original plaintiffs 48 C. 493 (P.C.). See also 16 L. 782; 17 P.L.T. 926. A suit under S. 92 does not abate on the death (or withdrawal) of one of the plaintiffs who obtained sanction for instituting the suit 47 M.L.J. 745 Foll.; 146 I.C. 628 (2)=1933 M. 854=65 M.L.J. 690. See also 55 A 687=1933 A.L.J. 1393. Where in a suit under S. 92, the question is whether the property is private or public and the defendant contends it to be a private one, the cause of action survives on his death against his sons and the suit does not abate. 148 I.C. 882=1934 A.L.J. 511=1934 A 315. S. 92 is mandatory but is permissive and directory. It is necessary for the continuance of the suit that there should be at least two plaintiffs. 37 A. 296. Scheme suit—Death of defendant if suit abates. 1926 M 162=48 M 688=49 M.L.J. 324.

AMENDMENT OF PLAINT—The sanction of the Advocate-General is equally a condition precedent to the amendment of the plaint especially where such amendment relates to a cause of action arising after the institution of the suit and fresh parties are added in consequence, with a claim for fresh reliefs against them. 36 B 168. The phrase "Any other Court empowered in that behalf by the Local Government" in S. 92, probably refers to Courts such as the Subordinate Judge's Courts. 48 C 53. But see 22 I.C. 95=18 C.W.N. 612. A notification by a Local Government empowering a Sub-Judge to try a particular suit pending before the District Judge is not one contemplated by S. 92 39 C. 146. See also 31 I.C. 397. Amendment of suit by adding strangers to the trust as defendants and prayers for reliefs beyond S. 92, takes the case out of the section and compromise therein does not bind the public under S. 11 (Expl. VI). 55 C. 519 (P.C.).

PARTIES TO SUIT.—The alienee of the trust property for the breach of which a mutawalli is sued under S. 92 may be made a party. 42 C 1135. See also 47 I.C. 111=28 C.L.J. 4, 35 B 470, 164 I.C. 615=43 L.W. 409=1936 M 449. But see 38 M. 1364, 28 M.L.J. 326, and also see 27 M.L.J. 266; 11 P. 288. Strangers to the trust are neither necessary nor proper parties 10 R. 342, 11 P. 288. Beneficiaries can sue trustees for encroachments made by them 101 I.C. 744=1927 A 518. A relief against strangers for recovery of possession of properties in their hands cannot be granted under S. 92 and hence they must be struck off the record. 27 M.L.J. 266; 39 C.W.N. 1103=1935 C 805. But see 53 M.L.J. 183. In a suit for framing

a scheme for a public charity, the persons who *bona fide* allege to be trustee thereto should be made parties, otherwise their right would be lost if a scheme were framed. 50 I.C. 58 (36 M. 364, Ref.).

ADDITION OF PARTIES—In a suit for the protection of a trust under S. 92 the Court has power under O 1, R 10 to add parties for the effectual adjudication of questions relating to administration of the trusts 43 M 707=38 M.L.J. 201. Court can add other worshippers if the suit is not properly prosecuted 13 I.C. 232=10 M.L.T. 514. Under S. 92 a suit may be brought by the Advocate-General himself or two worshippers to whom he has given his consent in writing to sue or by the Advocate-General in conjunction with those persons. The right of each to sue in his own name is not inclusive of the right of the other 43 M. 707=38 M.L.J. 201. No consent from Advocate-General is necessary to be added as defendants. Plaintiffs no doubt do 5 R 263=103 I.C. 261=1927 R. 182. Suit by body in charge of endowment—Statute modifying management of institution—New body cannot apply to continue the suit, where the application would amount to an evasion of S. 92 52 C.L.J. 78=1931 C 281. In the case of a representative suit relating to a trust instituted with the consent of the Advocate-General or the Collector under S. 92, C.P. Code, no fresh consent is necessary in the case of each fresh addition of a party. Any member of the public who is interested in the trust may come in and carry on the suit or appeal, as the case may be, without obtaining a fresh sanction. An appeal is only a continuation of the suit 62 C. 1132=61 C.L.J. 469=39 C.W.N. 951. Right to sue—Trust for maintenance of choultry for feeding the poor, and building of temple—Suit by two members of public for framing scheme for management of trust *Held*, that though the plaintiffs are not directly interested in the choultry for the poor, they are interested in the building of the temple, and in the suit so brought, the trust should be considered as a whole 165 I.C. 63=1936 M 495.

RIGHT OF SUITS "INTEREST"—A decree obtained in a suit under S. 5 of the Religious Endowments Act does not bar a suit under S. 92 of the Code 63 I.C. 418. A suit relating to a public trust is not maintainable without the Advocate-General's permission unless the plaintiff has special claim or interest 35 I.C. 846. The fact that the plaintiffs belong to the family of the founder and are entitled to succeed to the properties thereof under certain contingencies would naturally give them an "interest" so as to enable them to bring a suit under S. 92 41 M.L.J. 20 (42 M. 360, Dist.). Residents of the locality in which a choultry is situated and members of the community for whose benefit the choultry was founded have a sufficient "interest" therein within S. 92 to institute a suit 35 M.L.J. 661. A member of a church need not sue by virtue of an office 39 M. 1056=30 M.

(d) directing accounts and inquiries;

(e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust,

Notes.

L J. 423. The section protects the right of the public and does not take away private rights; it should not be used to deprive individuals, whose rights have been infringed, of their remedy 25 M.L.J. 373. A suit by parties to a scheme suit to establish a private right which may interfere with the scheme settled is not maintainable 9 N.L.J. 45=94 I.C. 326=1926 N. 326. A Hindu entitled to worship in a temple has an "interest" in it, the section does not require a "direct" interest. 24 I.C. 712 Right to sue—Bad for want of requisite interest on the part of one of the plaintiffs—Subsequent addition of other persons having requisite interest—Effect of 43 M. 720=38 M.L.J. 504

APPEAL—When a suit filed with the consent of Advocate-General at the instance of relators is dismissed, and the Advocate-General does not think fit to appeal, the relators cannot file an appeal on their own account 9 Bom.L.R. 996 See also 37 P.L.R. 85. When the suit is dismissed all the plaintiffs together must appeal 100 I.C. 838=1927 L. 382. There is no authority for the proposition that some of the persons who have obtained leave can either institute a suit or can present an appeal, when the remaining persons are alive and have not concurred either in the institution of the suit or in the presentation of the appeal 16 L. 782=158 I.C. 465=1935 L. 251. Where an appeal was filed by four out of the five persons who had obtained the consent of the Collector and the other who was not impleaded as appellant owing to his absence was impleaded as a respondent applied to be transposed as an appellant and the application was granted *Held*, that the appeal was competent as it was presented with the concurrence and at the instance of such person (*Ibid*) Powers given under scheme—Order in exercise of their powers—Whether appealable. 92 I.C. 556=1926 M. 130, 1930 M. 918=128 I.C. 575. Scheme—Further directions left open—Appeal—Modification in respect of matters left undecided—Not legal 12 L.L.J. 199. Where a scheme provides for an application for modifying or altering it an order passed on such an application is not appealable 55 B. 414. See also 133 I.C. 401=1931 A. 765. Appointment of mutwalli on framing scheme—Appeal by defeated candidate does not lie because he was not a party to the original action and because it was not a judicial order 14 P. 236=157 I.C. 477=1935 P. 261.

PARTIES TO APPEAL.—Where a person interested in a proceeding under S. 9 prefers an appeal against order of the District Judge, the proper respondents will be the parties that started the proceedings and in no case can the District Judge be called upon as respondent to support his own

judgment. 144 I.C. 701 (1)=1933 A. 151. The fact that some of the reliefs cannot be granted on account of the absence of the consent in writing of the Advocate-General does not disentitle the plaintiff to the other reliefs. 145 I.C. 294=14 Pat.L.T. 768=1933 P. 246. Where the directions given by a Court in the previous suit for settling a scheme have entirely failed to secure the due administration of the trusts for want of effective machinery, a new scheme must be framed to make the administration effective 1934 P. 443. Suit under S. 92. District Judge has no power to direct transfer of suit to Subordinate Judge 37 Bom.L.R. 120. A suit instituted with the sanction in writing of the Legal Remembrancer of the U.P. appointed by the Government to exercise the powers of the Advocate-General, but without the sanction of the Local Government to the specific suit is incompetent. 59 I.A. 121=53 A. 990=62 M.L.J. 249 (P.C.); [58 I.A. 460=61 M.L.J. 402=53 A. 910 (P.C.). *Foli.*] See also 1935 N. 28.

COMPROMISE OF SUIT—A suit under S. 92 cannot be compromised if it is proved that the endowment is a public one and where the question whether the endowment is public or not is still in dispute, there cannot be a lawful agreement and it cannot be said to be proved to the satisfaction of the Court that the suit had been adjusted by a lawful agreement so long as such a controversy exists 26 I.C. 360=18 C.W.N. 1264. A Court should not sanction a compromise of a suit under S. 92 under which any portion of the trust properties is given to any of the parties 37 M.L.J. 489.

JURISDICTION—A suit under S. 92, should be brought in the place where the subject-matter of the trust, i.e., the trust property or trust money, or any part of it is situate. A suit under the section for the usual reliefs against the functioning trustees, in a case where the trust fund is in the hands of the trustees or where the claim against them is in the nature of a debt, must be instituted either in the Court having jurisdiction over the place where the trustees reside or where the debt can be enforced on the ground that a part of the cause of action has arisen. The suit can be properly instituted in the District Court of the place where the trust is situate, though under S. 92, both the sub-Court and the District Court to which the former is subordinate have concurrent jurisdiction 42 L.W. 505=1935 M. 983=69 M.L.J. 274. Where money settled on trust is deposited at Madras with a firm carrying on business at Calcutta a suit relating thereto can be maintained in Calcutta. 59 C. 357. S. 92 must be taken as overriding Cl. (12) of Letters Patent (Calcutta). (*Ibid*) As to legality of transfer of a suit under S. 92 by District Judge to Sub-Judge, see 1935 B. 172, cited under S. 24.

(j) purchasing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged;
 (g) settling a scheme; or
 (h) granting such further or other relief as the nature of the case may require

(2) Save as provided by the Religious Endowments Act, 1863, no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

93. [S. 539, last para.] The powers conferred by sections 91 and 92 on the Advocate-General may, outside the Presidency towns, be, with the previous sanction¹ of the² [Provincial] Government, exercised also by the Collector or by such officer as the² [Provincial] Government may appoint in his behalf.

PART VI.

SUPPLEMENTAL PROCEEDINGS.

94. In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—

Leg. Ref.

¹ For notification by the Government of Eastern Bengal & Assam, see E. B. and A. Gazette, 1909, pt I, p. 392.

² Substituted for the word 'Local' by Government of India (Ad. of Ind Laws) Order, 1937.

Notes

RES JUDICATA.—Suit under S. 92—Collector's permission alone obtained—Subsequent Privy Council decision saying sanction from Local Government compulsory—*Held*, that the trial of the suit was not without jurisdiction as admittedly the permission of the Collector to the appeal was obtained before the suit was brought and that procedure was according to the procedure laid down in Civil Circular No. 1-48, and hence the judgment was *res judicata* 1935 N. 28.

COSTS.—In a suit under S. 92, which was instituted *bona fide* and in which the plaintiff's allegation are found to be substantiated, it is only proper that the plaintiff should get all their costs out of the estate 63 C.L.J. 573

Sec. 92 (2) —Clause is mandatory 7 P.L. T. 4=1925 P. 544

Sec 92 and S. 73 of Madras Hindu Religious Endowments Act.—The respective spheres of S. 92, C. P. Code, and S. 73 of the Madras Hindu Religious Endowments Act must not be forgotten. The latter Act removes from the ambit of S. 92, C. P. Code, only those religious trusts which amount to "religious endowments" under that Act. Where an endowment or fund is set apart for two purposes, namely, for the renovation of a temple and for the maintenance of a vedapatasala not connected with any temple, the entire amount of the fund being devoted to both purposes together without any apportionment or severance, the endowment is not a "religious endowment" falling under the Madras Hindu Religious Endowments

Act, because one of the purposes, though religious, is outside the scope of the Act. 42 L.W. 505=1935 M. 983=69 M.L.J. 274

S. 92 and O. 1, R. 10 (2) —In a suit under S. 92, for settling a scheme for a trust, it is necessary to implead as a defendant a person who is not merely a beneficiary but is a near relation of the founder of the trust and has got the necessary qualification which, under the terms of the trust-deed, entitles him to be made a trustee, in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. If he is not so impleaded, he will have no right of appeal against the decree of the trial judge affecting the trust properties 167 I.C. 828=1937 O.W.N. 271.

Secs 92 and 93 —Suit under S. 92—Collector's permission alone obtained—Subsequent by Privy Council deciding sanction from Local Government compulsory—Decision in suit, not without jurisdiction. 157 I.C. 90=1935 N. 28.

Sec 93.—In a case where the defect of want of previous sanction by the Local Government is cured by the provisions of the Public Suits Validation Act (XI of 1932) it is not necessary for the plaintiffs to obtain any sanction of the Local Government during the pendency of the suit (1932 P.C. 51, Ref.) 8 Luck 266; 1933 Oudh 22. See also 63 C.L.J. 70=1936 C. 815. A suit which has been dismissed under S. 93, C. P. Code, on the ground that the consent required by the section is not in order may be restored under S. 3 of the Public Suits Validation Act of 1932, if an appeal from the decree dismissing the suit is competent and open at the time of the latter Act. Once the order of restoration is made, the suit has to be proceeded with and tried in accordance with law. The suit cannot again be dismissed on the ground that there has been no valid consent given by the Collector. 63 C.L.J. 70=1936 C. 815.

Sec. 94.—Court has not got wider powers under this section in the matter of granting

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property,

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

Compensation for obtaining arrest, attachment or injunction on insufficient grounds

95 [Ss. 491, 497.] (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

(a) it appears to the Court that such arrest, attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court, and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him:

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction

Notes.

temporary injunctions than those conferred by O 39, R 1 23 L W 85=92 I.C. 615=1926 M. 258 A Civil Court has no jurisdiction to issue an injunction to a party to a proceeding under S 40 of the B T Act restraining him from proceeding further with an application made by him under that section to a Revenue Court 5 Pat L J. 76=53 I.C. 37=1919 I at H C C. 461 An order directing the furnishing of securities and submission of accounts passed on an application for the issue of temporary injunction is one under S 94 (e) 17 I.C. 361=17 C.W.N. 318 As to jurisdiction of court to issue injunction to another Court, see 1935 Pesh 182

Sec 94 (c) and O 39.—When a Court accepts an undertaking given by the defendant in a suit and dismisses an application for attachment before judgment, the order of the Court amounts in substance to an injunction restraining him from acting in breach thereof. The form only implies that the Court is prepared to deal with him honourably in the expectation that he will treat his undertaking as equivalent to an order of Court. It is not open to the defendant to afterwards say that because the Court did not pass an order of its own after accepting his undertaking he is not in the position of a person bound by an order of Court. If the defendant commits a breach of his undertaking, the Court has jurisdiction to commit him to jail for contempt of Court and for

violating the undertaking 165 I.C. 747=44 L W 714=1936 M 651

Sec 95 RIGHT TO APPLY FOR COMPENSATION.—A defendant can apply for compensation whether process is served on him or not 15 B 160, 26 I.C. 369 The application can be made only to the Court which disposes of the case 3 W.R. Mis 28, and a Court of Small Causes can award compensation 26 M. 504 The Court cannot of its own motion grant compensation 26 M 494. Compensation can be given even when the suit is withdrawn 15 B. 160. The section applies also to conditional attachments of the class contemplated by O 38, R. 5 (3). 35 C.W.N. 546. The only ground put forward in an application for attachment before judgment was that unless the attachment was made the plaintiff in the event of success would have difficulty in realising the decretal amount, the application did not mention any of the grounds which justify an application for attachment before judgment under O 38, R 5, and on the face of it the application was made on altogether insufficient grounds and was entirely unjustified. If such application is granted, the case is clearly one in which the defendant is entitled to reasonable compensation against the plaintiff under S 95 151 I.C.=283=11 O.W.N. 1135=1934 Oudh 429 (2) The question to be decided under S 95 is whether there are no sufficient grounds for applying for attachment and not whether there are no reasonable grounds

PART VII.

APPEALS.

Appeals from Original Decrees.

96. [S. 540.] (1) Save where otherwise expressly provided in the body of

Notes.

stated in the creditor's application for attachment. Though not stated in the application, if there are really sufficient grounds, the defendant would not be entitled to compensation under S. 95. 1937 N 126. An application for compensation for wrongful attachment of property cannot be entertained by the Court before the order of attachment is set aside by the Court. 151 I.C. 994=1934 M 638=67 M.L.J. 448. S. 95 is not inapplicable to cases in which the plaintiff happens to be a minor. 42 L.W. 542=1935 M 886.

ORDER FOR COMPENSATION—It is doubtful if an award of compensation can be made in a case where the order of injunction was passed after hearing both the parties and it was found there was sufficient grounds for making it. 17 L.W. 150=1923 M. 352. The fact that an interim order of attachment before judgment is made absolute is no bar to the Court entertaining an application for compensation under this section. 1931 M.W. N 956 (1923 M 352, Expl.) The proper stage for making such an application would be only when the suit is heard and until then, it would be premature. (*Ibid.*) An order for compensation is one independent of decree, although it sets off the compensation as against the decreed amount. 21 I.C. 756. A compensation may be given for improperly obtaining temporary attachment though the same is set aside on notice. 49 I.C. 86=9 L.W. 69.

PRESUMPTION.—It must be presumed that the Court granted the application for arrest or attachment upon sufficient grounds, unless the contrary is proved. 18 W.R. 450.

PROOF—Damages can be awarded only when it appears to the Court deciding the suit that there was no probable ground for instituting it. 13 M.L.J. 70. Plaintiff must prove want of reasonable and probable cause in a suit for damages for attachment before judgment and malice. Malice is any improper or indirect motive, *i.e.*, no hatred or enmity is necessary. 35 M. 598=21 M.L.J. 1052. *See also* 9 I.C. 60=13 O.C. 357. The decree-holder who wrongfully moves the court, is a trespasser responsible for all damages though he may have acted innocently and mistakenly. 12 I.C. 26=4 Bur.L.T. 220. To justify an attachment before judgment it is not enough that the defendant is in straightened circumstances but it must be proved that he was actually about to dispose of his property. 49 I.C. 86=9 L.W. 69.

DAMAGES, EXTENT OF.—The litigation and delay, and also every depreciation of the goods, by any immediate fall in the market, are the natural and necessary consequences of the creditor's unlawful act. 17 C. 436. For wrongful attachment the decree-holder moving the Court is responsible for any loss

suffered by a person whose goods are wrongfully attached. 12 I.C. 26=4 Bur.L.T. 220. Expense or injury in S. 95 for wrongful arrest includes also general damages such as damages for injury to reputation or humiliation. No special procedure is necessary for wrongful arrest. 3 L.W. 30=32 I.C. 592. A Court is not justified in awarding compensation to a defendant in a suit under S. 95, on the basis that his prestige suffered or that he felt humiliated by reason of an attachment before judgment obtained by the plaintiff. *Damage to prestige and humiliation do not amount to "injury"* for which compensation can be awarded under S. 95. The claim to damages must be in respect of some damage caused to the defendant as the proximate result of the attachment which had been applied for on insufficient grounds. 39 C.W. N. 915.

RIGHT OF SUIT.—A claim for compensation for wrongful attachment of property before judgment made in a counter-affidavit disputing the propriety of the interim order, is no bar to a suit for damages. 38 M.L.J. 324. Suit for damages, if can be maintained against a defendant for obtaining maliciously and without reasonable cause a perpetual injunction which was dissolved on appeal. 42 C. 550. (13 W.R. 305, doubted.) *See contra* 30 C.W.N. 465=94 I.C. 444=1926 C. 757. The suit barred under S. 95 (2) and the application under section 95 must be *ejusdem generis* with the same cause of action. An application under S. 95 does not bar a subsequent suit for damages caused by reaping and removal of the crop on land which the plaintiff was, by the Court's injunction, forbidden to enter. 1932 M.W.N. 536. Main tenability of suit for damages for malicious attachment apart from S. 95. 59 C. 1073.

APPEAL—An appeal will now lie from an order granting compensation. 28 A. 81, 24 M. 62, or refusing compensation, 25 M.L.J. 46. An order of a Divisional Court under S. 95 refusing an order of the Court of first instance is an appellate order under S. 104 (9) and is not appealable. 11 I.C. 917=4 Bur.L.T. 204. An order under S. 95, C.P. Code, passed by a Small Cause Court dismissing an interim attachment issued by itself is valid and such an order cannot be questioned on appeal. 26 I.C. 359.

REVISION.—The grant of compensation under S. 95, is no doubt a matter of discretion, but the discretion has to be exercised in a judicial manner. Where the Court has given no reasons for refusing the application for compensation, the order clearly ignores the terms of S. 95 and is not one according to law. 151 I.C. 283=11 O.W.N. 1135=1934 Oudh 429.

Sec. 96. APPEAL, WHAT IS—An application by a party to an appellate Court asking

Appeal from original decree this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

Notes.

it to set aside or revise a decision of a subordinate Court is an appeal within the ordinary acceptance of the term. An irregular or incompetent appeal is none the less an appeal for purposes of limitation. 63 M.L.J. 329=59 I.A. 283=60 C.1 (P.C.)

RIGHT OF APPEAL.—There is no right of appeal unless it is conferred by statute. 11 M. 26=14 I.A. 160 (P.C.); 40 C. 21=39 I.A. 197, 203 (P.C.); 28 A. 549; in express words 20 B. 803, 43 C. 857; 1929 R. 198, 1929 A. 577; 39 C.W.N. 567. It cannot be assumed that there is a right of appeal in every case decided by a Court. Such a right must be given by statute or some authority equivalent to a statute [11 M. 26 (P.C.) Ref.]. 57 M. 271=66 M.L.J. 438, 57 M. 670=66 M.L.J. 532. An agreement not to appeal if for consideration and is otherwise good is valid and enforceable 14 M.I.A. 204; 8 C. 455, 1 A. 267 (F.B.); 134 I.C. 262=1931 N. 126. Application under S. 34, Trust Act, order on, if open to appeal. See 11 O.W.N. 1533=1935 O. 72.

RIGHT OF APPEAL.—EXTENT OF.—S. 96 gives right of appeal from every decree passed by a court of original jurisdiction. The right of appeal vests in every party adversely affected by the decree and against only that part of the decree which adversely affects him 151 I.C. 25=1934 A. 677. See also A.I.R. 1937 Sind 94.

FORUM OF APPEAL.—A brought a suit against B for redemption of a house on the payment of Rs. 1,000. B pleaded *inter alia* that A had admitted B as owner of the house and that as such he had rebuilt the house incurring a cost of Rs. 15,000, which A must pay in addition to mortgage-money. The Subordinate Judge passed a preliminary decree for possession by redemption of the mortgage on payment of Rs. 9,050. B filed an appeal for enhancement of the amount. Held that the appeal lay to the High Court and not to the District Court as the value of the subject-matter in a redemption suit was the amount adjudicated by the trial Court, Rs. 9,050, and not the valuation given by the plaintiff, Rs. 1,000. [1926 L. 376 (F.B.), Foll., 106 P.R. 1895, (F.B.) held overruled.] 148 I.C. 234=1933 L. 155.

Sec. 96 (3).—Consent decrees are not appealable 43 C. 85. But they can be set aside for proper grounds by a separate suit. 15 B. 594. No appeal lies against a decree passed upon a compromise even if the compromise be disputed. For a consent decree to come within the prohibition of S. 96 (3) it is not necessary that the consent should continue till the passing of the decree. 12 P.

359=14 P.L.T. (Supp.) 1=1933 Pat. 306. Where a compromise has been recorded and it has not been challenged in any way in the lower Court the recording of the compromise must be held to have been done by consent and S. 96 (3) read with S. 108 would bar an appeal against the order. 57 B. 206=35 Bom. L.R. 127=1933 B. 205. See also 156 I.C. 1035. Consent decree—Parties inviting Court to adopt special procedure—Court adopting and deciding suit—Appeal from decision—Maintainability 71 M.L.J. 281. In construing a particular provision of the Code the Courts should, as far as possible, give to the other provisions of the Code their proper and effective meaning to attain their proper and effective purpose. There is a distinction between a decree passed by consent of parties to which S. 96 applies, and a compromise of suit under O. 23, R. 3. S. 96 does not in all cases bar an appeal which involves a consent decree. Where an order recording a compromise is passed under O. 23, R. 3, an appeal lies from it under O. 43, R. 1, Cl. (m) and S. 96 (3) is not a bar to such appeal. [1933 B. 205, not foll.] 29 S.L.R. 437=163 I.C. 240=1936 Sind 59. S. 96 (3) is not applicable to mutation proceedings. 35 P.L.R. 395.

AN AGREEMENT TO ACCEPT THE DECISION OF A COURT AS THAT OF AN ARBITRATOR without any objection implies that the decision was to be accepted as final and there is to be no right of appeal to another forum. 15 L. 726=1934 L. 176 (2). Where the parties to a suit agree and say that the determination of their disputes by a third person is to be final between them, it is to be regarded as an undertaking not to appeal. A decree passed is still a decree passed by consent, when the Court finds there was a compromise, whether the compromise is admitted by both the parties or disputed by one of them, and the parties are estopped from impugning the decree made in accordance with the finding of third person by whose decision they have agreed to be bound 60 C.L.J. 173. When a party offers to be bound by the statement of a certain person, that statement becomes conclusive evidence under the Indian Oaths Act and it is on the basis of that evidence that the Court decides the case. It cannot therefore be said that the decree in such a case is passed with the consent of the parties. 15 L. 305=149 I.C. 1102=1934 L. 67 (1). Decree in accordance with award not appealable—When objections against award have been heard and decided 119 I.C. 694. S. 96, cl. (3) pre-supposes that the party appealing has consented to the decree being passed—Person denying to be party to compromise can appeal 114 I.C. 101=1929 S. 32.

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SCOPE OF SECTION.—The new Code does not deprive the litigant of the right of appeal which he had under the old Code even though such right could not be exercised immediately on the introduction of the new Code. 21 M.L.J. 631. *See also* 151 I.C. 25=1934 A. 677. Finding of fact of Original Side Judges of High Court are generally accepted. 20 S.L.R. 295. *See also* 97 I.C. 505=1926 Sind 216; 1934 A. 531. A decree to be appealable must be a final disposal. 1929 M. 404=122 I.C. 519.

APPLICATION OF SECTION, SUB-CL. (3).—S. 96 (3) applies only to suits and not to proceedings in execution 4 Pat.L.T. 735=1924 P. 346.

WHO CAN APPEAL.—A party cannot appeal against a decision in his favour on the ground that one of the findings is against him. 24 I.C. 36. *See also* 2 L.W. 101=27 I.C. 861, 3 A. 152 (F.B.) It a decree is upon the face of it, entirely in favour of a party to the suit, he cannot appeal. 7 A. 606 (F.B.), 8 P. 617. An adverse finding against any single issue or issues is not appealable unless such finding is incorporated in the decree. 6 M.L.J. 87. *See also* 44 I.C. 723. An appeal is not maintainable against opinions in a judgment when the decree is in favour of a party. 51 I.C. 622. When a suit is dismissed for want of cause of action there cannot be an appeal by defendant on a finding. 20 C.W.N. 1354. Notwithstanding a suit is dismissed, a defendant has a right of appeal and for that purpose it is open to the parties to go behind the decree and see really what the adjudication is. 25 M.L.J. 379. *Also see* 36 M.L.J. 641. If a person who ought not to have been made a defendant is impleaded as such, he cannot appeal. An order directing the removal of a party's name from the array of parties is in substance though not in form a decree and an appeal lies therefrom. 53 A. 466. No person has a right of appeal from a decision unless his interest is prejudicially affected by it. 41 I.C. 468. A defendant has a right of appeal even if the suit has been dismissed against him, if he is aggrieved by the decree. 30 M. 447; 9 C.W.N. 584. Any plaintiff or a defendant has a right to appeal without the concurrence of the other parties to the suit 22 B. 718. The representative of a deceased person can appeal from the decree although he may not have been brought on the record. 12 M.L.J. 435.

WHO CAN APPEAL—THIRD PARTY CLAIMING UNDER PARTY TO SUIT—RIGHT TO PREFER APPEAL.—The right of appeal is a creature of statute and it can be exercised only by those in whom the power is vested expressly or implied by the statute. In a suit under O. 21, R. 103, against the Official Receiver representing the estate of an insolvent, a decree was passed in favour of the plaintiff. The Official Receiver did not prefer an appeal. The appellant, who was one of the creditors of the insolvent represented by the Official Receiver in the trial Court, presented an appeal against the decree in so far as it related to the Official Receiver and an application for leave to appeal against that decree on

behalf of itself and the general body of creditors of the insolvent. *Held*, that the appellant, not having been a party to the suit, was incompetent to prefer the appeal. *Held, further*, that even if leave to appeal may be granted to a person not a party to the suit, this was not a proper case in which leave should be granted. 57 M. 670=1934 M. 360=66 M.L.J. 532. Order on application under S. 34, Trust Act—Appeal. *See* 11 O.W.N. 1533.

"EX PARTE" DECREE.—A defendant against whom a decree has been passed *ex parte*, and who has not adopted the procedure provided by O. 9, R. 13 can appeal from such decree under the general provisions of this section. 9 M. 445. Appealability of order under O. 17, R. 3. 5 R. 838=1927 R. 148.

RES JUDICATA.—A finding upon a point necessarily arising in the case operates as *res judicata* between the parties, and the aggrieved party can prefer an appeal against the finding although the decree is in his favour. 7 A. 606; 11 C. 301 (P.C.), 40 I.C. 771.

CONSENT DECREE.—Serious and substantial injustice to the party must be shown to result from letting the order stand which was made by the consent of the pleader under a mistake of fact. 46 M.L.J. 160=1923 P.C. 184 (P.C.). Decree on basis of compromise—Person verifying compromise having no authority—Party can appeal. 1929 Oudh 385 (F.B.) No appeal lies from an order made by consent of parties especially if the appellant has derived some benefit under it. 57 I.C. 70=30 C.L.J. 231, 34 I.C. 186=20 C.W.N. 752. *See also* 91 I.C. 294=1926 B. 39. No appeal lies against an order of dismissal of a suit under O. 23, R. 3 of the C. P. Code. 34 I.C. 186=20 C.W.N. 752. A decree under O. 23, R. 3 can be passed only after there has been an order that the compromise be recorded. 43 C. 85. An order recording a compromise which has not been challenged in the lower Court must be held to have been done by consent and no appeal lies against the order. 35 Bom.L.R. 127. A person who is not a party to the compromise though a party to suit can appeal against the compromise decree which binds only those who are parties to the compromise. 22 C.L.J. 333=20 C.W.N. 178. *But see* 91 I.C. 620=1926 C. 512. A consent decree in a partition suit as between some of the parties is not binding on any of the parties. 27 I.C. 242. An appeal lies against a decree passed on compromise entered into by a vakil without reference to his client. 41 M. 233 (23 M.L.J. 381, Dist., 21 M. 274, Foll.) An order directing the appointment of a Commissioner with the consent of parties does not come under Cl. (3) of the section. 29 M.L.J. 219, 27 M.L.J. 173. The fact that defendant does not raise any objection to a particular relief cannot make the decree a consent decree when the relief is eventually decreed. 49 I.C. 840=15 N.L.R. 39.

WAIVER.—Where the plea of limitation is waived though the suit is time-barred, the decree following is a consent decree and thus not appealable. 39 M.L.J. 68=24 C.W.N. 1055.

97. Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

Appeal from final decree where no appeal from preliminary decree

Notes.

(P.C.). Agreement to abide by decision of Court—Appeal, if lies, 1926 A 90=89 I.C. 586

DECREE ON APPEAL—An appeal being a continuation of the original proceeding, the Appellate Court's decree is the decree in the suit 30 M.L.J. 379.

PRELIMINARY DECREE—Where in a suit for contribution the lower Court decided that the defendants were liable to contribute and also the extent of the liability and it only remained to work out the amount of the decree, held, that the findings amounted to a preliminary decree from which an appeal was competent 148 I.C. 1052=11 O.W.N. 606=1934 O 307

Sec 97 PRELIMINARY AND FINAL DECREES.—Where a final decree is passed no appeal will lie against a preliminary decree. But the Court may allow the appeal to be amended so as to convert it into one against the final decree 48 C 1036, *see also* 1928 L. 73=107 I.C. 610 Where the preliminary decree for sale on a mortgage provides that if the net proceeds of the sale are insufficient to pay the amount of the decree, etc., the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance, such a provision constitutes an adjudication adverse to the defendant and an award to the plaintiff of a personal decree, and if the defendant does not appeal from it, he is precluded under S 97, C.P. Code, from afterwards disputing its correctness. It is not therefore open to the defendant in such a case to object to the plaintiffs' application for a personal decree after the mortgaged properties are exhausted 151 I.C. 1055=11 O.W.N. 1196

PRACTICE AND PROCEDURE—It is a salutary rule that where the issue is simple and straightforward and the only question is which set of witnesses is to be believed the findings of fact of the trial judge should not be lightly disregarded 49 C 132. If the competency of an appeal is in question the appellant must establish that he has a right of appeal, for a right of appeal is not a natural right but must be given by express rules of statute 43 C 857. Small cause suit tried on the original side—Appeal from decree 51 I.C. 967 An appeal lies from a decree in a suit transferred from the Small Cause Court to the Original Side under S 23 of the Provincial Small Cause Courts Act and the Appellate Court can remand the suit 45 I.C. 645

FORUM OF APPEAL—Transfer of venue. 37 M. 477. Where on withdrawal of a claim against some defendants a decree is passed which makes the defendants liable for their own costs, an appeal does lie 18 M.L.T. 460=31 I.C. 312 The value of the subject-matter in a redemption suit is the amount

adjudicated by the trial Court and not the valuation given by the plaintiff. It is the former that determines the appellate forum. 1933 L. 155

PRELIMINARY DECREE, WHAT IS—The C.P. Code makes no provision for something which is neither a decree nor an order, nor anything which is both, nor does it provide that one adjudication by the Court can be resolved into diverse elements, some of which are decrees and some orders. The question is one of substance, whether an adjudication is a decree or an order. 42 C 914 (P.C.) *See also* 148 I.C. 1052=1934 O 307. Though no appeal against the final decree is preferred it is no reason for not hearing the appeal against the preliminary decree in a suit for partition. 36 A. 532 If an appeal from preliminary decree succeeds, the final decree passed later on falls to the ground. 34 A. 493; 36 A. 532; 35 M.L.J. 361 The passing of a final decree, whether precludes a party from preferring an appeal against the preliminary decree 37 M. 455=22 M.L.J. 317, 24 M.L.J. 190. The right to appeal lies only from a preliminary decree and not from a preliminary finding in a suit directing accounts to be taken 38 B. 331, 39 B. 339 (F.B.) Where there is only a preliminary finding and no decree is drawn up, there is no preliminary decree and no appeal under S 97 37 B. 480, 37 B. 60 The legislature in enacting S. 97 intended to prevent preliminary questions being raised in the form of an appeal after a case has been decided upon the merits 36 B. 536 Effect of passing of final decree after filing of appeal from preliminary decree *See* 92 I.C. 545=1926 B. 43. An appeal filed against a preliminary decree can be heard though final decree made after the appeal was passed and lodged, is not appealed against, a preliminary decree is not maintainable unless there is also an appeal against the final decree passed subsequent to the preliminary decree by the Court below 71 I.C. 290 (40 C 1036, referred to), 91 I.C. 358=1926 C 557. But *see also* 157 I.C. 416=1935 L. 482 An appeal against the preliminary decree after the final decree is passed but before it is signed is not incompetent, as no copy can be got for the final decree until it is signed and drawn up and the only appealable decree is the preliminary decree 46 I.C. 802=22 C.W.N. 831 (30 I.C. 321, *Foll*) The order remanding after settling certain issues is a preliminary decree and must be appealed from. 32 I.C. 866=22 C.W.N. 43 Where, before the filing of an appeal against a preliminary decree, a final decree was passed and no appeal was preferred against the final decree, there is no appeal against the preliminary decree 27 I.C. 135=20 C.W.N. 231 (18 C.L.J. 321, *Foll*); 30 I.C. 321=22 C.L.J. 90; 1928 L. 73, *See contra* 34

98. [S. 545; (1)] Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from such decree shall be confirmed:

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the

Notes.

C.W.N 66 (F.B.), 1930 Pat 177=11 P.L.T 61 (F.B.) Under the old Code, objections to a preliminary decree could be taken in an appeal against the final decree, without appealing from the preliminary decree. 24 I C 18=21 C.L.J. 459. A final decree, passed before the appeal from the preliminary decree must be brought to the Appellate Court's notice, otherwise the Appellate Court's decree supersedes the final decree also. 17 C.W.N. 868=18 C.L.J. 209 (36 C. 672, 6 C.L.J. 547; 32 C 1023, 32 A. 225, Dist; 3 C. 20, Foll.). See also 20 I.C. 576=18 C.L.J. 214, 21 I.C. 510=18 C.L.J. 223; 21 I.C. 516=18 C.L.J. 321. Appeal from preliminary decree cannot be treated as one against the final decree also. 74 I.C. 485=11 O.L.J. 248.

Sec. 98: SCOPE AND APPLICATION OF SECTION.—With the addition of sub-S. (3), S. 98, C. P. Code, made by the Repealing and Amending Act, XVIII of 1928, that section has no application to cases heard by Division Bench of a Chartered High Court, whether on appeals from decrees of Subordinate Courts or from decrees passed by a Judge of the High Court on the Original Side. All cases of difference of opinion among the Judges composing the Division Bench are governed by Cl. 26, Letters Patent, and the Division Bench should state expressly the points of difference. 15 L. 425=149 I.C. 575=1934 L. 371 (F.B.). Cl. 20 of the Letters Patent (Lahore) and not S. 98 of the C. P. Code applies in case of a difference of opinion between the Judges of a Division Bench even in the case of an appeal from the *mofussil*. (52 M 563, Foll.) 142 I.C. 427=34 P.L.R. 584=1933 L. 648 (1). Where a bench of two Judges differ, S. 98 regulates the decision of the appeal if it is from a Subordinate Court under the Code or any local or special statute and in all other cases the decision is governed by the Letters Patent. 93 I.C. 344=7 L. 179=1926 L. 65 (N.B.—There is no difference of procedure after the recent amendment of the Letters Patent.) Where two Judges of a Division Bench differ on a point of law and refer the matter to a third Judge, the latter must confine his opinion to the specific point and not dispose of the case *de novo* on the merits. 35 A. 487=40 I.A. 182 (P.C.). Under the old Code when two Judges differed, the whole appeal was referred to a third Judge, but under the new Code it is only the point of law that has to be referred. 39 C. 353=16 C.W.N. 817. Under the proviso to the section

reference can be made only when there is a difference on a question of law and not on fact 17 C. 3 (11)=16 I.A. 137. Letters Patent, Cl. 36 and not S. 98, governs the procedure in cases of difference of opinion in revision cases. 18 M.L.T. 591=32 I.C. 330=17 Cr. L.J. 42. S. 98 applies even to Chartered High Courts subject to Letters Patent, Cl. 36. The result is that Cl. 36 applies to Chartered High Courts and S. 98 to Courts other than Chartered High Courts. 52 M. 563=57 M.L.J. 264 (F.B.). The procedure when Judges differ on second appeals from *mofussil* is governed by S. 98, C. P. Code, and not by Cl. 36, Letters Patent. 43 B. 433 (F.B.); 3 B. 204, 10 C. 814, 25 M. 555; 22 M. 68, 11 A. 176 (F.B.), Rel. See also 91 I.C. 897=1926 C. 121, 30 C.W.N. 1011=97 I.C. 236=1926 C. 1211 Reference to a third Judge—Third Judge deciding case on another point—Procedure 26 C.W.N. 985=1922 C. 544 If the appellate Court Judges agree that a part of the lower Court's judgment is erroneous, that part must be reversed, and if as to rest the Judges are equally divided, it is deemed as confirmed. 31 I.C. 965=22 C.L.J. 525 (11 A. 176; 6 B.L.R. 131, Dist); 1928 M. 180. But see 7 L. 179. Judges differing on a question of law—Decision to be arrived at with reservation of point of law 22 I.C. 383=18 C.W.N. 33. Where in an appeal under the Land Acquisition Act the Judges composing a Division Bench differ as to the amount of additional compensation the award of the lower Court should be confirmed under S. 98. 41 M. 943=35 M.L.J. 110.

DECREE CONTAINING ADJUDICATIONS REGARDING SEVERAL ITEMS—ONE ITEM CONFIRMED AND ANOTHER VARIED—DECREE—FORM OF.—Where the "decree" contains adjudications regarding several items, each adjudication is a decree as defined in S. 2 (2) and the provisions of S. 98 should be applied with reference to the adjudication of each item Where the Judges composing a Bench do not agree in confirming the adjudication made by the lower Court in respect of one item, but they agree in reversing the decree or adjudication by the lower Court as regards another item in dispute, the decree appealed from should be varied so far as the Bench agree that it should be varied and confirmed so far as they agree that it should be confirmed. (31 I.C. 965, Rel.) 55 A. 672=1933 A.L.J. 1425=1933 A. 473

DIFFERENCE ON QUESTIONS OF LAW—PROCEDURE—REFERENCE OF WHOLE CASE NOT PROPER—When a Bench differ in opinion on

point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

¹[(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the letters patent of any High Court.]

99. [S. 578] No decree shall be reversed or substantially varied nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

Leg. Ref.

¹ Sub-section (3) added by Act XVIII of 1928

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certain points of law, under S. 98, they may state those points and the hearing by the other Judges is confined to the specific points stated and cannot cover the whole case again S. 98 is confined to points of law only but the newly added sub-S. (3) makes it subject to the provisions of the Letters Patent, Cl. 27 of which states that the points of difference may be referred to the other Bench. This clause is wider than S. 98 of the C P Code, because it covers points of fact as well as points of law. But in both cases, only the points of difference should be stated and not the whole case 146 I C 84=1933 A L.J. 1127=1933 A 861 (F.B.).

Sec 99. SCOPE AND APPLICATION OF SECTION—The section applies only to errors or defects or irregularities in the suit or proceedings out of which the appeal then being heard arises, and not to previous suits or proceedings which have come to an end. 23 A. 499 (500). Applicability to appeal under S 142, Calcutta Municipal Act. 31 C.W.N. 1040 The best test to ascertain whether an erroneous interlocutory order has affected the ultimate decision on the merits is to see whether the Court would have come to the same decision had the erroneous order not been passed 2 C.L.R. 257 Where the appellate Court did not apply its mind to the case fully and proceeded on an entire misapprehension of the trial Court's decision a remand for a fresh disposal of the appeal would be justified. 130 I.C. 573=1931 C. 164=52 C.L.J. 566 A decree can be varied on appeal on grounds which have come into existence since it was passed 133 I.C. 244=1931 B 280=33 Bom L R 266.

JURISDICTION—The term "jurisdiction" is used in the sense of pecuniary or local jurisdiction or jurisdictions relating to the subject matter of the suit 28 C 324, 5 C.L.J. 71; 5 C.L.J. 329 The word "jurisdiction" in S. 99, judged from the point of view of locality, pecuniary value or the subject-matter of a suit, means competency to try. 101 C. 731=7 N.L.R. 33 See also 158 I.C. 971=1935 Pesh 151. Whether non-compliance with S 147-A of the Bengal Tenancy

Act amounts to want of jurisdiction see 45 C.L.J. 24 Jurisdiction is that of the trial Court 93 I.C. 938=1926 L. 402. When there is a want of jurisdiction appellate Court will interfere even if there is no miscarriage of justice. 95 I.C. 406=1926 A. 650 See also 1937 P 147

MISJOINDER.—The words "any misjoinder of parties or causes of action" have been inserted to supersede the rulings in 27 M 80, 24 C 540; 15 A 380. Misjoinder—Joinder of different tenants in suit for enhancement of rent 23 C.W.N. 945=30 C.L.J. 140 An objection as to misjoinder cannot be taken for the first time on appeal, especially when the suit is decided on the merits in the first Court 17 I.C. 97 Suit by Hindu sons impeaching a large number of alienations by their father in favour of various persons—Allegation of vice, extravagance and immorality—Impleading all alienees 78 in number as defendants—Plea of misjoinder raised in written statement but not pressed or proceeded with further—Court dealing with all transactions and coming to correct conclusion—Decree confirmed by High Court—Objection in appeal to Privy Council not competent. 166 I.C. 649=16 P. 149=41 C.W.N. 418=1937 P.C. 42 (P.C.) Misjoinder of causes of action when interference by High Court proper See 22 M.L.J. 225 Whether misjoinder in S. 99, C.P. Code, includes non-joinder. 44 M.L.J. 249. Objections as to non-joinder—Procedure—Lawfully stated. 42 M.L.J. 133

ORDER OF HONORARY ASSISTANT COLLECTOR ON A PUBLIC HOLIDAY—ULTRA VIRES.—There are standing orders of the Government of India that no work of a civil nature can be done on a public holiday and if it is done, then it amounts to a nullity. Accordingly an order passed by an Honorary Assistant Collector on a public holiday dismissing an application for execution of a decree is clearly *ultra vires*, and is liable to be set aside in revision 167 I.C. 280=1937 O.W.N. 247=1937 O 272

ILLUSTRATIVE CASES—Decree passed can not be reversed simply because it was passed without hearing arguments 93 I.C. 291 An order adding parties to a case is not one affecting the merits 3 B.L.R. (O.C.) 113 As to decree passed without hearing arguments, see 13 O.L.J. 473 The joinder of an unneces-

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sary party in a mortgage suit does not involve its dismissal but is a mere irregularity 521 C 105. But where a person who is a necessary party is not impleaded as defendant in spite of such objection being taken at the very start, the suit should be dismissed. 146 I C 72=1933 M 664=65 M. L J 290 Striking out names from the plaint and amending issues are not errors affecting the merits of the case 4 Beng L R (O C) 97 See 9 A 508 and 14 C 159. Suit wrongly brought in firm's name—Amendment of plaint—Power of appellate Court. 1935 R. 240 The defendant could not object to the frame of the plaint in appeal, where it stated all the facts fully and did not in fact mislead the defendant 34 I C 704=12 N. L R. 90 Absence of Court's permission under O. 1, R 8, C P Code, cannot be raised for the first time in appeal 1931 O 375 An objection that there cannot be a decision in a partition suit of rights subordinate to that of the co sharers cannot be gone into for the first time in appeal 63 I C. 161=33 C L J. 317 An error in the valuation of the claim is not one which affects the merits of the case 1 B H. C. R. 163. Set-off—Court fee not paid—Objection in appeal—Interference. 19 I C. 918=17 C L J 305 (F B) Form of an issue throwing onus on the wrong party, is not a ground in appeal for setting aside the decree provided the parties were not misled and the evidence fully gone into 17 C L J 38=17 C. W. N 280 Where the plaintiff in disregard of the provisions of the Code has united in the same suit not merely several causes of action, but several suits against separate defendants with the result that litigation was conducted as though the defendants were a community with common interests, the procedure though highly irregular, nevertheless prevents the landlord from objecting to the use of evidence given in the case of some tenants as evidence in favour of all the parties 43 M 567=47 I A 76=38 M L J 476 (P C) (on appeal from 24 M L J. 571) The deposition of a handwriting expert signed by him and admitted in evidence does not vitiate the trial though it is not signed by the Judge 68 I C 664=1923 N 7 (1). The exclusion of evidence in the lower Court is not sufficient ground for reversing that Court's decision, unless the appellate Court comes to the conclusion that the evidence referred, if it had been received, ought to have varied the decision 8 B 408. Error in rejecting documents already admitted by the predecessor of the Judge is not one affecting the merits. 13 B. 449 The second appellate Court cannot set aside the decree of the first appellate Court on the ground of improper admission of additional evidence unless it is satisfied that the decision on the merits is wrong, and that the additional evidence might have resulted in the wrong decision 26 I C 50=1914 M W N 864 (36 M. 477, Foll). When an unstamped promissory note is treated as a bond and received

in evidence on payment of stamp duty and penalty, the receipt of such document is not an irregularity affecting the merits of the case 1 A 725 The omission to explain the non-production of a document before tendering secondary evidence is only a mere irregularity 59 I C. 461. Omission to record reasons for admission of additional evidence by the appellate Officer is an irregularity not affecting the merits of the case and is curable under S 99 14 I. R 366 (Rev)=17 R D 507 Recording evidence in a language which is not the language of the Court is a mere irregularity which can be cured by this section. 34 C 396. Also the disposal of a suit on a Sunday 29 A 562 If the power of attorney, on the strength of which a suit is instituted is defective as when it is a special and not a general power, there is merely an irregularity in proceedings not affecting the merits of the case. 47 B 227 Where the plaintiff filed the plaint through an agent and did not even sign the plaint, and there was no power-of-attorney on the record and no explanation was apparently obtained for her failure to sign the plaint and no objection however appeared to have been taken *Held*. S. 99 of the C P. Code, applies to the case 1 R. 42, 134 I C 36=1931 A 507. Defect of signature does not justify reversal of the decree 59 I C. 282=1 Pat L T 647 Defect in signing of plaint can be remedied in appellate Court 104 I C 747. Irregularity in signing vakalat-nama is only formal 74 I C 1033. Where the mother of a minor refuses to act as guardian the Court ought to appoint one of its officers as guardian *ad litem*. An omission to appoint one is a serious defect not curable by S 99 62 I C 464=25 C W N 525 Absence of a formal order appointing a guardian may sometimes be a mere irregularity. 30 I A. 182 1935 O W N 333, but not when the minor's interests had been entirely disregarded 29 A 679 See also 1935 O W N 333=1935 O 287 Decree on compromise—Omission to record the compromise not fatal 1935 A. W. R. 765=1935 All 738 Where the order amounts impliedly to a redemption decree, it may be treated as such under S 99 of the Code notwithstanding an irregularity in form 26 I C 701=10 N L R 150. Withdrawal of suit with permission on condition as to costs—No date mentioned for payment—Fresh suit filed before payment—Irregularity 1935 N 56 Award—Order filing award and judgment combined into one—No separate judgment and order as required by Sch II, para 21—If illegal—Irregularity—If cured 1936 N 246 A remand under O 41, R. 23, when the first Court decided the suit on the merits, is an irregularity within S. 99 not affecting the merits of the case 41 C 108 (28 C 324, Foll) Where order passed under O 39, Rr 5 and 6 should have been passed under O 21, R. 42, the High Court refused to set aside as in substance the order was right. 41 I C 89. Execution sale—Want of attachment in execution does not interfere with power of Court to sell property 37

Appeals from Appellate Decrees.

100. [S. 584.] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from

Second appeal

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I.C. 964=1917 M W N 89. (21 A 311, Foll.) Refusal of summons under O. 16, R. 1—Party producing copy of document sought to be produced in Court but neither proving that it was original nor that it was true copy—There was no miscarriage of justice due to refusal. 49 C L J 546=1929 C 459 Subsequent mistakes and irregularities may be condoned, under this section, provided the suit has been instituted in such a way as to give the Court authority to try it. 26 B 259 On an application for grant of a certificate for money said to be due to the wife, a certificate had been granted for collecting the money due to the husband. *Held*, that the defect was purely a formal one, hence the order of grant of certificate could not be interfered with on that ground. 1935 P 478.

Sec 100. SECOND APPEAL.—Appeal under S 142, Calcutta Municipal Act—First appeal or second appeal—Test. 32 C W N 378=1928 C 450=109 I C 618 Where no appeal lies to the District Judge from the judgment of a sub-judge but one is filed, the appeal is a nullity, for the first appellate Court acts without jurisdiction, and second appeal lies. 1935 L 319 (1) No second appeal against order under O 21, R 90, C P Code, even if decree-holder himself was purchaser. 1936 A L J 939=165 I C 654=1936 A 763 Nor against owner under O 21, R 92 allowing deposit and setting aside sale. 161 I C 26=1936 P 119 Suit to recover rent of agricultural land in Burma is not of a nature cognizable by Small Cause Court and so second appeal lies even if amount is less than Rs 500, 1935 R 386=13 R. 633 (F B) (Overruling 3 R. 390)

QUESTION OF FACT—ILLUSTRATIVE CASES — Interference with findings of fact by the High Court is subject to limits prescribed by S 100 46 C 189 (P C); 1933 O 259=145 I C 233; 1933 M 565; 146 I C 445=1933 R 174; 144 I C 315=1933 R. 91, 142 I C. 696=1933 O. 115, 145 I C 122=1933 L 141; 145 I C 155=1933 L 172, 152 I C 180=11 O W N. 1165=1934 O 449 See for a full discussion 3 O W N 645=97 I C 853=1926 O 578 See also 47 C 107=37 M L J 36=46 I A 140 (P C) Extremely strong grounds are necessary for interfering with the finding of the trial Judge who heard the witnesses, that they were unworthy of belief. 116 I C 432=1929 N 117 (1) A finding of fact is binding on a second appellate Court, if the lower appellate Court committed no error of law in arriving at the finding. 21 I C 251; 30 I C. 503, 57 I C. 739; 35 I C. 392, 1926 A 130, 1926 N 192, 158 I C. 51=1935 P 152; 1935 P 42 (apportionment of award in land acquisition case between various types of people interested in the land, by lower appellate Court). A finding of fact based upon admissible

evidence is binding upon the High Court in second appeal. 148 I C. 1079=11 O. W. N. 674=1934 O. 97 (2), 1535 L 641, 1935 A L J 664=155 I C. 634=1935 A. 662. Per *Lord Williams, J*—The High Court cannot interfere with the findings of fact unless those findings have been based upon a misconception of the evidence or upon some mistake which has arisen in the consideration of that evidence in the lower Court. Per *Buckland, J*—The rule regarding the finality of the findings of the lower Court on questions of fact should be strictly enforced. 152 I C 597=61 C 365=1934 C. 633 See also 1934 O 261=147 I C 871, 147 I C 1224=10 O W N. 911; 147 I C 1175=1934 L. 163 (Fact of compromise being entered into). Where it had been already decided by the lower Court that a certain wall and a door did not encroach on the plot in suit, *held*, that it was not open to the High Court in second appeal to direct the lower Court to hold an enquiry as to the same matter. This would be in effect to reopen and try for a second time a claim for a mandatory injunction in respect of the door and the wall. 40 C W N 449=1936 P C 83=70 M L J 455 (P C) A decision on facts by the lower appellate Court is binding on the High Court, however unsatisfactory the reasoning may be. 1933 P 708, 152 I C. 419=11 O W N 1359; 35 P L R 608; 15 L R 40 (Rev)=18 R D. 12; 13 P. 254=1934 P C. 5=66 M L J 298 (P C), 1935 L 172 Inconsistent findings by lower Court one before and the other afterwards—The later one prevails—No interference with the later finding in second appeal. 53 M L J 700 (P C) But when there is (i) no evidence (12 C 972), or (ii) no sufficient legal evidence (16 I C 887), or (iii) important evidence is ignored (32 P. L R 714; 103 P L R 1915, 54 M L J 600), or (iv) only a colourable pretence of considering the evidence is made (38 I C. 561), or (v) there is no honest and complete consideration, a finding of fact can be contested in second appeal. Otherwise it is final. 18 C 23 (P C), 3 L 389; 1935 L 389, 35 I C. 392 (wrong application of law) Inferences of fact which are not unreasonable and are justified by evidence cannot be interfered with in second appeal. 62 I C 1002; 20 I C 523 See also 8 L R 314 (Rev), 96 I C 14=1926 O 522, 95 I C 463 (1)=13 O L J 146, 39 C W N. 303. Where more than one inference is legally open from the evidence, the High Court cannot in second appeal refuse to be bound by that inference drawn in the Court below. 1913 L 239 (1), 73 I C 232; 46 I C 794; 21 B. 91; 74 I C 843. The plaintiffs sued the defendants for a permanent injunction for the closing of a drain from their latrine. The lower appellate Court based its finding on a sweeping statement that water discharged from latrines in Indian homes should as a rule be treated as nuisance

every decree ordered in appeal by any Court subordinate to a High Court, on

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and granted the injunction. *Held*, that the finding of the lower appellate Court about the drain in question constituting a nuisance was given without reference to the evidence bearing on the point and its order for the closing of the drain must be set aside 161 I.C. 411=1936 O.W.N. 310=1936 O. 211. A finding of fact is not binding in second appeal if it is marked by errors of law as that of ignoring the presumption of correctness attaching to the record-of-rights 161 I.C. 709=17 Pat.L.T. 405=1936 P. 185. If the first appellate Court has evidence proper for its findings notwithstanding the statutory presumptions then its findings of fact are final and conclusive 18 C. 23 (P.C.) and 14 C. 740 (P.C.), *Relid on*; 34 C.W.N. 1=1929 P.C. 286 (P.C.). The High Court is not entitled to go behind the findings of fact of the District Judge which did not result from the misconstruction of a document or the misapplication of law or procedure but upon the oral evidence in the case. 37 M.L.J. 199 (P.C.); 42 I.C. 68=11 Bur.L.T. 229, 54 C. 586=53 M.L.J. 117 (P.C.) *See also* 1928 M. 377, 10 Pat.L.T. 630 The finding of fact of a lower appellate Court which proceeds on an erroneous view of the law, and which is inconsistent with the facts recited can be interfered with by the High Court 44 A. 602; 95 I.C. 636=1926 N. 416, 11 L.L.J. 82=1929 L. 314. A finding of fact which has been arrived at in complete disregard of legal propositions involved in the consideration of the question in issue, cannot be regarded as conclusive. 155 I.C. 824=1935 A.L.J. 828=1935 A. 774; or in disregard of the presumption provided by any Statute 157 I.C. 561=37 P.L.R. 570=1935 L. 912 Question of fact—Evidence when open to examination. 1 L.L.J. 72 A finding of fact arrived at on a consideration of evidence which is inadmissible and which proceeds partly on such evidence can be assailed in second appeal 2 L. 271 (57 I.C. 561, *Foll*); 138 I.C. 399, 39 C.W.N. 277 *See also* 18 N.L.J. 333 But when the finding is based really on other evidence, and the inadmissible evidence is only used for the purpose of further support, that does not vitiate the finding or necessitate a remand 39 C.W.N. 311. An erroneous finding of fact is different from an error in procedure Where there is no error or defect in the procedure the finding of fact by the Court of First Appeal is final. 63 I.C. 575; 59 I.C. 885=3 L.L.J. 86; 40 I.C. 772, 139 I.C. 365=1932 O. 264, 138 I.C. 465=1932 A. 293 (F.B.) Erroneous findings of fact however gross or inexcusable cannot be questioned in second appeal. 98 I.C. 1035; 99 I.C. 199=1927 O. 89; 98 I.C. 1072, 99 I.C. 183, 103 I.C. 215=1927 L. 574; 98 I.C. 869=1927 M. 217; 52 M.L.J. 674, 99 I.C. 769=1927 N. 158, 100 I.C. 792; 52 M. 538=57 M.L.J. 64 (P.C.); 57 M.L.J. 205 (P.C.), 1935 L. 172, 157 I.C. 470=16 Pat.L.T. 666=1935 P. 351; 161 I.C. 516=1936 P. 140. *See*

also 92 I.C. 327, 131 I.C. 395=1931 O. 142; 132 I.C. 791; 134 I.C. 1023; 9 O.W.N. 1015, 1063, 136 I.C. 783=1932 M. 173, 1933 O. 115. Vague finding of fact may be subject to question in second appeal. 37 I.C. 27; 40 I.C. 496=1929 L. 653. A finding of fact arrived at by the lower appellate Court without applying its mind to the facts and circumstances on which the trial Court has based its decision cannot be binding in second appeal. 40 C.W.N. 769 Finding of fact becoming irrelevant by change in law—High Court can consider in second appeal, the altered aspect of the finding on the evidence. 96 I.C. 775=1926 A. 725 Finding of fact—Trial Court's finding reversed in appeal—Cannot be interfered with in second appeal 6 R. 586 Still more so in the case of concurrent findings by the lower Courts 57 M.L.J. 594 (P.C.); 115 I.C. 99 Perverse findings though of fact are good grounds for remand in second appeal 1931 M.W.N. 102

FOLLOWING ARE QUESTIONS OF FACT.—Question as to existence of custom. 141 I.C. 668=1933 A. 306. Where a custom is alleged to exist, the existence or non-existence of such a custom is a question of fact; but it is a question of law whether there is proof to support the custom or whether the evidence is legally sufficient to support such a custom. 158 I.C. 109=1935 A.W.R. 735=1935 A. 720, 157 I.C. 654=1935 O. 459. *See also* 18 N.L.J. 172 (*See also* under heading 'Custom' *supra*) Grant by Government of grazing land. 36 A. 256 That a gift was an absolute one enuring for the benefit of the donees' descendants. 4 L. L.J. 457 Whether a land was abandoned 91 I.C. 493=1926 C. 751. Abandonment of holding 145 I.C. 1022=1934 L. 163 Ancestral character of land 15 L. 645=149 I.C. 986=1934 L. 719, 35 P.L.R. 378=1934 L. 351 Partibility of property 151 I.C. 533=11 O.W.N. 259=1934 O. 177. *See also* 144 I.C. 471=34 P.L.R. 739=1933 L. 350 (Whether land is ancestral or not) *See also* on the same point 145 I.C. 628=34 P.L.R. 567=1933 L. 765 Question of ownership 1933 A. 603 Question of title. 162 I.C. 522=40 C.W.N. 758=1936 C. 245 Inference of a lost grant from a certain set of facts 23 N.L.R. 192=1928 N. 87; 57 I.C. 350 *See also* 1925 P. 748, 31 I.C. 501. Question whether building is movable or immovable property. L.R. 3 A. 128; 1922 A. 45 A finding as to the state of mind of a person when he performed a certain act. 12 I.C. 730=8 A.L.J. 1154. Question of *bona fides* 92 I.C. 602=1925 L. 505, 94 I.C. 927=1926 O. 501; 131 I.C. 662=1931 N. 67 But *see* 6 R. 643 Question of bad faith. 110 I.C. 868 Care and good faith 91 I.C. 988, 34 P.L.R. 642=1933 L. 738 Whether certain payments were made in good faith. 148 I.C. 757=1934 P. 121. Reasonable cause in a malicious prosecution. 91 I.C. 112; 28 O.C. 387=1925 O. 359, 1929 A. 429. But *see* 57 C. 25; 138 I.C. 282=1932 A. 386, 137 I.C. 829=1932 M. 601. Finding as to malice. 1934 L. 907; 161 I.C. 443=1936 A.

any of the following grounds, namely:—

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441, 158 I.C. 31=37 Bom L.R. 468=1935 B 355 But the High Court is entitled to examine whether the inference drawn from the facts is legitimate, *i.e.*, whether the facts found did, or did not, amount to absence of reasonable and probable cause. 1935 L 765 Wilful negligence 24 A.L.J. 825=96 I.C. 1046=1926 A 394; 1928 A. 166 Whether a transaction, *e.g.*, *heba* was entered into with intent to defeat or delay creditors. 63 I.C. 169 The question whether a particular person did a certain act with a particular intention or not 45 I.C. 303. Negligence of the guardian *ad litem* of a minor 52 M.L.J. 709, 107 I.C. 702=1928 A 166. But *see* 1926 M.W.N. 350=95 I.C. 707 (1)=1926 M 905. Contributory negligence by plaintiff 144 I.C. 1914=1933 A. 214 Reasonable diligence 142 I.C. 691=1933 A 158. Question of unsoundness of mind. 144 I.C. 741=34 P.L.R. 297=1933 L 458 The question whether a statutory presumption is rebutted by the evidence is always a question of fact 57 I.A. 86=59 M.L.J. 53=122 I.C. 316=1930 P.C. 91 (P.C.). *See also* 131 I.C. 638=1931 L 605; 136 I.C. 783=1932 M 173, 132 I.C. 513=1931 L 618; 158 I.C. 1134=16 Pat. L.T. 363=1935 P. 415; 165 I.C. 763 Existence of relationship of landlord and tenant—Presumption—Entry in record-of-rights. 64 I.C. 190 *See also* 1934 L 424 (Finding that certain mohalla is not a separate sub-division) Inference can be drawn from the fact that rent was never paid at the rate mentioned in a *kabuliyat* but at a lower rate, that the parties never meant to act upon the *kabuliyat* from the beginning 39 C.W.N. 888 *See also* 38 P.L.R. 590 Nature of tenancy—Permanent or precarious 61 C. 32=150 I.C. 238=38 C.W.N. 65=1934 C. 288 Amount of rent 146 I.C. 811 In a suit for enhancement of rent, the finding that there was no prevailing rate of rent 160 I.C. 1102=1936 P. 54 So also a finding that the tenancy was one of which the rent was fixed. 1936 C 582. *So also* inference from record-of-rights as to nature of holding. 166 I.C. 454 (Pat.). Question of breach of contract 4 Lah. L.J. 317. Question whether the rate of interest was or was not excessive in the circumstances of the case 159 I.C. 205=1935 L 440. In a contract to sell and to purchase, a finding as to who broke the contract is a finding of fact 31 N.L.R. 250=155 I.C. 778=1935 N 111. The question of an implied obligation under S 70 of the Contract Act 40 B 646 Finding of undue influence is a finding on the merits. 40 I.C. 215, 18 N.L.J. 67=158 I.C. 973; and misrepresentation, 59 B 502=159 I.C. 213=37 Bom L.R. 471=1935 B 326 The question whether time is or is not of the essence of a contract 67 I.C. 157 Question of good faith under S. 14, Limitation Act 8 L.R. (Rev.) 23. *See also* 102 I.C. 628; 138 I.C. 646=1932 L 531. Construing an entry in a document as not constituting a mere acknowledgment but a distinct promise to pay. 37 P.L.R. 126=159 I.C. 677=1935 L. 877. Ques-

tion whether there was sufficient cause for non-production of evidence under O. 17, R. 1. 103 I.C. 301 (2) A decision of an appellate Court upon the ordinary meaning of a word. 32 I.C. 240=20 C.W.N. 584 *So also* as to what is meant by the witnesses by the use of a particular word. 157 I.C. 526=1935 A.L.J. 772=1935 A. 586. 'Manufacture', meaning of, is one of fact. 42 C. 888. '*Maujudgi*' (continuance as wedded wife). meaning of in an agreement is also one of fact. 1935 L 902 Whether one heir of a tenant represents other heirs 10 I.C. 116=11 C.L.J. 180 Question of plaintiff's status is a finding of fact 1923 L. 626. *See also* 93 I.C. 570 Finding that plaintiff is not adopted son 37 P.L.R. 379=157 I.C. 865. Question whether parties follow Mahomedan law is one of fact. 34 I.C. 219 Extent of wakf property 144 I.C. 467=34 P.L.R. 763=1933 L 342. The conclusion that the plaintiff was a full owner and not merely a *dohidar* is a finding of fact. 1923 L 611 That certain property is not wakf and does not belong to it is a finding of fact 5 L.L.J. 11; 12 L. 540 (100 I.C. 626, Rel. on); 138 I.C. 215 (1). *See also* 144 I.C. 467=1933 L 342. Whether the lands in suit form part of a person's *inam* lands. 163 I.C. 93=1936 M.W.N. 348=43 L.W. 369 *Also* the question as to what lands are included in the permanent settlement. 100 I.C. 507=1927 C 457 A finding as to legitimacy is one of fact 153 I.C. 349=1935 O.W.N. 25=1935 O 80 But it would not be upheld in second appeal, where the lower appellate Court has ignored important pieces of evidence and the strong presumption of law in favour of legitimacy 60 I.C. 375. A finding as regards the factum of marriage between the parties is a finding of fact 5 L.L.J. 117 The finding that a woman has taken to a life of immorality is a finding of fact 31 I.C. 797 *See also* 1926 L 461 Question whether certain persons were members of a joint Hindu family is a finding as to status and is one of fact 67 I.C. 789=3 L.L.J. 552, 27 Punj. L.R. 223=97 I.C. 817 (1)=1926 L. 443. But *see* 95 I.C. 183=1926 N. 389 A question of what constitutes exclusion from a joint estate may well in many cases be a question of law. 21 C.W.N. 1142=42 I.C. 258. Family arrangement—Binding nature of, is question of fact. 4 L.L.J. 40. Question whether there has been a family settlement among the members of a joint Hindu family is one of fact 165 I.C. 217=1936 N. 186 The question of notice is not a pure question of law 159 I.C. 370=1935 C. 713 A finding that the subsequent purchaser had notice and knew that there was a contract of sale with the plaintiff is one of fact 3 L.L.J. 447, 1929 O 316, 130 I.C. 299 (2)=1931 A. 338, 54 A 557 Whether or not the relation between parties to a suit were sufficiently near to entitle the lower Court to come to the conclusion that the consideration that passed between them was the love and affection of the parties is a question of fact 154 I.C. 1043=1934 P. 44 *Also*, whether a certain sum of money was

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necessary for personal necessities 8 L 340. Existence of antecedent debts. 1926 O 33. Whether there was legal necessity to support alienation in Hindu Law. 14 L 584=34 P L R 113=1933 L 343. See also 146 I C. 535=1933 M. 836, 156 I.C. 774=1935 P. 175. An alienation by the *mahant* 17 Pat.L.T 488=162 I C 797=1936 P. 275. Where both the Courts below have found that the suit lands did not form part of an estate so as to oust the jurisdiction of Civil Courts, the decision is binding on the High Court. 18 L.W. 324=75 I C. 465. Question as to whether oral will was executed is one of fact 66 I C 413. See also 1929 A. 419 (2) So also the question whether a trade-mark was abandoned. 9 L 487; or whether a copyright has been infringed 64 M.L.J 193 (P.C.) Genuineness of a document is a question of fact 155 I C 827=16 Pat.L T 377=1935 P 349; 13 O.L J 176=91 I C 1046=1926 O. 257; 61 C. 365=152 I C 597=1934 C 633 (Genuineness of signature.) Effect of attestation is a question of fact. 51 I.C. 621 Waiver is primarily and in most cases an inference from facts 37 B. 480, 38 I C 302, 59 I.C. 607 A finding that the holder of a superior interest acquiring an inferior interest intends to keep the two interests separate and that consequently there is no merger. 39 C.W.N. 694. Question whether transaction is fraudulent preference is also one of fact 107 I.C. 490. A finding that a certain transaction was intended to defeat and delay the creditors and was collusive. 38 P.L.R 577. The finding that a mortgagee has never been in actual possession of the land. 67 I C. 152. See also 130 I C. 706 Question whether a mortgage is *benami*. 34 P.L.R. 642=1933 L 738. Also whether certain persons are legal representatives. 97 I.C. 489=1927 C 81. Whether a place is a town or village 27 Punj L.R. 73=94 I C 127=1926 L 542. The question whether a road is a public road or a private road is rather a question of law than a question of fact and in any case it is partly a question of law, and a finding thereon is not binding upon the Court in second appeal 157 I.C 638=1935 O W N. 899. Whether a transaction is a mortgage or sale. 92 I C. 42=26 Punj.L.R 799, 134 I C. 1092=1931 O 424 Whether a mortgage is proved. 96 I C. 253=1926 O. 546. Where the finding is arrived at without taking evidence but on a construction of the document and the surrounding circumstances it can be interfered with in second appeal 134 I C 337=1931 B. 371=33 Bom L.R. 663. See also 138 I C 204=1932 B. 230=34 Bom.L.R. 372 Whether a public lane has been so narrowed as to cause damage to the residents is a question of fact 1929 A 504 Public right of way 39 C W N. 303; 151 I C 263=1934 A 941 Whether the judgment debtor has sufficient property to meet the execution of a decree, after he had parted with some other properties. 1929 A. 458=116 I C 815 Finding in pre-emptio suit that the price stated in the sale-deed is fictitious. 4 Luck 396. See also 1931 O. 400.

Finding as to dissolution of partnership. 1929 L. 154; 144 I C 573=37 L W 288=1933 M. 353; 35 P.L.R. 557=1934 L. 557. Finding as to particular custom set up. 158 I C. 796=37 Bom L.R. 584=1935 B. 371 Whether a right of privacy exists by custom and the nature and limits of such a custom, if it does exist, are questions of fact. 155 I C. 1056=1935 A.L J. 432=1935 A 754. Finding that the right of privacy was in no way diminished. 1929 O. 535. Planting of trees—If amounts to an accession under Transfer of Property Act, S. 63 113 I.C. 405=1929 A. 330. Question in suit to establish right of easement, as to whether enjoyment was peaceable and as of right 56 C 927. So also as regards finding as to the length of user. 158 I C. 361=1935 L 346. Finding as to the material alteration of instrument 1929 M. 622. A finding that the inhabitants of a particular locality have or have not in certain circumstances acted in a certain manner. 134 I C. 21=1931 A. 499 Questions about the adequacy of damages are ordinarily questions of fact which cannot be entertained in second appeal 161 I.C. 593=1936 N. 70. The question as to when the arrears of pay claimed by a person became due. 1936 C 277. Finding that a cause of action accrued at a particular place 1931 A 556 As to omission by lower Court to give effect to an admission, see 143 I C 900=1933 S 121

QUESTION OF LAW—ILLUSTRATIVE CASES.—Points involving questions of law can be raised for the first time in second appeal. 144 I.C. 452=27 S.L.R. 41=1933 S. 176. See also 1935 P. 132 It is certainly open to a second appellate Court to ignore a point even of law if it is raised for the first time in that Court At the same time, the power of that Court to give effect to a plain provision of law even though not raised in the Courts below cannot be questioned. Where the equities of a case require such a course to be adopted there is no legal bar to the point being taken cognizance of by the Court itself. 4 A W R. 9:4=157 I C. 615=1935 A 143 The question whether a point is one of fact or of law is itself a question of law 109 I C 253=1928 N 277. Where the lower Court Judge states the law correctly and does not misdirect himself and comes to a particular conclusion, he decides the point as a question of law and not as a question of fact 161 I C 331 (2)=17 Pat L T 366=1936 P 136 Questions of law and of fact are sometimes difficult to separate The proper legal effect of a proved fact is essentially a question law. 10 L 360, 1928 A. 381, 36 Bom L.R. 1055; 134 I C. 294=1931 L 489; 134 I C. 1037=32 P L R 727, 132 I C 772=1931 O. 381; 8 O.W.N 1281, 854; 138 I.C. 282; 129 I C 335=1931 O. 19 (45 I.A 183 and 57 I.A 86 Rel. on; 931 L 395, 35 C.W.N. 1047; 54 I.A. 178, Foll.) So also is the question of admissibility of evidence and the question whether any evidence has been offered on one side or the other; but the question whether the fact has been proved when evidence for and against has been properly admitted, is necessarily a pure

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question of fact. The High Court has no jurisdiction in second appeal to revise the evidence and set aside the decree of the lower appellate Court on the ground that it had applied the wrong standard of measurement to land of which the rent was in question. 46 C. 189=51 I C. 760 Questions as to the proper legal effect of proved facts are questions of law for purposes of second appeal. 63 I A 140=40 C.W.N. 417=1936 P. C 77=70 M L J. 190 (P C) Or of admitted facts 163 I C 81=1936 I. 104, 20 I C. 951=11 A L J 713, 96 I C 356=1926 N. 494, 25 A L J 1014, 1929 A 767; 135 I C. 221=1932 L 183, 1935 A. 143=157 I C 615. Gross negligence of guardian is a question of law. 1926 M 905=1926 M W N 350; also question of amount of dower to be paid 1926 O 128. The question whether in determining the infringement of certain legal rights the correct tests have been applied is a pure question of law 42 C 46=27 M L J 117 (P.C) The meaning of words is a question of fact in all cases, the effect of the words is a question of law 75 I C 686=1923 A. 337, 46 I C 794, also 4 O W N. 1229, 1926 L. 21, 1926 O. 260, 1926 A 465 The question whether there is evidence of an agreement is a question of fact But if the Court comes to the conclusion that there is no evidence or that the evidence in no circumstances could be held to be evidence of an agreement, a question of law might arise. 160 I C 1079=17 Pat L T 360=1936 P 96 Legal effect of an agreement is a question of law 27 A L J 1083 A Court of second appeal is not bound to entertain a question of law raised for the first time before it. It can however take the point of itself or if some good cause is shown it may permit that point to be argued 43 A 193 (F B) As to certain questions in relation to partnership, see 164 I C 1100=1936 R 383 It is a question of law whether the alleged expulsion of a member effected by means of a communication operates by itself as a dissolution of the partnership which is not for fixed term 1935 L. 132. The question whether the inference about the dissolution or non-dissolution of a particular partnership drawn by the lower appellate Court from the facts found by it is or is not correct, is a question of law 159 I C 433=1935 A L J 1251=1935 A. 1008 The appellant cannot in second appeal take a point of law which involves the taking of additional evidence. 72 I C. 993=1923 B 37 See also 14 L R 102 (Rev)=17 R D 120 In such circumstances remand should not be ordered for further investigation. 32 C.W.N 778=1928 C. 870; 33 C W N 1193=1930 C 315. Inferences drawn from documentary evidence are not questions of law and cannot be challenged in second appeal. 74 I C 811, 37 C.I J. 580, 7 L.W 210; 35 M L J 304 Legal inference from proved facts—Finding of fact and inferences from facts—Liability to be disturbed in second appeal. 73 I.C. 795, 3 L 257. See also 95 I C. 636=1926 N 416,

32 C.W.N. 184. In second appeal, the High Court can make deductions from facts found without disturbing the findings of the lower appellate Court 32 I.C. 119=19 C.W.N. 1330. The conclusion that a certain process was not scientific involves a question of law 95 I.C. 614=1926 N 435; so also question of abandonment of tenancy. 32 C.W.N. 1111=1928 C. 891, 1930 L 215=125 I C 188. Question of permanent tenancy 61 C. 32=150 I.C 238=38 C W N 65=1934 C. 288, 57 C L J. 509, 163 I C 415=17 P L T 202=1936 P 384. The question whether in particular circumstances a donee takes a limited estate or an absolute estate cannot be said to be a question of fact which will be binding in second appeal 158 I.C 611=42 L W 336=69 M L J. 320. A decision by the lower appellate Court as to whether a particular legal relationship, that of landlord and tenant, was created or existed between the parties by reason of certain transactions is one on a point of law, and is not therefore binding in second appeal. 40 L W 810=1935 M 268=154 I C 753 The question as to whether the character of the building in suit has undergone a change from that of *payin* to that of *lettelthwa* is not purely a question of fact and the High Court is not debarred from considering it on second appeal. 158 I C 1092=1935 R 129 The question whether reversioner's consent to an alienation can be inferred from the established facts is a point of law 18 M.L.T 521=31 I.C. 487. A wrong decision based upon findings contrary to the facts found raises a point of law. 18 I C 148. An allegation of absence of evidence to support a specific finding of fact is a ground of law 40 I.C. 139 See also 134 I C 599=131 O 382, 132 I.C. 397=1931 L 139 But 'insufficiency' is not. 134 I C 125 Nor the question of what weight has to be attached to documents admitted and proved 60 C L J. 569=1935 C. 367 Status of tenant 29 Punj L.R. 162, 38 C 278, 55 C 355 An objection that the appeal to the lower appellate Court was presented out of time is a question of law 65 I C 580=1922 L. 240 Question of plaintiff's right of suit is a question of law 4 R 500 The question of *onus probandi* is a question of law. 2 L 249 The question whether a stipulation in a deed as to payment of interest is one by way of penalty is open to consideration in second appeal. 64 I.C. 350; 1929 P. 717 A decision by the lower Appellate Court opposed to the admissions of the parties amounts to a substantial error or defect in procedure 41 I C. 163. The plea of *res judicata* is a question of law and may be raised at any stage of suit 47 I.C. 685. See also 144 I C. 669=1933 L 606, 149 I C. 93=1934 A. 770 The question if a trustee could divest himself of his office is a question of law 21 I.C. 232 Finding in clear disregard of legal presumption is not binding in second appeal 37 Punj L R 653 Presumptions are questions of law and can be gone into in second appeal 1929 L 772;

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118 I.C. 808. So also, the question of pre-emption of lost grant 107 I.C. 522 (2). Question as to adverse possession 149 I.C. 807=1934 A. 288, 1935 C. 760.

MIXED QUESTION OF LAW AND FACT.—Finding as to mixed question of law and fact can be interfered with in second appeal 36 A. 231, but not where it involves a remand. 51 I.C. 862; 72 I.C. 177; 37 M. 22=24 M.L.J. 652, (1911) 1 M.W.N. 6=9 I.C. 41. Or when raised for the first time in second appeal 22 I.C. 802. Adverse possession being a mixed question of law and fact cannot be raised for the first time in second appeal 102 I.C. 476=1927 L. 522, 130 I.C. 296=1931 A. 293. See also 149 I.C. 807=1934 A. 288, 1929 O. 337=115 I.C. 440, 94 I.C. 38=1926 C. 881; 1929 P. 590=117 I.C. 444=1936 L. 741. Existence of custom, see 143 I.C. 880=37 L.W. 272=1933 M. 390. The question of family settlement 55 A. 554=1933 A.L.J. 1185=1933 A. 493. Nuisance. 64 I.C. 169. So also negligence 165 I.C. 882=1936 A.L.J. 262=1936 A. 771. Domicile under the Divorce Act 54 C. 259. Appeal decided *ex parte* wrongly by lower appellate Court—Second appeal is allowed 117 I.C. 229 (1). Whether the facts found attract the operation of provision of law is a mixed question of law and fact. 101 I.C. 674=1927 P. 256. Also whether reasonable care has been taken 99 I.C. 1=1927 A. 158. Also the question whether a power-of-attorney was effective on the date of transaction by agent 6 R. 113=54 M.L.J. 517 (P.C.). Whether a gift offends against the doctrine of *musha*. 101 I.C. 126. Question as to what passed in a sale of family properties. 23 L.W. 349=94 I.C. 68=1926 M. 851. Bill of exchange—Presentment for payment—Reasonable time—Mixed question of law and fact. 116 I.C. 887=1929 L. 577. Constructive notice is a mixed question of law and fact. 1931 B. 430=33 Bom.L.R. 499. Question whether a piece of land is communal. 1930 M.W.N. 515. Whether a new tenancy has been created is a question of mixed fact and law. 163 I.C. 538=1936 P. 411. The question whether a Hindu can inherit to a Mahomedan father 134 I.C. 1171=1931 S. 170. Under the Hindu Law a natural guardian can alienate the property of the minor for necessity or for benefit of the estate. The question is one of mixed law and fact 147 I.C. 1144 (1)=35 P.L.R. 278=1934 L. 329. The question whether an information given to the police is directed against a particular person. 1934 P. 14. Question as to the vicarious liability of master originally sued as principal. 1933 N. 299.

JURISDICTION.—Where a decree has been made by the appellate Court without jurisdiction an appeal lies against it precisely in the same way as if it had been made with jurisdiction. 45 C. 926, 1925 C. 1032, 1925 A. 737, 131 I.C. 141 (1)=1931 L. 96, 1933 A.L.J. 103. See also 94 I.C. 1=1926 A. 401. The question of jurisdiction can be for the

first time agitated in second appeal. 1923 L. 551. See also 1933 A.L.J. 103=1933 A. 403, 49 I.C. 137=29 C.L.J. 48, 75 I.C. 1053, 1931 A. 556. Decision of District Court on appeal from forest officer—Madras Forest Act (V of 1882), Ss. 10 and 16—Second appeal to High Court is competent. 39 M. 617=31 M.L.J. 324. A decree of a Deputy Collector in a suit under S. 213 of the Madras Estates Land Act—If second appeal lies 38 M. 655. See also 37 M. 443=27 M.L.J. 451 (P.C.). Where the amendment was allowed after the expiration of the limitation period, the High Court can take notice of it in second appeal though the point was not pressed in lower appellate Court 36 A. 370. A second appeal is not maintainable against an order rejecting cross-objections but the Courts might interfere in revision 44 I.C. 812. In a suit of a small cause nature, order in execution proceedings is not appealable. 45 M.L.J. 651. Where the lower appellate Court hears an appeal which it has no jurisdiction to hear, it is doubtful whether a second appeal lies; but revision is competent 150 I.C. 15=1934 L. 79.

PRACTICE AND PROCEDURE.—Where proper issues have not been framed and the lower Court has not discussed the real question in controversy it is open to the High Court hearing the second appeal to remand the case for proper disposal 152 I.C. 220=35 P.L.R. 156. Refusal by the appellate Court in the exercise of its discretion to admit additional evidence given under O. 41, R. 27, is not a substantial defect or error in procedure 33 A. 379. The refusal of the lower appellate Court to act under O. 41, R. 33, C.P. Code, is not an error of law with which the second appellate Court is bound to interfere 123 I.C. 39. Admission of additional evidence erroneously—Second appeal. See 92 I.C. 661=1926 M. 864. Question of fact—New evidence tendered in second appeal—Permissibility 31 Bom.L.R. 436=1929 B. 225. The High Court will reverse a finding in second appeal if there was substantial error in procedure resulting in a finding not *secundum allegata et probata* and not sustainable in law 39 B. 149, 10 Pat.L.T. 589=1929 P. 609. Decision based on finding of fact contrary to case set up can be questioned in second appeal 1926 L. 535. Where the appellate Court made a new case not raised by the parties and not warranted by pleadings or evidence High Court will interfere 104 I.C. 781, 132 I.C. 426=1931 A. 219. Also in a case of misuse of judicial discretion 94 I.C. 396=1926 L. 445 (2). Procedure—Finding of fact—False case on both sides. 45 I.C. 795=22 C.W.N. 149. Failure to appreciate true question in controversy is a defect in procedure and the appeal should be re-heard. 13 I.C. 455=2 C.L.J. 380. See also 34 I.C. 30=23 C.L.J. 600, 35 I.C. 631, 43 I.C. 488, 1931 R. 312. Where the lower appellate Court decided a question of fact not upon the evidence but holding that a superior Court decided a similar case between different parties in a particular way,

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there was a defect in procedure and a second appeal lay. 6 P. 698 (F.B.) Second appeal lies in a case where a preliminary decree for accounts is passed and that decree is set aside by the lower appellate Court though the appellate Court did not pass a decree in pursuance of its judgment. 31 P.L.R. 386=1930 L. 125.

PROCEDURE—EX PARTE HEARING OF APPEAL.

—Interference on second appeal. 3 L. 357. The failure to determine the critical question between the parties to a suit and to consider the oral evidence adduced on behalf of the defendant is a substantial error of procedure. 56 I.C. 40. So also if lower appellate Court gives decree not based on evidence. 26 I.C. 240. Where both parties agreed to proceed not only on the evidence taken before the Munsif but also on evidence recorded by the Commissioner, and the lower appellate Court discarded the evidence recorded before the Commissioner, there was defect of procedure within Cl (1) (c). 106 I.C. 841=45 C.L.J. 558. The appellate Court has no power to go behind a finding of the trial Court, when the appellant has accepted it in his ground of appeal. The carelessness of the appellant's Counsel in drafting the grounds makes no difference. 59 I.C. 689.

NEW PLEA IN SECOND APPEAL—A plea not raised in either of the Courts below cannot be entertained for the first time in further appeal to the Chief Court. 29 I.C. 761. See also 29 I.C. 895, 45 I.C. 101, 67 I.C. 919=2 L.L.J. 255, 3 L.L.J. 470. 21 L.W. 69=86 I.C. 4, 40 C.L.J. 561, 47 M.L.J. 680, 28 P.L.R. 181=102 I.C. 426=1927 L. 426=90 I.C. 304, 119 I.C. 698, 1930 A. 742, 138 I.C. 808=1932 O. 244. So also as to point not taken in the trial Court nor even in the memorandum of appeal in the lower appellate Court. 146 I.C. 939=1933 L. 015. See also 1933 A. 911. So also as to point not pressed in Courts below. 7 O.L.J. 17=55 I.C. 411. In second appeal a question of law cannot be dealt with by the High Court if its determination is based upon a question of fact not raised in the Courts below. 51 I.C. 256, 3 Pat. L.T. 623, 65 I.C. 277, 3 Pat. L.W. 213, 1 P. 25. See also 1929 R. 213; 133 I.C. 390=1931 N. 147, 1933 M. 836=38 L.W. 734. See also 157 I.C. 615=1935 A. 143. Noted under heading 'Question of Law—Illustrative cases' *supra*. A new plea involving an issue of fact requiring fresh evidence cannot be raised in second appeal. 97 I.C. 342=1926 A. 707, 33 C.W.N. 1211, 163 I.C. 364=1936 R. 260. So also plea that a finding of fact was based on inadmissible evidence. 1933 L. 951. See also 39 C.W.N. 277; 1935 M. 190. But see 1936 L. 1005. Where secondary evidence of the contents of a deed is led without objection by the other party, objection cannot be raised in second appeal. 1935 L. 628. Where there is no reference to a plea in the judgments of the Courts below or in the pleadings of the parties, the point cannot be allowed to be raised in second appeal. 1923 L. 56, 491; 1929 A. 456.

So also an alternative plea not put forth in Court below. 7 Pat. L.T. 145=1926 P. 156. See also a plea in second appeal which is not only not set up in the plaint but is quite inconsistent with it. 30 L.W. 787=118 I.C. 291. An objection which is taken in the trial Court but is not urged in the lower appellate Court cannot be raised in second appeal. 43 A. 555. See also 3 O.W.N. 934. Matters of procedure dependent upon facts cannot be raised in second appeal. 94 I.C. 417 (2). The High Court may be justified in an exceptional case in permitting a point of law to be taken in second appeal which goes to the root and the merits of the whole case. 71 I.C. 381=1923 A. 343, 1930 L. 937. A point of law which does not require any questions of fact to be determined but can be decided on the record as it stands may be allowed to be raised in second appeal for the first time. 66 I.C. 856, 21 A. 416, 25 Bom. L.R. 245=72 I.C. 226, 38 B. 227, 47 A. 324. See also 47 A. 932, 15 P. 356=17 Pat. L.T. 57=1936 P. 104, 164 I.C. 30=38 P.L.R. 608=1936 L. 418, 165 I.C. 66=1936 L. 612. But see 1930 A. 726, 126 I.C. 18, conflict set at rest by 53 A. 65 (F.B.). A mixed question of fact and law cannot be raised on second appeal for the first time. 4 L.L.J. 432, e.g., authority or partner to bind firm by acknowledgment. 1929 L. 250=118 I.C. 529, 134 I.C. 1171=1931 S. 170. A question of jurisdiction is one of pure law, which though not raised in the lower Court can be entertained and adjudicated upon in second appeal. 57 I.C. 206=18 A.L.J. 923; 9 Luck. 365=144 I.C. 916=11 O.W.N. 193=19 A.O. 55. Although S. 21, C.P. Code, does not in terms apply to appeals, the principle underlying it is of general application, so as to cover proceedings other than original suits. Hence where an objection as to jurisdiction is not taken in the lower appellate Court, the plea must be deemed to have been waived and cannot be raised in second appeal. 29 N.L.R. 342=1933 N. 318, 53 M.L.J. 688. But see 100 I.C. 37=1927 N. 164. A question of notice cannot be allowed to be raised for the first time in second appeal. 41 C. 418. Where the defendant did not raise in the Court of first appeal the point as to whether the notice to quit was legal and sufficient, the point could not be raised in second appeal. 2 Pat. I.J. 595=42 I.C. 655. See also 52 I.C. 517=10 L.W. 137. Where the question was as to the inalienability of certain property according to custom, and it was found to be so, a party who did not plead in the Courts below that the custom was qualified in the sense of the restraint against alienation being merely for the benefit of the proprietor, can raise that plea in second appeal. 1936 O.W.N. 260=1936 O. 235. New plea of *res judicata* when can be raised for the first time in second appeal. 5 L.L.J. 163=74 I.C. 577; 8 P. 107. Where an appellant in second appeal contended that an issue should be remitted to the Court below on a question of *res judicata* by elucidating certain facts and the plea was neither taken in the Court of first instance nor in the lower

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appellate Court, the High Court disallowed the plea in second appeal 149 I.C. 93=1934 A 770. See also 144 I.C. 669. Where the basis for a plea of *res judicata* had not been laid in the lower Courts it should not be allowed to be raised in second appeal. 40 L.W. 610=152 I.C. 246=1934 M. 551=67 M.L.J. 268. So also where plea of *res judicata* has been raised in written statement but abandoned by Counsel at time of issues 161 I.C. 72=1937 O.W.N. 229. Plea that suit is barred by S. 47, C.P. Code. 9 Luck. 375=147 I.C. 910=1934 O. 55. But see 25 L.W. 11=100 I.C. 40=1927 M. 406. As to *estoppel*, see 151 I.C. 263=1934 A. 941. Question of abatement—Raised for the first time in second appeal—Permissibility. 117 I.C. 665=1929 L. 119. Objections as to maintainability of suit if raised for the first time in appeal cannot be allowed. 3 L. 239. The contention that the parties did not constitute joint Hindu family cannot be raised for the first time in second appeal. 66 I.C. 881=3 L.L.J. 137. Points under the Limitation Act not taken in the Court below should not ordinarily be allowed to be raised in the High Court. 17 L.W. 169=72 I.C. 131. The plea of limitation or estoppel involving questions of fact which are not admitted or undisputed cannot be taken for the first time in appeal. 27 I.C. 933=115 I.C. 680=10 Pat.L.T. 53; 55 C. 201. Plea abandoned in Courts below not to be raised in second appeal. 55 I.C. 481. Finding arrived on mistaken view of pleadings how far binding on High Court. See 13 O.L.J. 536. A legal plea going to the root of the plaintiff's claim and arising on the facts found and not affected by any facts outside those findings can be taken for the first time in second appeal. 41 I.C. 45. Where the authority for a plea is not quoted in the Court below, the Court in second appeal cannot reverse the finding on the strength of that authority 1930 L. 737.

NEW PLEAS—FURTHER ILLUSTRATIVE CASES.
—When an appellant confines himself deliberately to some of the questions decided by the trial Court and does not attack the judgment of the trial Court on other questions decided by it if the appellate Court's judgment proceed only on the questions attacked and dismiss the appeal, it will not be open to the appellant to object to the judgment in second appeal on the ground that the judgment was not in accordance with law 150 I.C. 841=1934 P. 55 (2). A new plea attacking the validity of a sale deed on the ground of *lack of bona fides*, cannot for the first time be allowed in second appeal, the appellant having attacked it in the trial Court only on the ground of want of consideration and failed in his contention 147 I.C. 952=10 O.W.N. 1186. Where no objection is taken by a party in the lower Courts to the competency of the sub-agent to bring a suit, it is not open to him to raise that point in the High Court 1934 R. 289. Where the case was dealt with in the lower Courts on the footing that the defendant was a *surety* and in second appeal the plea was taken that he was co-obligor,

held, that the new plea could not be allowed to be raised. 152 I.C. 464=40 L.W. 479=1934 M. 639.

INCONSISTENT PLEA—Suit for ground rent—Proprietary title by adverse possession claimed by defendants—Title found against—Plea of irrevocable licence raised in second appeal not permissible 126 I.C. 584=1933 A. 632. Where a tenant denies the relationship of landlord and tenant in his written statement, it is not open to him in second appeal to repudiate the written statement and claim that he is still a tenant and means to retain possession in that character 156 I.C. 563=39 C.W.N. 882=1935 C. 393. See also 163 I.C. 364=1936 R. 260.

EVIDENCE—(1) ADMISSIBILITY OF EVIDENCE.
—Objections as to the admissibility of evidence will not as a general rule be entertained for the first time in second appeal 39 M.L.T. 198=104 I.C. 518, 150 I.C. 841=1934 P. 55, 41 L.W. 318=1935 M. 190. The appellant cannot raise objections to the admissibility of documents received in evidence in the lower Court if under the circumstances the application is too late. 34 I.C. 57 (F.B.); 41 C.L.J. 374=86 I.C. 734. Finding of a lower appellate Court based on inadmissible evidence can be impeached in second appeal 74 I.C. 383=1923 C. 261, 72 I.C. 985=1923 C. 378; 148 I.C. 1158=35 P.L.R. 360, 1934 P. 48=146 I.C. 937, 16 N.L.J. 232 (Admissible evidence excluded). When the finding is based really on other evidence, and the inadmissible evidence is only used for the purpose of further support, that does not vitiate the finding or necessitate a remand 39 C.W.N. 311. Where material evidence has been overlooked and the decision is based on wrong assumptions of fact, the finding, though one of fact, can be set aside in second appeal 142 I.C. 673 (1)=33 P.L.R. 1013. See also 41 L.W. 318=1935 M. 190; 39 C.W.N. 277; 108 I.C. 264; 138 I.C. 399; 1936 L. 1005. The Court hearing the second appeal can challenge a finding of fact arrived at by illegally relying upon irrelevant and inadmissible evidence 151 C. 459. See also 151 C. 515=17 C.W.N. 37; 103 I.C. 889=1927 L. 448, 2 Luck. 172. *Also* 51 B. 231, 1926 N. 99, 1935 O.W.N. 894, 39 C.W.N. 277, 11 O.W.N. 1589=152 I.C. 1042=1935 O. 41 (Where appellate Court based its finding on document rejected by trial Court as not proved, and without hearing arguments as to its admissibility). 159 I.C. 191=42 L.W. 658=69 M.L.J. 707. Where the Court imported into its judgment facts which come to its knowledge at the time of other and completely unconnected cases. Relevancy and proof of document is a question of law and can be raised at any stage, but the question as to the proof of a document is one of procedure and can be waived. 3 Pat.L.T. 149=63 I.C. 625, 2 Pat.L.T. 343=63 I.C. 226, 5 Pat.L.J. 410=57 I.C. 561. Where appellate Court duly admits additional evidence under O. 41, R. 27, and the aggrieved party does not at the time ask for any opportunity to produce further evidence, a finding of fact arrived on

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such evidence is quite proper and unassailable in second appeal. 156 I.C. 468=16 Pat.L.T. 49=1935 P. 105 (2) Where the appellate Court has admitted in evidence certain document because in its discretion it required that evidence to enable it to pronounce judgment, it is inexpedient for the High Court in second appeal to interfere with the discretion of the lower Court. 159 I.C. 711=1935 P. 470.

(2) APPRECIATION OF EVIDENCE.—Where the High Court differed from the lower Courts, not only in the estimate of the evidence, but also with regard to the inferences derivable from document produced in the case and other circumstances, their Lordships dealt with the case on its merits. 2 P. 38=45 M.L.J. 460. If a finding of fact is recorded on a misinterpretation of the evidence it can be interfered with in second appeal. 1923 L. 585, 31 I.C. 695=19 C.W.N. 1015, 32 I.C. 862. Where the soundness of the conclusions drawn from the facts is in question, it is a matter of law and can be questioned in appeal. [20 C. 93 (P.C.) Rel. on.] 119 I.C. 674=1929 N. 270. A second appeal lies on a finding on no evidence. 104 I.C. 781, 8 L. 30, 99 I.C. 1046, 52 M.L.J. 20. A finding cannot be contested in a second appeal if it is based on a misreading of first Court's judgment. 1923 L. 502 (2). See also 145 I.C. 652=10 O.W.N. 380. Although in second appeal findings of fact cannot be impugned it is nevertheless open to a party to challenge the correctness of the conclusions drawn from such findings. 1923 L. 497 (2), 65 I.C. 475=1 Lah. L.J. 72. Findings of fact are conclusive in second appeal even though there has been an error on the part of the Court below in weighing the evidence. 53 I.C. 137, 92 I.C. 104=1926 C. 727, 4 Lah. L.J. 426, 1929 O. 41. See also 150 I.C. 306=1934 N. 124, 1933 P. 698 (Effect of admission). The ignoring of an important plea of evidence by the lower appellate Court is a good ground for second appeal. 42 I.C. 76, 153 I.C. 373=1935 O.W.N. 11=1935 O. 86. The credibility of witnesses accepted by the Courts below cannot be considered in second appeal but the sufficiency of the evidence can be considered in second appeal. 25 I.C. 869. Omission by the lower Court to give effect to an admission by a party to the suit is an error which can be rectified in second appeal. 143 I.C. 900=1933 S. 121. See also 1933 P. 698. Where the District Judge has not at all discussed the evidence bearing on the point in issue but merely expressed his concurrence in the finding of the lower Court on the issue, it cannot be considered a proper finding and the finding, though one of fact, is not binding in second appeal. 146 I.C. 292=34 P.L.R. 283.

(3) CONSIDERATION OF EVIDENCE.—Question of proper inference from facts found is a question of law. 8 L. 573=52 M.L.J. 663 (P.C.), 1929 A. 875. But see 1930 A. 218. Finding based on inadmissible evidence can be set aside by High Court. 66 I.C. 313=1922 A. 439. See also 1926 O. 464, 82 I.C. 823=1925

C. 469 (Finding inconsistent with evidence); 63 I.C. 813. See also 43 I.C. 525, 65 I.C. 504; 25 C.W.N. 1022=63 I.C. 954=35 C.L.J. 19. Also finding of fact based on no evidence or against express *prima facie* reliable evidence. 1926 O. 37, 1926 P. 187; 28 I.C. 555, 30 I.C. 505; 38 I.C. 62, 38 I.C. 586, 42 I.C. 282, 7 R. 751, 52 C.L.J. 235; 13 L. 399; 39 C.W.N. 1233, 1936 R. 488. Where an appellate Court fails to come into close quarters with the evidence, the findings must be held to be vitiated and there must be a re-hearing of the appeal. 1920 M.W.N. 163=53 I.C. 308=10 L.W. 525. See also 100 I.C. 306=1927 M. 493; 103 I.C. 486=1927 N. 166, 1924 N. 91; 1928 L. 737, 1929 P. 98=115 I.C. 674. Where the lower Court erred in not referring to some important evidence, in the conclusions drawn from uncontradicted evidence of respectable witnesses and in assuming wrong legal principles, the errors vitiated the lower Court's finding so as to furnish ground for interference in second appeal. 1935 M. 701. An unsatisfactory discussion of evidence, is not, like absence of evidence or disregard of it a ground for interference in second appeal. 1914 M.W.N. 833=1 L.W. 772. Nor the fact that the lower appellate Court's remark about the shifting of the onus, is not happily worded, if it has not really affected the decision on merits. 38 P.L.R. 577. The mere fact that the Court of first appeal has not made special mention of a document which is a piece of relevant evidence is not sufficient to show that it has not considered it at all. 43 I.C. 857=3 Pat. L.W. 213, 42 I.C. 397=2 Pat. L.W. 183. Finding of fact—Lower Court not referring to certain evidence since its attention was not drawn to the same—Judgment not vitiated. 11 L.L.J. 381. Mere omission to consider a piece of evidence will not alter the character of a finding of fact. 162 I.C. 21=1936 P. 243.

(4) INFERENCE FROM DOCUMENTS.—Under S. 100 the High Court has no jurisdiction to reverse the findings of fact arrived at by lower appellate Court however, erroneous, unless they are vitiated by some error of law. The rule is equally applicable to cases in which the findings of the lower appellate Court are based on inferences drawn from documents exhibited in evidence. [11 L. 199 (P.C.), Foll.] 61 I.A. 163=57 M. 652=48 I.C. 778=1934 P.C. 112=66 M.L.J. 595 (P.C.), 39 C.W.N. 1270=61 C.L.J. 369; or from conduct. 40 L.W. 755=1935 M. 70.

(5) SUFFICIENCY OF EVIDENCE.—A decision that there is no evidence to support a finding is a decision of law on which the Privy Council will interfere with the findings of fact of the Courts below. 41 C. 972=27 M. L.J. 80 (P.C.). See also 58 I.C. 482, 88 I.C. 584=1925 C. 1133. A finding based on no evidence is not binding in second appeal and can be interfered with. 60 C.L.J. 288. See also 1934 M.W.N. 1082=40 L.W. 749, 158 I.C. 512=1935 C. 648. It is open to a Court to accept evidence of one witness in preference to that of others and a finding arrived at on such evidence cannot be said to be supported

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by no evidence 151 I.C. 501=1936 S. 7 Judgment based on opinions of experts is open to challenge in second appeal 21 A.L.J. 311=75 I.C. 502 But see 1935 A.W.R. 429 157 I.C. 30=1935 A. 501, where finding based on the relative weight of the opinion of the handwriting experts was held to be one of fact The mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal 45 C. 285, 69 I.C. 800 Even from a finding of fact a second appeal may be taken if the finding is not supported by any evidence on record 30 I.C. 375, 65 I.C. 398, 13 L. 399 The sufficiency or insufficiency of evidence as proof of title cannot be debated in second appeal 9 I.C. 427. See also 1928 O. 352 (2)=110 I.C. 531, 1929 A. 557, but a finding on conjectures and presumptions can be questioned in second appeal 8 L.A.L.J. 485=97 I.C. 241 (2)=27 Punj. L.R. 721=1926 L. 659, 7 L.R. 104 (Rev.) See also 145 I.C. 407=1933 M. 163 So also a finding which is based wholly upon surmise without any positive evidence to support it 157 I.C. 1040=1935 M. 190=68 M.L.J. 648 A finding as to the existence of an agreement which has not been pleaded and based on no evidence cannot be accepted as binding 159 I.C. 96=18 N.L.J. 101

(6) MISREADING OF EVIDENCE.—The misapprehension of evidence is no ground for a second appeal 21 I.C. 393 But see 1926 L. 541 But where a finding of fact is arrived at as a result of a complete misreading of a document a second appeal is competent 42 I.C. 218, 1926 P. 725, 1930 L. 712, 134 I.C. 21=1931 A. 499; so also a finding arrived at on an erroneous assumption of an admission by party, who did not make at 1928 O. 333

(7) EXCLUSION OF EVIDENCE.—The High Court is not empowered to interfere in second appeal with an order of the lower appellate Court rejecting an application made to it for the admission of additional evidence. 42 M. 737=37 M.L.J. 125, 1923 L. 30, 32 P.L.R. 813, 131 I.C. 228=1931 L. 506, 1927 M.W.N. 63 (1)=99 I.C. 669 (1)=38 M.L.J. (H.C.) 24 Where evidence is excluded by an Original Court and such exclusion is not objected to in the first appellate Court such objection cannot be allowed in second appeal 161 I.C. 213, 12 I.C. 751=(1911) 2 M.W.N. 495. A finding of fact after ignoring a piece of evidence which is really admissible can be attacked in second appeal 91 I.C. 1026=1926 C. 603; 108 I.C. 191, 54 M.L.J. 600, 1929 L. 145; 112 I.C. 461, 32 P.L.R. 714, 1933 M. 163, 138 I.C. 406=1932 A. 603; 33 P.L.R. 1013, 1933 S. 121. Where the lower appellate Court rejects the oral evidence of possession adduced by one of the parties by applying an erroneous presumption of law, its finding on the question of possession is vitiated by an error of law and the High Court can reverse the finding of fact so arrived at 155 I.C. 1087=1935 O.W.N. 674=1935 O. 394. See also 39 C.W.N. 1233 (Improper rejection by lower appellate Court of Commissioner's plan relied on by trial Court).

(8) CONSTRUCTION OF DOCUMENT.—The expression 'construction' as applied to a document includes two things 'first, the meaning of the words; and secondly, their legal effect. The meaning of the words is a question of fact in all cases. The effect of the words is a question of law. Hence the interpretation placed upon the words in the deed is a clear question of fact. Even if the document admitted of more than one construction, one of which has been adopted by the lower appellate Court, the High Court will not be competent to challenge it 158 I.C. 71=1935 L. 378, 1937 S. 51 The question of the construction of document is a question of law, on which the High Court can entertain a second appeal 43 C. 1104=31 M.L.J. 745 (P.C.), 4 Pat.L.T. 627, 45 M.L.J. 663. See also 35 P.L.R. 578=1934 L. 662, 1926 O. 131, 1928 N. 289. But see 119 I.C. 667, 1926 L. 21; 1926 P. 49; 5 O.W.N. 275=1928 O. 269, 132 I.C. 844 (2)=1931 L. 686. A question of how a document should be construed if it is a document of title and not merely a piece of evidence in the case is a question of law 52 I.C. 119, 18 A. 588, 1926 M. 512, 1926 B. 493, 5 Pat.L.J. 251. See also 1926 M. 652=93 I.C. 307=24 L.W. 18, 149 I.C. 934=1934 L. 35 Unless there has been misconstruction, a mistaken inference from documents is an error, not of law, but of fact 60 I.A. 231=143 I.C. 437=1933 P.C. 171=65 M.L.J. 154 (P.C.) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were merely historical materials, have to be construed for the purpose of deciding that question, and a second appeal would not lie because some portion of the evidence might be contained in a document or documents and the first appellate Court has made a mistake as to its meaning [11 L. 199 (P.C.), Rel. on] 61 C. 45=151 I.C. 813=1934 C. 461, 161 I.C. 165=1936 P. 129, 155 I.C. 833=60 C.L.J. 412=1935 C. 282, 61 C.L.J. 143=39 C.W.N. 581 The question of the construction of a certain documents is a question of law but the question what legal inference may be drawn from a number of documents is a question of fact and not a mere question of law 151 I.C. 362=1934 A. 709 162 I.C. 838=1936 P. 287, 162 I.C. 334=1936 O.W.N. 375=1945 L. 857, 161 I.C. 158=1936 O. 225, 1935 O.W.N. 365=154 I.C. 1017=1935 O. 304 But the question of interpretation of decree is a pure question of fact, the decree not being a document of title. 1935 L. 115 (1) Documents.—Construction of.—Question as to—Law or fact—Documents forming root of title or basis of claim—Documents forming evidence in the case—Distinction 56 M.L.J. 1 (P.C.), 1930 L. 691; 134 I.C. 673=1931 N. 189 (48 A. 588, Fall) A wrong construction of a document coupled with a wrong inference from certain facts constitute an error of law where there is no other evidence accepted by the Court 55 I.C. 366=18 A.L.J. 195=20 N.L.J. 39. The deter-

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mination of the intention of the parties is a question of fact but if the sole evidence to decide it is a document of title, then a wrong interpretation of that document is a question of law on which a second appeal lies. 149 I. C. 1016=36 P.L.R. 98=1934 L. 193. *See also* 151 I. C. 311=36 P.L.R. 261=1934 L. 291. Where the question is whether two documents executed on the same day are connected so that one is consideration for the other, the question is not one of interpretation of documents, and if the lower Courts ascertain their connection on evidence other than of the documents themselves, the finding is a finding of fact which cannot be challenged in second appeal 1931 A 948 Finding based on construction of or inferences drawn from documentary evidence cannot be questioned in second appeal 99 I. C. 183, 100 I. C. 631, 104 I. C. 760. *See also* 1920 A 75, 12 L. L. J. 199. A finding based on a recital of consideration in a mortgage deed is conclusive in second appeal 21 I. C. 841. The misconstruction of a document which is the foundation of a suit is no doubt a question of law but the misconstruction of a document which is alleged to contain an admission, that is to say, a misappreciation of the meaning and effect of an admission is not a question of law which can be raised in second appeal 35 C.L.J. 182=68 I. C. 1003. Construction of document in case of a deed open to one of two constructions is question of law. 65 I. C. 580=1922 L. 240, 1928 N. 30=113 I. C. 373, 1929 L. 90 (1)=30 P.L.R. 108 (2), 1929 L. 833, 1930 L. 139, 130 I. C. 103=1931 N. 25 [34 A 579 (P.L.), *Keif*]. But *see* 1926 L. 672. The question whether the parties to a deed of transfer intended that certain property should pass under the deed is one of fact and cannot be agitated in second appeal 64 I. C. 746. Also question regarding whether a lease confers a heritable right or not. *See* 13 O.L.J. 565. The construction of a deposition is what the Court thinks is proved by it and it is wrong to speak of it as a construction so as to make it a question of law 63 I. C. 575. Where the lower Court arrives at a finding of fact by a wrong construction of the pleading and without any evidence, the finding is liable to be questioned in a second appeal. 56 I. C. 466, 3 O.W.N. 460=94 I. C. 776=1926 O. 353, 69 I. C. 800. *See also* 133 I. C. 886=1931 L. 854. Where a document leaves part of the subject matter ambiguous, and evidence is let in to remove the ambiguity, the interpretation becomes a question of fact 103 I. C. 255, 1927 A 689. The question of genuineness of signature is a pure question of fact 152 I. C. 597=61 C. 365=1934 C. 633.

OTHER ILLUSTRATIVE CASES—Where the appellant expressly abandons a point in the Court below he ought not to be allowed to take it in second appeal. 69 I. C. 44 (1), 134 I. C. 1171=1931 S. 170. Intent to abandon plea not to be inferred from lower Court's failure to record finding thereon 29 P.L.R. 607=1929 L. 81. As to abandonment by

tenant of holding, *see* 4 P. 838. Abandonment is a finding of fact 32 I. C. 355, 91 I. C. 493=1926 C. 751. The question of acquiescence is a matter of legal inference to be drawn from the facts proved in the case and can be taken up in second appeal 41 I. C. 927, 36 I. C. 700, 82 I. C. 309, 73 I. C. 137. Where the Court holds that the document is so worded as to obscure its meaning and prevent the executants from grasping the fact that they were executing a deed of surrender, it is not an interpretation of a document and such finding does not involve a point of law. 119 I. C. 698=1929 N. 343.

ABANDONMENT—The question as to whether there has been an abandonment of land by a riyat is largely and principally a question of fact. But the inference from the facts found, as to whether there was abandonment or not, is a question of law. 61 C. 937.

ABATEMENT—Though no second appeal lies from an order of abatement, it may be questioned in a second appeal if it "affects the decision of the case". 144 I. C. 133=1933 A. L. J. 561=1933 A. 294.

ACCORD AND SATISFACTION—The finding that there is a full accord and satisfaction is a finding of fact which must be accepted in second appeal 152 I. C. 398=1934 N. 226.

ACKNOWLEDGMENT—Although a finding as to whether certain statement amounts to an acknowledgment arrived at by the lower appellate Court is not open to second appeal, still when the lower Court fails to consider the effect of a statement, the second appellate Court can decide whether it amounts to an acknowledgment 14 L. 587=1933 L. 345.

ADOPTION—The question of adoption is clearly a finding of fact and cannot be interfered with in second appeal 1934 L. 968 (2)=154 I. C. 675.

ADVERSE POSSESSION—Where the question of adverse possession is one of inference from documents the concurrent findings of the Indian Courts may be upset by Privy Council as the question is not one of fact 42 A. 152=38 M.L.J. 259 (P.C.). *See also* 87 I. C. 1021. The question of adverse possession is a mixed question of fact and law. 26 C.W.N. 890; 40 I. C. 420, 75 I. C. 672, 71 I. C. 762=4 Lah. L. J. 309, and cannot be allowed to be pleaded for the first time in appeal. 102 I. C. 476=1927 L. 522. But *see also* 94 I. C. 38=1926 C. 881, 1926 L. 482, 148 I. C. 740=1934 P. 167.

ALIENATION—The finding of the Courts below that a particular alienation was a gift and not a sale is a finding of fact binding in second appeal 15 Pat. L. T. 596.

ANCESTRAL LAND—A finding that property is ancestral is a finding of fact which cannot be contested on second appeal 35 P.L.R. 532=1934 L. 517=151 I. C. 789=35 P.L.R. 406=1934 L. 406. *See also* 150 I. C. 1041=1934 A. 866 (Finding that property was purchased with the funds of a certain person) A party

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

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who has all along proceeded on the assumption that the property which he was claiming was ancestral cannot, when his claim was dismissed by the lower Courts on the ground that it was barred by limitation under Punjab Limitation (Custom) Act (I of 1920), S. 7, for the first time in second appeal, be permitted to contend that the property was self-acquired. 1933 L 845=35 P L R 85

BENAMI—A question of benami or fraud is not a question of pure fact, it is a mixed question of fact and law 43 I.C. 49=3 Pat. L.W. 339. See also 34 P L R 642=1933 L. 738. A finding as to benami given after consideration of the evidence on record is binding on the High Court in second appeal. 133 I.C. 440. When there is circumstantial evidence on which the trial Court justifiably infers that a transaction is benami, the finding of the lower appellate Court that it is not benami without considering the evidence is not a proper finding which can be regarded as binding in second appeal. 63 C 846=1936 C. 178.

'BONA FIDES.'—*Bona fides*, finding as to, is a question of fact 49 M.L.J. 549, 7 L.L.J. 358; 131 I.C. 662=1931 N. 67.

BURDEN OF PROOF AND PRESUMPTION—The question of onus is not necessarily and in all cases one of law. How much or what evidence is sufficient to discharge the onus is a question which will depend upon the weight to be attached to the evidence adduced 12 I.C. 691=13 Bom L R 1021. See also 9 I.C. 4. If the Judge's finding is determined only by the question of burden of proof, or on a one-sided examination of the evidence due to the view taken about the burden of proof, then the finding stands in need of revision, but if the evidence and circumstances on both sides are duly considered, the question of the burden of proof is of very little importance. 152 I.C. 441=1934 N 253 The adjustment of the burden of proof in a case is a question of law 43 I.C. 478, 59 I.C. 973=12 L.W. 170; 1 L 429, 2 L. 249; 7 L.R 230 (Rev)=94 I.C. 944=24 A L J 513=1926 A. 453; 51 C.L.J. 465 A fact resulting from a finding on wrong burden of proof and disregard of evidence on record is not binding in second appeal 2 Pat L.T. 919=76 I.C. 347, 133 I.C. 220=53 C.L.J. 616; 59 C. 1012=62 M.L.J. 336 (P.C.). See also 1932 M. 415=35 L.W. 511=19 N.L.J. 301, 163 I.C. 604=1936 R. 262, 1 L.R. 1936 N 142=164 I.C. 740=1936 N 130 (Even when Judgment of trial Court has been confirmed by appellate Court) After evidence was given by both sides and the lower Court has preferred that of one side, the objection as to wrong shifting of burden of proof is groundless in second appeal. 33 I.C. 817; 1930 L. 677=121 I.C. 377. See also 145 I.C. 992=34 P.L.R. 884=1933 L 377. The question whether the

presumption of the correctness of the record-of-rights has been rebutted in a particular case is more a question of fact than of law 65 I.C. 527, 45 I.C. 65=22 C.W.N. 449, 12 L. J 161 Failure to invoke a presumption under S. 114, Evidence Act, is ground for second appeal 25 A L J. 833; 121 I.C. 730 Refusal to draw the presumption under S. 90, Evidence Act, will not be interfered with in second appeal. 134 I.C. 296. But a legal presumption wrongly raised by the lower Court where the law does not warrant such a presumption can be interfered with in second appeal. 32 P L R 759

CONDUCT, INFERENCE FROM—see 40 L.W. 755.

COPYRIGHT—In an action brought by a plaintiff for breach of copyright, but which is in substance an action for breach of confidence in permitting the plaintiff's unpublished manuscript to be used without the plaintiff's consent, whether or not the book was used, handed over to a certain person and whether it was improperly used by him are pure questions of fact 142 I.C. 815=1933 A.L.J. 393=64 M.L.J. 193=1933 P.C. 26 (P.C.)

COSTS.—A second appeal on a question of costs can be maintained. 2 L.L.J. 310=64 I.C. 962 See also 27 P L R 391, 100 I.C. 598. But see 93 I.C. 1008=1926 A 419, 1928 O 224=107 I.C. 881, 6 O.W.N. 689 (F.B.). In second appeal the High Court will be very reluctant to interfere with an order of costs, unless it is shown that any grave injustice has been done to the party. 10 O.W.N. 981=1933 O. 455 Costs are in the discretion of the Courts below, and if no legal point or matter of principle is involved, the High Court on second appeal will not interfere. 35 P.L.R. 656=1934 L. 739 See also 148 I.C. 1166=1934 A L J. 803=1934 A 434, 149 I.C. 901=11 O.W.N. 754=1934 O 259

COURT-FEE—A second appeal lies from an order of appellate Court rejecting a memo. of appeal from non-payment of deficit Court-fees if there is an error in calculating the amount of Court-fees 51 I.C. 114

CROSS-OBJECTIONS—A second appeal lies from the decree of the appellate Court disallowing cross-objections of the respondent (10 M 292, Foll.) 1933 L. 400.

CUSTOM.—Question as to the existence of an ancient custom are questions of mixed law and fact 40 M 709=33 M L J 1 (P.C.), 143 I.C. 880=37 L.W. 272=1933 M 390, 41 M 374 (F.B.); 1933 A. 603 On this point, see also 27 Bom L.R. 880=88 I.C. 891; 88 I.C. 752=23 A.L.J. 932; 93 I.C. 363, 1926 A. 215; 20 A L J 57=64 I.C. 956, 1928 O. 269 A finding as to the existence or non-existence of a custom in so far as it is a finding that a certain practice does or does not prevail, is a finding of fact. The question whether a prevailing practice has the essential attri-

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

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butes of a legally binding custom is a question of law 141 I C 668=1933 A 306. See also I.L.R. 1936 N. 13=164 I C. 825=1936 N. 95. Whether the facts found in any given instance prove the existence of the essential attributes of a custom is a question of law which may be discussed in second appeal. 45 C. 285, 38 M.L.J. 275; 41 M. 374=34 M.L.J. 104, 40 M. 1108=32 M.L.J. 237, 19-29 M. 751, 150 I C. 758=1934 A.L.J. 879=1934 A 890. A finding of custom cannot be challenged in second appeal on the ground that the evidence is insufficient. 35 I C 630; 102 I C 596=1927 A 605; 100 I C 605=1927 A. 471; 99 I C 292=1927 A. 201, 4 O.W.N. 1229; 7 L.R. 94 (Rev.)=91 I C 942=13 O.L.J. 121=1926 O 143. But see 94 I C 987=1926 O 460, 1926 A 153, 59 M.L.J. 289=53 M. 597=57 I A 264 (P.C.) The question whether a custom is reasonable or not is a question of law and not of fact 29 I C 312=19 C.W.N. 1188. When there is legally insufficient evidence to prove a custom, a finding of the existence of custom may be questioned in second appeal, but when the insufficiency depends on the weighing of the evidence, it cannot be contested in second appeal. 9 I C 839 (29 M. 24, 28 A 98, Ref.), 70 I C 858=1923 L 53, 3 L 344. See also 92 I C 126=1926 O. 211, 116 I C 799. A decision as to the existence of a custom is a question of fact (134 I C 475), but an appellant in second appeal is entitled to show that the evidence, even if true, does not establish the custom 14 I C. 12, 134 I C 21=1931 A 499, 53 A 308. See also 13 L 31, 1931 A 583. Question of law—Question of custom—No evidence one way or the other—Question to be decided on authorities. Question involved one of law. 11 L.L.J. 110=110 I C 380=1929 L. 426. Where a wakf is established by user is a question of fact 100 I C. 626=1927 A 377, 12 L 540. Finding regarding custom upset in second appeal for misdirection 132 I C 804=1931 A. 547.

DAMAGES.—When the amount of damages is fixed arbitrarily, it cannot be taken as an amount arrived at on a finding which is binding on the High Court 1923 A 199; 28 N. L.R. 320. The amount of damages is a question of fact 9 I C. 984 (34 A 333, 3 C. L.J. 110, Ref.), 140 I C 68 (2)=1932 N. 118. Normally the question of damages is not considered in a second appeal, but the High Court may review the matter so that substantial justice as between the parties may be done 1934 A. 392.

DEDICATION.—The question whether certain property is wakf property is a question of law, at any rate a mixed question of law and fact 17 I C 303=16 O C 76, 12 L.L.J. 320, 138 I C 215 (1). Whether a dedication is real or nominal is a question of fact 131 I C. 283=1931 L. 170.

DEFAMATION.—The question whether a

writing is defamatory of the plaintiff the questions of fair comment, justification, *bona fides* and the quantum of damages awardable to the plaintiff in an action for libel, are all questions of fact on which the High Court in second appeal, is bound by the findings of the appellate Court. 32 M.L.J. 392. Finding of fact based only on the local investigation is not sustainable 1923 L 208 (1). Even if the judgment of the Appellate Court was meagre and not in conformity with the rule, unless a substantial error affecting the merits of the case is shown, High Court will not interfere. 31 M.L.J. 870. Where a judgment is of a most unsatisfactory and perfunctory character, the finding of fact contained in it can be challenged in second appeal 70 I C 853=1922 P. 583; 51 I C 385, 2 Pat L W 12. Defective procedure and error of law 85 I C. 958=22 L.W. 352.

DISCRETION.—Where two Courts fully acquainted with the case exercise a discretion, the High Court will not interfere with the exercise of such discretion 54 I C. 731, 13 I C 943=9 A.L.J. 15, 11 I C. 736=15 C.W.N. 1083; 66 I C. 147=1922 L 355, 131 I C. 461 (2)=1931 M. 632. See also 1933 L. 867. (Refusal to allow amendment of pleading. 140 I C 683=34 P.L.R. 736=1933 L. 829. (Rejection of document tendered at late stage), 1933 L 1014 (Admission of additional evidence). If Court's discretion to extend the limitation for an appeal under S. 5, Limitation Act, has not been exercised in a legal manner the High Court is entitled to reverse the decision arrived at 52 I C. 225=4 Pat L.R. 381; 123 I C 83, 122 I C 575; 1930 A.L.J. 1256 144 I C. 133=1933 A.L.J. 561=1933 A 294, 1936 L 742. But see 130 I C 840 (2)=1931 A 28. Where discretion is exercised arbitrarily on a question of costs a second appeal will lie 100 I C. 598. Wrong discretion by lower Court under O. 13, R. 1 can be interfered with in second appeal 110 I C 821=1928 P. 537. Discretion under S. 90 of Evidence Act. See 93 I C. 13=1926 O 362; 134 I C. 296. Where a discretion is given to adopt one of two methods to enforce the attendance of a witness in O. 16, R. 10, High Court will not interfere with its exercise 101 I C 257 (2)=1927 L 424. The issue of commission is a matter in the discretion of the Court, and if the discretion is wrongly exercised, the question cannot be agitated for the first time in second appeal. 1933 P 542. Improper exercise of discretion in utilising O. 41, R. 33 will not be interfered with in second appeal. 130 I C 774=1931 L. 370. Nor where the lower appellate Court examines of its own motion under O. 41, R. 27, C P Code, a witness who, in its opinion, should have been examined by one of the parties. 38 P.L.R. 449.

DOCUMENT.—Rejection of document not produced at first hearing, not interfered

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

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with in second appeal. 90 I C 602. 1926 C 106.

DOWER—A finding as to the amount of dower is a mixed question of fact and law 89 I C 672

EASEMENT—Failure to draw inference of easement is question of law 85 I C 81=1925 N. 270, 7 N L J 232=85 I C 84=1925 N. 168. Question of additional burden on the servient heritage by particular user is one of fact for a decision of which a remand is essential 61 M L J 58

LANDLORD AND TENANT—A finding as to the status of a tenant is a finding of fact and should not be interfered with in second appeal except on the ground of some clear error of law 46 I C 351 See also 40 I C 513=21 C W N 809, 87 I C 757=1925 C 1238, 1925 P. 294, 85 I C 636=1925 C. 761, 1926 C 264 (Recognition of tenancy), 41 C L J 135=29 C W N. 500=86 I C. 316=1925 C 632 1926 C 350 (question of uniform payment of rent) See also 6 P. 698=134 I C 296 The question whether a tenancy is one at will or of permanent nature on certain given facts is mixed question of law and fact 44 C. 119; 31 Bom L R 1279. See also 35 C W N 1047. But see 92 I C 899 (2)=1926 C. 592; 137 I C 658=1932 C 398=54 C L J 353. The nature of a tenancy is a question of law when it turns on the construction of some written instrument 20 I C 363=17 C W N 1073 The question whether a legal right, such as the right of tenant in the land, has determined is a question of law 15 I C 857 Question of law—Division of tenancy under S. 88, B T Act 39 C L J. 289 Which of the heirs represent the tenancy is a question of fact. 91 I C 748=1926 C 517 As to plea of want of notice to quit. 145 I C 992=34 P L R 884=1933 L. 377

FRAUD—A finding that an allegation of fraud was unproved is a finding of fact and is not open to challenge in second appeal 35 P L R 578=1934 L 662.

FORFEITURE OF TENANCY—A finding on the question whether there was forfeiture of tenancy by denial of title of landlord is a finding of fact and cannot be interfered with in second appeal 145 I C 992=34 P L R 884=1933 L. 377 The lower appellate Court in coming to finding that there was no forfeiture of the tenancy failed to take into consideration the effect of a statement made by the tenant. *Held*, that the finding was open to challenge, in second appeal [1923 P. C. 187, Dist ; (34 A. 579 (P C.), Ref] 149 I. C. 517=1934 A. 103

GRANT, NATURE OF—The finding that it was not proved that the *lawa jama*—that is to say, the pension moneys paid by Government—were included in the *watan* or hereditary endowment, and that therefore the plaintiffs could not claim a share in them as such, is a finding of fact 60 I A 231=29 N. L R 210=1933 P. C. 171=65 M L J. 154 (P. C.).

JOINT FAMILY—A finding that there has or has not been a disruption of a joint Hindu family is not a finding of fact and can be questioned in second appeal It is an inference of the legal effect of the facts found. 144 I C 919 The question whether the three brothers were joint or separate, would ordinarily be a question of fact but if in coming to a finding certain documents relied upon by the defendants as evidence of partition are illegally excluded from evidence on the ground that they are not admissible the finding can be challenged in second appeal 1934 P 48=146 I C 937

LEGAL NECESSITY—The finding as to the existence of necessity is a finding of fact and cannot be impugned in second appeal. 1923 L 669, 70 I C 815 But see 100 I C. 943; 96 I C 1006=1926 N. 486, 132 I C 271=1931 O. 144 (2).

LEGITIMACY—Question of legitimacy cannot be gone into in second appeal, it being a question of fact 2 L L J 505

LOAN OR DEPOSIT—The question whether certain money was received as a deposit or by way of loan is one of fact and the finding on that matter cannot be challenged in second appeal 152 I C 319=17 N L J. 68=1934 N 219.

MISJOINDER—A finding of fact on a question of misjoinder arrived at on evidence cannot be disturbed in second appeal 33 I. C. 118=(1916) 1 M W N 9 Objection as to misjoinder cannot be taken for first time in second appeal 1928 M. 635

NEGLECT OF GUARDIAN—The finding of the lower Appellate Court that the guardian has not been guilty of negligence is a finding of fact which cannot be challenged in second appeal. 142 I C 629=34 P L R. 110=1933 L. 337

NON-JOINDER—An objection as to non-joinder of parties cannot be taken for the first time in second appeal. 44 M 344=40 M L J 282 Notice to quit, validity of notice to quit is one of law 29 C W N. 626=87 I C. 708. The question of negligence is very largely a question of fact. 71 I C 346=1922 C. 317 Non-joinder of party in appeal—First Court's decree becomes final as regards that party. Joinder of that party in second appeal is not permissible 14 R D 430, 32 Bom L R. 1252.

PARDANASHIN LADY—A finding that a lady is not a pardanashin lady is a finding of fact and cannot be challenged in second appeal 144 I C 720=34 P L R. 304=1933 L. 451

PUBLIC RIGHT OF WAY—See 151 I C. 263=1934 A 941, 39 C W N 303

TECHNICAL OBJECTION—See 145 I C 992=34 P L R. 884=1933 L. 377, 144 I C. 573=1933 M 353

REMISSION—When a Judge in second appeal interferes with the concurrent findings of fact of the Court below, he exceeds his jurisdiction under S. 100, C. P. Code, and

Second appeal on no other grounds.

101. [S. 585.] No second appeal shall lie except on the grounds mentioned in section 100.

102. [S. 586.] No second appeal shall lie in any suit of the nature cogniz-

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his decision is liable to be set aside in Letters Patent Appeal 38 C.W.N. 763=1934 C 707.

Sec. 102 SCOPE OF SECTION.—The provisions of S. 42 are controlled by those of this section when a Court of Small Causes transfers a decree for execution to another Court 25 C. 872. *See also* 143 I.C. 493=34 P.L.R. 583=1933 L. 363; 155 I.C. 888=1933 M. 636, 26 A. 358 (360), 50 I.C. 629, 32 B. 356, 2 B. 248, 46 A. 73, 1924 A. 263, 103 I.C. 344. The words "of a nature cognizable" seem to have reference to the subject-matter of the suit as distinguished from the amount of the claim. 23 M. 547 (F.B.) *overruling* 22 M. 229. The mere fact that a question of title is raised does not prevent the suit from being one of a small cause nature 6 C.W.N. 687, 24 C. 557, 36 I.C. 202=4 L.W. 245, 116 I.C. 114=30 L.W. 365=1929 M. 389, 134 I.C. 251=1931 A.L.J. 967, 1935 O.W.N. 503=155 I.C. 240=1935 O. 413. S. 102 of the Code contemplates a suit of the nature cognizable by Courts of Small Causes irrespective of what defence is put up in the case 155 I.C. 240=1935 O.W.N. 503=1935 O. 413. The value of the subject-matter of the suit must be determined by reference to the value put by the plaintiff not only for fiscal purpose but also for purposes of jurisdiction 27 A. 202, 32 I.C. 998, 13 I.C. 493, 12 N.L.R. 47. The section assumes the original character of the suit rather the character it may assume by reason of the findings of the lower Courts. 6 Bom. L.R. 781, 50 I.C. 629, 32 B. 356, 2 B. 248, (1911) 2 M.W.N. 587=13 I.C. 174=22 M.L.J. 47. The suit as originally brought must be looked to 13 I.C. 493. *But see* 34 I.C. 909, 41 B. 367=38 I.C. 881. A suit of a nature cognizable by a Small Cause Court does not cease to be so because the Court in which it was instituted as a small cause suit returned the plaint to be filed on the regular side 15 M. 98. *See also* 24 C. 557, 65 I.C. 7 (20 A. 480, 12 A.L.J. 1032, Foll.) Or because the suit is tried as an original suit by a Judge who has no small cause powers 156 I.C. 607=37 Bom. L.R. 355=1935 B. 254 (2). Plaint returned by Small Cause Court under S. 23.—In suit for money due for use and occupation on the ground of permissive possession—No second appeal lies 1929 M. 781 (1), 57 I.C. 557=23 O.C. 117; 107 I.C. 193 (2) (small cause suit tried as regular suit). *See also* 12 I.C. 957=10 M.L.T. 500, 134 I.C. 251=1931 A.L.J. 967. Section is not restricted to cases where the Court trying the suit on the original side was also empowered to try the suit on the Small Cause Court side. The test in deciding whether a second appeal lies or not is to be found in the suit and not in the powers of the Court which tried the suit. 129 I.C. 174=7 O.W.N. 1112=1931 O. 49. A suit for the recovery of rent other than house rent is a suit of the nature cognizable in

Courts of Small Causes 4 M. 419 (F.B.); 56 I.C. 845; 1922 P. 154, 1922 P. 184, 1928 C. 709. A suit for rent including *galli-patti* and local cess is a suit of small cause nature 37 Bom. L.R. 355=156 I.C. 607=1935 B. 254. As to suits for rent, not being cognizable by Small Cause Court *see also* 34 M.L.J. 104=41 M. 374 (F.B.) (*Thando-zam* payable to *muasidar*); 14 L.W. 349=42 M.L.J. 118 (suit for arrears of *kattubadi* is of small cause nature); 119 I.C. 386=1929 M. 525 (suit for rent or for damages for use and occupation), 17 I.C. 704=23 M.L.J. 517 (suit for rent, where there is only an incidental prayer for declaration). A suit to recover the rent of agricultural land is not a suit of the nature cognizable by Courts of Small Causes (3 R. 390, *overruled*) 13 R. 633=1935 R. 386 (F.B.) Suit for rent—Alternative claim for money below Rs. 500—Later claim cognizable by Small Cause Court—Second appeal in rent suit barred by S. 153, Bengal Tenancy Act—Joinder of two claims for purposes of second appeal—Permissibility. 40 C.W.N. 698. No second appeal lies from a decision in a suit for mesne profits when the value of the suit is less than Rs. 500 24 M. 118. *But see contra* 158 I.C. 1119=18 N.L.J. 76. A claim for profits by a person who has obtained a decree for specific performance of an agreement of sale of land, against the defendant in possession is a suit for mesne profits and not for damages. 158 I.C. 1119=18 N.L.J. 76. A *mala fide* prayer for injunction does not alter the nature of a small cause suit for money 1930 A.L.J. 1043. What must be looked at is not the shape in which the case comes up to High Court, but the shape in which the suit was originally instituted in the Court of first instance 11 A. 13. *See also* 35 M.L.J. 377. Where a suit cognizable by a Small Cause Court has been tried against the provisions of S. 16 as an ordinary suit by a Judge who is not invested with Small Cause Court's powers, the parties to the suit having raised no objection to the trial, it should not be considered as a small cause suit, and appeal would lie from the decision. 30 N.L.R. 252=149 I.C. 886=1934 N. 121. The section does not apply to appeals from orders. An order on appeal from a decree in an original suit of the nature cognizable in a Court of Small Causes, remanding the suit for re-trial, is appealable. 3 A. 18 (F.B.) When the original suit is of the nature cognizable in Courts of Small Causes and the subject does not exceed Rs. 500 in value, no second appeal will lie in respect of an order made in execution proceedings relating thereto 12 A. 579; 18 A. 481 (F.B.), 12 M. 116. *See also* 46 A. 73, 3 L.L. 141, 37 M.L.J. 303; 29 I.C. 740=11 N.L.R. 99 (section applies no less to orders in execution than to the decree itself). *See also* on this point, 46 I.C. 82; 18 I.C. 245, 43 I.C. 15=1917 P. 80; 34 C.L.J. 477. No second appeal lies against the deci-

No second appeal in certain suits

able by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

163. In any second appeal, the High Court may, if the evidence on the

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sion of an Honorary Munsif in a suit of a nature cognizable by a Court of Small Causes. 155 I.C. 95=1935 A.L.J. 426=1935 A. 574

THE FOLLOWING ARE SUITS COGNIZABLE BY SMALL CAUSE COURT.—A suit for compensation for money realised by the defendants from the actual occupants of land, who are stated to be plaintiff's tenants. 24 C. 557, suits for recovery of money under Ss. 69 and 70 of the Contract Act. 15 C. 652. See also 40 I.C. 578=15 A.L.J. 534, 34 I.C. 697=23 C.L.J. 557 (Suit for rent or damages. See also 33 I.C. 346=22 C.L.J. 564). Suit to recover *khatari* or tax for homestead. 1 P.L.W. 541=39 I.C. 949. Suit against Government, for less than Rs. 500 for repairs made. 37 M. 533=23 M.L.J. 732. Suit against District Board President for damages. 46 M. 808=45 M.L.J. 25. Suit for damages for wrongfully cutting and carrying off trees. 36 I.C. 202=4 L.W. 245, 130 I.C. 481=1930 A.L.J. 1247. (But not so where there is allegation of criminal act or intent, 1936 N. 276). Suit for damages for removal of trees. 27 C.W.N. 469=1923 C. 568. See also 155 I.C. 888=1933 M. 636. Suit for refund of money paid under S. 73 as rateable distribution. 45 A. 359. But see also 13 I.C. 907=15 C.L.J. 49. Suit for money forcibly taken. 57 I.C. 505. For profits of plaintiffs wrongfully appropriated. 31 I.C. 797. Suit for declaration of title to moveables. 21 I.C. 638, 11 A.L.J. 599. Suit for money due. 17 I.C. 522. Suit to recover deficiency from defaulting purchaser. 45 B. 223. Suit for recovery of compensation for want of title to lands sold. 100 I.C. 327=1927 R. 90. Suit for share of profits of an office received by co-share. 37 B. 700. See also 132 I.C. 201 (1)=1931 A. 551. Suit for price of fish taken from a tank. 68 I.C. 626=1923 C. 321. Suit for grazing fee. 59 I.C. 595=32 C.L.J. 83. Suit for recovery of price of coal. 59 I.C. 188. Suit for recovery of money advanced in partnership business with profits. 51 I.C. 435. (Unnecessary prayer for declaration does not alter the nature of suit. 41 I.C. 627.) Suit for damages for infringement of monopoly. 69 I.C. 431=1923 L. 244. Suit on agreement to share proceeds of tenancy. 67 I.C. 841. Suit for interest on mortgage money. 66 I.C. 285. "Choutayi" dues are not cess within Art. 13 of Sch. II. 52 M.L.J. 706. So also *swatantrams* are not cess. 53 M.L.J. 727. A suit for recovery of money value of *bhaoli* produce of some *mahua* trees standing on a plot of land, is not a suit for rent but is a suit for money, and not outside the jurisdiction of the Court of Small Causes. 160 I.C. 186=17 Pat.L.T. 88=1936 P. 102.

THE FOLLOWING ARE NOT SUITS COGNIZABLE BY SMALL CAUSE COURT.—A suit under O. 21, R. 93 is not of a nature cognizable by a Small

Cause Court. 11 M. 269, but a suit for the profits of land wrongfully received by defendant is. 25 B. 625, and a suit for rent containing a prayer for the enforcement of a charge is not small cause one. 26 M. 308; also a suit to recover defendant's share in the land revenue paid. 26 B. 437. Suit for recovery of presents made on promise of marriage is not Small Cause suit. 14 I.C. 837=5 Bur.L.T. 57. Suit for *haq chaharum*. 63 I.C. 292=19 A.L.J. 719. Suit for contribution. 32 I.C. 200=23 C.L.J. 125. Suit for damages in respect of water flow. 21 I.C. 393. Suit for water-cess, defendant denying liability and pleading grant. 40 L.W. 629=1934 M. 683=67 M.L.J. 558. Suit for declaration of title to immovable property (*hut*). 9 I.C. 1. Suit for recovery of excess amount paid to decree-holder under fraud and cheating. 1928 C. 776. Or for money criminally misappropriated. 1928 L. 887. Suit for arrears of maintenance. 1931 B. 286=33 Bom.L.R. 510. Suit for damages for wrongful attachment and negligence. 1936 N. 257.

POWERS OF HIGH COURT.—As a rule, the Court is not in favour of entertaining revisions from orders of the lower appellate Courts in cases which are covered by S. 102, C.P. Code. These orders are intended by the legislature to be final. 165 I.C. 137=1936 L. 293. Findings called for by High Court not returned.—Power of High Court to find on the evidence. 43 M. 567=38 M.L.J. 476=47 I.A. 76 (P.C.) (On appeal from 24 M.L.J. 571). Also 99 I.C. 189=1927 C. 1, 51 B. 258; 8 P.L.T. 74=102 I.C. 301=1927 P. 167, 1930 M. 489. When the lower Court has not framed the appropriate issue, the second appellate Court may raise and decide it itself if there is sufficient evidence on record for deciding it. 47 C. 107 (P.C.) When the lower Court has not given any finding on a question of fact the High Court can, under S. 103, arrive at a finding on the evidence on record. 28 I.C. 673=1 L.W. 249; 8 R. 425. See also 47 I.C. 950; 3 P.L.T. 303. Or may remit the case to the lower Court for a finding on that issue with liberty to the parties to adduce additional evidence. 49 I.A. 286=45 M. 586=43 M.L.J. 640 (P.C.) Where the judgment of a Court of appeal is reversed on a question of custom or usage on a preliminary point, the High Court should not take on itself to examine the evidence as to usage but should remand the case for disposal on the merits by the lower appellate Court. 40 M. 1108=32 M.L.J. 237. Failure of the lower appellate Court to consider matters alleged by decree-holder about judgment-debtor.—Procedure to be followed. 118 I.C. 312 (2).

Sec. 103.—Where the lower Court has decided a question of title, which is one of fact on inadmissible evidence and other evidence, the High Court can remand the case to the lower appellate Court directing it

Power of High Court to determine issues of fact.

record is sufficient, determine any issue of fact necessary for the disposal of the appeal¹ [which has not been determined by the Lower Appellate Court, or which has been wrongly determined by such Court by reason of any irregularity, omission, error or defect, such as is referred to in sub-section (1) of section 100].

Appeals from Orders.

104. [S 588, para. 2.] (1) An appeal shall lie from the following orders,

Orders from which appeal lies.

and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:—

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court;

(b) an order on an award stated in the form of a special case,

(c) an order modifying or correcting an award;

Leg. Ref.

¹ Substituted by Act VI of 1926

Notes.

to record a fresh finding after eliminating the inadmissible evidence and confining itself to the other evidence in the case; or it may proceed under S 103, C.P. Code, and arrive at its own finding on a perusal of the relevant and admissible evidence 1936 L 788

N B —This section supersedes the rulings in 9 A 147 (F.B.) and 9 A. 26 (30).

Sec 104 SCOPE AND APPLICABILITY OF SECTION—Where a Court is seized with a matter under a particular rule and an order thereunder is appealable, then the order actually made by the Court in that matter is also appealable 45 B 99=22 Bom.L.R 1126 See also 3 L.L.J. 463. A non-appealable order does not become an appealable decree because the order is drawn up in the form of a decree Hence where an order of remand merely sets aside the decree of the trial Court and does not itself decide any of the points raised for determination and does not determine the rights of the parties with regard to any of the matters in controversy in the suit, it cannot amount to a decree and must be treated as a non-appealable order. 151 I.C. 947=1934 P 13 It was not intended by S 104 (2), Civil Procedure Code, to override the express provision of the Letters Patent or to take away by implication a right of appeal conferred thereunder 3 L 188; (14 A 226; 39 A 191; 9 C 482; 11 A 375, 26 C 361; 25 M 555, Ref.) See also 56 M. 915=145 I.C. 449=65 M.L.J. 222 (F.B.). Where on appeal from an order returning a plaint to be presented to the proper Court an order was passed remanding the case to the trial Court, no further appeal is competent from that order; nor does a revision lie therefrom 125 I.C. 581 See also 1930 L 418=121 I.C. 300. No second appeal lies from the order confirming the auction sale. Non-adherence to the compromise by which the judgment-debtor withdrew his objection to the sale, cannot affect the competency of the second appeal. 151 I.C. 314 (1)=1934 L. 326 (1). Execution sale before new Code. Application to set aside after new Code—Right of appeal—No vested right in procedure. 16 I.C. 436; 122 I.C. 161=1929 M 903 Order refusing

leave to bid at an execution is only a ministerial order and not appealable. 122 I.C. 161=1929 M. 903. Order granting amendment—Not appealable unless it can be considered as a question of review 33 C.W.N. 958=1929 C. 676. An order removing a review is appealable at the instance of the parties to the litigation but the Receiver himself has no right of appeal. 36 C.W.N. 903 See also 39 C.W.N. 384. Appointment of Receiver in mortgage suit—Subsequent insolvency of mortgagor—Application by Official Receiver for removal of Receiver in suit and for possession—Order rejecting—Appeal 39 C.W.N. 384. Order dismissing application to restore application for setting aside *ex parte* decree dismissed for default—Appealability 41 L.W. 811=1935 M. 609 As to appeal against order passed under O. 21, R. 90 C.P.C. 163 I.C. 765

LETTERS PATENT APPEAL—The Civil Procedure Code does not control the provisions of the Letters Patent. The judgment of a single Judge of the High Court in an appeal under O. 43, R. 1 (s) of C.P. Code is appealable under Cl. 15 of the Letters Patent (22 M 68 and 13 M L J 497, Foll.) 56 M 915=145 I.C. 449=1933 M 570=65 M.L.J. 222 (F.B.) See also 3 L. 188 Calcutta High Court—Original Side Rules—Reference by Registrar under R 50 of Ch 26—Opinion of Judge on—Appeal—Letters Patent (Cal.), Cl. 15. 40 C.W.N. 1264.

Cl. (a).—An order in effect refusing to file an award under Sch. II, para 15 (1) (c), C.P. Code, is not appealable as it is not one superseding the arbitration proceedings. 154 I.C. 332=3 Bom.L.R. 1222=1935 B. 78

Cls. (a) and (c).—No appeal lies against an order rejecting objections made to an award and passing a decree on the award. Such an appeal cannot be said to be an appeal from a decree nor can it be said to be an appeal under Cl. (a), S. 104, which only refers to orders superseded and not to orders refusing to supersede. Nor can the order be said to be one modifying or correcting the award under Cl. (c) of S. 104. For it is an order refusing to do so. 163 I.C. 590=1936 R. 240

Cl. (c).—Appeal from a decree based on a modified award preferred under a mistake may be converted into an appeal from the

- (d) an order filing or refusing to file an agreement to refer to arbitration;
- (e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (f) an order filing or refusing to file an award in an arbitration without the intervention of the Court;
- (g) an order under section 35-A;
- (h) an order under section 95;
- (i) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

Leg. Ref.

¹ Cl (ff) inserted by Act IX of 1922

Notes.

order modifying the award 138 I C 848=36 C.W.N 1069=1932 C 713 Under S 104 (c), there is a right of appeal from an order modifying an award and if the appeal is expressly from the order modifying the award, no second appeal is admissible. But if the appeal is in form not from the order modifying the award but from the decree which is passed on that order, the form of the appeal may justify the admission of a second appeal 153 I C 764=1935 Pat 109

Cl (d)—Order of refusal of leave to file an agreement on the ground of jurisdiction is appealable 132 I C 218=1931 L. 673

Cl. (e).—There is no right of appeal against an order in proceedings under S. 19, Arbitration Act, which is an Act, complete within itself, and is not affected by the rules as to appeal laid down in the C.P. Code with reference to the second schedule Clause (e) of S 104 relates to an order under para 18 of the second schedule to the Code 132 I C 850 (852)=1931 L. 644

Cls (e) and (f) AWARD AND ARBITRATION—S 104 (1) (f) applies to arbitrations under the Code 5 Bur L.T 155=17 I C 902 See also 1 R 265=1923 R 199; 22 I C 690, 73 I C 820; 125 P.R. 1912, 132 I C 850 (852)=1931 L. 644 Neither clause (d) nor (f) sanctions an appeal against an order of a Court in arbitration proceedings 117 P.R. 1916=34 I.C. 192 See also 39 I C 508=62 P.R. 1917. An appeal from a decree passed in the words of an award, in so far as the decree relates to the modifications and corrections made in the award, clearly lies under S 104 (c). But the appeal must be limited to the modifications and corrections only and no other grounds can be urged in the appeal. 1930 L. 26=124 I C 339=31 P.L.R. 668 See also 138 I C 848=36 C.W.N 1069=1932 C 713; 15 I C 519=17 C.W.N 617 An order filing an agreement to refer to arbitration made by certain parties to the suit is appealable under the new Code as under the old Code 36 M 353=21 M.L.J. 990 Appeal from order rejecting application for reference to arbitration. 27 I C 721 See also 132 I C. 218=1931 L. 673 (An order refusing leave to file an agreement to refer to arbitration on the preliminary question of jurisdiction is appealable.) See also 45 C. 502, The decision of a Court on an application to file a private award, part of it being on a matter outside the scope of the arbitration,

is an "order" and it is open to first appeal and not to a second appeal. 66 P.R. 1915=31 I C 80 See also 47 I C 171; 60 I C 590. An order refusing to file an award made under the Arbitration Act, is appealable 43 A. 348; 17 I C. 171=154 P.W.R. 1918; 60 I C 590; see also 1930 L. 418=1 R. 1930 L. 204=121 I C 300 Application to make a private award a rule of Court—Order returning the application for presentation to proper Court—Order is one refusing to file award and is appealable See also 132 I C. 218=1931 L. 673, 7 L.B.R. 277=25 L.C. 7=8 Bur L.T. 44 (Order of Appellate Court setting aside order of the lower Court refusing to file award made without intervention of Court—No appeal) Order refusing to set aside is not appealable 46 I C 687=45 C 502. An order refusing to set aside an *ex parte* decree passed in accordance with an award is appealable. 38 A. 297 See also 29 L.W. 490

Cl (f)—S 104 (f) of the Code empowers the appellate Court not only to go into the question of the existence of the reference and of the award, but also to go into questions such as are indicated by para 14 or para. 15 and this interpretation does not lead to any inconsistency 155 I C. 1022=1935 Pesh 69 No second appeal lies against appellate Court dismissing appeal under S 104 (f) against an order filing award given in a private arbitration 39 P.L.R. 117

Cl (ff)—An order refusing compensatory costs, under S 35-A, C. P. Code, is not appealable in view of the proviso to S 104 (ff) 18 N.L.J. 309

Cl (g)—Supersedes the decisions in 28 A. 81 and 24 M. 62 An appeal lies under S 104 (g) from an order refusing relief under S 95 as well as from one granting such relief 49 I C. 86=9 L.W. 69 An appeal lies against an order awarding compensation for improper attachment. 11 I C 349=21 M.L.J. 460

Cl (h)—Does not apply to order as to penalties under Stamp Act 5 C. 311. Appeal lies from an order directing arrest and detention in civil prison of a person otherwise than on execution of a decree. 1932 A. 524=1933 A.L.J. 221=136 I.C. 367 Whether the decision of a question of fraud before the execution and conduct of an execution sale brings the case within the scope of S 47, C.P. Code. 40 I C. 246=25 C.L.J. 399

OTHER CASES WHERE NO SECOND APPEAL LIES—No second appeal lies against an order of Small Cause Court. 36 M.L.J. 435 (26 I.

(i) any order made under rules from which an appeal is expressly allowed by rules:

1[Provided that no appeal shall lie against any order specified in cl (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made]

(2) No appeal shall lie from any order passed in appeal under this section.

105. [S. 591.] (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in exercise of its original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the

Leg. Ref.

¹ The proviso has been inserted by Act IX of 1922

Notes.

C. 359, Diss.) An order passed in execution of a decree under S. 9 of the Specific Relief Act is not appealable. Also an order passed in execution of such a decree directing the arrest of judgment-debtor 39 I C. 379=18 P L.R. 1917. See also 39 I C. 375. No second appeal lies from an order of the appellate Court against an order passed under O 21, R. 72 (3). 23 I C 270=13 A L J 351, see also 39 A 191. No second appeal lies from a decision on appeal under the provisions of O 43, R 1, C P. Code 11 L L J 546=120 I C. 684=1930 L 208, 1930 A L J 454=121 I C 545=1930 A 122. No appeal lies from an order passed in appeal remanding for trial on merits a case in which the plaintiff had been returned for presentation 33 A 479. There is no appeal from the order of an appellate Court restoring suit dismissed for want of process fee 9 I C 484. Orders under O 21, R 40 setting aside or refusing to set aside sale on appeal by the High Court deal finally with the rights of parties and are appealable to the Privy Council 40 C 635=40 I A 140 (P C), 2 Pat L T 401=6 Pat L J 319=107 I C 448. For order under O 21, R 92, see 118 I C 805, 7 R 37. Order for restitution passed under inherent powers of Court under S 151, C P Code, setting aside sale under O 21, R 90, C P Code. No right of appeal 9 P 685=122 I C 589=1930 P 280. There is no second appeal against an appellate order confirming an order refusing to set aside a sale on the ground of fraud. 14 I C 53=17 C W N 524. See also 15 I C 679=10 C W N 1051. No second appeal lies from an appellate order disallowing an application under O 21, R 89. 38 C 339, 107 I C 438=1928 L 444, 45 C L J 557. (No second appeal from order under O 21, R 90.) Order of District Court in appeal in terms of compromise is final and is not appealable. 3 L 175. An order in appeal setting aside the order of the lower Court returning the plaintiff for presentation to the proper Court is not open to second appeal nor is such order open to revision, though it may be erroneous in law or in fact 43 A 334. No appeal lies against an appellate order setting aside an order of the Court of first instance refusing to set aside an *ex*

parte decree. 9 I C 55=9 M L T 269

MISCELLANEOUS.—Though a party for failing to satisfy a decree is arrested under S 104, cl (h), yet he is given a right to appeal under Ss 42, 47 and 115 of C P. Code. 30 I C 684=19 C W N 1085. An appeal lies against an order refusing to take action under O 39, R 2 (3). 39 M. 907=30 M L J. 523. An appellate Court under this section has no power to stay execution of decrees. 102 I C 11=1927 L 494

Sec. 104 (2) SCOPE OF.—S 104 of the Code refers to appeals to High Courts in British India and does not forbid appeals to His Majesty in Council when they comply with the conditions laid down in Ss 109 and 110 of the Code 148 I C 1202=11 O W N 57=1934 O 291. An order recording a compromise or adjustment under O 23, R 3, C P Code, is not open to second appeal. The Code only provides for one appeal when the factum or legality of a compromise or adjustment of a suit is questioned. 60 C L J. 173

Sec. 105 SCOPE OF SECTION.—Though S 105 refers only to decrees, the provisions of that section also apply to appeals against orders as well 1936 M 936 Sub-S (2) is new and supersedes the rulings in 12 A 510 (F B), 18 M 421. 12 C 45, 14 B 232. See 10 I C 514=15 C W N 830, as to the meaning of word 'decision', see 50 I C 180=1925 A 610 (F B) "Affecting the decision of the case", means affecting the decision of the case on the merits" 131 I C 518=1931 A 329, 133 I C. 129=1931 A L J. 377=1934 A. 294 (F B) dissenting from 1927 R 150 and following 1925 A 610, 3 Lab L J 59=59 I C. 676. But see 12 A 200; 22 C 981; 9 C W N. 584 at p 587. See 41 C L J 136=1925 C. 711, 47 A 555, 27 A L J 1103. An order refusing to record an adjustment is not an order affecting the decision of a case, but is merely an order ensuring that the merits of the case should be determined. It is not therefore open for an appellant to challenge such order in appeal under S 105 when it has not been appealed against. 31 N L R. (Supp) 72=160 I C 202=1936 N 8. The policy of the Legislature in enacting S 105 was to give finality to orders of remand 72 I C 588=1923 C 385, 37 I C 844, 89 I C. 1009, 22 L W 460=1924 M 1019, 86 I C 608=1925 M. 916, 47 A. 853, 51 A 780=27 A L J 448. There is no appeal from an order setting aside an *ex parte* decree. 51 B 495;

decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

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but the order can be questioned in appeal from the subsequent decree 5 R. 80. But see also 85 I C 468 (469)=1925 O. 27. Remand order not conclusive on points not specially decided therein beyond possibility of revision. 23 A L J. 656=1925 A 566 Order in pending suit superseding award can be questioned in appeal from decree 10 O W N. 117=1933 O. 563 See also 50 C 21, 1929 L 174. An order remitting an award for reconsideration of the arbitrators is not open to challenge in appeal 146 I C 22=1933 L. 530 An order under S 151 can be challenged under S. 105 if it affected the decision of the case on the merits. Otherwise the appellate Court is not bound to set it aside 147 I C. 1013=35 P L R 266=1934 L 312

Sec. 105 (2).—Only prevents a party from agitating in an appeal a question which he could have objected to in the appeal against an order 29 M L J 772; 48 M 267=47 M L J. 710. Hence as under S 249 of the Agra Tenancy Act no appeal lies from any order passed in appeal, an order of remand passed in an appeal under that Act can be attacked in second appeal against the decree that is passed on remand 157 I C. 1119=1935 A L J. 517=1935 A 553 Order setting aside abatement of suit is not final and can be attacked in appeal against final decree 47 A. 555; 52 C 472 Though no second appeal lies from an order of abatement, it may be questioned in a second appeal if it "affects the decision of the case". 144 I C 133=1933 A L J. 561=1934 A 294. An order setting aside an abatement in the course of trial and allowing substitution of the heirs of a deceased party cannot be questioned in appeal from the decree in the suit whether such an order is passed before or simultaneously with the decree, such an order not being one which affects the decision of the case with reference to its merits within the meaning of S 105 (52 C. 472, Foll) 14 L. 361=141 I C 337=34 P L R. 221=1933 L. 152. See also 145 I C 170=1933 C. 498 An order refusing to set aside the abatement of a suit is one which "affects the decision of the case" within the meaning of S 105, C P Code, and can therefore be challenged in appeal and second appeal from the decree 39 C W N 1173. Plea not raised in appellate Court—Appeal 35 I C. 571 The sub-section does not apply to appeals to the Privy Council. 33 A 391, 40 C. 635 (P C) See also 144 I C 916=35 Bom L R. 458=1933 B 260 Though S 105 (2) does not apply to appeals to the Privy Council, the principle of S 105 (1) can be applied to such appeals. 145 I C. 258=35 Bom L R 415=1933 B. 251. The section does not restrict Art. 15 of the Letters Patent (25 M. 525) and embodies so

much of the principle contained in 7 M I A. 283; 10 M I A. 340; 10 M I A. 413 "Error, defect or irregularity" within the meaning of this section, mean error, defect or irregularity in procedure or in law, and not on matters of fact. 35 I C 209=14 A L J 610, 32 C W N 1020, 9 P. 102=1930 P 266=125 I C. 136 But see also 12 A. 200, 25 A. 280; 31 N L R 72=160 I C 202=1936 N. 8. Unless the objection is taken in the memorandum of appeal it is not open to the appellant at the hearing of an appeal, to question the validity of the order 15 A. 119. See also 20 A. 370; 18 A. 19 (F B), 14 B. 232 and 22 A. 366.

INTERLOCUTORY ORDERS.—The principle of S. 105 is applicable not only to decrees and interlocutory orders but also to orders and interlocutory orders leading to the final decree. 35 I C 74=4 L W. 411. Order passed after decree on an application for amendment is not an interlocutory order. 114 I C. 41. Notwithstanding the dismissal of an appeal against an interlocutory order it is open to a party to complain of any defect or irregularity in the order in an appeal from the final decree itself. 44 A 533 But see also 33 I C 208. A plaintiff does not lose his right to raise a question of the propriety of an intermediate order with which he has complied, for the right under S. 105, C P Code, is not a qualified right. 1 L 54. Where the Court granted leave to the defendant to defend the suit under O 37, C P Code, on certain conditions and subsequently passed a decree on the defendant not complying with those conditions, it is open to the appellant at the hearing of the appeal from the decree to canvass the validity of the conditional order granting leave to defend 13 R 239=157 I C 778=1935 R 245

REMAND ORDER.—Where remand was ordered on one of the two points, any one of which would have been sufficient to dispose of the case, the remand order must be deemed to have confirmed the decision on the other point 26 C W N. 739=74 I C. 597=1922 P C 51 (P C) Where a decree after remand is appealed against, the appellant cannot question the correctness of the remand order 63 I C 845, 64 I C. 816, 65 I C 745, 21 L 252, 1923 R. 29, 10 I C 514=15 C W N. 870 (32 C. 1023=12 C W N 590, foll; 30 A 479, diss, 32 M 83, dist.). 1928 C 325; 6 R. 506. Remand order, whether can be ignored 2 Pat L J 669. The Court remanding the case after deciding certain points can afterwards refuse to reconsider those issues 20 C W N 43 See also 46 I C. 922 Under S 105 (2) a lower Court cannot treat an order of remand of the appellate Court as a nullity owing to the want of jurisdiction in the latter to pass it. 47 I C 886. In an appeal against an order of remand,

106. [S. 589.] Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie from the decree in the suit in which such order was made, or where such order is made, by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

General Provisions relating to Appeals.

107. [S. 582, para. 1.] (1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power—

Notes.

no objection could be taken on the ground that the lower appellate Court had no jurisdiction to entertain the appeal which had abated and to order for substitution of names. The proper stage for such an objection is when the *decree* itself is appealed from. 164 I.C. 730=1936 A.L.J. 538. Where on appeal by the plaintiff the case is remanded on the ground that the burden of proof was on the defendants and not on the plaintiff, S. 105 (2) precludes the defendants from questioning the correctness of that decision in second appeal. 1923 N. 283. Right of appeal against a remand order is unaffected by the disposal of the suit on remand before institution of the appeal. 14 I.C. 673=8 N.L.R. 42. (12 A. 510, 3 A.L.J. 40, Rel.) A Court hearing an appeal against an order of remand has power not only to decide whether the order of remand is in accordance with law or not, but also whether the decision is correct or not and to dispose of the suit accordingly. 15 I.C. 181=15 O.C. 33; 16 A. 252, 3 A. 675, 5 C. 144; 20 M. 152. The reversal of the previous order has the effect of nullifying the final order. 37 M. 29=21 M.L.J. 1063.

MISCELLANEOUS—Under O. 43, R. 1 (d), an appeal lies against an order refusing to set aside an *ex parte* decree but no appeal lies against an order setting aside such a decree. 31 I.C. 914=40 P.R. 1916. See also 133 I.C. 129=1931 A.L.J. 377=1931 A. 294 (F.B.), 34 I.C. 713; 12 I.C. 795=7 N.L.R. 162. **Abatement**—Order setting aside—Objection to, in an appeal from the decree if can be made. 71 I.C. 587=1923 L. 230, 35 I.C. 209=14 A.L.J. 610 (25 A. 280, foll.). See also 141 I.C. 337=1933 L. 152; 37 C.W.N. 138. Order allowing substitution of heirs or setting aside order of abatement passed by trial Court cannot be questioned in an appeal from the decree. 37 C.W.N. 138. Decision as to legal representative—Appeal whether lies. 5 L.W. 206=39 I.C. 371. In an appeal against the decision passed on review, objection may be taken that the review was improperly granted. 1 A. 363. See also 131 I.C. 518=1931 A. 329. An appeal lies under this section from an order improperly adding a person as a plaintiff in a suit. 7 C. 148.

Sec. 106—A Sub-Court should not be deemed to be subordinate to the District Court, as regards suits the subject-matter of which exceeds Rs. 5,000. 3 M.I.J. 97. See also 17 C. 680.

Sec. 107 **SCOPE OF SECTION**.—This section

is intended to affect only proceedings under the Code, and is not intended to extend the operation of any portion of the Limitation Act. 12 C. 590 (593) (F.B.). S. 107, Cl. (2) invests the appellate Court with the same powers as are conferred on a Court of original jurisdiction. It does not purport to give the order passed by the appellate Court the same effect as an order passed by the original Court of a like nature. 59 C. 388=138 I.C. 643=1932 C. 482. O. 7, R. 10 applies to appeals by virtue of S. 107. 74 I.C. 93=1923 N. 310=8 N.L.J. 63. An order rejecting a memo of appeal for deficient Court-fee is not a decree or final order and does not preclude the appellant from presenting a fresh memo on proper court-fee. 59 C. 388=138 I.C. 643=1932 C. 482. See also 1932 M.W.N. 104 (memo. of appeal should first be returned for correct stamping). S. 107 does not confer powers not conferred by O. 41. 42 I.C. 972=7 L.W. 10.

POWERS OF APPELLATE COURT—ILLUSTRATIVE CASES—An appellate Court is competent to examine any of the parties to ascertain the facts of the case, if necessary, for the ends of justice. 42 A. 48=52 I.C. 289. Discretion to admit additional evidence should be exercised only in the interests of justice. 28 Dom. L.R. 1391 (P.C.). As to the principle applicable to reception of additional evidence by appellate Court, see 132 I.C. 259=1931 O. 298; 138 I.C. 513=1932 O. 227. An appellate Court has power to issue a commission for local investigation. In such a case, the Court is not bound to record its reasons. 135 I.C. 243=1932 A. 270, to refer to arbitration with the consent of parties matters in dispute in an appeal. 3 M. 78; 18 C. 507, 12 C. 173. has power under Ss. 107 and 151 to add a new party in an appeal. 3 P.L.J. 409=46 I.C. 398=1918 P. 276, has power under Ss. 107 and 152 to correct clerical or arithmetical mistake apparent on the face of the record. 26 A.L.J. 1323=1928 A. 458. Power of appellate Court to allow withdrawal of suit—Proper procedure. See. 39 C.W.N. 586. Amendment of plaint in second appeal—Power of Court. See 1935 R. 88. Although an appeal directed against a dead man is not appeal, if the name of such dead man appears on the petition of appeal instead of his legal representatives, through a *bona fide* error, the petition of appeal can be allowed to be amended under the provisions of O. I, R. 10 read with Ss. 107 and 153. 123 I.C. 824=1930 A. 131. Non-joinder of absolutely necessary parties cannot be condoned in appeal. 87 I.

- (a) to determine a case finally;
- (b) to remand a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

Procedure in appeals 108 [Ss. 587, 590.] The provisions of this Part from appellate decrees and orders relating to appeals from original decrees shall, so far as may be, apply to appeals—

- (a) from appellate decrees, and
- (b) from orders made under this Code or under any special or local law in which a different procedure is not provided.

Appeals to the King in Council.

109 [S. 535] Subject to such rules as may, from time to time, be

Notes.

C 904=1925 O 606 To add necessary party on appeal and remand the case. 18 C.W.N. 259=21 I.C. 928=26 M.L.J. 86 (P.C.) affirming 35 C. 618 Where parties are transposed in appeal, no question of limitation arises 52 M.L.J. 33 Has an inherent power to remand even cases not coming within O. 41, R. 23. 37 M.L.J. 536 (44 C. 929, 36 M. 492, Rel.) See also 43 I. 938, 33 I.C. 570=18 Bom. L.R. 27 The High Court has inherent power to remand when the provisions of S. 107 do not apply I.L.R. 1936 N. 188=1936 N. 140 Can pass an order of remand by consent of parties in excess of its powers under the Code 22 I.C. 41=1914 M.W.N. 90 The powers of the High Court as to remand are not restricted by the provisions of O. 41, R. 23 and 25 and the High Court can always make an order of remand if the exigencies of the case require it. 43 C. 1001 See also 36 I.C. 813 Where the pleadings and issues were clear, and the plaintiff did not produce evidence, the case should not be remanded to the trial Court in order that the suit might be reheard 155 I.C. 10=1935 R. 19 No appeal lies against an order returning memorandum of appeal for presentation to proper Court. Revision however is competent 56 I.C. 805=2 Lah. L.J. 366 The appellate Court can return a plaint presented in a Court of a grade lower than that competent to try it for the presentation to the proper Court 25 A. 174 (F.B.). An appellate Court has the power to return the plaint itself for presentation to the proper Court An order of remand for that purpose is mere surplusage. 149 I.C. 1050=6 P.L.R. 99=1934 L. 233. Even where an appeal from the final decree lies interlocutory orders may be dealt with under the Court's powers of superintendence and revision to avoid irreparable injury to the parties 5 Pat. L.J. 550=1 Pat. L.T. 668 Appellate Court can entertain application to have *ex parte* decree set aside, where the applicant is a party to appeal from the whole decree 42 I.C. 972=7 L.W. 10 The appellate Court can pass an order which the Court of first instance might have passed 39 M. 907=30 M.L.J. 523. Can award costs against

the estate of a deceased plaintiff. 8 C. 440; 42 I.C. 451 Pleas raised but not proved—Inconsistent pleas raised—Best available evidence suppressed—Appellate Court can reverse a finding 57 M.L.J. 565 (P.C.) Suit by B for alternative reliefs against C and D—Suit decreed against D and dismissed against C—Appeal by D—No appeal or cross-objections by B—Application by B to add C as co-respondent in second appeal—Permissibility. 1933 M. 806=65 M.L.J. 548 Suit to enforce agreement for sale—*Ex parte* decree—Decree set aside as against some defendants and suit tried as against others—Agreement found not genuine and suit dismissed—*Ex parte* decree against other defendants, if can be set aside—Powers of appellate Court 145 I.C. 283=1933 M. 529=65 M.L.J. 15.

Sec 107 (2)—Where no cross-objections have been filed by respondent, the appellant has an absolute right to withdraw his appeal unconditionally at any time before judgment, his only liability being to pay costs. 1931 A. L.J. 232=132 I.C. 194

Sec 108—The words "so far as may be" should be taken to mean so far as is consistent with the principles on which second appeals are admitted and determined 7 M. 52. 53, 57 B. 206=144 I.C. 448=35 Bom. L.R. 127=1933 B. 205 See also 9 A. 147, 152 (F.B.) There would be no appeal against an order recording compromise by consent of parties 35 Bom. L.R. 127 This section must be read with Art. 175, Cl. (c) of the Limitation Act 34 C. at p. 1023 In second appeal the High Court can bring on record persons who had been originally joined in the suit, but who were not joined in the lower appellate Court 19 M. 151 See also 28 M. 498 The Code does not require the appellant in second appeal to file a copy of the decree of the Court of first instance. 4 M. 419 (F.B.) An appellate Court can pass an interim order of injunction pending an appeal against the order of the lower Court refusing it. 14 M.L.J. 491 As to allowing amendment of plaint in second appeal 1935 R. 88

Sec. 109: SCOPE AND APPLICATION OF

When appeals lie to King made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

Notes.

SECTION—Leave to appeal can be granted only when the decree appealed against is a final decree, 13 M. 349. Where the conditions prescribed by the section are satisfied, it is the duty of the High Court to grant leave to appeal. The chances of success of the appellant in the proposed appeal are not material 139 I.C. 54=35 L.W. 206=1932 M. 46. [See also Notes under Letters Patent, Cl. (15).] It does not mean the same thing as "final order" referred to S. 109 (a). 49 C. 967. (48 I.A. 31, 23 A. 227, 21 C.L.J. 281, Ref.) As to the meaning of the words "final order" see 1933 P.C. 58=64 M.L.J. 307 (P.C.). The word "order" referred to in S. 109 (c) is intended to be not merely a final order but it is wide enough to include an interlocutory order. 49 C. 967. S. 109 should be read subject to the special jurisdiction conferred by S. 12 of the Oudh Courts Act 134 I.C. 1017=8 O.W.N. 1207. There is a vast difference between an order made or a judgment passed on the appellate side of a Court and the final order passed on appeal. The latter may be included in the former but the former is necessarily not the same as the latter. 15 Pat 659=164 I.C. 287=17 P.L.T. 760=1936 P. 465. An order made in revision under S. 115, is not an order made on appeal though it might have been made on the appellate side of the Court and hence High Court has no jurisdiction to give leave to appeal to His Majesty in Privy Council under S. 109 (a) (*Ibid*). As a general rule, leave ought not to be given in the case of interlocutory orders. 2 A. 65, 23 A. 220 (P.C.), 25 A. 629. See also 144 I.C. 916=35 Bom.L.R. 458=1933 B. 260, 130 I.C. 102, 8 B. 548, 6 B. 260. The words "any decree or order" in S. 109 (c) do not mean any decree or order other than the decree or final order passed on appeal by High Court or by any other Court of final appellate jurisdiction. 54 I.C. 828=6 O.L.J. 664. How far decision in scheme suit is appealable to Privy Council, see 1925 P.C. 155=87 I.C. 313=49 M.L.J. 25 (P.C.) Appeal where High Court on appeal reverses the decision of the Court below, see 49 C. 560=43 M.L.J. 41=49 I.A. 108 (P.C.) Leave to appeal will not be granted upon a mere question of practice, e.g., an order for inspection 9 Bom.H.C.R. 398. The fact that appeal lies under the Letters Patent does not preclude an appeal to the Privy Council. 7 B.L.R. 730. Consent decree is not appealable to His Majesty in Council. 5 Pat L.J. 383. The certificate cannot be refused on the ground that no appeal lies against a judgment pronounced in accordance with an award and a decree following it. Sch II, para. 21 (2) of the Code does not affect appeals to the Privy Council. 15 I.C. 2=15 O.C. 55. No appeal lies to the Privy Council against an order of the Calcutta High Court

dismissing a Munsif under Cl. (2) of S. 26 of Bengal Regulation V of 1831. 13 M.I.A. 343, also against an order cancelling a notification under which a person is admitted as a vakil. 6 A. 163. In ordinary circumstances, an appeal which *prima facie* falls under S. 109 (a) cannot be converted into one under S. 109 (c), merely because it fails to reach the money value required by S. 110. It may be that in special cases the High Court may be able to certify under O. 45, R. 3, appeals from its own final decision which are of value less than Rs. 10,000, but such exceptional procedure can only be justified by exceptional circumstances. 10 O.W.N. 953=1933 O. 394 (2).

"DECISION."—The word "decision" in S. 109 (a) means merely the decision of the suit by the Court and not judgment. Hence in order to affirm the decision of the Court below within the meaning of S. 109 (a) it is sufficient for the appellate Court to affirm the decree. It need not also affirm the grounds of fact upon which the judgment was passed [25 A. 109 (P.C.), Foll.] 14 L. 609=144 I.C. 18=34 P.L.R. 946=1933 L. 690.

"FINAL ORDER"—WHEAT IS.—Final order—Suit dismissed on preliminary point—Order of remand is final order 62 I.C. 776=25 C.W.N. 896. See also 1933 L. 82. An order is final only if it finally dispossess of the rights of the parties and as an order refusing a stay would not finally dispose of those rights, but leave them to be determined by the Court in the ordinary way, it was not final. 47 I.A. 124=24 C.W.N. 721=39 M.L.J. 27 (P.C.) Order rejecting application to sue as pauper is not final. 88 I.C. 575=1925 O. 548, 6 P. 67=100 I.C. 886=1927 P. 175, 123 I.C. 231. Order refusing to record compromise is not final 29 C.W.N. 832=89 I.C. 94=1925 C. 857. Order of High Court dismissing petition for adjudication of debtor is final order. 12 R. 355=1934 R. 292. An order refusing to admit an appeal and an order dismissing an application for review of that order are both final orders within the meaning of S. 109 (a) 1936 R.D. 120. As to order dismissing application for restoration of appeal dismissed for default, see 145 I.C. 534=1933 A.L.J. 255=1933 A. 453. As to order dismissing appeal as having abated, see 14 L. 609=144 I.C. 18=34 P.L.R. 946=1934 L. 690. A final order means an order which finally decides any matter directly at issue in the case in respect of the rights of the parties 10 I.C. 439=13 C.L.J. 507; 13 C.L.J. 90=15 C.W.N. 848; 132 I.C. 211=1931 L. 556. It is used in its ordinary sense and therefore means an order which puts an end to the litigation between the parties, or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancillary matters for decision. 24 Bom.L.R. 925=47 B. 106. See also 1 A.L.J. 26, 28 I.C.

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction;

Notes.

569=21 C.L.J. 281. An order is "final" if it determines the rights of the parties, and "interlocutory" if it relates to a matter of procedure only. 1931 N. 24=130 I.C. 102=27 N.L.R. 172. (Case-law discussed.) The decision of the High Court on the point of limitation remanding the suit for decision on the other essential or cardinal points in the case is not a final order but an interlocutory order against which no appeal lies under S. 109 (c). 144 I.C. 916=35 Bom L.R. 458=1933 B. 260. Dismissal of appeal from judgment of single Judge on the Original Side is barred by limitation, if final order. 1927 R. 20. See also 35 Bom L.R. 458.

ORDERS WHICH ARE NOT FINAL—NO APPEAL LIES.—Order granting review is not final order disposing of the case. 54 A. 401=140 I.C. 110=1932 A.L.J. 235=1932 A. 318. An order by the High Court refusing the stay of execution under O. 41, R. 15 is not a final order passed on appeal. 10 I.C. 444=13 C.L.J. 681. So also order refusing to appoint a receiver. 12 P. 723=144 I.C. 457=14 Pat. L.T. 302=1933 P. 293. Order excusing delay in filing appeal under S. 5, Limitation Act, is not a final order. 90 I.C. 723. Order refusing to stay proceedings under S. 9 of the Arbitration Act is not appealable. 47 I.A. 124=24 C.W.N. 721=39 M.L.J. 27 (P.C.). There is no appeal from a non-existent suit. See 89 I.C. 185=1925 P.C. 174. An order remanding a suit to the original Court for disposal on the merits is not a decree or final order." 42 L.W. 568=1935 M.W.N. 796=69 M.L.J. 497. Nor an order of the High Court remanding an execution proceeding for reconsideration. 38 P.L.R. 112. Nor an order of an appellate Court under O. 41, R. 25 remitting an issue to the trial Court whether a certain party rebutted the presumption as to the applicability of a family custom. 160 I.C. 811=1936 O.W.N. 218=1936 O. 205. The High Court in an appeal decided that a document which was not admitted in evidence by the lower Court was admissible and provable, but did not determine the legal effect of the document. The case was remanded to the trial Court directing the document to be admitted in evidence and leaving the lower Court unfettered discretion. *Held*, that the order was not in any sense a "final order." 154 I.C. 942=1935 L. 458. An order of remand made by the High Court which decided only one issue out of several raised in the first Court is not a "final order." 14 A.L.J. 50=38 A. 150. See also 60 I.C. 522=2 L. 106, 46 I.C. 922; 132 I.C. 211=1931 L. 556, 37 C.W.N. 405=1933 P.C. 58=64 M.L.J. 307 (P.C.), 10 R. 335=140 I.C. 420=1932 R. 137; 10 R. 449=1932 R. 189. It is final if it decides a cardinal point in the suit. 1 A.L.J. 26, 1925 R. 147. See also 27 N.L.R. 172=130 I.C. 102=1931 N. 24 (Case-law discussed). 10 R. 499=1932 R. 189; 10 R. 335=140 I.C. 420=1932 R. 137; 23 A.L.J. 12=47 A. 335. An order of remand can be appealed

against His Majesty in Council provided the order decides a cardinal point in the case. 3 Pat L.J. 339. See also 33 A. 391=9 I.C. 932=8 A.L.J. 192 (10 M.I.A. 340; 8 B. 548; 17 A. 112; 23 A. 220, *Cons.*); 48 I.C. 132=1918 M.W.N. 844; 33 I.C. 756, 43 I.C. 290=19 O.C. 36; 38 M. 509=26 M.L.J. 96. The order of remand is not a decree, and an appeal would lie only if it amounts to a final order. The main test as to the finality of the order of remand is whether it finally decides the rights of the parties, and the decision can never be challenged again. In order to have finality it is not sufficient that a question of jurisdiction of the Court to entertain the suit has been decided. The finality must be a finality in relation to the suit itself, and if the suit is still a live suit in which the rights of the parties have still to be determined, there is yet no final order. An order of remand under which an order of Revenue Court returning the plaint for presentation to the Civil Court is set aside does not dispose of the rights of the parties, and therefore is not final. 56 A. 277=147 I.C. 376=1934 A.L.J. 219=1934 A. 58. See also 145 I.C. 131=1933 L. 82 (Order of remand in insolvency proceedings). An order of remand to original Court for trial on the merits though it decides an important and a vital issue in the case does not finally dispose of the rights of the parties, on the contrary, it leaves the suit alive and provides for its trial on the merits in the ordinary way. It is not therefore a final order and is not appealable (Test of finality laid down). 60 I.A. 76=11 R. 58=65 M.L.J. 307 (P.C.). Scheme suit under S. 92—Trial Court finding temple to be private and dismissing suit—High Court on appeal finding temple to be public and remanding suit—High Court's order is not final adjudication. 116 I.C. 300=1929 M. 308. An order of the High Court remanding a case for trial with the direction that a person should be sued as a residuary legatee is not a decree or order within the Code. 46 I.C. 681=22 C.W.N. 640. Nor an order setting aside a compromise decree for certain technical defects and directing the Judge to re-hear the application for recording the compromise. 6 P. 282=1927 P. 363. Nor an order of the High Court deciding that a certain person should be allowed to sue as a pauper. 8 C.W.N. 296. An order refusing leave to appeal *in forma pauperis* is not a final order and so not appealable to Privy Council. 10 R. 504=1932 R. 192. Also an order refusing to admit an appeal presented after the prescribed period. 9 Bom L.R. 566. An order of the High Court directing execution to proceed is not a final order. 1 C.L.R. 354; 4 Pat L.J. 461. No appeal lies against an order appointing or refusing the appointment of a Receiver. 22 C. 928, 10 I.C. 439=13 C.L.J. 507; 6 Pat L.T. 119=1925 P. 173. An order refusing to extend time for deposit of Court-fees in an appeal is not a final order under S. 109, C.P. Code and

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and

Notes.

hence not appealable. 50 I. C. 79=17 A. L. J. 443. A High Court's order refusing to entertain an application for restoring an appeal which was dismissed for default, is not appealable to His Majesty in Council. 37 I. C. 832. No appeal lies from an order dismissing an appeal in default of the appellant's compliance with the rules of the Court as to the composition of the paper book in the case. 2 Pat. L. T. 112=5 Pat. L. J. 719. Where a decree has been made directing accounts to be taken, leave to appeal must be given. 15 B. 155 (P. C.). Temporary injunction—Refusal to issue, not final order. 28 I. C. 569=21 C. L. J. 281. An order rejecting an application for review is not an order appealable under S. 109 (a). 22 I. C. 259=16 O. C. 264. An order which only determines the competency of an incorporated body as a judicial person to apply for probate but does not determine whether it would be entitled to a grant of it if it applies is not final. 60 I. C. 208=23 O. C. 34. Probate proceedings, appeal in. See 1925 P. 712. Order under S. 8 of the Presidency Towns Insolvency Act, if appealable to Privy Council. See 22 L. W. 362=1925 M. 243. Where in pursuance of the direction of the Privy Council the High Court asked the Commissioner to take accounts and passed a decree in accordance with his report, the decree is not one passed in any proceeding taken by the parties in order to review or modify the decision of an inferior court. No appeal lies to Privy Council from such a decree. 55 B. 785=33 Bom. L. R. 1476.

CASES WHERE APPEAL LIES—FINAL ORDER—Order of High Court in revision reversing order, granting leave to sue *in forma pauperis* is a final order—Appeal to Privy Council lies. 13 C. L. J. 688=15 C. W. N. 879. "Final order passed on appeal" may include an order directing dismissal of appeal on appellant's failure to furnish security for costs. 54 A. 390=140 I. C. 125=1932 A. 312=1932 A. L. J. 254. An order passed on appeal by a High Court, determining a question mentioned in S. 47, is a final decree. 3 A. 633 (F. B.). A decision on a question relating to execution, discharge or satisfaction of a decree is a decree provided the judgment conclusively determines the rights of the parties. 3 P. L. J. 339. Order of High Court allowing appeal from order refusing to set aside *ex parte* decree and ordering *de novo* trial is final and is appealable to High Court. 1932 A. L. J. 338. An order of the High Court on appeal setting aside or refusing to set aside a sale in execution is a final order and is appealable to the Privy Council. 40 C. 635=40 I. A. 140=25 M. L. J. 140 (P. C.). Order for a personal decree in mortgage suit is final order—Appeal to Privy Council lies. 21 A. L. J. 686=45 A. 741. Final decree or order—Decision that suit is not barred by *res judicata*. 54 I. C. 504=18 A. L. J. 83. Order passed by the High Court upon an appeal made to it under S. 86 of the

Prob. and Adm. Act, if final. 12 Bur. L. T. 87=51 I. C. 596 (40 C. 21, Rel.). An order which deprives a party of the benefit of a final decree and directs the suits against him to be tried again is a final order and an appeal lies to the Privy Council. 28 I. C. 567=21 C. L. J. 279. An order of the High Court setting aside an order of the Subordinate Court dismissing a partition suit for default after preliminary decree has been passed is a final order. 2 Pat. L. T. 155=60 I. C. 479=6 Pat. L. J. 116.

CERTIFICATE AS TO FITNESS—"FIT CASE."—Interlocutory orders are within the ambit of cl. (c). 31 C. W. N. 540=103 I. C. 561=1927 C. 481. Where substantial rights are in no way affected by an order, there is *prima facie* no reason for granting a certificate that the case is a fit one for appeal to His Majesty in Council. 42 L. W. 568=69 M. L. J. 497. A certificate granted under S. 109 (c) must show on its face that the discretion conferred by that section has in fact been exercised. 44 M. 243=48 I. A. 31=40 M. L. J. 229 (P. C.). See also 64 I. C. 959=23 Bom. L. R. 1132. The special power of certifying a case to be a fit one for appeal has been conferred on the High Court to meet particularly hard cases and that on such a special certificate having been given the appeal to His Majesty in Council becomes competent. 147 I. C. 1067=1934 A. L. J. 1166=1934 A. 198. S. 109 (c) is intended to meet special cases such for example as those in which the point in dispute is not measurable by money though it may be of great public or private importance. 144 I. C. 916=35 Bom. L. R. 458=1933 B. 260, 35 P. L. R. 546=152 I. C. 684=1934 Lah. 515, 42 L. W. 568=69 M. L. J. 497; 44 M. 293 (P. C.). In deciding whether a certificate of fitness should be granted it is not enough to find that the order sought to be appealed against involves a substantial question of law. The tests usually applied to determine fitness are whether the point involved is of great public or private importance, and whether that litigation is not made oppressively expensive and the elucidation of the real issues in the case by a trial of the suit is not unduly postponed or delayed. 1934 P. 564. See also 56 A. 277=1934 A. L. J. 219=147 I. C. 376=1934 A. 68, 15 P. 659=17 Pat. L. T. 760=1936 Pat. 465=157 I. C. 614=1935 A. L. J. 233=1935 A. 454. In a suit to amend a scheme for the management of the Nursapuri mosque only item in the amended scheme which was the subject of dispute was the meaning of the term "Nursapuri" as used therein. It was held that the dispute involves the determination of the rights of a large body of persons in connection with the management of the mosque and deeply affects the religious sentiments, rights and privileges of a large body of Mahomedans and in the circumstances, the question that falls for determination in the litigation brings it within S. 109 (c), C. P. Code, and therefore a certificate granting leave to appeal to His Majesty in Council ought to be granted. 13

(c) from any decree or order, when the case as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

Notes.

R. 123=1935 R. 113 The question whether the words '*any accession is made to the mortgaged property*' in S 70, T. P. Act, mean any accession made to the mortgaged property by the mortgagor or his representatives in title or any accession to the mortgaged property by whomsoever made, is a question of great public importance having regard to the existing law in India and the large number of cases which must be affected by it. 14 R 86=1936 R 65 Every question of law is not a substantial question of law. When the question has been well settled it is not a substantial question of importance fit to be taken on appeal to His Majesty in Council. 42 L.W. 568=69 M.L.J. 497. Discretion to be used in granting certificate is a judicial discretion. 10 I.C. 439=14 C.L.J. 507. Mere questions of law are not sufficient. 21 I.C. 783=15 Bom. L. R. 1021. Even if they be of some difficulty, see 132 I. C. 290=1931 M. 642. There must be questions of public or private importance or precedents covering numerous other cases. 21 I. C. 783, 31 C.W.N. 540=103 I. C. 561=1927 C. 481, 45 M.L.J. 514=1924 M. 231; 21 I. C. 738, 43 M.L.J. 728, 1923 M. 125; 23 I. C. 739; 24 I.C. 620, 61 I. C. 131. See also 1 Pat.L.T. 239=56 I. C. 615; 6 Pat. L. J. 125; 1934 A.L.J. 1166=147 I. C. 1067=1934 A. 198. Conditions for grant of certificate. 40 I.C. 680=33 M.L.J. 481. For case of order of remand, see 71 I. C. 339=10 O.L.J. 289. When leave was granted to defendants to appeal to P.C., it would be proper to grant leave to plaintiff also to appeal against an adverse finding involving a question of law. 62 C. 992. Where two Judges have arrived at diametrically opposite conclusions on vital points leave can be granted. 54 I.C. 828=6 O.L.J. 664. The fact that different High Courts in India have held divergent views in respect of matters similar to those before the Court is in itself no reason for certifying the case as one fit for appeal. 1936 P. 194. Valuation of suit above Rs. 10,000—Appeal valued at less than Rs. 10,000—Leave—Question of law. 54 I.C. 450. Where two appeals arising out of the same suit were disposed of by the High Court by one judgment proceeding on one ground common to all the appellants, and the valuation of one of the appeals was above Rs. 10,000 while that of the other was less than Rs. 10,000. *Held*, that as the point involved in both the appeals was a common one, a certificate of fitness can be granted in the latter case under S. 109 (c). 1936 A. W.R. 883=1936 A.L.J. 1025=1936 A. 832. In ordinary circumstances an appeal which *prima facie* falls under S. 109 (a) cannot be converted into one under S. 109 (c) of the Code merely because it fails to reach the money value required by S. 110. 6 O.W.N. 211=1929 O. 243.

LEGAL PRACTITIONERS.—Order of High Court refusing to enrol a *legal practitioner* is

one under its disciplinary jurisdiction and administrative powers and is not a fit case for appeal to Privy Council. 1 P. 590. But see also 1932 A.L.J. 861 (where an advocate has been ordered to be suspended from practice, High Court can grant leave to appeal to Privy Council). In the case of an advocate the High Court found that not only was the filing of fee certificate contrary to the rules framed by the High Court but that he acted in bad faith in filing it. The point raised was that there was some contradiction in the two subsections of the rule at the time when the advocate had got his form of certificate printed, which contradictions had been lately removed by amendment, that there was latitude allowed to him inasmuch as it was provided that the certificate shall be so far as it is possible in the form prescribed and that in filing a certificate he had made it clear in it that he had not received the amount in cash but had accepted a promissory note in lieu of the fee. *Held*, that this was a case which should be certified as a fit one for appeal to the Privy Council under S. 109 (c), C. P. Code, or at any rate under Cl. 30 Letters Patent. 4 A.W.R. 1129=1934 A. 898. In an application by a pleader for leave to appeal to the Privy Council from an order suspending him from practice for being punished for contempt of Court committed personally, *held* that the Allahabad High Court can grant leave either under S. 109 (c), C. P. Code, or S. 30, Letters Patent. 55 A. 246=145 I. C. 853=1933 A.L.J. 273=1933 A. 225. It is the practice of the Allahabad High Court to treat orders striking off names of pleaders from the roll of the pleaders as falling under S. 109 (c), C. P. Code. But leave under S. 109 (c) cannot be granted as a matter of course and the applicant has to satisfy the High Court that the case is otherwise a fit one for appeal to His Majesty in Council. Where some points of law are raised in the case a certificate can be granted under S. 109 (c). 1936 A.L.J. 1272=1937 A. 167. The High Court has got power, under S. 109 (c), C. P. Code, or under Cl. 30, Letters Patent, to grant leave to appeal to Privy Council against an order passed by a Bench, suspending an advocate from practice, under cl. 8 of the Letters Patent and the Bar Councils Act, 1926. 150 I. C. 699=1934 A.L.J. 722. Question of construction of agreement may be a fit case. 45 M.L.J. 514=1924 M. 231. Fit case—Certificate conclusive. See 45 M. 475=43 M.L.J. 323=1922 P. C. 257 (P. C.).

"ON APPEAL"—MEANING.—Order refusing to admit appeal as time barred is order "on appeal". 42 I. C. 893=131 P.L.R. 1917; 62 I. C. 216=33 C.L.J. 128 (Order refusing an application under S. 5, Limitation Act).

'SUBSTANTIAL QUESTION' OF LAW.—A substantial question of law is one on which there may be a difference of opinion. The expression does not mean 'important' ques-

110. [S. 596.] In each of the cases mentioned in clauses (a) and (b)

Value of subject-matter S. 109, the amount or value of the subject-matter the suit in the Court of first instance must be

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tion of law Where what is complained of is the application of the law to the facts of the case the requirements of S. 110 are not complied with. 132 I.C. 2. Where the principles of law on a particular point are well settled and the only question is the application of these legal principles to a particular set of facts, it cannot be said that a substantial question of law arises within the meaning of S. 110. 134 I.C. 790=1931 L. 753 (2) (50 A. 208, Ref.) See also 14 L. 609=144 I. C. 18=34 P.L.R. 946=1933 L. 690 As to what are substantial questions of law rendering a case fit for appeal to Privy Council, see 44 M.L.J. 217=1923 M. 232, 1927 O. 43 See also 1933 M. 22, 38 A. 188=33 I.C. 345=14 A. L.J. 143 (Position of holder of succession certificate), 40 C. 685=17 C.W.N. 752, 138 I. C. 630=9 O.W.N. 103=1932 O. 134 (Question whether the use of certain words in Urdu by the husband must be held to effect a divorce under the Mahomedan Law in spite of the admitted fact that there was no intention to divorce on the part of the husband, is a *proposition of law*, but not a *substantial* question of law) 1933 M. 221 (Construction of deed), 32 P.L.R. 860. (Question as to evidence not raised before the appellate Court cannot be the basis for grant of leave to appeal to Privy Council). (Competency of District Judge to dismiss insolvency application); 44 M.L.J. 424=1923 M. 602 (Different suits involving substantial same question); 17 L.W. 445=72 I.C. 918=1923 M. 443 (Question of land tenure and forfeiture on alienation) See also 45 M. 394, 26 A.L.J. 336=108 I.C. 238=1928 A. 220; 43 M.L.J. 728=69 I.C. 385=1923 M. 125, 138 I.C. 670=1932 A.L.J. 730 (Question whether certain proceedings are in the nature of arbitration or compromise). Substantial question of law must be such that it may result in a precedent governing numerous other cases or decide a case of great public or private importance See also 54 A. 431=140 I.C. 418 (Misconstruction of award and reference to arbitration) See also 54 A. 459. The question whether O. 1, R. 3, C.P. Code, can be so interpreted as to permit of joinder of causes of action not permitted under O. 2, R. 3, though one of law is not a substantial question of law, or a question of great public importance. So also the question of, applying the law, O. 1, R. 3, to the facts of a particular case is not a substantial question of law of any importance. The questions relate only to such formal matters as the joinder of parties and causes of action 46 L.W. 568=69 M.L.J. 497. High Courts in granting permission may impose conditions as to payment of costs See 44 M.L.J. 217, *supra*. High Court in granting leave must also consider whether the subject-matter is above or below appealable value. See 2 L.W. 992=31 I.C. 46. The question whether fraud of the mortgagor would

vitate registration and disentitle the mortgagee to enforce his mortgage was a substantial question of law and fit for appeal to Privy Council. 18 A.L.J. 137

PROCEDURE—Where there are separate appeals, and a joint application for leave to appeal in both cases is filed, *held*, (1) the joint application is not sustainable, (2) that is not open to the party to file another application out of time, and (3) that he can, however, amend the application by confining the prayer for certificate for leave to appeal to one of the cases. 140 I.C. 70=33 P.L.R. =1932 L. 441. The applicant is not entitled as of right to appeal from an order passed on the revisional side of the High Court. 147 I.C. 1067=1934 A.L.J. 1166=1934 A. 1. Advisability of the legislature conferring power upon the High Court to impose a condition in a fit case requiring the appellant to bear the costs of the appeal, at the time of granting leave to appeal to the Privy Council (at any rate in cases falling under S. 66-A (2), Income-tax Act) suggested. 163 I.C. 275=1936 S. 68. As to the correct frame of application for leave to appeal filed by one of the contributories of the wound company, against the order of compulsory winding up, see 165 I.C. 568=1936 L. (F.B.)

Sec 110: SCOPE OF SECTION—The Madras Civil Courts Act (III of 1873) does not control the construction of this section 15, 237 (F.B.) See also 42 I.C. 966=1917 P. (Effect of N.W.F.P. and Assam Civil Courts Act, S. 21) Ss 5 and 12 of the Limitation Act do not apply to applications under this section 28 A. 391. The assent of the respondent to the issue of a certificate cannot give effect to it in the absence of the conditions required to give the right of appeal. 23 227 (P.C.) See 32 C. 963

"DECREE OR FINAL ORDER MUST INVOLVE" These words refer to suits in existence and not to suits in *gremio futuro*. 24 A. 236 (23)

CONCURRENT FINDINGS OF FACT—No appeal lies to the Privy Council when there are concurrent findings upon questions of fact and when upon such findings no question of law arises. 27 I.A. 166=28 C. 1 (P.C.), 25 B. =10 M.L.J. 300 (P.C.); 28 I.A. 11=23 A. 2 (P.C.) See also 1927 M. 443=53 M.L.J. 37, 25 A.L.J. 970, 1931 P.C. 68=61 M.L.J. 4 (P.C.). It cannot be said that whenever the appellate Court varies the decision of the lower Court on any point then *ipso facto* S. 110 comes into operation irrespective of the nature of the intended appeal. Where the findings are concurrent there must be a substantial question of law to support an application for leave to appeal to Privy Council. 119 I.C. 771=31 Bom. L.R. 619=1929 B. 359

AFFIRMS THE DECISION—The word "decision" means merely the decision of the suit by the Court. In order to "affirm" it

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R. 500 Also an order deciding whether the whole decree amount has become payable in an instalment decree by reason of default in one instalment 1929 L 390.

MISCELLANEOUS—An order directing execution to issue against a judgment-debtor is one under S 47, determining the rights and liabilities of parties with reference to the relief granted 19 C L.J. 581=26 I. C. 866=19 C.W.N 1008. An order refusing to discharge a receiver appointed in an execution proceeding is within S 47. 3 P.L.J 513=46 I.C. 655 Also an order allowing execution of a decree alleged by the defendant to be declaratory in nature. 37 M 29=21 M L.J. 1063. An order requiring a Receiver to deposit in Court money part of which was collected by him as a party to the suit (the party being appointed as Receiver) and prior to his appointment as Receiver, is in substance and effect an order directing a party to make a payment and is one in execution That part of it is appealable under S 47, C. P. Code. It does not fall under O 40, R 3 (c) 156 I.C 886=41 L.W. 763=1935 M. 464=68 M.L.J 628. Though no appeal lies against an order passed wholly and simply under S. 73, an order which decides a matter covered by S. 47 (1) may although it be passed ostensibly under S 73 be the subject of appeal. 16 L 990=156 I.C 845=1935 L 302. Decision of executing Court on application under O 34, R 5, C. P. Code is appealable. 38 P.L.R 259=164 I C 53=1936 L 562 An order directing an applicant to file another execution petition while refusing to execute the decree as asked for is appealable 160 I.C. 812=1936 Pesh 46 An agent of decree-holder competent to execute decree is also competent to file appeal against order refusing to allow execution. 164 I C 463=1936 L 508

APPEAL ORDERS NOT APPEALABLE UNDER THIS SECTION—An order disallowing the objection of a judgment-debtor that a fresh attachment is necessary is not appealable 34 A 530 An order in execution of a mortgage decree that there ought to be rateable reduction in the decretal amount is only an interlocutory order, as the Court has still to determine the market value and rateable liability of each item 1930 A. 638. Order directing restitution following on setting aside of sale is not appealable—If appeal wrongly entertained—Second appeal lies. 1930 P. 280. See also 35 C.W.N 105=1931 C 779 (2). Order overruling Collector's objections to alienability of land and directing him to proceed with the execution sale of the properties is not appealable being merely a direction by the Court to its ministerial officer 1929 L. 391. An order relating solely to jurisdiction does not determine any question relating to the execution, discharge or satisfaction of a decree. 52 I.C. 461=4 P. L.J. 461. No appeal lies against an order dismissing "as informal" a decree-holder's

application to set aside dismissal of a prior execution application 1928 L. 811 (2). Nor against order allowing amendment of execution petition. 44 L.W. 99=164 I.C. 217=1936 M 623=71 M.L.J. 256. No appeal lies from an order staying execution. 100 I C 23=9 L.L.J 193, 9 R 35=1936 O. W.N. 664=164 I C. 424=1936 O 369 See also 80 I C 39=1924 A 794 (Order as to costs in granting stay). No appeal lies against an order refusing to stay execution. 100 I.C 76 (2)=1927 L. 235, nor against an order rejecting security. 102 I.C. 621=1927 L 527. Also 9 L.L.J 189 No appeal lies from an order refusing execution of a decree on the ground that it has been attached. The order does not fall under S 47, C. P. Code 154 I C 678=1935 O W N 331=1935 O. 272. No appeal lies against an order directing respondent to draw out costs on furnishing security. 5 R. 534. Acceptance of sufficiency of surety by lower Court where order for furnishing security to the satisfaction of lower Court was made by High Court is not appealable. 59 M L. J 892 See also 32 P.L.R 806. An order settling sale proclamation is not appealable. 46 M.L.J 192, 27 M. 59=14 M L.J. 57 (F B); 1929 L. 815, 134 I C 833, 1934 C 761 So also an order fixing value of properties to be sold 99 I.C 455=1927 A 208, 6 O W N 1085, 56 M L J 224. Also an order under O. 21, R 99 on application by the decree-holder auction-purchaser. 1930 L 363 So also order refusing payment to decree-holder out of monies deposited under O 21, R 90, C P Code. 58 M 972=1935 M 842=69 M L J. 349 (F B) Also order deciding question of delivery of possession between judgment-debtor and decree-holder auction-purchaser is not appealable. 8 R. 162=126 I.C. 209=1930 R 61 But see 53 C 781 (F B.); 60 C 832=37 C.W.N. 671=1933 C. 680, 56 C L J 520=1933 C. 311 Order directing party to pay Receiver's remuneration is not appealable 1930 L 352 Also an order directing execution against a surety to a receiver ordered to pay up monies 59 I.C. 844=10 L B R. 236 An application by the Official Receiver of an insolvent's estate praying that certain property of the insolvent attached and brought to sale by a creditor should be released from attachment and that the sale should be stayed or that the sale proceeds should be deposited in Court pending determination of the question as to who is entitled to them, is really a claim or objection under O 21, R 58 and no appeal lies against an order dismissing such application 41 L W 28=1935 M 151=68 M L J 78 Where objection filed by a stranger was allowed, no appeal is competent as against the objector but the Court can treat the appeal as an application for revision and disposal of it. 145 I C. 730=1933 L 421 An order passed in execution by Civil Court remitting award made under co-operative Societies Act to arbitrator for rectifica-

dispute on appeal to His Majesty in Council must be the same sum or upwards,

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34 C.L.J. 299=66 I.C. 407=1922 C. 316. See also 16 L.W. 262=1923 M. 30; 51 C. 869=51 I.A. 319 (P.C.); 114 I.C. 320 (3) Appeal dismissed for want of proper court-fees 1 P.L.R. 1920=54 I.C. 400 (4) Modification of lower Court decree with consent of appellant or his vakil, see 66 I.C. 621=25 C.W.N. 775. (5) Appeal dismissed as time-barred 23 M. L.J. 219=16 I.C. 486 Partial variation of decree is not affirmance of judgment 31 I.C. 272=1916 M.W.N. 122; 10 L. 688 So also where cross-objections are allowed 1931 A.L.J. 968 A person in contempt cannot be heard in prosecution of his own appeal, until he purges his contempt, and his appeal, as it is not proper to keep the other party before the Court for an indefinite period, i.e., till he purges his contempt, can be dismissed A petition, therefore, for leave to appeal to Privy Council against such dismissal is not maintainable. 117 I.C. 724=1929 M. 672. Even in case of affirmance of judgments, if the subject-matter is over Rs. 10,000 and there is a substantial question of law, an appeal lies to Privy Council as of right. 30 I.C. 372; 9 I.C. 1040, (10 O.C. 65, Foll., 8 C.W.N. 294, 62 P.W.R. 1908, not foll.), 89 I.C. 941.

INTERLOCUTORY ORDERS—No question of appeal to Privy Council arises in cases of interlocutory orders of High Court 148 I.C. 54=1934 L. 26

"COURT IMMEDIATELY BELOW"—A single Judge of the High Court is a Court "immediately below" the Division Bench of the High Court under S. 110 32 P.L.R. 833

SUBSTANTIAL QUESTION OF LAW—As to the meaning of the words "substantial question of law," see 45 C.L.J. 458=103 I.C. 625=1927 C. 619; 17 C. 146; 18 C. 23, 18 I.C. 305, 36 I.C. 1; 1 Bur.L.J. 62=68 I.C. 690=1923 R. 71; 85 I.C. 8=1924 P. 271, 106 I.C. 531, 1933 M. 221 See also 148 I.C. 1202=11 O.W.N. 577=1934 O. 291 It is sufficient that there should be a substantial question of law not of general importance but as between the parties 14 L. 609=144 I.C. 18=34 P.L.R. 940=1933 L. 690 Per *Courtney-Terrell, C.J.*—In order that a point may be a substantial question of law within the meaning of S. 110 it should be such as to impress the High Court that it is debatable in view of the authorities or that the authorities themselves may require re-consideration The mere fact that the Judges out of deference to the arguments exhibited patience in the hearing and care in the judgment does not establish that a point is substantial Per *Mahomed Noor, J.*—A question of law does not become "substantial" simply because the Judges have stated and examined it in detail in order to show it has no substance. 146 I.C. 744=1933 P. 703 (S.B.). The existence of a point of law by itself does not give a right of appeal to the Privy Council under S. 110 There must be a substantial question of law The words "substantial question of law" do not mean a question of general importance

but a substantial question of law as between the parties in the case. The question must be one in respect of which there may be a difference of opinion 142 I.C. 711=1933 M. 221; 147 I.C. 121=10 O.W.N. 879. In dealing with an application for leave to appeal to the Privy Council it is not part of the duty of the Court to prejudge the case on the merits, but at the same time it is the duty of the Court to determine where a point of law arises for discussion on appeal to the Privy Council, whether there is any substance in the point. 106 I.C. 632 Mere question of law is not substantial question of law. 106 I.C. 362; 16 L.W. 262=1923 M. 30, 121 I.C. 506=31 P.L.R. 17 (Question of limitation well-settled); 1933 M. 221 (Construction of deed is substantial question of law). See also 25 A.L.J. 970, 40 I.C. 110, 73 I.C. 407 (Question as to the applicability of S. 47, Civ. P. Code, is not a substantial question of law), 26 P.W.N. 614 Question of law which is not doubtful or of general interest or without previous decisions of the Privy Council is not "substantial question of law". 85 I.C. 409=1925 O. 545. Where there is no doubt about legal principles, but only their application to particular facts of the case is questioned it cannot be said that there is substantial question of law 165 I.C. 735 (L.). Substantial question of law means as between the parties in the case and not a question of general importance 54 I.A. 126=102 I.C. 889=2 Luck. 95=1927 P.C. 110 (P.C.), 55 C. 944=32 C.W.N. 817=1928 P.C. 172, 128 I.C. 622=32 Bom.L.R. 1189=1930 B. 509 But see 53 B. 552=119 I.C. 782. Where no substantial question of law is involved leave to appeal should not be granted 16 A. 274 (P.C.) See also 28 C. 1 (P.C.), 25 B. 332 (P.C.); 23 A. 227 (P.C.) But also see 16 C. 287, 43 A. 513, 45 A. 667 The majority of cases between riparian owners give rise to questions of law 106 I.C. 538 To justify the grant of a certificate for leave to appeal to the Privy Council a substantial question of law must be involved in the case, i.e., question of law in respect of which there is a difference of opinion 43 A. 513=63 I.C. 837=19 A.L.J. 462 See also 45 A. 667=75 I.C. 100=1924 A. 66 Interpretation of Privy Council decision is a question of general importance justifying appeal 56 I.C. 526 See also 27 C.W.N. 204=1923 C. 451. Right of procession claimed by Mahomedans against Hindus is of general importance and fit case for appeal to Privy Council 1930 A. 121=122 I.C. 415 (2) Where the subject-matter is less than Rs. 10,000 in value and the sole question is one of evidence the point is not one of general importance and interest to justify the grant of a certificate 54 I.C. 463 The rejection of an application to receive additional evidence does not involve any substantial question of law. 21 C. 484 Misconstruction of a part of the evidence concerning facts is not a "substantial question of law" within the section 30 I.C. 372 So also sufficiency of evidence to prove

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value.

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custom. 90 I.C. 270, 83 I.C. 180=1924 L. 473 Nor is the question of binding nature of document by widow on estate and reversioners. 103 I.C. 654 The mere question of construction of any particular document is not a substantial question of law within the meaning of S 110 of C.P. Code. 25 A.L.J. 970. See also 1933 M. 221; 40 I.C. 110; 14 I.C. 269; 25 O.C. 349=73 I.C. 407=1922 O. 214, 30 I.C. 372 (Misconstruction of evidence). See also 145 I.C. 549=1933 A.L.J. 172=1933 A. 461 The interpretation of a document may amount to a substantial question of law, but that will depend on the circumstances of each particular document Where the language of a document is very simple, it does not involve any substantial question of law. 151 I.C. 307=11 O.W.N. 1055=1934 O. 433 (2); 83 I.C. 90=1925 O. 219 The construction of a difficult document such as an indemnity bond is a mixed question of law and fact and involves a substantial question of law so as to form a valid ground for leave to appeal to Privy Council. 103 I.C. 31=1927 M. 443=53 M.L.J. 375 High Court affirming judgment of lower Court—High Court ignoring rule regarding recitals in ancient documents—Case is fit for certification. 1929 M. 827 Construction of consent decree is not substantial question of law 126 I.C. 719=51 C.L.J. 270=1931 C. 174 High Court dismissing appeal on appellant's failure to furnish security—Leave not granted 36 A. 325=23 I.C. 532=12 A.L.J. 451. Whether a document was validly presented for registration is a substantial question of law. 18 I.C. 126. The question of rightful or wrongful exercise of its discretion by the High Court does not involve any substantial question of law 46 B. 249=24 Bom L.R. 196=1922 B. 11, 61 I.C. 131=8 O.L.J. 1. No appeal lies to the Privy Council, if the question of law which is the ground for appeal, has already been decided by the Privy Council. 30 I.C. 239=1929 A. 339 Question concluded by authority—Likelihood of other estates being affected—Question not one of general importance. 1929 M. 780=57 M.L.J. 477 Substantial question of law—Decisions of High Court bearing on point—Correctness of the same questioned—Whether amounts to question of law 7 R. 271=1929 R. 280. Where the point of law has been settled by a Full Bench so far as the Court in which leave for appeal is prayed, the fact that there is conflict between that Court and some other High Court does not render the case a fit one for appeal. 109 I.C. 167=1928 M. 488 Case relating to transaction common in the country. Law on the subject not clear, question if can be certified 28 Bom L.R. 1437=100 I.C. 143=1927 B. 19. Where a matter is clearly settled by statute, certificate should not be granted. 160 I.C. 171=1936 O.W.N. 191. Where the law as to constructive *res judicata* has been applied (and correctly applied) to a set of facts concurrently found

by two Courts in India, there is no such "substantial question of law" 157 I.C. 605=61 C.L.J. 69. Where the High Court in affirming a decision holds that under a clause in the memorandum of association, the directors of a company plainly had power to do a certain thing, and that such power was clear and manifest, and the whole case turns on the merits and is decided on the facts, it cannot be said that there is any substantial question of law involved on the appeal. 13 R. 774 Where, in the beginning, the plaintiff had made certain allegations which at a subsequent stage of the trial he changed and the High Court found that the new facts alleged by him were the correct facts, and having found them true, decreed the plaintiff's suit. *Held*, this was not a substantial question of law. 157 I.C. 1024=1935 L. 302=1935 L. 91 Question as to the nature of the estate acquired by a Hindu widow is not a substantial question of law. 1933 L. 1044. That a suit to set aside a decree obtained by fraud was brought by a person who was not a party to the suit in which that decree was passed is not a question of such public importance as to justify the issue of certificate under S 110 14 I.C. 626=5 Bur I.T. 13 No certificate can be granted to appeal to Privy Council when the Chief Court affirms the decision of the Court next below solely on facts as there was no substantial question of law and the case was not otherwise fit for appeal to Privy Council 35 I.C. 583=64 P. R. 1916 On this point, see also 41 I.C. 781=133 P.L.R. 1917; 63 I.C. 222; 11 I.C. 159=13 C.L.J. 501; 62 I.C. 205=33 C.L.J. 131; 26 C.W.N. 651=70 I.C. 933=1923 C. 215; 30 I.C. 372. See also 45 I.C. 182 (Question of limitation); 38 I.C. 141 See also 102 I.C. 433=4 O.W.N. 163. Question of intention of legatees attesting will is not substantial question of law 88 I.C. 579=1925 O. 541 In appeals to the Privy Council in partition suits, the question of valuation itself is one of sufficient importance for allowing leave to appeal. 155 I.C. 633=16 P.L.T. 279=1935 P. 266.

VALUATION.—The conjunction "and" between (a) and (b) cannot be read as "or" so that besides the value of the subject-matter of the suit the value of the property has to be considered both at the time of the institution of the suit and at the time of the decree of the High Court. The words "subject-matter" and property are not synonymous. The latter word is used with a view to indicate property not in suit or dispute, which may be directly or indirectly involved. 1929 N. 75; 53 M. 167=1930 P.C. 44 (P.C.), 54 A. 431=140 I.C. 418; 1932 A.L.J. 838; 35 C.W.N. 669=1931 P.C. 125=61 M.L.J. 273 (P.C.). "Property" in S 110, second para., need not necessarily be the subject-matter in dispute in the suit. 138 I.C. 670=1932 A.L.J. 730. But see also 9 R. 53=1931 R. 183. For the purpose of ascertaining the amount or value of the subject-matter of the suit in the Court of

and where the decree or final order appealed from affirms the decision of

Notes.

first instance, it is necessary to ascertain the amount or value, or the subject-matter of the suit at the date of the institution of the suit [53 M. 167 and 10 P. 86 (P.C.), Ref.] 12 R. 164=149 I.C. 1033=1934 R. 65. And not at date of decree. 38 P.L.R. 767=1936 L. 31 (57 I.A. 56, Foll.) The value referred to in this section is the market value, and where under the Court-Fees Act or otherwise a plaint or memo. of appeal is not required to be valued according to the real market value, but is allowed or required to be valued upon some other basis, the doctrine of "approbate and reprobate" does not apply, and the party can rely on the real market value for purposes of appeal to Privy Council. 58 C. 66=132 I.C. 910=1931 C. 417. Section applies to the value of an annuity which is sought to be recovered, not the value of the property upon which that annuity is charged. 45 M.L.J. 253 (P.C.), 28 C.W.N. 289=45 M.L.J. 253=18 L.W. 146=1923 P.C. 102 (P.C.). See also 46 I.C. 576=22 C.W.N. 282 (P.C.). It is the extent to which the decree or order has operated to the prejudice of the applicant for leave that determines whether the decree or order is subject to appeal or not, and whatever may be the value of the property in respect of which a claim or question is involved in the appeal, no appeal lies under S 110 unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order, and from which he seeks to be relieved by His Majesty in Council, is Rs 10,000 or upwards. Where the application is for leave to appeal against an order of the High Court dismissing a petition for adjudication of an alleged debtor, the value of the petitioning creditors' debts is not the criterion to be applied, nor is the value of the debtor's estate as a whole. The question that falls for determination is, has the applicant been able to satisfy the Court that he has suffered loss or detriment of the value of Rs. 10,000 by reason of the decree or order from which he seeks to obtain leave to appeal 12 R. 355=1934 R. 292. See also 1933 O. 397. Valuation of subject-matter—Counter-claim more than Rs 10,000—Effect of appeal from portion of decree. 38 A. 488=31 M.L.J. 571=35 I.C. 939 (P.C.) (Cause of action different against several defendants) See 16 L.W. 262=1923 M. 30. Not only must the value of the suit exceed Rs. 10,000 but the subject-matter of the appeal to the Privy Council should be Rs. 10,000 or over in value. 24 A. 174. The part decreed by the High Court could not be included for purposes of valuation by plaintiff 57 I.C. 40. The mere fact that the history of the property in dispute was the same as another valued at more than Rs. 10,000 would not bring it under S 110 of the C.P. Code so as to give the applicant a right of appeal to His Majesty in Council. 26 I.C. 6. The value of the subject-matter of the suit in the Court of first instance must

also be Rs 10,000 or upwards. 39 M. 843=30 M.L.J. 317=31 I.C. 296 (24 A. 174, Foll.) Where the plaintiffs had estimated the market value of the property in dispute at Rs. 2,500 for purposes of court-fee of first instance and on appeal they could not be allowed to change their valuation for the Privy Council. 43 M.L.J. 728=69 I.C. 385=1923 M. 125, 34 C.W.N. 671=128 I.C. 108=1930 C. 737. As to when plaintiff may be allowed to vary the valuation for purposes of appeal to Privy Council, see 41 C.W.N. 289. For the purpose of valuation for a Privy Council appeal the value at the date of a decree is to be considered and not the value at the institution of the suit. 44 C. 119=35 I.C. 605=21 C.W.N. 530. See also 1932 L. 526=138 I.C. 37. Appeal lies where the amount indirectly involved is more than Rs 10,000. 35 A. 445=21 I.C. 617. The question whether a decree involves indirectly a claim to property worth more than 13,000 rupees in value must be decided with reference to actual circumstances at the time and not to circumstances which are remote, and not in particular to a mere possibility that future suits as to all or part of a large extent of the property alleged to be concerned may be instituted at some time in the future. 43 M.L.J. 728=69 I.C. 385=1923 M. 125, 84 I.C. 581=1923 C. 451; 52 C. 650 (P.C.). The value of the subject-matter must be taken to be the amount or value which the plaintiff obtained or would have obtained had he been successful at the time when the decree was passed. 60 I.C. 523=2 Pat.L.T. 340, 6 Bom.L.R. 403. To determine the value prescribed by S 110 of the C.P. Code the decree has to be looked at, as it affects the interests of the parties prejudiced by it. 4 Pat.L.J. 415=52 I.C. 723=1919 P. 257. In a suit for possession of a garden on the basis of a lease, the plaintiffs claimed possession and in the alternative the refund of premium or salary paid by them and costs of the improvements effected by them. The suit as well as the appeal to the High Court was valued at Rs. 10,000 which was not disputed by the defendants either in the written statement or at any stage of the trial. The plaintiffs, however, were given a decree only for $\frac{1}{2}$ share of garden. The defendants applied for leave to appeal to the Privy Council and the plaintiffs objected, pleading that the subject-matter of the appeal would be only of the value of $\frac{1}{2}$ of Rs 10,000. Held, that as the original claim in the alternative was for refund of Rs 10,000, the question whether that amount should or should not be refunded to the plaintiffs would also be a question in the contemplated appeal in case the Privy Council should think fit and proper to dismiss the claim for possession and hence the matter involved was of the requisite valuation. 157 I.C. 605=61 C.L.J. 69. A party taking advantage of the other party's valuation cannot object to it. 104 I.C. 577=1927 M. 862; and plaintiff's own valuation does not absolutely bar him from setting

the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

Notes.

up higher valuation (*Ibid*) Also 31 C.W.N. 268=99 I.C. 921=1927 C. 225 In a suit for a permanent injunction and declaration, which the plaintiff had to value, for purposes of court-fees at the actual or market value and did value in a particular way in his plaint at Rs. 2,250, and was thereby able to begin the suit in the Subordinate Judge's Court, is precluded from going back upon such valuation and from showing that the former valuation was not real or from setting up a higher valuation for the purpose of an appeal to the Privy Council so as to bring it within S. 110 (1), C.P. Code, 59 C.L.J. 448=38 C.W.N. 751. See also 1931 C. 417=58 C. 66=132 I.C. 910 Where the parties did not agree as to the valuation, and the Court upheld plaintiff's contention and held that the value was less than Rs. 10,000 and the suit was fought on that footing, held, it was open to the plaintiff to show that the value was more than Rs. 10,000 so as to entitle him for leave to appeal to Privy Council 133 I.C. 415. See also 58 C. 66=1931 C. 417=132 I.C. 910; 34 L.W. 817=61 M.L.J. 692. The rules under the Suits Valuation Act in accordance with which the land is valued for the purposes of jurisdiction do not apply in determining the value for the purpose of S. 110, but it is the market value which has to be ascertained 6 A.L.J. 44; 75 I.C. 520=4 L. 185=1924 L. 82 See also 10 I.C. 990=13 C.L.J. 505, 75 I.C. 654=1923 L. 286 (2); 58 C. 66=132 I.C. 910=1935 C. 417 In cases of probate proceedings regarding estate of value of over ten thousand rupees leave can be granted. 99 I.C. 759 (1)=5 R. 119=1927 R. 56 The subject-matter of a suit in the Court of the first instance was less than Rs. 10,000. In order to make up the prescribed valuation it was sought to add the amount of the decree for mesne profits of the property, which decree was obtained in a separate suit. Held, that the decretal amount could not be added so as to increase the value of the appeal to the Privy Council as it did not fall within Cl. 2, S. 110 39 M. 843 and 57 I.A. 56, Rel on. 38 P.L.R. 767=1936 L. 31 Future mesne profits should be taken into consideration in assessing the value of the subject-matter for the purposes of S. 110 6 Pat.L.J. 246=63 I.C. 492 See also 3 Pat.L.J. 377=46 I.C. 137, 2 Pat.L.T. 463=62 I.C. 959=1921 P. 229, 32 C. 1286; 38 C. 400, 18 A. 196; 107 I.C. 828 Arrears of pension accrued due may also be added. 44 I.C. 475=3 Pat.L.J. 317 Costs of suit cannot be added to swell up valuation 6 P. 444=104 I.C. 267=1927 P. 328. Under S. 110 the value of the subject-matter of the suit is real market value. The fact that for the purpose of stamp duty the plaintiff under the option given to him by S. 7 of the Court-Fees Act valued it at less than its market value cannot deprive him of his right to appeal to the Privy Council 5 L.W. 542=39 I.C. 911. (15 M. 237, 31 I.C. 401, Pol.) See also 58 C. 66=1931 C. 417 Appeal and cross-appeal—Appeal dismissed

and cross appeal allowed—Value of cross-appeal being less than Rs. 10,000—No leave to appeal to Privy Council to be granted. 123 I.C. 523=1930 L. 554 See also 1931 A.L.J. 968, 1 I.A. 317; 45 C.L.J. 225 Where decrees obtained in a number of rent suits follow a single judgment and the total amounts recoverable are more than Rs. 10,000, though the amount involved in each decree is small, the condition as to pecuniary value is satisfied and special leave can be granted 22 I.C. 390=1914 M.W.N. 162 See also 28 Bom.L.R. 1437=100 I.C. 143=1927 B. 19 Valuation of mortgage suit. See 25 O.C. 349=73 I.C. 407=1922 O. 214 Valuation when there is variation in appeal 3 Pat.L.T. 550=66 I.C. 663=1922 P. 555 Valuation of suit for damages See 66 I.C. 606=11 L.B.R. 152 In a suit for damages for libel, plaintiff cannot ensure an appeal to the Privy Council by merely placing his damages at a high figure. 9 C.W.N. 370 In a suit for partition, the value of the matter in dispute is the value of the whole estate sought to be partitioned 10 C.W.N. 564 See also 29 I.C. 759=140 P.L.R. 1915 which distinguished 10 M.I.A. 252; 10 C.W.N. 564 and 6 C.W.N. 411. But see contra 26 Bom.L.R. 1261, *infra* In partition and partnership suits it is the value of appellant's share and not the value of the whole property that determines valuation 49 B. 149=1925 B. 137=26 Bom.L.R. 1261 But see 138 I.C. 670=1932 A.L.J. 730 in which it was held that in a suit for partition, the value of the whole estate is the value to be taken into account when considering whether leave to appeal to Privy Council should be granted Where the High Court refuses to issue a *mandamus* in an income-tax case under S. 66 (3) of the Income-tax Act, and the value of the subject-matter is over Rs. 10,000 there can be an appeal to Privy Council 12 L. 166=1931 L. 138 (F.B.). Valuation in suit for enhanced rent. 1935 C. 414=82 I.C. 744, 82 I.C. 414=47 M.L.J. 379. In a suit for enhancement of rent the value for purposes of appeal to Privy Council is twenty times the enhancement decreed in the suit 128 I.C. 622=32 Bom.L.R. 1189=1930 B. 509 Contract of sale—Price payable or consideration is its value 1929 N. 75 The second paragraph of S. 110 is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order If a decree affects the petitioner's rights in or to such other property, that may be taken into consideration in estimating the amount or value of the subject-matter in dispute on appeal to His Majesty in Council 66 I.C. 606=11 L.B.R. 1. See also 106 I.C. 538 But see 160 I.C. 799=1936 O.W.N. 181=1936 O. 181. In a mortgage suit the amount payable to a puisne mortgagee who is a party to the suit can also be added to ascertain value of appeal 103 I.C. 831=1927 P. 391 The fact that the appeal involves a mere

111. [S. 597.] Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—
 Bar of certain appeals.

Notes.

question of law is no ground for granting leave in cases where the value is less than Rs. 10,000. 23 A 415

INTEREST AND COSTS.—In calculating the valuation of the suit in the Court of the first instance *interest pendente lite* with *future interest* up to the *dies datus* might fairly be taken into account. In determining the value, however, the costs of the original suit cannot be taken into account. 28 N.L. R. 345, 12 R. 164=1491 C 1033=1934 R. 65. As to adding costs, see 6 P. 444=1927 P 328=104 IC 267. As the award of interest subsequent to the date of suit was entirely discretionary to the Court and as the plaintiff would not be entitled to it as a matter of legal right, it could not, in the strict legal sense, be deemed to be part of "the subject-matter in dispute on appeal" within the meaning of S 110 of the C P. Code. (It would be different in the case of a defendant; but he should appeal against the whole decree, including interest *pendente lite*.) (42 A 445, Ref.) 1933 M.W.N. 260=37 L.W. 491=64 M.L.J. 496.

MESNE PROFITS.—Future mesne profits may be taken into consideration in assessing the value of the subject matter for purposes of this section 63 IC 492=2 Pat L. T. 675, 46 IC 137, 62 IC 959.

"DIRECTLY OR INDIRECTLY INVOLVED"—The condition laid down in para 2 of the section is independent and self-sufficient and does not depend on fulfilment of both or either of the conditions in the first para 1937 A L J 38=1937 A.W.R. 1297. The mere possibility of similar litigation in the Presidency will not entitle the petitioner to add to the value in one case that of the other cases as "indirectly involved" unless the other litigation will be affected by *res judicata*. 34 L W 817=61 M.L.J. 692 following 57 M.L.J. 477. See also 54 A. 431; 38 P.L.R. 767=1936 L 31; 1937 L 95.

CONNECTED CASES.—Where in two connected suits the points are identical but one only exceeds Rs. 10,000 in value and is certified as fit for appeal to the Privy Council, the other suit should also be similarly certified though its subject-matter is less than Rs 10,000 in value. 43 A 223=18 A L J 1119=59 IC 794. See also 48 IC 124=16 A.L.J. 864, 33 IC. 369=13 A L J 1075. Connected appeals.—Certificate given in one—Other also entitled to appeal. 27 IC 378=13 A L J. 57=37 A 124. See also 50 IC. 760=23 C.W.N. 582; 10 IC. 967 (1)=13 C.L J. 503. Appeal to Privy Council—Appeal and memo of objections to High Court—If one proceeding or different proceedings 52 M. 521=1929 M. 429.

CONSENT DECREE.—No appeal lies against a consent decree to His Majesty in Council and leave to appeal cannot be granted 5

Pat.L.J. 383=57 IC 245 (2). But see 6 Pat. L.J 171=62 IC. 235=1921 P. 193.

DISCIPLINARY PROCEEDINGS.—Section 39, Letters Patent, empowers the High Court to declare the fitness of an appeal in a non-criminal matter, if it is a final judgment or order, of the Court made on appeal or in the first instance. A proceeding under C. 10, Letters Patent, does not fall under any of the jurisdictions specified in the Letters Patent, Cl 3', and therefore no leave to appeal could be granted. 41 C. 734=15 C. L J 383=19 C.W.N. 593. Proceedings under Cl 8 (Rangoon), Letters Patent, against legal practitioner—Leave to appeal cannot be granted 8 R 40. Proceedings for contempt in respect of a newspaper article by an advocate and published by the editor of the paper, in which the persons guilty of contempt are convicted and sentenced, are in the exercise of the inherent jurisdiction of the High Court and of a criminal nature. They are not of a civil or administrative character. The matter is of an exclusive jurisdiction and the order is final. Neither S 109 nor S 110, C P Code, applies to the case 155 IC. 1'8=1935 A L I 810=1935 A. 811.

PRACTICE AND PROCEDURE.—See 1925 M. 1223=49 M.L.J. 309, 26 Panj L.R. 123=1925 L. 468. Where leave to appeal is granted the certificate granting leave should show on its face that discretion of the Court was invoked and exercised 25 C.W.N 770; 6 Pat L. J 163, 2 Pat. L. T 132=62 IC 320=13 L.W 365 (P.C.) Under S 110 (2), C. P. Code, the question directly or indirectly involved must be one between the parties to the suit 93 P.R 1913=21 IC 624. The High Court has no jurisdiction to grant leave to appeal to the Privy Council *in forma pauperis* 44 IC. 731=3 Pat.L.J. 179. See also 42 M 32=35 M L J. 258; 115 IC 832. If the appellant takes up a new position while appealing to Privy Council leave cannot be granted 58 IC 179.

LEAVE TO APPEAL.—Grounds.—Point not allowed to be raised for the first time in second appeal. 76 IC 516=1923 A. 463. Decree of High Court partly affirming and partly reversing decree of lower Court 66 IC. 721=1923 A 243. See also as to affirming judgments. 62 IC. 71=10 L.B.R 307 and cases cited under S 109. See also 2 Pat. L. T. 173=60 IC 500=1921 P 129 (Defendant taking no interest in the proceedings).

Sec. 111. SCOPE AND APPLICATION OF SECTION.—Section 111 applies to a single Judge of a High Court established under the Charter Act, 1861 127 P.W.R. 1917=42 IC. 893=131 P.L.R. 1917. Even where leave to appeal from it to Division Bench has been rejected. 160 IC. 150 (1)=17 Pat. L.T. 173=1936 P. 106. Appeal from a single

(a) from the decree or order of one Judge of a High Court [constituted by His Majesty by Letters Patent] or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

(b) from any decree from which under section 102 no second appeal lies.

111-A. (NEW) ²[Where a certificate has been given under section 205 (1) of the Government of India Act, 1935, the three last preceding sections shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court:]

Provided that—

(a) so much of the said sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any Order in Council made thereunder, has been wrongly decided;

(b) in determining under clause (c) of section 109 whether the case is a fit one for appeal, and, under section 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the said Act, or any Order in Council made thereunder, shall be left out of account.]

Savings

112. [S. 616.] (1) Nothing contained in this Code shall be deemed—

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

Leg. Ref.

¹ For words 'established under the Indian High Courts Act, 1861, or the Government of India Act 1915,' the words within brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

² This section has been newly inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

Judge acting in revision does not lie. 46 M 958=46 M.L.J. 117=1924 M. 399. No appeal lies to Privy Council from the decree or order of one Judge of High Court passed in the exercise of either appellate or revisional jurisdiction. 33 Bom.L.R. 1106=134 I.C. 1164=1931 B. 503 (13 C.L.J. 90; 13 C.L.J. 691; 6 P.L.J. 116, Not foll; 56 C. 512; 46 M. 958, Foll.)

Sec 112.—The Code of Civil Procedure does not limit the prerogative right of the Crown to admit appeals, where leave to appeal is refused by the High Court. 15 B.

155. Where a question of great public importance arises, special leave to appeal will be granted, even though the subject-matter in dispute is under the appealable value. 8 M.I.A. 1. Also where an important principle of law is involved. 8 M.I.A. 203. In 11 A. 72 special leave was granted to try the question whether a District Court can review an order refusing to register a document. See Notes under Ss 109 and 110. As regards the power of the High Court to grant an extension of time for furnishing security in Privy Council appeals in so far as there is any conflict between Act XXVI of 1920 and O 45, R. 7, C.P. Code, on the one hand and R 9 of the Privy Council Rules on the other, the Privy Council rule must prevail by reason of this section. 101 I.C. 555=51 B. 430=1927 B. 217 (F.B.). Under R. 9 of the Privy Council Rules, High Court has power not only to extend the time for making the deposit and for furnishing the security, but also to change the form of security. 132 I.C. 438=33 Bom.L.R. 487=1931 B. 278. But as a matter of practice, High Court will be

PART VIII.

REFERENCE, REVIEW AND REVISION.

113. [S. 617] Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court and the High Court may make such order thereon as it thinks fit.

Review.

114. [S. 633.] Subject as aforesaid, any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

Notes.

reluctant to change the form of security except for good cause. (*Ibid*)

Sec. 113—Where it was difficult to hold that the Judge making the reference entertained any reasonable doubt as to what his decision should be or as to what decision was correct, but the respondent withdrew any objection on this ground, as he said the questions that arose would affect a very large amount of money, reference was entertained. 1 R 220=1923 R 193 On this section, see also 14 I C.782=14 Bom.L R. 259 (Powers of Collector) Reference ought not to be made in a case covered by authority 39 M.L.T 606 Deputy Commissioner is not a Court within the meaning of S. 113 read with O 46 5 O.W.N 891=1928 O 485

Sec 114: REVIEW—WHEN CAN BE ALLOWED—SCOPE OF SECTION—Section 114, C P Code, has to be read with O 47, R 1 which prescribes the grounds upon which an application for review may be made, and unless the case can be shown to be within the terms of this rule, a review ought not to be granted O 47, R. 1 must be read as in itself definitive of the limits within which review is permitted and the words “any other sufficient reason” must be taken as meaning a reason sufficient on ground at least analogous to those specified immediately previously. (49 I A. 144) 151 I C 41=1934 P C 213=67 M.L.J. 608 (P C) An obvious and patent error of law might be a good ground for review, but where there is no such blunder, no review lies. The High Court reversed the decree of the lower Court on the fact which was not disputed but on explanation as to the description of a certain payment made by the appellant The respondent put in an application for review on the ground that a new contention was put forward. *Held*, that there was no new contention and that review should not be allowed. 1933 R 85=146 I.C. 946 It is a wrong procedure for a lower Court to review its former order merely on the ground that a ruling of the High Court had not been brought to its notice on the previous occasion 132 I C. 815=1931 A.L.J 889=1931 A 91. *Held*, by the majority of the Full Bench

(*Mukerji, J*, dissenting), that an application for review of the judgment passed by a Bench hearing an appeal under the Letters Patent from the decision of a single Judge would not lie. 53 A 535=1931 A. 244 (F.B.) (1 A.L.J. 509 and 16 A.L.J. 964, Appr)

Per *Banerji and Bennet, JJ.*—Procedure is one thing and jurisdiction is another. There is a clear distinction between procedure and jurisdiction. A Bench hearing a Letters Patent Appeal derives its jurisdiction to hear the appeal from the Letters Patent and not from the Code, because the Letters Patent provide that such an appeal should lie to a Bench and the Code makes no such provision and as S 114 is not intended to provide for the review of judgments passed in the exercise of jurisdiction derived from other laws no review is competent (Case-law discussed) 53 A. 535=132 I C. 24=1931 A 244 (F B) See also 134 I C 630=1931 P 409

SEVERAL STAGES IN REVIEW PETITION—A review proceeding ordinarily commences with an *ex parte* application The Court then may either reject the application at once or may grant a *rule* calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or discharged and the hearing of this rule may involve to some extent an investigation into the merits If the rule is discharged the case ends. If, on the other hand, the rule is made absolute, then the third stage is reached Though in one aspect the result is the same whether the rule is discharged or on the re-hearing the original decree is repeated in law there is a material difference, for in the latter case the whole matter having been reopened there is a fresh decree In the former case the parties are relegated to and still rest on the old decree Particular case held to fall at the second stage and appeal held to be competent. (30 B. 56, Rel on) 55 M. 871=1932 M 669=63 M L J 357

MISCELLANEOUS.—Public Prosecutor was given sanction to prosecute an attorney—Leave to appeal to Privy Council against order granted—Review allowed. 41 C. 734=19 C.W.N. 593=22 I C 324 Reversal of High Court's decision in a connected case by

115. [S. 62.] The High Court may call for the record of any case which has been decided by any Court subordinate to such

Revision

High Court and in which no appeal lies thereto, and

in such subordinate Court appears—

Notes.

the Privy Council is not a sufficient cause for review 43 M L J. 33=70 I C 741=1922 M. 227 Review cannot be granted on the ground of mistake of law or on the merits. 8 N L J 31=87 I C 125=1925 N 266. Review can be allowed in respect of probate proceedings. 3 R. 261=1925 R. 314 Applicability to appeals under Letters Patent—Review 29 Bom L R 371 Judgment in an income-tax case on a statement made by the Commissioner under S. 66 of the Income-tax Act does not come under S. 114, C. P. Code, because the judgment is neither a decree nor an order. 1930 A. L. J. 78=122 I C 741 Section does not apply to Revenue Court proceedings 138 I. C. 465=1932 A. L. J. 437=1932 A. 293 (F B).

Sec 115. SCOPE OF SECTION.—The powers of the High Court under the section are strictly limited to those matters mentioned therein 35 C W N 775=134 I C 1063=1931 C 604. When High Court as a Court of revision, under its inherent powers to remand, remands a case for further evidence on an issue and findings, retaining seizin of the case, it has no power to scrutinize or review the evidence. The powers of that Court are limited by S. 115 and all it can do is to determine whether the lower Court exercised its jurisdiction with material irregularity in arriving at the finding it did on the issue remanded to it for trial I L R 1936 N 188=1936 N 140. The High Court ought not to interfere in the exercise of revisional jurisdiction, unless very strong considerations and, in particular, considerations of law constrain it to interfere 146 I C 933=1934 P 41 See also 30 S L R 271=1936 S 172 Revision is not directed against decisions on Questions of law or fact in which jurisdiction is not involved [40 M. 793 (P.C.), Ref.] 27 S L R 190=1933 S 329. Mere mistake of law or fact is no ground for revision. 1937 R. 61, 166 I C 215=1937 O.W.N. 39 High Court should do nothing to encourage litigants to avoid the procedure laid down and seek a speedy remedy by eliminating steps provided 145 I C 261=1933 N 221 (1). S. 115 does not require that there should be an application 15 P. 738=165 I C 927=1936 P 591=160 I C. 361 (2)=1936 S. 1 Or that such application need necessarily be made by an aggrieved party The only limitation against the exercise of the power of this Court under S. 115 is that the case should be one in which no appeal lies 146 I C. 258=1933 L 327 See also 144 I C 883=1933 S 200. The High Court's power to interfere in revision and set aside an illegal order setting aside an execution sale, is not affected or rendered nugatory by the fact that the original execution case has been dismissed. Any order that the High Court might pass will not in any way be affected by that fact.

62 C L J 308=39 C W N 913. Omission to give a finding on necessary issue is failure to exercise jurisdiction. 150 I C 312=36 P L R 69=1934 Pesh 33 Where the decision of a suit involves the decision of legal inferences to be drawn from the established facts and the question is an important question of law, revision is competent even if the suit is of a small cause nature 163 I C. 448=1936 Pesh. 148 The powers of revision under S. 25 of the Provincial Small Cause Courts Acts are more extensive than those exercisable under this section 27 A 192, L R. 3 A. 17. Under this section the High Court can revise orders of Presidency Small Cause Courts 7 C W N 547. As to applicability of section to appellate order in proceedings under S. 476, Cr P Code, see 11 O W N. 1469=1935 O. 59, 1935 A L J. 943=1935 A. 696 As to applicability of section to decision of Deputy Commissioner in rent suits in Chota Nagpur, see 1935 P. 417. Order of Sub-Collector refusing to set aside rent sale under S. 131, Madras Estates Land Act, or order of Collector under S. 205, is open to revision 44 L W. 567=1936 M W N 1175=71 M L J 607.

"COURTS" SUBORDINATE TO HIGH COURT.—For the purposes of S. 115, C. P. Code, a Court subordinate to a High Court is one over which the High Court has appellate jurisdiction 160 I C. 36=1936 O 132. "Any Court subordinate" whether it includes single Judge of the Chief Court of Oudh 2 Luck. 1=99 I C. 547=1927 O 59=11 O W N. 1533. It does not. 153 I C 267=11 O W N 1533=1935 O 72. The Bombay High Court has power under S. 115 to revise an order of the Judicial Assistant at Aden as the latter is subordinate to the former 144 I C. 705=35 Bom L R. 271=1933 B 194. The Revenue Officer when making a settlement of rents under Chapter XI of the Madras Estates Land Act is not a Civil Court So the Board of Revenue when directing the revision of his proceedings under S. 172 is also not a Civil Court and the High Court cannot either under S. 115, C. P. Code, or S. 107, Government of India Act, revise an order made or purported to be made under S. 172 56 M. 883=140 I C. 331=1932 M 612=63 M L J 450 (F B) See also 55 M 942=1932 M. 529=63 M L J 282 (Order under Hereditary Village Officers Act). The section does not apply to Revenue Courts at all. The High Court's revisional jurisdiction in such cases is derived from other statutes, such as S. 253 of the Agra Tenancy Act 1932 A L J 863=1932 A. 589 As to whether Assistant Collector of second class is subordinate to Chief Court, see 163 I C 930 "Court" Meaning of 50 M 121=99 I C. 148 (2)=1927 M. 93; 4 R. 304=98 I C. 902=1927 R. 1 (F B). Joint Sub-Registrar acting under S. 75 (4), Registration Act, is not a Court subordinate. 51

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M. 245=1928 M. 475 The District Court exercising judicial function according to S. 198 of the Bombay Municipalities Act, 1925, is a Subordinate Court 55 B 544=33 Bom. L.R. 1067=1931 B 582. A Judge deciding an election petition under S. 15 of the Bombay City Municipal Act is not a Court but a *persona designata* and his decision cannot be the subject of a revision to the High Court. 142 I.C. 378=35 Bom.L.R. 89=1933 B 105. See also 1933 A.L.J. 971. So also the District Judge acting under the Mandalay Election Rules and deciding an objection to an election. 11 R. 1=142 I.C. 80=1933 R. 41 (1). See also 1933 A.L.J. 971. So also a Judge holding an enquiry under S. 19 (3) (b) of Bombay Local Boards Act. 151 I.C. 89=1934 Sind 110. As to District Court exercising jurisdiction under Indian Companies Act, see 1935 A 310. Where a decree is transferred to Collector for execution under S. 68 he is acting judicially but not as a Court. The High Court has no jurisdiction to revise his order. 35 Bom.L.R. 761=1933 B 369. The High Court's power extends to revising the order of the Collector made by him in the exercise of his own revisional powers 41 L.W. 589=1935 M. 367=68 M.L.J. 441. An order by the Deputy Collector acting under the Madras Estates Land Act under O. 21, R. 101 is one revisable by the High Court, and not by the District Collector under S. 205 of the Estates Land Act, and hence an application to the District Collector for revision is incompetent. But when the District Collector declines to interfere with the Deputy Collector's order, the High Court cannot interfere with that order under S. 115 though the District Collector is wrong in dismissing it on the merits 41 L.W. 623=1935 M. 309=68 M.L.J. 324. The District Magistrate exercising powers under S. 318 U.P. Municipalities Act, 1916, is not a Court subordinate to the High Court 140 I.C. 125=1932 A 651. In proceedings under S. 18, Land Acquisition Act, the Collector acts as an administrative and not a judicial officer subordinate to the High Court and his order refusing to make a reference cannot be revised by the High Court. 1932 A.L.J. 769=1932 A 568 (F.B.), 54 A. 282=1932 A 598. See also 12 R. 275=150 I.C. 1049=1934 R. 618; 38 C.W.N. 844=60 C.L.J. 184=1934 C 758. The 'Court' mentioned in S. 3 (d) of the Land Acquisition Act, is a Court subordinate to the High Court and therefore amenable to its revisional jurisdiction 148 I.C. 617=1934 A.L.J. 32=1934 A. 260 (F.B.); 1930 L. 242; 137 I.C. 68=1932 O. 180. In dealing with the acquisition of property, the Calcutta Improvement Trust Tribunal is acting as a "Court", and the Court is entitled to interfere with the order passed by the President of the Tribunal 139 I.C. 180=36 C.W.N. 370=1932 C 660. Courts in the exercise of superintending powers will not ordinarily interfere except in cases of grave and otherwise irreparable injustice. 31 B. 138. See also 9 R. 71=134 I.C. 744=1931 R. 136, 134

I.C. 454=1931 A. 72; 140 I.C. 226=36 L.W. 586; 138 I.C. 277=1932 L. 305. High Court need not interfere on mere technical grounds 138 I.C. 121=1932 M. 223. Interference is justified when the view of the lower Court if allowed to prevail, would result in confusion and subvert the result of a past litigation. 137 I.C. 603 (2)=34 Bom. L.R. 206=1932 B. 210. The High Court may deal with a case under this section without there being an application by any of the parties. 28 C. 680; 4 M. 217, 139 I.C. 167=1932 M. 714, 32 C. 146, 28 A. 72, 1 P. 232=15 I.C. 122, 144 I.C. 883=1933 S. 200, 146 I.C. 258=1933 L. 327. 68 M.L.J. 218. But see 7 C.L.R. 191. Whether revision lies against order under O. 26, R. 1, see 32 C.W.N. 128, against order under O. 39, R. 1, see 102 I.C. 700; against order under O. 47, R. 7, see 5 R. 121, against order under S. 73 of the Madras Village Courts Act, see 1927 M.W.N. 420; against order under Part VII of the Succession Act, see 102 I.C. 622. What cannot be obtained by an appeal ought not to be available in revision. 103 I.C. 670=1927 M. 859. High Court will not extend its interference in revision to matter in which it would not interfere even in second appeal (20 C.L.J. 213, Foll.) 116 I.C. 133=1929 M. 259. Interference in revision is discretionary and when the interference is likely to work, not in the interests of justice but rather against it, such a course should not be taken. 1930 L. 417 (2). See also 54 C.L.J. 253=36 C.W.N. 16=134 I.C. 1045=1931 C. 607, 1933 A. 154, 42 A. 626=60 I.C. 81, 1931 M. 534. Right of revision—One party applying to Court to prevent pleader of opposite party—Court preventing pleader—Opposite party can apply for revision 110 I.C. 544=1928 M. 592.

REVISION AND APPEAL.—There is an analogy between a revision application and an appeal but the two are not identical. In a suit or an appeal, the points to be decided ordinarily are those on which the parties are at variance. A revision application stands on a different footing. It is a matter between a higher Court and a lower Court, in fact revisional powers may in certain cases be exercised without an appeal or an application by any of the parties concerned 144 I.C. 883=1933 S. 200.

POWERS OF LOCAL LEGISLATURE TO AFFECT REVISIONAL JURISDICTION OF HIGH COURT.—Per *Bennet, J.*—The local legislature has power (with previous sanction) to pass laws affecting the jurisdiction and powers of the High Court, whether derived from the Government of India Act, 1919, the Letters Patent or the Codes (ii) The power of superintendence under S. 107, Government of India Act, 1919, depends on appellate power and can also be affected by laws of the local legislature (iii) Where a special tribunal is created by an Act of the local legislature or of the Indian legislature to determine rights created by that Act, and that Act states that the decision of the tribunal shall be final, there is no interference with the rights of appeal, superintend-

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ence, or revision of the High Court, because the High Court never had such rights over the tribunal. 147 I.C. 148=1933 A.L.J. 971. See also 151 I.C. 880=38 C.W.N. 986=1934 C. 666.

POWERS OF REVISION OF NON-CHARTERED HIGH COURTS—Whatever powers Courts other than Chartered High Courts may have must be exercised under S. 115, C. P. Code, and not under the section by which powers are conferred by the Government of India Act upon Chartered High Courts. 151 I.C. 89=1934 S. 110.

FINDING OF FACT.—The power of interference in revision is much more limited than that in case of second appeals. Hence a concurrent finding of fact of the lower Court based on evidence cannot be interfered with. 1936 P. 558. A finding of fact of the Court of appeal below is not liable to be set aside in revision. 151 I.C. 1088=59 C.L.J. 417=1934 C. 795. The question whether it has been established by evidence that a particular person became a surety for the payment of the amount due on a promissory note is a question of fact which cannot be agitated in revision. 150 I.C. 1055=1934 R. 306. The lower appellate Court decided the appeal on finding based on the construction of a power of attorney which it had jurisdiction to do. *Held*, that the finding was not open to challenge in revision. 15 L. 305=149 I.C. 1102=1934 L. 67 (1). Where a finding is arrived at after a consideration of the oral evidence and incidentally of certain letters, the question of the construction of these letters is not a matter which can be examined in revision. 151 I.C. 385 (2)=1934 A. 530. A finding that a certain document is not genuine is a finding of fact. 161 I.C. 21=1936 L. 725. So also a finding of the lower Court about the bailee having taken necessary care of the goods such as is required by S. 151 of the Contract Act. 161 I.C. 417=1936 O.W.N. 334=1936 O. 264.

CONSTRUCTION OF SECTION—S. 115 being merely an empowering section granting jurisdiction regulated by the discretion of the High Courts, it ought to receive a liberal rather than a narrow interpretation. 40 B. 86=33 I.C. 358; 65 I.C. 37. High Court has revisional power under the Charitable and Religious Endowments Act (XIV of 1920). 27 A.L.J. 911=1929 A. 581. "Record of a case" means the record of the legal proceeding decided although it is only a legal proceeding in the suit. 24 S.L.R. 277=1930 S. 265 (F.B.). There is no provision in the section that the High Court cannot interfere in a case where an appeal lies to an inferior Court. Hence where the plaintiff has not filed an appeal to the District Judge which remedy he has from an order of the Sub-Judge rejecting a plaint, the High Court can interfere in revision. 154 I.C. 103=1935 P. 86. See also 63 C.L.J. 105=1936 C. 786. S. 115 of the Code clearly refers in Cls. (a) and (b) to jurisdiction, which means the jurisdiction of the Court and not the com-

petence of any party to sue. A finding that a party is not competent to sue is not therefore a finding affecting the Court's jurisdiction. 165 I.C. 278=38 P.L.R. 315=1936 L. 783.

INTERLOCUTORY ORDERS—As to interference in revision with interlocutory orders, see 75 I.C. 107=1923 L. 301, 54 C. 1038, 156 I.C. 162=1935 R. 122, 106 I.C. 57 (As a general rule no interference with interlocutory orders). 134 I.C. 118 (L.). It is intolerable that where issues are decided separately, there should be what is really an interim appeal in the form of an application in revision to High Court. 146 I.C. 615=1933 R. 263. The High Court has jurisdiction under S. 115 to revise an interlocutory order passed by a Subordinate Court from which no appeal lies to the High Court. But it is only when irremediable injury will be done and a miscarriage of justice inevitably will ensure that the Court will intervene. 11 R. 36=143 I.C. 525=1933 R. 49. See also 60 C.L.J. 91=38 C.W.N. 1146, 154 I.C. 615=1935 P. 90. Where the order is extraordinary or illegal or one made by the Court without any power to do so, it is open to the High Court to interfere. 134 I.C. 118 (L.). Or, if the order is palpably incorrect and is one which gives the Court jurisdiction which it has not got. 13 R. 595=1935 R. 466. The word "case" covers interlocutory order. Such order if it goes to the root of the case can be revised. 27 N.L.R. 254=130 I.C. 145=1931 N. 17. See also 9 R. 71=134 I.C. 744=1931 R. 136, 9 R. 86, 9 R. 92. Interference would be justified if otherwise irreparable damage would result. 4 L.L.J. 176=65 I.C. 282, 44 B. 619, 5 M.L.J. 75, 1936 A.M.L.J. 4. See also 11 R. 36, 131 I.C. 503=1931 R. 193 (2) (Order impounding a document) or there are other special and exceptional circumstances necessitating interference. 26 I.C. 954=20 C.L.J. 426, or where there are other most cogent reasons. 43 I.C. 684. As far as the Madras High Court is concerned, it cannot be held that there can be no interference by way of revision in an interlocutory matter or proceedings on the ground that it is not a case decided. 113 I.C. 646=1929 M. 121. Sind Judicial Commissioner's Court has no jurisdiction to interfere in revision under S. 115, C. P. Code, with interlocutory orders even in exceptional circumstances. 24 S.L.R. 227=1930 S. 265 (F.B.). The Rangoon High Court has always entertained applications in revision with a certain amount of freedom, even when the cases are not complete, if to allow a case to proceed would result in waste of time, trouble and money. 157 I.C. 814=1935 R. 225. On this point, see also 85 I.C. 619=1925 C. 1118; 28 C.W.N. 991=82 I.C. 1008. Interlocutory orders that can be rectified on appeal are not revisable although there may be no appeal directly from such orders. 5 M.L.J. 75. But see 14 C. 768. See also 9 M. 256; 5 A. 293; 18 B. 35. Where decree is against legal representative, as to whether revision lies from order in execution rejecting

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application by posthumous son to be impleaded as legal representative. 1936 S. 166.

THE FOLLOWING INTERLOCUTORY ORDERS ARE OPEN TO REVISION.—Where the order is arbitrary and unwarranted in law 58 I.C. 729=18 A.L.J. 486; 1927 M.W.N. 218 (as) where the lower Court wrongly refused to grant commission for examination of witnesses, 35 C.L.J. 78=68 I.C. 9; improper orders under Guardian and Wards Act, 42 I.C. 240, where amendment was improperly refused, 67 I.C. 335, defect of jurisdiction causing failure of justice, 67 I.C. 278=2 L.L.J. 673; 60 I.C. 481; where irreparable damage may result, 4 L.L.J. 176=1922 L. 100; or where irreparable waste of time and money would result, 2 L.L.J. 555=64 I.C. 387, allowing a party to adduce evidence after closing of the case, 59 I.C. 450, order as to misjoinder of parties and causes of action 43 M.L.J. 277=70 I.C. 684, misjoinder of causes of action, 43 M.L.J. 218=69 I.C. 960, 42 M.L.J. 97; order refusing to add person as party defendant, 1929 O. 143, 1929 M. 403 (2), 1930 P. 592; order directing trial piecemeal on certain issues only, 60 I.C. 528=2 Pat.L.T. 154; improper order of remand, 1922 P. 79; 1922 P. 359=50 I.C. 470, 45 C.L.J. 194 [In such case High Court cannot go into merits of the order of remand 39 M.L.T. 150] Order setting aside *ex parte* decree 32 C.W.N. 507 Question whether particular person should be next friend—Order of Court—Revisable 1929 L. 257=11 L.L.J. 130 Summary rejection of application under O. 9, R. 9 is revisable 1929 L. 878 An order refusing leave to sue as a pauper is not an interlocutory order and is revisable. 142 I.C. 379 (32 A. 623 and 48 M. 700, Foll.) A Court has jurisdiction to consider the merits of the case on an application to sue *in forma pauperis*, the fact that the Court placed reliance on evidence which might not be relevant to a pauper application is not an irregularity affecting its jurisdiction and no revision lies. (40 M. 793, Appl.; 17 S.L.R. 133, Foll.) 26 S.L.R. 491=142 I.C. 379=1933 S. 82; 117 I.C. 908

THE FOLLOWING INTERLOCUTORY ORDERS ARE NOT OPEN TO REVISION.—The question of whether there is "sufficient cause" for an adjournment under O. 17, R. 1 is a question of fact; whether decision on the merits is right or wrong, it must be held to be final on the point 154 I.C. 935=1935 A.L.J. 372=1935 A. 476 Order granting adjournment on payment of costs. 25 I.C. 207=12 A.L.J. 460, order deciding preliminary issue in a suit where such order would be appealable after final decision in the suit. 56 I.C. 248, 146 I.C. 615=1943 R. 263, 156 I.C. 615 (1)=1935 R. 158. (Preliminary issue of *res judicata* decided first), 4 A.W.R. 721=1934 A.L.J. 1204=1934 A. 986 (Refusal to decide question of law in the first instance). See also 149 I.C. 126=1934 C. 499 But see also 58 I.C. 729=18 A.L.J. 486, 39 A. 254=38 I.C. 828; defect of jurisdiction where no failure of justice is

caused. 67 I.C. 278=2 L.A.L.J. 673; order directing a party in scheme suit to give evidence. 16 I.C. 3, order deciding admissibility of certain evidence 101 I.C. 385=29 Bom.L.R. 304; order refusing to add parties. 25 A.L.J. 991; orders which are open to appeal. 16 L.W. 312=74 I.C. 812, 22 I.C. 279=1914 M.W.N. 95, 24 I.C. 781=1 L.W. 232; 71 I.C. 911; 41 I.C. 942, order refusing to stay proceedings under S. 10, C.P. Code, 1924 L. 425 (F.B.), Rel. on, 105 I.C. 131=1936 L. 569, order disallowing interrogatories 58 I.C. 721, refusing to frame additional issues, 29 I.C. 876, 1923 P. 518=7 I.C. 148. Order dismissing application to examine witness on commission, 64 I.C. 821; 116 I.C. 97, order as to appointment of guardian *ad litem* is not open to revision, 46 I.C. 316=5 Pat.L.W. 92; where another remedy is open to the party and no irreparable harm would be done 5 P.L.J. 400=56 I.C. 649; order giving directions as to taking accounts; 3 Pat.L.T. 638=1922 P. 508, or giving directions as to the order in which properties ought to be sold in court auction 1933 A. 959 Order allowing plaintiff to withdraw the suit with liberty to bring a fresh suit, supported by good reasons 10 O.W.N. 311. As to order imposing condition of security in granting leave to defend under O. 37, R. 3 (2) See 70 M.L.J. 241=43 L.W. 298=161 I.C. 182=1936 M. 240. As to order reviewing plaint rejected for non-payment of Court-fee, see 67 C. 61. An interlocutory order directing the plaintiff to pay an additional court-fee cannot be the subject of revision The proper course for the aggrieved party would be to file an appeal if and when the plaint is rejected on his refusal to pay the court-fees. Suit for partition decreed—Succeeding Judge modifying prior order—Valid—Cannot be interfered with in revision being only of an interlocutory nature 34 C.W.N. 731=1931 C. 52 Order as to *locus standi* of a person to apply for setting aside sale under O. 21, R. 89 is not open to revision 161 I.C. 424=1936 O.W.N. 344 So also in execution Where the custody Court decided that certain person is not entitled to any priority, with reference to property in its hands. 163 I.C. 584=38 P.L.R. 800=1936 L. 521. Also order on application under S. 19, Arbitration Act, 1936 S. 205.

OTHER REMEDY OPEN.—Where another remedy is open to the party, *e.g.*, by a suit or appeal or otherwise, the Court will not entertain an application for revision See 31 C.W.N. 615=98 I.C. 89=1927 C. 114; 29 Bom.L.R. 1355=1927 B. 599, 1927 M. 1030, 64 I.C. 469; 58 I.C. 299, 63 I.C. 809, 40 A. 216; 44 B. 595; 47 I.C. 190; 18 L.W. 105; 41 M.L.J. 373; 31 M.L.J. 827, 371 C. 348, 30 I.C. 845=18 M.L.T. 243, 1 L.W. 905; 29 M.L.J. 53; 1 L.W. 233, 1914 M.W.N. 95=22 I.C. 279. 23 M.L.J. 281; 1912 M.W.N. 956, 1 P. 68=65 I.C. 135; 8 O.W.N. 999=1931 O. 408, 14 L. 51; 1933 M. 217, 134 I.C. 160=12 Pat.L.T. 613, 1931 A. 294 (F.B.); 53 A. 466=1931 A. 333 (2); 161 I.C. 258=1936 R. 12, 155 I.C. 617=16 Pat.L.T. 158=1935 P. 186, 14 P. 488=16 Pat.L.T. 311=1935 P. 385, 153 I.C. 998=16 A.L.J. 72.

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Courts cannot help those litigants who choose a wrong remedy. 1933 L. 317 and 1933 R. 64, Rel on 1935 L. 934. On this point the following cases may also be consulted. 145 I.C. 765=1933 M. 217, 152 I.C. 1014=1934 P. 664; 151 I.C. 382=1934 R. 188, 148 I.C. 333; 60 C.L.J. 197; 1933 P. 604, 14 L. 51=142 I.C. 738=1933 L. 317, 1933 P. 625; 151 I.C. 668=1934 R. 230; 1934 R. 212, 146 I.C. 845=34 P. L.R. 262=1933 L. 509, 144 I.C. 897=35 Bom. L.R. 360=1933 B. 185. But this is simply a rule of practice which arises from the optional nature of S. 115 which says that the High Court may make such order in the case as it thinks fit, and the High Court can interfere in special cases. 11 R. 134=144 I.C. 163=1933 R. 64. See also 68 M.L.J. 218. It has been practice of Madras High Court to exercise revisional powers in cases where lower Court decides a preliminary issue as to the maintainability of the suit, holding the suit maintainable, although there is a remedy by way of appeal against the decree in the suit itself. But it by no means follows that, because the High Court has the power to interfere it must necessarily do so. The High Court, on the contrary, ought not to interfere unless the particular point can be shortly and conveniently disposed of by way of revision. 58 M. 771=41 L.W. 257=1935 M. 282=68 M.L.J. 218. Even where an appeal is open, if the effect of allowing a revision will be a convenience to the parties and save expense, the High Court will be inclined to interfere with the order. 55 A. 256=1933 A.L.J. 268=1933 A. 374. So also where having regard to all the circumstances of the case and in the interests of justice it considers such a course necessary. 148 I.C. 1074=1934 L. 119. See also 1933 R. 259; 151 I.C. 1002=1934 R. 243, 146 I.C. 493=1933 O. 540; 1933 P. 86. The order rejecting a plaint is a decree. An order passed in appeal from that order that no appeal lies amounts to dismissal of the appeal. Even such order is a decree and is open to a second appeal, and not a revision to the High Court. The mere fact that the lower appellate Court refuses to entertain the appeal is no ground for preferring a revision to the High Court from the original order. 49 C.L.J. 81=115 I.C. 368. See also 119 I.C. 481=1929 L. 605. Where a plaint presented to the Subordinate Judge, First Class, was returned for presentation to the proper Court and on appeal the District Judge affirmed the order, *held*, that a revision was not maintainable against the appellate order. 31 Punj L.R. 178. The ordinary rule is that the High Court cannot interfere in revision if the party has a remedy by way of appeal or second appeal. But this rule has its exceptions, and each case must be judged upon the circumstances peculiar to it. 28 A. 72. See also 68 M.L.J. 218, 1935 P. 86; 9 L. J. 19, 15 A. 405; 34 A. 592; 8 Pat L.T. 677=103 I.C. 32=1927 P. 316, 1931 A.L.J. 974, 4 L.L.J. 71=67 I.C. 945 (Revision entertained in case of gross injustice, though other remedy open). See also 11 R. 134=144 I.C.

163=1933 R. 64; 1933 Pesh. 52=143 I.C. 87 142 I.C. 628=1933 P. 158, 58 C. 55=1931 C. 385; 10 A. 119; 5 R. 742; 14 P.L.T. 70, 53 A. 532=1931 A. 663; 1931 L. 664. The High Court will not interfere with orders allowing or disallowing claims to rateable distribution except in very exceptional circumstances. 60 I.C. 371; 14 L.W. 582=70 I.C. 20 (2). See also 1931 M.W.N. 1012, 134 I.C. 195; 33 P.L.R. 975, 41 L.W. 490=1935 M. 399, 1936 O.W.N. 262=1936 O. 185, 1936 O.W. N. 116=1936 O. 132; 1936 Pesh. 52=1935 L. 971. But where the lower Court proceeds on a clear misapprehension of a section of the Code, and refuses rateable distribution under S. 73, C.P. Code, it clearly refuses to exercise a jurisdiction vested in it by law, and the High Court will interfere in revision notwithstanding that a remedy by suit is open to the aggrieved party. 1935 M.W.N. 1300=69 M.L.J. 908. So also the High Court will not interfere in revision with a decision under O. 21, R. 61 as the party aggrieved has a remedy under R. 63. 1930 P. 394; 39 C.W.N. 733; 30 S.L.R. 288. But if it can be shown that the Judge passing the order failed to exercise jurisdiction vested in him by Rr. 58 to 62, O. 21, its order is open to revision. 14 R. 516=164 I.C. 638=1936 R. 306. But see 58 C. 55=132 I.C. 631=1931 C. 385 and 44 L.W. 703=1936 M. 940 regarding proceedings under O. 21, R. 101. The High Court under S. 115, C.P. Code, has no jurisdiction to interfere in revision with an order under S. 144 which is subject to an appeal. 158 I.C. 908=1935 A.L.J. 995=1935 A. 873. S. 115 of C.P. Code contemplates the calling of the records from a trial Court and the appeal referred to therein means an appeal to the High Court. If, therefore, a trial Court has acted with material irregularity in the exercise of its jurisdiction or acted illegally, the High Court has power to interfere in revision provided that no appeal lies to the High Court. The section does not require that no appeal in the meantime should have been preferred to the District Judge or that if preferred it is only the order of the District Judge which can be revised. 118 I.C. 189=1929 A. 793. Refusal to entertain an application for review based on the ground of fraud is revisable notwithstanding the existence of another remedy, 33 C.W.N. 572=1929 C. 513. When another remedy is open to a party, but it is very inconvenient and practically is no remedy, the Court should give relief by way of revision. 2 A.L.J. 370, 65 I.C. 476, 26 L.W. 76=104 I.C. 371=1927 M. 799; 53 M.L.J. 903, 27 L.W. 286=1928 M. 416. See also 60 M.L.J. 713=1931 M. 1; 1933 R. 64. High Court will interfere in revision in such cases to prevent multiplicity of proceedings. 131 I.C. 14=1931 M. 511. See also 135 I.C. 199=1931 L. 176; 33 P.L.R. 975; and save parties from long and expensive litigation. 54 A. 516=1932 A. 411=1932 A.L.J. 359. Plaintiff attached certain property which the defendant alleged was under wakf. Lower Court held that the wakf was illusory. In appeal Lower appellate Court allowed to continue

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the attachment Defendant came in revision to the High Court. It was contended that revision of such order did not lie. *Held*, that an order of this kind could be revised even though aggrieved party had remedy by regular suit. 19.9 R. 297, Foll.; 1935 R. 395 Appeal to lower Court under S. 47, C. P. Code—Auction purchaser can petition High Court for revision as a second appeal by him does not lie. 117 I.C. 789=1929 M. 84 There is no ground for restricting the scope of the words "in which no appeal lies" to cases where no appeal lies from the order sought to be revised. 1930 A.L.J. 924=1930 A. 604 (2) See also 123 I.C. 127=1931 L. 302 (1). Where the order of remand passed in appeal appeared to have been passed without jurisdiction, held in revision that the order should be set aside and the appeal remitted for reconsideration, though the order of remand could be called in question in an appeal from the final decree. 133 I.C. 127=1931 L. 302 (1). When the order is in effect a decree, if it is appealable though it is described as a decretal order and no revision lies against it. 54 M. 337=1931 M. 471=60 M.L.J. 167 The High Court is reluctant to interfere in cases under the Dekhan Agriculturists' Relief Act where the revisional powers of District Judge suffice. 55 B. 411=33 Bom.L.R. 476=1931 B. 284. An order under S. 73 is not merely a ministerial order, it is a judicial order. But the order cannot be interfered with in revision as the party has another remedy by way of suit. 21 S.L.R. 193=1933 S. 329 Order dismissing suit under S. 9, Specific Relief Act, will not be revised, as remedy by regular suit is open to him, 165 I.C. 908=1936 O.W.N. 1228

FAILURE TO EXERCISE JURISDICTION AND WRONG EXERCISE OF JURISDICTION—The High Court is bound to interfere where it appears that the Court of First Instance has exercised a jurisdiction not vested in it by law. 26 M. 176, 21 M.L.J. 1020, 1935 Pesh. 21: 153 I.C. 453=68 M.L.J. 115, 68 M.L.J. 236; 55 I.C. 41, 51 I.C. 873=4 P.L.J. 340; 51 I.C. 189=4 P.L.J. 277, 49 I.C. 442=4 P.L.J. 57 Ousting jurisdiction must be patent on the face of the record before it can be predicated of a Court that it has exercised a jurisdiction not vested in it by law. 44 B. 595, 65 I.C. 50. (Error held not to be so patent) 1922 S. 1; 1933 S. 82 and Sind Misc Appln. No. 44 of 1930 (rel. on) 27 S.L.R. 261=1933 S. 229 Where a Court has jurisdiction to make an order and refuse to make it on the ground that it has no jurisdiction, that is a good ground for interfering in revision under S. 115. 36 Bom.L.R. 449=58 B. 485=1934 B. 252. "Jurisdiction" in S. 115 of C.P. Code means a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit. 23 I.C. 97=41 C. 323; 15 I.C. 669 See also 46 C.L.J. 182=103 I.C. 468=31 C.W.N. 818; 11 M. 220 (F.B.); 7 A. 345, 350, 8 A. 519. A Court's decision regarding its own jurisdiction in a particular matter is open to revision. 104 I.C. 342=1927 S. 239; 116 I.C.

172. But see 1929 L. 83 Where orders of lower Court amount to refusing to try the case and to exercise jurisdiction vested in them, revision lies. 1937 N. 39. Refusal to entertain defence which law allows is a case of non exercise of jurisdiction, and revision lies. 165 I.C. 926 (Nag.) Where the question is whether the Civil or Revenue Court should take cognizance, an erroneous decision can form the subject-matter of revision. 27 A. L.J. 1157. An order of a Small Cause Court returning the plaint for presentation to proper Court is revisable. 1932 A.L.J. 1068=1933 A. 106 So also an order by a Court returning a plaint for presentation to the Small Cause Court and this even when the District Judge failed to make a reference under O. 46, R. 7. 1932 N. 70. Where the parties went to trial on the merits and the Court raised an issue as to want of jurisdiction *suo motu* at a late stage and returned the plaint held, that the order was not justified and should be set aside in revision. 131 I.C. 303 (2)=32 P.L.R. 737 Where the lower Court exercises jurisdiction in a proper manner, the High Court will not interfere. 45 A. 548=73 I.C. 538, 45 A. 425 See also 68 M.L.J. 324 Ordinarily interference in revision is inadvisable in cases of decisions as to jurisdiction and should only be made in exceptional cases to remedy injustice. 1923 L. 565, 73 I.C. 755=1923 L. 524. Where a decree is obtained against a person who does not represent the estate and the estate is sought to be sold in execution of such a decree, the case falls within the principle of 32 C. 296, and the decree is liable to be set aside in revision for want of jurisdiction. 53 C.L.J. 415=134 I.C. 305=1931 C. 673 The High Court's interference under S. 115—if confined only to question of jurisdiction. 20 C.W.N. 1080=1 Pat.L.J. 465=37 I.C. 129 On the mere ground that the decision was wrong, a High Court certainly will not interfere but where the lower Court had no jurisdiction to enquire into the question, High Court has power to interfere in revision. 1 R. 265=76 I.C. 504 See also 106 I.C. 901=10 L.L.J. 51 relying on 6 L. 487 (P.C.); 40 M. 793 (P.C.), 27 M. 504; 30 C. 397; 46 C.L.J. 182=103 I.C. 468=31 C.W.N. 818; 27 A.L.J. 961=119 I.C. 859. The order of a Court wrongly refusing to entertain an application on the ground that it did not lie at all, is on account of the declining of a jurisdiction, liable to be set aside. 38 M.L.J. 322; 48 I.C. 139=8 L. W. 436; 31 I.C. 536=2 L.W. 1115, 31 I.C. 209, 28 I.C. 707=2 L.W. 366. Points of jurisdiction, even though not taken in the lower Court, can be argued in the High Court. 41 L.W. 20=1935 M. 89.

ILLUSTRATIVE CASES OF WRONGFUL EXERCISE OF JURISDICTION—Where a Court has acted by inventing a rule of procedure for itself which is not warranted by law the High Court is not only competent to interfere but should interfere in its revisional jurisdiction. 27 A.L.J. 769=1929 A. 593. The High Court can interfere in revision when a Civil Court has wrongly entertained

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a suit cognizable by a Revenue Court. 56 L. C. 94n=23 C.C. 28. Also when a suit is wrongly tried by a Court of Small Causes. 1932 L. 637. District Munsiff exercising small cause jurisdiction when not invested with such powers—Revision lies. 22 I.C. 909=12 A.L.J. 109. But High Court would not interfere in revision, in a suit cognizable by a Small Cause Court, but tried by a District Munsiff and appeal suit heard by the District Court without any objection. 21 B. 417; 75 I.C. 769. Revision lies against order wrongfully refusing to file appeal. 99 I.C. 690. Jurisdiction, want of—Plea to be substantiated by evidence. 52 I.C. 32. An order without enquiry is without jurisdiction. 24 L.W. 839=99 I.C. 383=1927 M. 188. Omission to refer to evidence. 104 I.C. 321; 99 I.C. 946=44 C.L.J. 565. The omission of an appellate Court to deal with an appeal before it on the merits is a failure to exercise jurisdiction vested in it by law. 40 C. 518=20 I.C. 420. The High Court has power to set aside the order of the lower appellate Court on the ground that no appeal lay to it at all. 5 Pat.L.J. 97=55 I.C. 15. See also 140 I.C. 48=1932 L. 416. But see 1929 R. 198. Where the lower Court accepts an appeal which is incompetent, the High Court may interfere in revision and set aside its order. 152 I.C. 622=35 P.L.R. 431=1934 L. 540. Where an order, not being appealed against, becomes final, it cannot be set aside by the Appellate Court when hearing an appeal against a later order, nor can such Court pass an order which is inconsistent with the earlier order. Such an order of the appellate Court is liable to be set aside in revision. 152 I.C. 693=35 P.L.R. 466=1934 L. 538. An order of the appellate Court directing the re-hearing of a suit without any finding as to the sufficiency of the cause for the non-appearance of the defendant is illegal and without jurisdiction. 54 I.C. 965=1 Pat.L.J. 69. See also 100 I.C. 135=1927 M. 335. Where the appellate Court has jurisdiction to hear an appeal and passes an order directing the first Court to proceed with the suit the order cannot be attacked in revision, even though it may be erroneous in law. 53 A. 519. An erroneous decision of the lower appellate Court that the first Court had or had not jurisdiction to entertain a suit can be interfered with in revision. 39 M. 195=24 M.L.J. 112, 76 I.C. 1010=1923 L. 412. Where a Court assumes jurisdiction to pass an order on an erroneous view of the law, in a matter where it has in fact no jurisdiction, it is a case for interference of the High Court. 46 M. 536=44 M.L.J. 1, 100 I.C. 936=1927 L. 342. Jurisdiction—Refusal to exercise—Court misinterpreting S. 73 of the C.P. Code and consequently refusing help. 101 I.C. 527=15 C.W.N. 842. See also 1927 M. 1030; 60 I.C. 371; 70 I.C. 20 (2) (Mad.). Where the Court below does not judicially consider what it ought to have considered, and decides something that it is not called upon to decide, there is

illegal or irregular exercise of jurisdiction. 155 I.C. 1088=1935 A.W.R. 559=1935 A.L.J. 527=1935 A. 310. When a Court, upon an erroneous view as to the scope of a section of the Code, applies it to a case to which it has no application, it acts without jurisdiction. 33 C. 487, 99 I.C. 425=1927 M. 427. See also 36 C.W.N. 788=1932 C. 857 (B. T. Act). Where a Court rejects the application of two idols, represented by their shebait for permission to file a suit, *in forma pauperis* on the erroneous assumption that they are not "persons" entitled to present such an application under O. 33, C. P. Code, its decision amounts to a conscious violation of the specific rules of the C.P. Code and is open to revision. 1931 N. 17, 1924 N. 44 and 1922 B. 584, Foll. 31 N.L.R. 413=18 N.L.J. 347=158 I.C. 660=1935 N. 209. See also 1936 A.M.L.J. 4. A mere misconstruction by a subordinate Court of S. 87 of the Negotiable Instruments Act is not a ground for revision by the High Court under S. 115, C. P. Code. 12 I.C. 138. Issues framed not arising from plant and rejecting application to confine issues to matters stated in plant—Revision lies. 1929 N. 347. Suit dismissed on questions not raised—Revision lies. 1929 L. 294. Case of misconstruction of pleadings. 1927 L. 44. Where the lower Court has found a different case for the petitioners from that set up by them in their petitions, and allowed their claim, it is an irregularity which justifies interference in revision. 133 I.C. 301=1931 M. 534. A Judge who passes a decree which is not supported by any evidence on the record has taken upon himself a jurisdiction not vested in him by law. 10 C.W.N. 14, 9 A. 398, 404. Finding of fact without evidence. 64 I.C. 85. Holding particular evidence as inadmissible was vastly different from failing to exercise a jurisdiction vested by law in the Court of the first appeal. 1929 P. 633. Where, by an error of law, the Court excludes certain evidence from consideration, the evidence being the main evidence in the case, there is such a material irregularity in the exercise of its jurisdiction as may lay the judgment open to revision. 119 I.C. 417 (2). See also 14 Pat.L.T. 70, 35 C.W.N. 1242; 1931 A. 452. When a document has some legal effect on the decision, its exclusion can be treated as a refusal to exercise jurisdiction. 25 I.C. 204. When the conclusion of the lower Court is obviously opposed to the finding expressed in the body of the judgment, the High Court can interfere in revision with such an order. 1929 M. 841 (1)=119 I.C. 64; 1930 M.W.N. 1227. Where a subordinate Court proceeds with the trial of a suit in contravention of S. 10, C.P. Code, it usurps a jurisdiction not vested in it by law and its order refusing to stay the suit though interlocutory, is open to revision by the High Court. 42 A. 409, 70 I.C. 5=16 L.W. 607. An order

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under S. 10 staying a suit amounts to a decision that the Court has no jurisdiction to try the suit. If wrongly used, it is a refusal to exercise jurisdiction and is open to revision under S. 115. 50 I.C. 212; 14 I.C. 711, 14 I.C. 221, 1929 L. 694. See also 139 I.C. 48=33 P.L.R. 787. But see 1929 L. 662. An order refusing to stay a suit during the pendency of another suit in the same Court is not an interlocutory order and is not subject to revision under S. 115, C. P. Code, and S. 44 of the Punjab Courts Act. However, if circumstances justify such a course the Court may interfere either under S. 151, C. P. Code or under S. 107 of the Government of India Act. 31 Punj L.R. 174=1930 L. 525. An order refusing to stay the trial of a suit which is connected with an appeal pending in the appellate Court is revisable. 1933 L. 50. Where a Judge refused to try the issues raised before him, he has declined to exercise a jurisdiction vested in him by law and the High Court can interfere. 39 A. 297=38 I.C. 335. The failure of a District Judge to decide a plea amounts to a refusal to exercise a jurisdiction and his decision is liable to be set aside in revision. 54 I.C. 662. Omission to decree claim admitted 1922 P. 355, 1923 P. 41. Also where an objection to the place of suing is overruled and embodied in a formal order. 41 A. 602=51 I.C. 331. As to order allowing amendment of plaint, see 36 P.L.R. 264=1934 L. 974. The refusal by the lower Court to allow an eminently just and equitable application for amendment is tantamount to a refusal to exercise a jurisdiction vested in the Court under Ss. 151 and 152 of the Code. 8 Luck. 734=11 O.W.N. 550=1934 O. 352. See also 148 I.C. 347=15 Pat. L.T. 602=1934 P. 425, 38 C.W.N. 1183. An order directing a plaint to be returned for amendment without a prayer being without jurisdiction, is open to revision by the High Court. 24 M.L.J. 455=19 I.C. 672, 1913 M.W.N. 1024=21 I.C. 767. Also an order dismissing summarily an application by plaintiff to restore a suit dismissed for default. 100 I.C. 677=1927 L. 239. Where an order refusing to re-open a suit decreed *ex parte* is set aside on appeal, the order setting aside the trial Court's order is open to revision. 145 I.C. 370=1933 R. 156. The Judge had before him an application for re-opening the *ex parte* decree which on the face of it was time-barred and which he recognised as being time-barred on its face. Yet he allowed an extension of time. *Held*, that in re-opening the case he exercised a jurisdiction which he had not got and that the order re-opening the case should be set aside. 144 I.C. 980=1933 R. 110. Failure to exercise jurisdiction vested by the Calcutta Rent Act can be interfered with under S. 115, C. P. Code. 26 C.W.N. 711=49 C. 928. Failure to deal with question of

limitation arising in the case is no material irregularity requiring interference in revision. 32 I.C. 785=3 L.W. 176. But see 18 I.C. 391=17 C.W.N. 667. Where a suit was withdrawn by the plaintiff without the Court's considering the terms of withdrawal especially as to costs, it was held that the omission to consider the question of costs which resulted in injustice to defendant is a failure to exercise the jurisdiction vested in the Court. 31 I.C. 617=13 A.L.J. 10 (Rev.) 1929 A. 683. Application for decree absolute.—Declining to entertain objections. 5 Pat. L.J. 342. When a date is appointed for the hearing of parties in order to ascertain valuation on sale proclamation, the Court acts without jurisdiction in fixing valuation at an earlier date without hearing the parties. 3 P.L.T. 342=65 I.C. 360. Where the Court wrongfully cancelled a lease granted by a guardian which was perfectly within his competence *held*, in revision, that the order was made without jurisdiction and must be set aside. 1930 L. 1017=132 I.C. 203. Where a Court orders that a guardian is responsible for the income of the estate of minor only from the date of the grant of the certificate of guardianship, and the order is not appealed against, it is not competent for the successor of the former Judge to hold him liable from an earlier date on which he was appointed, and such an order is liable to be set aside in revision. 35 P.L.R. 547=152 I.C. 691 (1)=1934 L. 592 (1). Jurisdiction—Execution sale—Deposit by person not entitled, allowed. 26 C.W.N. 167=70 I.C. 127=1922 C. 95, 45 A. 425=21 A.L.J. 313, 52 I.C. 344. Where the lower court took a *wrong view of the law relating to procedure* and refused to proceed with the execution proceedings. *Held*, that the lower court had refused to exercise a jurisdiction vested in it and the High Court could interfere. 143 I.C. 189=10 O.W.N. 263=1933 O. 225. In deciding that certain property was not saleable the lower Court was only exercising its jurisdiction and it cannot be said to have refused to exercise its jurisdiction, by refusing to execute the decree by attachment of property which it held to be not saleable. 149 I.C. 815=1934 R. 263. The High Court has jurisdiction to interfere with the wrong exercise by the Courts below of powers vested in them under O. 21, R. 89 to 92 dealing with confirmation and setting aside of auction-sale. 67 I.C. 286; 32 C.W.N. 57=104 I.C. 199=1927 C. 633; 17 Pat. L.T. 852=1937 P. 104; 17 Pat. L.T. 940 (F.B.). Where a Judge has proceeded on the assumption that a Court has no jurisdiction to order addition of parties to a suit in which one of the defendants died before the institution of the suit, he has failed to exercise a jurisdiction vested in him by law. 147 I.C. 782=1934 A.L.J. 126=1934 A. 25. Appellate Court wrongly entertaining appeal from order passed under O. 21, R. 58, in claim

- (a) to have exercised a jurisdiction not vested in it by law, or
 (b) to have failed to exercise a jurisdiction so vested, or

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by judgment-debtor of attached property in representative capacity. 17 Pat. L.T. 810. The refusal to entertain an application under O. 1, R. 8 without proceeding in accordance with law comes under S. 115. 145 I.C. 387=14 Pat. L.T. 361=1933 P. 302 Issuing notice under Regulation not in force is revisable. 10 Pat. L.T. 787=1929 P. 537 Defect in the signature of plaintiff in a suit in the Village Court cannot be interfered with by Munsif under S. 73, Village Courts Act, nor by the High Court in revision. 30 L.W. 499. Where the lower Court refuses to set aside a sale of a Patni, erroneously holding that S. 14 of the Patni Regulation is not retrospective, it fails to exercise a jurisdiction vested in it by law and consequently the order is open to revision. 61 C. 903=38 C.W.N. 720=1934 C. 512.

REVISIONAL JURISDICTION TO ATTAIN "ENDS OF JUSTICE".—The powers under S. 115 are intended to be exercised with a view to subserve and not to defeat the ends of justice. 144 I.C. 904=1933 A. 154 See also 145 I.C. 164=35 Bom. L.R. 388=1933 B. 245, 41 L.W. 20=1935 M. 89. Where the conditions set out in S. 115 are present, a summary view of justice is frequently not a conclusive or even a very safe guide, especially, where the real obstacle in the way of the opposite party is a statutory bar of limitation. 1934 P. 50. An order under S. 145 passed by a Sub-Judge can, if necessary, be revised by the High Court although an appeal lies to District Court from such order and a further appeal from the order of the District Court lies to the High Court. 11 R. 134=144 I.C. 163=1933 R. 64. Where the Court passed an order in the course of execution *assessing mesne profits on an erroneous basis*. *Held*, that the preliminary decree was erroneous in so far as it failed to fix the basis for the assessment of mesne profits and that, having regard to the fact that if this Court had pursued the proper course and fixed the basis in the preliminary decree, it would have been open to revision and with a view to save a great deal of money, time and labour, the order should be interfered with in revision. 151 I.C. 922=38 C.W.N. 384=1934 C. 503. Where the burden of proof has been wrongly placed by the lower Court and there has been a miscarriage of justice the High Court should interfere. 159 I.C. 70 (1)=1935 R. 131.

Sec 115, Cl (a).—Where a Court proceeding to act under O. 21, R. 90 sets aside a sale without proof of substantial injury, such an order is one passed without jurisdiction within the meaning of this section. 9 M. 145. See also 106 I.C. 568 (Application not conforming to R. 89 of O. 21) Proceeding under O. 41, R. 23 instead of under O. 41, R. 25 does not create a point

of jurisdiction so as to justify interference. 64 I.C. 436. A Court has jurisdiction to hear an application for review though insufficiently stamped and the High Court will not interfere on that ground. 21 I.C. 942 (C); 43 A. 288; 2 L.W. 366. Where the trial Court extended time for paying deficient Court-fee after the passing of a decree, *held*, that the order was without jurisdiction and must be set aside in revision. 129 I.C. 732=1931 A. 318. A general order of remand by an appellate Court which misunderstands its own duties and in substance declines jurisdiction is liable to be revised by the High Court. 63 I.C. 358. The investigation contemplated by O. 33, R. 7 must be confined to the applicant's pauperism, and if the Court receives evidence on the merits, it exercises a jurisdiction not vested in it by law. 13 M.L.J. 292 (F.B.). See also 45 A. 548. Subordinate Court legally incompetent to try suit—Appellate Court ordering it to hear and dispose of it—Appellate Court acts without jurisdiction. (Case-law reviewed.) 1930 A. 713=1930 A.L.J. 1233 (F.B.).

Sec. 115, Cl. (b).—If by taking a mistaken notion of his legal powers, a Judge fails to exercise a jurisdiction vested in him by law, the High Court can interfere. 12 M.L.J. 473. See also 10 O.W.N. 263=1933 O. 225, 1931 A. 756=1932 A.L.J. 13. Where a Judge puts an erroneous construction upon the provisions of an Act, this does not amount to failing to exercise a jurisdiction vested by law. 13 C. 90 (93). Where no application is made under O. 21, R. 90, but nevertheless, the Court refuses to confirm the sale under O. 21, R. 92, it has failed to exercise a jurisdiction vested in it. 20 C. 8 (11) (P.C.). See also 13 A. 761. Court's refusal to set aside sale, when judgment-debtor deposits the decree amount and applies under O. 21, R. 89, is revisable. 118 I.C. 805=1930 O. 9. See also 133 I.C. 407=1931 A. 756. When a Court refuses to investigate a claim under O. 21, R. 58 to 60 it refuses to exercise jurisdiction vested in it by law. 4 C.L.R. 74; 49 C.L.J. 51=1929 C. 225. Where the Court refused to adjudicate the claim and it appeared that it had failed to consider the law applicable and prejudice was thereby caused, *held*, that the High Court could interfere in revision. 1929 R. 152=7 R. 132. Where the Judge refuses to consider the objections to an award though filed within time, he refuses to exercise a jurisdiction which vests in him. 1933 R. 38. Where the lower Court has failed to take notice of the real point in the case, the High Court can interfere in revision. 106 I.C. 226 (2)=1928 L. 299; 5 R. 803. When a Judge refuses to accept a plaint he fails to exercise a jurisdiction vested in him by law. 32 C. 146. Where the Court rejects

(c) to have acted in the exercise of its jurisdiction illegally or with

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an application for leave to sue *in forma pauperis* for defective verification and does not give a chance to the applicant to correct the defect, it amounts to failure to exercise the jurisdiction vested in it under S. 153, C. P. Code. 1933 A.L.J. 110=1933 A. 295 A purchase by the decree-holder's pleader for himself may be attacked on principle and may be, in certain cases, avoided, but it is not an error of law or jurisdiction if the Court does not avoid it. 117 I.C. 727=1929 M. 624. Failure to comply with provisions of R. 22 of O. 21—Illegality—Objection not taken—Appeal not maintainable—Interference of High Court in revision. 7 R. 110.

Sec 115, Cl (c) COURT ACTING ILLEGALLY OR WITH MATERIAL IRREGULARITY.—Test as to applicability of this clause I L R 1936 N 73=164 I.C. 848=1936 N. 157 Cl (c) of S 115 has a distinct meaning from that of the other two clauses. It does not refer only to defects of procedure, nor is it confined to errors in the method or manner of trial. It empowers the High Court to interfere and correct gross and palpable errors of Subordinate Courts for the ends of justice 38 C.W.N. 1146=60 C.L.J. 91. Cl. (c) of S 115 contemplates cases other than those referred to in cls. (a) and (b). The words in cl. (c) did not occur in the Code of 1877 and were introduced for the first time in the Amending Act of 1879. They are intended to re-refer to cases where the Court has jurisdiction and has exercised it but has acted illegally or with material irregularity in the exercise of jurisdiction. 34 C. W. N. 515. For the meaning of the words "illegally" and "material irregularity", see 7 B. 341 at p. 358 (F.B.); 7 R. 339 =1929 R. 145, 1929 A. 683. See also 1932 A.L.J. 803; 149 I.C. 1126=1934 Pesh. 29. "Acting illegally or with material irregularity" does not mean committing an error in the decision arrived at; but where a procedure has been adopted which is grossly improper and leads to a denial of justice, it amounts to a material irregularity in the exercise of its jurisdiction. 1933 A.L.J. 110=1933 A. 295; 34 Bom.L.R. 1273=1932 A. 154. It is a material irregularity to come to a finding which is based entirely on a guess 151 I.C. 429=1934 R. 214. Or on surmises for which there is no justification from the evidence on the record. 1936 O. W. N. 237. Where the lower Court decrees the suit on a case which is not to be found in the pleadings and is inconsistent therewith, it acts illegally in the exercise of its jurisdiction and with material irregularity. 14 R. 511=163 I.C. 668=1936 R. 235. Or where suit is decided on a case not put forward by parties 1935 Pesh. 174. Where in a pre-emption suit the lower Courts import irrelevant considerations into the discussion of evidence and refuse to give the

valued the full sum proved to have been paid, merely because those considerations raise suspicions in the minds with regard to genuineness of the price paid, it commits a material irregularity 160 I.C. 452 =1936 Pesh. 12. As to whether revision lies where a wrong order impleading party to suit was rectified by a subsequent order by successor in office, see 39 C.W.N. 1010. Only in an exceptional case High Court investigates the evidence in the exercise of its revisional powers. 12 P. 83=1; Pat. L.T. 651=1933 P. 575 (F.B.). If the Court refuses a party a right to lead evidence on a matter on which the parties are at issue, it exercises its jurisdiction with such material irregularity as to vitiate its order and the proper course is to set aside that order. 144 I.C. 461=14 Pat.L.T. 300 =1933 P. 278. There is material irregularity in the exercise of jurisdiction, if there is no proper consideration of pleadings and evidence and the High Court would interfere in revision with a finding of fact reached owing to misconception of the method by which the question should be considered 144 I.C. 834=29 N.L.R. 164 =1933 N. 188. Unless the Judge confines himself to the case of the plaintiff as set out in the plaint he acts with material irregularity in determining the question of whether the plaint discloses a cause of action. 145 I.C. 307=14 Pat.L.T. 338=1933 P. 284. The fact that the burden of proof as to certain issues has not been correctly placed is no ground for interference in revision 151 I.C. 548 (1)=35 P.L.R. 334. An order of the lower Court which is virtually a refusal to go into the question of jurisdiction before proceeding to hear the suit on the merits amounts to an irregularity open to the High Court to interfere in revision 152 I.C. 369=1934 M. 617 (1). Order allowing plaintiff to *withdraw suit* on grounds not covered by O. 23, R. 1. See 25 A.L.J. 870=103 I.C. 229=1927 A. 704; 25 A.L.J. 838=103 I.C. 372. See also 145 I.C. 222=1933 O. 255; 147 I.C. 441=1934 A. 214, 1935 A.W.R. 30. Where a mortgage bond was on the face of it discharged, and in the possession of the obligor, it was however, held to be a material irregularity to make the latter prove the fact of discharge. It was for the plaintiff, who sued on mortgage to prove the loss of the document and further to show that the debt was subsisting. 163 I.C. 809 =1936 M. 526. See also 61 C.L.J. 18=1935 C. 710. Where the lower Court in framing the issues, definitely places the burden of proof wrongly and refuses to recast the issues correctly, where the matter is one considerable importance, the High Court will properly interfere in revision. 158 I.C. 601=1935 M.W.N. 798=42 L.W. 405=1935 M. 784=69 M.L.J. 239. When the only issue tried by the lower Court is not one upon which the dispute between the

material irregularity, the High Court may make such order in the case as it

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cannot be properly adjudicated, Court acts with material irregularity 7 Bom. L.R. 12 (16). Where in disposing of an objection under O. 21 R. 58, C. P. Code, the Court failed to decide the only real issue, namely, the question of possession, and decided the other issue as to title, *held*, that the Court had acted with material irregularity and it was a proper case for interference in revision. 132 I.C. 666=1931 L. 666. The expression, "material irregularity" was held to include an irregularity of procedure materially affecting the merits of the case. 13 C. 225. Where the decree in suit is contrary to the judgment and the terms of a compromise filed by the parties and the Court rejects an application for correction under S. 152, C. P. Code, it is open to the High Court to interfere in revision with the order of the lower Court. 134 I.C. 1009=1931 O. 422. But a wrong interpretation of a deed of compromise filed in the execution proceedings does not amount to a material irregularity in the exercise of jurisdiction. 1935 L. 971. Material irregularity—Application under O. 21, R. 89—Deficient sum deposited—Same due to miscalculation of Court Officer—Objection raised after 30 days—Court refusing permission to depositor to deposit deficient amount—Interference in revision. 33 C.W.N. 1170=1930 C. 249. *See also* 28 C. 574 (583), 1928 M.W.N. 49. Where the Court did not consider the question of extension of time under S. 5, Limitation Act, *held* that it acted with material irregularity in rejecting the appeal as having been filed out of time. 1933 L. 260=145 I.C. 153. A mere error in law is not an illegality or material irregularity. 23 B. 177. *See also* cases under "Error of Law". If the Subordinate Court follows the decision of other High Courts in preference to those of its own High Court, it acts in the exercise of its jurisdiction with material irregularity. 11 P. 616=140 I.C. 572=1932 P. 346. Where there is a wilful disregard or conscious violation of a rule of law or procedure, the case is one of material irregularity calling for interference in revision under S. 115, C. P. Code. 59 B. 430=156 I.C. 662=37 Bom. L.R. 241=1935 B. 222. An order by the Full Bench of the Presidency Small Cause Court, allowing an application under S. 38 of the Presidency Small Cause Courts Act and sending the case back for retrial, which order is influenced by what was told them in their private room at an *ex parte* enquiry, is improper and ought to be set aside in revision. 62 C. 289. Granting leave under S. 20 (b) without issuing notice to opposite party does not amount to acting in the exercise of jurisdiction illegally or with material irregularity so as to justify interference in revision. 1933 L. 266. But where an order under S. 24 (1) directing the transfer of a

suit is passed without notice, it is tainted with material irregularity. 1931 A.L.J. 1061. Where the result of an erroneous decision is to perpetuate the error and cause multiplicity of suits not for one year but for all time, the High Court would be justified in interfering in revision. 115 I.C. 351=56 M.L.J. 273. *See also* 1931 M. 511. Rent decree executed as money-decree for want of proper parties—Simultaneous attachment and proclamation of sale—No notice to judgment-debtor—Encumbrance not mentioned—Price fetched inadequate—High Court could interfere in revision. 1929 P. 588. Where in such a matter the Court, after due inquiry under O. 21, R. 17, directs the release of part of the land and to order the sale of only so much as was necessary to satisfy the decree, there is no ground justifying interference in revision. 153 I.C. 1024 (1)=1935 P. 143. The mere fact that notice did not proceed in the peculiar way prescribed in S. 61 of the Presidency Small Cause Courts Act, does not deprive the Court of jurisdiction or vitiate the trial under that section and does not call for interference in revision. 59 C. 311=36 C.W.N. 530=1932 C. 441. Execution sale—Order setting aside in contravention of statutory requirements as to deposit—Revision. *See* 39 C. W.N. 913. An order contravening provisions of O. 21, Rr. 89 and 92 is an illegal exercise of jurisdiction and is a material irregularity within S. 115 (c). 1930 A. 843. Confirmation of a sale in execution before an application under O. 21, R. 90 by the judgment-debtor has been decided is a material irregularity which adversely affects the judgment-debtor. 1933 A. 137=145 I.C. 732. There is no material irregularity in a Court confirming a sale to a decree-holder, who did not happen to go herself to the auction, but sent her husband who did not have a proper power of attorney to act on her behalf, hence the order confirming the sale is not open to revision. 1935 R. 521. As to order refusing to proceed with execution of decree on plea of uncertified adjustment, *see* 1935 R. 481. Where in a petition under O. 21, R. 100, the lower Court asked the decree-holder to begin his case and examine his witness before the examination of the claimant's witnesses, it is a serious irregularity which justifies interference in revision. 132 I.C. 301=1931 M. 534. *See also* 1932 M. 513 (Proceedings under S. 53, Provincial Insolvency Act). Court refusing leave to adduce evidence in guardianship proceeding—Order is revisable. 34 C.W.N. 763=1931 C. 59. An inference based on a mere conjecture is vitiated by material irregularity. 1931 R. 318. Omitting to give grounds for allowing to bring fresh suit, while suit is withdrawn is material irregularity and therefore revision lies. 34 C.W.N. 912=1931 C. 107. If grounds are given, they cannot be scrutinized in revision. 125 I.C. 580.

thinks fit.

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Order consolidating two suits against the wishes of the parties and when the issues and the evidence in them had little in common can be raised. 13 Pat.L.T. 726. A Court acts with material irregularity when it sends a suit for trial to the wrong Court. 138 I.C. 136=1932 M. 217. Security-bond given for grant of succession certificate—Application for its assignment—Rejection without perusing bond. See 154 I.C. 816=1935 A.W.R. 361. The failure of a Court to fix a time for payment of process amounts to a material irregularity, and if the Court, which has not fixed a time for the same, dismisses a suit under O. 9, R. 2, C. P. Code, for failure to pay process-fees, the High Court will interfere in revision and set aside the order of dismissal. 158 I.C. 250.

ILLUSTRATIVE CASES—ABUSE OF PROCESS OF COURT—Where in a mortgage suit a preliminary decree was passed and the judgment-debtors failed to pay up the amount and thereupon the plaintiff applied for a final decree but the parties were absent on that date and the Court dismissed the suit under O. 9, R. 3, and the plaintiffs subsequently applied under S. 151 praying for the setting aside of the order, *held*, that the Court had no power to dismiss the suit but should have proceeded to pass the final decree. *Held also* that the order of dismissal was an abuse of the process of the Court and could be rectified in an application under S. 115. 8 L. 496=10 O.W.N. 293=1933 O. 299. Arbitrators in a case claimed a certain amount as their fees for their work. The Court reduced the amount to less than 1/7th without giving any opportunity for the arbitrators to put up their case. *Held*, that failure of the Court to hear the arbitrators fell within purview of Cl. (c) of S. 115. (53 I.A. 27, Rel. on.) 160 I.C. 361 (2)=1936 S. 1. When executing Court did not give any consideration to the question whether the Collector's proposal ought to be confirmed in the circumstances, but proceeded to adopt it as a matter of course, the Court failed to exercise judicially the discretion which is vested in it under S. 72, C. P. Code. It amounted to a material irregularity. 1935 L. 964. Where the Court dismisses an application for restoration of a suit dismissed in default under the impression that Art. 163, Limitation Act, applies to the case which does not in fact so apply, it constitutes a material irregularity and the order is open to revision. 1935 Pesh. 186. An appellate Court failing to notice an important ground of appeal when dealing with the appeal, commits a material irregularity. 162 I.C. 416=1936 Pesh. 97. It is obligatory on Court to record a proper judgment complying with the requirements of law even in dismissing an appeal under O. 41, R. 11, C. P. Code. Where the

appellate Court simply dismisses the appeal with the remark that there was ample material to support the order passed by the trial Court, its order is liable to revision. 38 P.L.R. 431. The Court acts with material irregularity in refusing to allow an amendment under O. 9, R. 17. Where the real question between the parties could not be properly decided without allowing the amendment and where the amendment, if allowed, would prevent a multiplicity of suits on a matter which is rather trivial. 157 I.C. 112=1935 A. 651. Where a judge summarily deals with an application to be added as party to a suit and dismisses it, totally misapprehending the nature of the application he acts with material irregularity. 157 I.C. 894=39 C.W.N. 1249=1935 P.C. 185.

ADDITION OF PARTIES—Addition and substitution of parties when open to revision. 45 C.L.J. 146, 1927 M.W.N. 301. No revision lies from an order striking out a defendant, as such an order does not decide anything between the parties. 14 I.C. 263, 32 A. 623. So also where parties are added. 64 I.C. 563, 90 I.C. 721. When in a suit the mortgagee claimed land from a third party through the mortgagor and the suit was decreed though the mortgagor was not a party the Court acted with material irregularity. 54 C. 338=99 I.C. 749=52 M.L.J. 368 (P.C.). Where addition of parties causes not only misjoinder of parties, but also causes of action, revision lies. 90 I.C. 721. Where the right to raise an objection as to non-joinder came into existence during the suit, and such objection was not taken in the trial Court, it cannot be raised in revision. 46 I.C. 648. But see 44 I.C. 564. Where an order for addition of parties was made due to devolution of interest during pendency of suit, appeal and not revision is the remedy. 14 C. 716. Addition of parties—Order refusing to make a transposition of parties when open to revision. 34 I.C. 186=20 C.W.N. 712. As to addition of party financing litigation see 68 M.L.J. 236. See also 45 M.L.J. 703=10 I.C. 68 (Scheme suit); 39 I.C. 160=5 L.W. 207, 25 A.L.J. 991. As to exercise of power under O. 1, R. 10 see 47 I.C. 721. Where a Court does not apply its mind to real dispute in the case and wanders into discussion of extraneous matters and disallows an application by a person who is directly affected by the result of the suit, to be impleaded as defendant, and, directs him to seek his remedy by separate suit; the order is open to revision. 164 I.C. 882=1936 L. 619.

AMENDMENT OF PLAINT AND PLEADINGS—The High Court has power to interfere under S. 115 with an order directing that a plaint should be amended. 63 I.C. 419. See also 36 P.L.R. 264=1934 L. 974=8 L. 734=1934 O. 352; 1925 M. 188, 89 I.C.

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782; 87 I.C. 30=48 M.L.J. 349=1922 L. 394 (1); *see contra* 15 C.W.N. 682=10 I.C. 308, 101 I.C. 701 (1)=9 Lah. L.J. 357; 30 L.W. 557=1933 M. 322, 1933 A.L.J. 27 relying on 43 A. 564. The refusal of the Court to allow an amendment in order to enable the controversial matter between the parties to be settled once for all amounts to failure to exercise a jurisdiction vested in it by law. 55 A. 256=1933 A.L.J. 268=1933 A. 374. *See also* 55 A. 169. If the result of the amendment allowed by the lower Court be to convert the suit into one of another and different character by the addition of the prayer for a relief barred by limitation at the date of plaint, it is a case of material irregularity which should be put right by revision. 133 I.C. 497=1931 M. 542=61 M.L.J. 316. A Court is not empowered to accept additional written statement to meet allegations not raised in the plaint. The proper course is to amend the plaint, if allowable, and direct filing of written statement, and frame issues and decide. 30 I.C. 41=29 M.L.J. 53. Where a Court dismisses a suit refusing an opportunity to amend the plaint, if necessary, the High Court can interfere under S. 115 1 P.L.T. 188; 55 I.C. 445; 22 M.L.J. 136=12 I.C. 173; 15 L.W. 667=68 I.C. 167; 98 I.C. 458=1927 M. 212. *See also* 1932 M. 603=141 I.C. 420. Where there is another remedy open to a party, such as an appeal, if eventually the judgment is passed against him, the High Court would not entertain revision. 10 I.C. 308=15 C.W.N. 682, 15 L.W. 667=68 I.C. 167.

AMENDMENT OF DECREE—Where the lower Court refused an application to amend a decree by inserting a provision for the taking of accounts mentioned in the award in accordance with which the decree was passed, *held*, that the omission to incorporate that provision was accidental, that the order of the lower Court may be set aside and application for amendment allowed in revision. 34 P.L.R. 802.

APPEAL—An appeal can be treated as an application under this section. 17 M.L.J. 119, 28 B. 458 (460), 4 A.L.J. 492; 45 C.L.J. 194; 1929 M. 205 and *vice versa*. 6 C.W.N. 346; 50 I.C. 931=9 L.W. 596. *See also* 34 I.C. 264; 31 I.C. 812=23 C.L.J. 235; but not one filed after limitation for appeal has expired. 2 L.L.J. 734. *See also* 41 M. 554=34 M.L.J. 309; 9 L.W. 81; 30 M.L.J. 486=34 I.C. 372. Nor where appeal is expressly prohibited by Code. 1935 P. 177. Incompetent appeal entertained by appellate Court can be set aside in revision. 25 Bom.L.R. 147=72 I.C. 256. *But see* 131 I.C. 561=35 C.W.N. 31=1931 C. 425.

ARBITRATION—Where in arbitration proceedings an appeal is not allowed, revision would be still more objectionable. 47 A. 121 Order of reference to arbitration—Jurisdiction of Court challenged—Revision.

See 1927 C. 52=106 I.C. 93; 110 I.C. 881=1928 A. 740. Where the applicant wishes to challenge the validity of the order of reference to arbitration, a revision is competent. 54 A. 297=1932 A. 665; 1932 S. 128. Where a reference is made to an arbitrator whom the Court has no power to appoint, the High Court can interfere in revision. 1931 A.L.J. 682=1931 A. 761. In arbitration proceedings taken in the course of a pending suit an order superseding the reference to arbitration is not open to revision. 160 I.C. 1052=38 P.L.R. 121=1936 L. 538. So also in the case of an order passed under S. 19, Arbitration Act, 1936 S. 205. Order appointing arbitrator against party's wish—If revisable. 51 A. 54=115 I.C. 611. Where the parties had agreed that the case should be decided by arbitration and counsel for parties made statements before the Court giving the names of the two persons whom to appoint arbitrator but the statements were silent as to what was to happen in case both the persons refused to act and there was no express provision that the Court would have no power to appoint a third arbitrator and the Court appointed a third arbitrator on refusal of the named arbitrators, *held*, that there was no material irregularity and that the fact that the Court had misinterpreted the statements of counsel on a point of law would not justify interference in revision. 151 I.C. 148=1934 A.L.J. 711=1934 A. 368.

AWARD—The order of a Court decreeing a suit in terms of an award is not open to revision. 152 I.C. 90=11 O.W.N. 1203=1934 O. 494, 38 P.L.R. 783. Where only some of the arbitrators take part in the hearing, but no objection is then taken and the merits of the award are not affected thereby, an order confirming such award is not open to revision on this ground. 38 L.W. 927=1933 M. 862=65 M.L.J. 755. *See also* 1933 M. 697=65 M.L.J. 376. Where the Judge refuses to consider the objections to an award though filed within time, he refuses to exercise a jurisdiction which vests in him, and a revision application against it should be allowed. 142 I.C. 835=1933 R. 38; 30 S.L.R. 271=1936 S. 172. Where in superseding an award the Court acted illegally and with material irregularity, the High Court could interfere in revision. 20 A.L.J. 125=64 I.C. 934=1922 A. 69; 27 A.L.J. 918=1929 A. 743. On this point, *see also* 87 I.C. 371; 133 I.C. 416=1931 A. 721; 133 I.C. 465=1931 A.L.J. 727=1931 A. 659. Where an award is impugned on the ground that the arbitrator held his enquiry in the absence of the objector and the latter applies to the Court to summon the arbitrator as a witness to substantiate his allegation, the refusal of Court so to do is not only a material irregularity but is an illegality and the order passed by the Court filing the award and passing a decree on its basis is improper. 145 I.C.

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329=34 P L R. 397=1933 L. 538. Where after the matter in dispute in suit was referred to arbitration and an award passed the objections of the petitioner were rejected and the Court proceeded under Sch. II, para. 16 to pronounce judgment according to the award, *held*, that the order was of an interlocutory nature and incapable of being revised. The arbitration proceedings are merely a portion of a branch of a suit and a part of a suit cannot be a "case" within the meaning of S 115, C. P. Code. (Case-law discussed.) 143 I.C. 309=34 P.L.R. 651=1933 L. 692, 38 P.L.R. 121=160 I.C. 1052=1930 L. 538. *See also* 163 I.C. 380=38 P L R. 725=1936 L. 466. Revision is not maintainable against an order setting aside an arbitration award while the case has not been fully decided 164 I.C. 722=1936 A.L.J. 547. An order passed under Sch II, para 15, setting aside an award is not revisable. 34 Bom.L.R. 376=138 I.C. 215=1932 B. 232. Where a Court sets aside an award of arbitration on the ground of misconduct on the part of the arbitrators its order is not open to revision. 47 B. 721=73 I.C. 464; 43 A. 101=59 I.C. 667, 59 I.C. 811=45 B. 832, 1929 L. 688; 1931 A.L.J. 842; 157 I.C. 1017=1935 A. 456. Where no notice was given of the filing of the award as required by the rules, the High Court can interfere in revision with a decree passed in terms of the award 63 I.C. 243. When a Court passing a decree on an award has committed an error in procedure or has misused the jurisdiction prescribed by Sch II, whether there is revision against the decree *See* 64 I.C. 363; 64 I.C. 294; 38 I.C. 769, 105 I.C. 105. If it can be shown that the lower Court acted altogether without jurisdiction in passing a decree in terms of the award, it would be permissible to entertain a revision under S. 115 146 I.C. 582=10 O.W.N. 1196=1933 O. 547. Where the party has consented to the illegal procedure, he cannot afterwards move the High Court in revision 135 I.C. 230=1932 A. 154=1931 A.L.J. 1087. Nor where no objection was taken in lower Court to the filing of private award on the ground that it was not registered 1937 C. 201. Interference in revision is not rightful where there is no irregularity in the proceedings or error in procedure or misuse of a jurisdiction and the decree of the Court is passed according to award of arbitrators. 16 I.C. 996; 28 I.C. 427. The Court on filing an award not containing decision on a point in dispute cannot be considered to have exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction vested in it by law. 17 I.C. 33=1912 M.W.N. 1076. Where a Court accepts an award filed by the arbitrator without giving the parties time to file exceptions to the award, there is material irregularity in the exercise of discretion, and the order accepting the award should

be set aside. 1933 A.L.J. 149=1933 A. 313. High Court would not interfere with an award, if substantial justice has been done 1933 A. 924=147 I.C. 746. Where the arbitrators improperly admit crucial evidence in the case, which must strongly affect their minds, the High Court will interfere in revision and set aside the whole award notwithstanding that it has been filed in Court and a decree passed in accordance therewith. 41 L.W. 51=1935 M. 184. High Court should not interfere with the award if no illegality is apparent and the irregularities in procedure are formal. 12 I.C. 269=21 M.L.J. 1005. High Court would not interfere with a decree based on an award on a technical objection. 137 I.C. 151=1932 O. 156. Also in case of arithmetical error in award 53 M.L.J. 38=103 I.C. 829. It should not interfere unless it finds not only an illegality committed but some substantial harm resulting from that illegality. 61 M.L.J. 761=34 L.W. 725. Whether revision lies from order refusing to give opportunity to party to produce evidence in support of objections to award, *see* 37 I.C. 400; 53 A. 778=1931 A. 761. High Court has power to revise the proceedings of the lower Court after the delivery of the award to it and can rectify any illegality or material irregularity in the lower Court's procedure in dealing with the award 34 I.C. 845=9 S.L.R. 183. *See also* 50 I.C. 52=4 P.L.J. 267, 65 I.C. 50. But where the ground of attack on an award has failed and the Court has refused to set aside the award under para 16 (1) of the second schedule a decree must be passed in accordance with the award and a finality attaches to such a decree and the matter cannot be allowed to be challenged in revision 134 I.C. 30=1931 A.L.J. 906, 158 I.C. 11=1935 O.W.N. 1036. Where suit is decreed in terms of award, the fact that the Court rejected the application of the applicants to withdraw the matter from the arbitrator wrongly thinking that it had no jurisdiction to do so, is no ground for interference in revision. 157 I.C. 649=1935 O.W.N. 920.

"CASE DECIDED"—Meaning of.—Order under S. 10 of the Religious Endowment Act—Revision—Powers of interference. 40 M. 793=33 M.L.J. 69 (P.C.). Order deciding that Sikh Gurdwara Act applies terminates proceedings and revision lies. 8 L. 362=1927 L. 394. "Case" is not defined in the Code, it cannot be confined to litigation in which there is a plaintiff who seeks to obtain a particular relief against a defendant before the Court, but includes an *ex parte* application praying that persons in the position of trustees or officials should perform their trust or discharge their judicial duties. 40 M. 793 (P.C.). The word "case" in S. 115 is a word of wider import than such words as "suit" or "appeal". 40 B. 86=33 I.C. 358; 48 B. 43, 41 C. 632; 1936 S. 205. The word "case" does not necessarily mean "suit" but can mean a pro-

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ceeding in any proceeding in a suit has terminated it is certainly a case decided within the meaning of S. 115 although the suit itself has not been finally disposed of. 1929 A. 743=51 A. 1010. In the case of a suit, it is the suit itself and not any branch of it which can be regarded as a "case". But proceedings before the commencement of a suit as well as proceedings after a suit has come to an end, being proceedings independent of the suit, must stand on a different footing. 158 I.C. 949=1935 O. W.N. 1158 (F.B.). The words used in S. 115 do not contemplate the invoking of the revisional jurisdiction of the High Court in the case of interlocutory orders passed during the trial of a pending suit. (*Ibid.*) A case must be something complete in itself so that it may be treated as independent matter. 1929 A. 957 Where the Court below decides that it should proceed with a suit, it does not decide a case within the meaning of S. 115 and no revision lies. (*Ibid.*) The words "case decided by a Court" mean a matter which has been disposed of effectually by the Court and not merely for the time being. A purely *ad interim* order that does not effectually dispose of the matter before the Court would not be case decided. 51 A. 957=1929 A. 581. The decision on a single issue by a subordinate Court in a suit which is still pending in that Court is not a "case" decided. 43 A. 564=63 I.C. 15. See also 138 I.C. 30=1932 O. 271. Proceedings relating to question of stay can be treated as a "case". 132 I.C. 222=1931 L. 503. An application under S. 10 for the stay of a suit is not a "case" and an order for stay passed on that application is not the decision of a case within S. 115 58 I.C. 90=42 A. 409 See also 144 I.C. 107=1933 L. 50; 27 M.L.J. 494; 15 C.W.N. 666, 42 C. 926; 4 Lah L.J. 425; 141 I.C. 177 (1)=1933 L. 191. An order refusing stay under S. 19, Arbitration Act, is a case decided and revision lies against that order. 132 I.C. 850=1931 L. 644. Where on the objection of the defendant that the Court has no jurisdiction to entertain the suit, the Court decides it has jurisdiction, the order of the Court does not amount to a decision of a case and no revision lies against it. 5 L.L.J. 140=71 I.C. 487, 41 A. 43, 42 A. 564; 59 I.C. 680. "Case"—Refusal to issue interrogatories. 69 I.C. 417=1923 L. 282 (2) Case—Order directing verification of pleadings—Order as to costs. 64 I.C. 207. As to order allowing amendment of pleadings, see 55 A. 169, 1934 L. 974; 1933 A. 374 Orders under S. 34 of the Guardians and Wards Act are open to examination by the High Court on revision side. 55 I.C. 587 The decree passed in a suit under S. 9, Specific Relief Act, is revisable. 53 A. 414=129 I.C. 559=1931 A. 205. Order refusing leave to file written statement to a partner is a case decided within

S. 115 1930 A.L.J. 1212=1930 A. 701 (2). Order dismissing an appeal summarily is a decree and is open to revision by High Court, if there is no second appeal provided for. 36 M. 128=21 M.L.J. 887. Appeal against order in application under O. 21, R. 90. Revision. 45 C.L.J. 557. Where the plaintiff dies during the pendency of a suit, and two parties apply to be brought on record as his legal representative, and the Court decides under O. 22, R. 5, C. P. Code, in favour of one party, it amounts to a case decided 1935 L. 934. Case decided—Proceedings under Legal Practitioners Act—No power to revise. 56 I.C. 433=21 Cr.L.J. 449. Where a Court allows or refuses to allow a suit to be withdrawn with liberty to bring a fresh suit, it "decides", and the High Court has jurisdiction to interfere. 61 I.C. 584, 103 I.C. 229. See also 10 O.W.N. 311. An order permitting the plaintiff to withdraw a suit as against certain defendants can be revised. 128 I.C. 827=1930 A. 863. Where the trial Court gives a considered decision and permits the plaintiff to withdraw the suit with liberty to file a fresh suit, it cannot be challenged in revision. 13 L. 547=136 I.C. 1=1932 L. 360 By an order restoring a case which had been previously dismissed, a case is decided. 1933 A.L.J. 4=1933 A. 41 See also 141 I.C. 188=1933 L. 169. An order setting aside an order rejecting an appeal for failure of the appellant to give security for costs is not open to revision when it is made in the interests of justice. 42 A. 626=60 I.C. 81. An order of a Small Cause Court returning the plaint for presentation to proper Court is a "case decided". 1932 A.L.J. 1068=1933 A. 106. The refusal by a Court to adjourn the hearing of a suit in order to enable the applicant to pay the Court-fee is not an order which should be revised by the High Court 45 A. 218=60 I.C. 921; 64 I.C. 211. Dismissal for default. See 53 C. 827. The High Court has power to interfere in revision with an order for the payment of deficit Court-fee, if it is convinced that the order is not supportable under the law and is passed in the illegal exercise of jurisdiction by the Court below. The fact that the plaintiff would have a right of appeal after the plaint has been rejected, on his non-compliance with the order, is no bar to revision. 60 C.L.J. 469.

ILLUSTRATIVE CASES—(1) "CASE DECIDED"—WHAT IS—No revision lies from an order merely refusing to allow an amendment of a pleading. Cases where the amendment comes under some other order of the Code, for example, the addition or substitution of parties, or striking off a pleading may amount to a case decided; but an order passed purely under O. 6, R. 17 is not. 165 I.C. 1=1936 A.L.J. 923=1936 A. 686 (F.B.). Where the effect of an order of the Court is definitely to debar the plaintiff from proving a part of his claim by refu-

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sing an amendment which did not alter the nature of his suit, that is a final decision of the Court on that part of his case and is a "case decided". 55 A. 256=145 I.C. 859=1933 A L J. 268=1933 A. 374. A Court in framing issues or refusing to frame issues is deciding a case, if onus of proof is involved in the form of the issues. 163 I.C. 809=1936 M. 525. The dismissal of an application by the defendant to have the issue relating to the jurisdiction of the Court decided in the first instance amounts to a "case decided". 146 I.C. 792=1933 A.L.J. 707=1933 A. 753. An order of Court refusing to allow an amendment of the plaint amounts to "a case decided". 1934 A.L.J. 989, 157 I.C. 112=1935 A. 651=1935 A. M.L.J. 100. An order returning the plaint for re-presentation in another Court can be revised 144 I.C. 828. See also 17 N L J 169=1934 N. 259. Where the order sought to be revised marked the termination of a definite state of a proceeding in a suit a "case" should be deemed to have been decided so as to attract the application of S. 115. 147 I.C. 782=3 A. W.R. 119=1934 A L J 126=1934 A. 25. The order of the trial Court directing the payment of additional Court-fees amounts to a "case decided" (Case-law discussed) 55 A. 274=1933 A.L.J. 311=1933 A. 350. 154 I.C. 520=1935 A.L.J. 376=1935 A W R. 368=1935 A. 455. *But see contra* 158 I.C. 949=1935 O.W.N. 1158 (F.B.). An order to amend the decree is different from the amended decree and a revision lies from the former order. 147 I.C. 633=1934 A. 100 (2). An application for pauperism may be treated as a case within S. 115, but a mere admission of the petition cannot be so treated 150 I.C. 561 (1)=1934 L. 401 (2). An order of the District Judge refusing to grant an absolute discharge to an insolvent cannot form the subject of second appeal. It can however be the subject of revision. 150 I.C. 80=35 P L R. 114=1934 L. 198. The proceedings for a temporary injunction are taken under O. 39 and must be deemed to be "a case" and therefore open to revision as they do not directly affect the ultimate decision of the suit one way or the other 1933 L. 1046. The dismissal of an application to treat a time-barred appeal as a cross-objection to the appeal by the opposite party is not a decree but only an order which is open to revision by the High Court 15 L. 641=1934 L. 273. A revision against an order refusing a review is not incompetent 151 I.C. 568=1934 A.L.J. 937=1934 A. 971. See also 148 I.C. 496=1934 A. 250. As to order holding *vakalatnama* liable for stamp duty, see 58 B. 597=36 Bom L R. 658=1934 B. 299. Where a partner of firm which was being sued against was not permitted to cross-examine the plaintiff's witnesses and to produce evidence for defence as any other defendant, the order passed

by the lower Court was not in accordance with law and its decision that the defendant was not entitled to take part in the conduct of the case amounted to a "case decided" within the meaning of S. 115. 55 A. 719=1933 A L J. 1204=1933 A. 523.

"CASES DECIDED"—WHAT ARE NOT.—When a Court grants an application for a certain amendment it cannot be said that a case has been decided within the meaning of S. 115. C. P. Code 152 I.C. 886=1934 A L J. 757=1934 A. 785. The decision of the Court below under S. 10 that it has jurisdiction amounts to a mere finding on a question of law which is the subject-matter of issue and cannot be treated as being in itself a "case decided". The mere fact that a separate application for a stay of the proceedings has also been dismissed would not confer jurisdiction on High Court. 149 I.C. 176=1934 A.L.J. 702=1934 A. 520. A mere decision as to the amount of the Court-fees payable does not amount to a "case decided" nor is it necessarily an irregularity in procedure or illegality or a refusal to exercise jurisdiction. 149 I.C. 1183=1934 A.L.J. 381=1934 A. 620 (F.B.). No revision lies from an order refusing to take up and decide an issue of law before the evidence is commenced. Such an order does not amount to a case having been decided 1934 A L J. 1204=1934 A. 980. Where an order is passed setting aside the award of the arbitrator and directing the parties to produce evidence, there is no case decided but only a case pending and no revision lies under S. 115, C P Code. But where the High Court has given certain directions to the lower Court as to how it should proceed in hearing the parties and considering the objections to the award and the lower Court has not carried out those directions and has purported to act in a different manner, the High Court has under the provisions of S. 107 of the Government of India Act power and jurisdiction to set aside the order of the lower Court setting aside the award and to direct it to carry out its orders already given 154 I.C. 310=1935 A L J. 309=1935 A.W.R. 244=1935 A. 519. The question whether the award is bad on the face of it or whether there is misconduct on the part of the arbitrators is entirely a question for the trial Judge. The order of the Judge that the award cannot stand is entirely within his jurisdiction. Besides, such order is not open to revision under S. 115, C P Code, because it is not a case which has been decided but is in the nature of an interlocutory order preceding the hearing of the case itself 152 I.C. 309=15 Pat L T. 693=1934 P. 550. Orders allowing applications under O. 9, R. 9, C P. Code, should only be sparingly interfered with 152 I.C. 110=11 O.W.N. 1373=1934 O. 491. See also 151 I.C. 765=1934 M. 681=67 M.L.J. 485. Whether a decision that an application is maintainable can be called "case decided" within the meaning

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of S. 115, is at least open to doubt. 1936 N. 280. Orders relating to an application for restoration of proceedings dismissed in default constitute a 'case' within the meaning of S. 115. 161 I.C. 212=1936 L. 618. Where an execution application is dismissed for default of a decree-holder and an application to restore the execution petition is also dismissed, revision from the order of dismissal of the execution petition does not lie. 1934 L. 349. See also 60 C.L.J. 469. As to rejection of plaint in part, see 1936 L. 1021. A decision in a pending suit that certain evidence is inadmissible does not amount to a "case" decided within the meaning of S. 115, C. P. Code. 18 N.L.J. 132. So also order disallowing certain questions put to a witness. 156 I.C. 805=1935 A.L.J. 549=1935 A.W.R. 654=1935 A. 599 (F.B.). Nor an order remitting issues for decision under O. 41, R. 25, C. P. Code. 154 I.C. 676=1935 O.W.N. 352=1935 O. 333.

COURT-FEE AND VALUATION OF SUIT—CONFLICT OF RULINGS—The general practice in all the High Courts is not to interfere with interlocutory orders unless when such order may result in irreparable injury to one or other of the parties. When a suit is allowed to proceed on an insufficient Court-fee it is not either of the litigant parties who suffers but the revenue. It is not the object of a fiscal statute to enable litigants to be defeated on technicalities. 15 P. 340=161 I.C. 22=17 Pat L.T. 9=1936 P. 85. Where a preliminary issue, as regards Court-fee, has been fully decided, the order is an order deciding a case and is open to revision. (55 A. 274, Foll.) 148 I.C. 908 (1)=11 O.W.N. 617=1934 O. 212 (2). In a case where there is a mere matter of valuation and the Judge applies his mind and comes to a decision, the Judge having exercised his jurisdiction no appeal will lie against the quantum of stamp duty which he directs shall be payable. But where the question is as to the particular category into which the suit falls, i.e., whether duty is payable upon the suit as belonging to a particular class or whether another duty is payable as belonging to another class and the Court decides that the case falls into a class other than that contended for by the applicant and therefore is liable to payment of an amount which is larger than that which the plaintiff contends for, and refuses to entertain the suit until the higher duty is paid, it amounts to a refusal to exercise jurisdiction under legal grounds and therefore it is a matter proper for revision. 152 I.C. 1003=1934 P. 641. An order made by the lower appellate Court, before it dismisses the appeal for default, directing the appellant to make good deficient Court-fee is not open to revision because it cannot be said that the order was passed without jurisdiction, or that the Court acted illegally or with material irregularity or exercised a jurisdiction not

vested in it by law. 151 I.C. 292=11 O.W.N. 1040=1934 O. 396. Where a favourable decision has been given as regards Court-fee to the plaintiff, the High Court has no power of revision either under S. 115, C. P. Code, or under S. 107; Government of India Act. It is immaterial whether the applicant is the defendant or the Government. 56 M. 744=65 M.L.J. 25=144 I.C. 516. *Quere.*—Where Government is not a party to the suit, it is doubtful whether a petition for revising the order as to Court-fee favourable to the plaintiff can be presented by Government. 56 M. 744=65 M.L.J. 25. Questions of Court-fee if they involve questions of jurisdiction are revisable 134 I.C. 816=34 L.W. 252=1931 M. 716. Also where they bear upon the value of suit for purposes of jurisdiction 1936 M. 411=70 M.L.J. 398. Also where the decision is wrong, and results in a refusal to exercise jurisdiction vested in it 163 I.C. 462=1936 Pesh. 140. When it is a question of principle to be applied to the levying of Court-fees, the High Court may interfere in revision 142 I.C. 195 (1)=1933 M. 367. An order under S. 149 requiring the plaintiffs to pay the additional Court-fee is not open to revision. 51 I.C. 581, 104 I.C. 145=1927 M. 1021 (2)=53 M. 452; 102 I.C. 877. See also 11 O.W.N. 1555; 158 I.C. 949=1935 O.W.N. 1158 (F.B.). As to when orders relating to Court-fees are open to revision, see 29 C.W.N. 627=86 I.C. 853, 87 I.C. 660=48 M.L.J. 688, 27 L.W. 286=1928 M. 416. Where a Court has come to a reasonable decision on the points of law involved and holds that the Court-fee paid is insufficient, it should not be interfered with in revision on the ground that it takes a different view on such points 22 N.L.R. 125=1933 N. 107=143 I.C. 84=16 N.L.J. 29 (F.B.). Court-fee—Order as to—Revision against—Maintainability—Order favourable to plaintiff—Order unfavourable to him—Distinction 56 M.L.J. 302. Court-fee and jurisdiction—Order favourable to plaintiff as to—Revision against—Interference in—Jurisdiction—Suits Valuation Act, S. 11—Scope and effect of 56 M.L.J. 394. The order of the lower Court holding that the Court-fee paid is correct is not revisable. 32 L.W. 694=59 M.L.J. 953. A decision of a sub-Court on a question of valuation determining the amount of Court-fee, is subject to revision 10 B. 610. But not an order directing to pay additional Court-fees. 12 C.L.R. 141. Revision lies to the High Court from an erroneous order for payment of additional Court-fee, and the plaintiff need not wait for the dismissal of the suit by disobeying the order and then move the High Court in appeal or revision. 36 I.C. 381. See also 15 I.C. 46=17 C.W.N. 160; 103 I.C. 268 (2)=1927 N. 256; 62 C. 417=39 C.W.N. 248=1935 C. 279. The Patna High Court has held that the High Court will not revise an interlocutory order de-

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manding *ad valorem* Court-fee on a plaint, as the order of rejection on the plaint is appealable. 5 Pat.L.J. 400=56 I.C. 649=1932 P. 319; 155 I.C. 617=16 Pat.L.T. 158=1935 P. 186. *See also* 51 I.C. 581. The High Court has power to interfere in revision with interlocutory orders of lower Courts, *e.g.*, direction to pay Court-fee. 50 I.C. 470=4 Pat.L.J. 195. *See also* 55 I.C. 786=1 Pat.L.T. 5. An order rejecting the memorandum of appeal for deficient Court-fee is not a decree or final order and the Court has jurisdiction, on the re-presentation of the appeal with the proper Court-fee, to admit the appeal and have it registered. 59 C. 388=138 I.C. 643=1932 C. 482.

COMMISSION—Order issuing commission for examination of plaintiff may be interfered with in revision. 3 P. 863=6 P.L.T. 520; 1927 M. 524. The Court has jurisdiction to dispose of the application for *examination of witnesses on commission*. An order rejecting the application cannot be said to be without jurisdiction nor can the Judge be considered to have exercised it illegally or with material irregularity only because he took an erroneous view on a question arising in the case. An interlocutory order like the one in question cannot be said to amount to a "decision" of the case within the meaning of S. 115. 1934 A. 37 (2). Where a defendant who has made a counter-claim applies to be examined on commission the mere advantage of observing the defendant's demeanour in the box is not a sufficient reason for refusing a commission. The failure to distinguish between applications of the plaintiff and of the defendant in such a matter is an irregular exercise of jurisdiction in which the High Court can interfere in revision. 57 M. 705=67 M. L.J. 95.

CONSTRUCTION OF DOCUMENT—If there is a misinterpretation of the document the concurrent findings of the lower Courts are open to revision by the High Court. 146 I.C. 363=1933 Pesh. 67. The High Court will be reluctant to interfere in revision with a finding on the interpretation of a document unless the lower Court was very clearly wrong. 1935 M. 160=1934 M.W.N. 854; 154 I.C. 582=1935 M. 160. Where a document cannot possibly bear the construction that has been placed by the lower Court on it, the High Court has jurisdiction to revise its decree. 164 I.C. 888=38 P.L.R. 348=1936 L. 801.

COSTS—The question of costs is principally within the discretion of the Court below and unless the High Court is satisfied that this discretion has been exercised arbitrarily it will not interfere in revision with that discretion. 144 I.C. 76=1933 A. 311.

CRIMINAL PROSECUTION—An order punishing a person for contempt of Court can be revised. 27 A. 380. Also an order grant-

ing sanction under S. 195 of the Criminal Procedure Code. 17 M.L.J. 123. But *see also* 3 A. 508. An order of a Judge passed under S. 195 or S. 476, Cr. P. Code, is open to revision under this section and not under S. 439, Cr. P. Code. 23 Cr.L.J. 291=1922 A. 438. *See also* 1923 A. 490 (1); 48 I.C. 499; 12 Pat.L.T. 671=1931 P. 411; 35 C.W.N. 775=134 I.C. 1063=1931 C. 604, 1931 L. 105. Prosecution order of a Collector under S. 476, Cr. P. Code, while acting under S. 70, C.P. Code; cannot be revised by High Court. 33 I.C. 419=14 A.L.J. 1077. The High Court can revise an order under S. 476, Cr. P. Code, passed by a Civil Court if it fails to specify the charges. 38 A. 695=36 I.C. 836. *See also* 11 O.W.N. 1469. A petition to revise proceedings under S. 195, Cr. P. Code, of a Civil Court should not be under S. 439, Cr. P. Code. 17 Cr.L.J. 184=33 I.C. 824, *contra* 19 I.C. 197=40 C. 477. *See also* 28 I.C. 334=19 C.W.N. 447; 40 C. 477=17 C.L.J. 245=33 I.C. 824; 32 I.C. 330=18 M.L.T. 591. Where the trial Court after an enquiry comes to the conclusion that a defendant in a civil suit ought to be prosecuted under Ss. 193, 465 and 471, I.P. Code, and sends a complaint but on appeal the appellate Court comes to a finding that the materials on the record do not justify the hope that the prosecution would end in conviction and set aside the order of the trial Court the former Court does not act without jurisdiction or irregularity in the exercise of its jurisdiction and the High Court will not interfere with its order under S. 115, C.P. Code. 152 I.C. 34=1934 A.L.J. 870=1934 A. 1065. Where an order withdrawing the complaint is made by the District Judge, the application in revision against that order is governed by S. 115. 147 I.C. 535=35 Cr.L.J. 432 (2)=1934 P. 55 (1).

DELAY—Revision is a privilege and not a right and it corresponds to the remedies in England known as *Certiorari* and *Mandamus*. The invariable rule in these cases is that a party aggrieved must come to the High Court for relief at the earliest possible moment and also must come with no ulterior purpose. 39 I.C. 570; 43 I.C. 470; 19 C.L.J. 9; 1923 M.W.N. 159=72 I.C. 137. As a general rule the High Court does not entertain revision petitions after three months, but the High Court may, in a proper case, excuse the delay in the exercise of its discretion. 16 L.W. 760=65 I.C. 732. *See also* 98 I.C. 723 (1); 1933 L. 175 (Delay of over a year). It is not the usual practice of the High Court to interfere in revision after great delay, *e.g.*, when the application is made more than one year from the date of the order. 142 I.C. 687=33 P.L.R. 1070=1933 L. 175. But where the applicant was not a party to the order which he seeks to revise and the order was passed behind his back and without notice to him, the delay is excusable and should

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be continued 1930 O.W.N. 262=1936 O. 185 A Court is not competent to refuse the issue of a commission for examination of a witness on the ground that the application is made at a late stage and that consequently it might entail an adjournment of the trial. Such refusal amounts to a misdirection and justifies the High Court in interfering with the order in revision. 40 L.W. 839=67 M.L.J. 878. The conclusion of the Court that there has been an unnecessary delay for the claim would not be open to revision by the High Court. But, if without any opportunity having been given to the objectors or their counsel to explain the delay, the Court has dismissed the objections summarily, the Court has acted with material irregularity and the order of dismissal can be set aside in revision. 1933 A.L.J. 117=1933 A. 751 (1). Considerable delay in filing a petition is not in itself a sufficient ground for rejecting the petition where once it has been admitted to hearing. 1935 L. 120. As to delay of over three years, see 86 I.C. 329. See also 1929 O. 383.

DISCRETION—It is not open to the High Court in revision to question the discretion exercised by the lower Court, unless it is apparent on the face of the record that the discretion has been arbitrarily and erroneously exercised. 36 P.L.R. 5=150 I.C. 305=1934 L. 807 (1). Where the lower Court has passed an order upon a careful consideration by exercising discretion vested in it and upon judicial principles the order cannot be interfered with in revision. 14 Pat L.T. 252=1933 P. 239. See also 59 C.L.J. 389=1934 C. 780=37 C.W.N. 1093. Where discretion is given to a Court, it has to be exercised judicially and not arbitrarily, and it is open to the High Court to interfere in revision where such Court appears to have exercised this discretion without applying its mind to the case. 1933 A. 957. S. 115, C.P. Code, does not apply to a case where the lower Court has considered the matter judicially and has refused to exercise its discretion under S. 151, C.P. Code. In such a case no question of jurisdiction arises at all. But there are circumstances in which the High Court would itself be justified in exercising its discretion under S. 151 and setting aside the lower Court's order. 4 A.W.R. 607. Failure to exercise discretion in excusing delay on insufficient grounds for filing application for review after time falls under this section. 100 I.C. 727=1927 A. 386. Late production of documents—Order excusing delay and admitting documents—Discretionary under O. 13, R. 2—not revisable. 1930 P. 603. Where an appellate Court refused to admit additional evidence offered three days after the argument was closed, the High Court would not interfere with its order in revision. 67 I.C.

252. The High Court will not interfere in revision with a discretionary order permitting evidence to be adduced under O. 41, R. 27. 33 P.L.R. 330=137 I.C. 513. As to interference in revision with the discretion of lower Court, see 7 Lah L.J. 290=90 I.C. 632; 85 I.C. 660; 1925 C. 293, 90 I.C. 243=48 A. 199, 83 I.C. 133=1922 A. 218; 1932 C. 831. The High Court will not interfere in revision with the lower Court's order directing the Commissioner to ascertain mesne profits. 16 L.W. 312=74 I.C. 812. Where a subordinate Court not only has made a mistake in law but has entirely misunderstood the nature of the judicial discretion it was called upon to exercise the High Court will interfere in revision under S. 115. 42 M.L.J. 97=45 M. 194, 25 M.L.T. 116=1918 M.W.N. 888; 26 M.L.J. 467=23 I.C. 572. A High Court ought not to interfere with every exercise of discretion by the Court below, even if no appeal is allowed, but must do so only where there has been a wanton abuse of process. 23 I.C. 522=15 M.L.T. 399; 31 C.W.N. 653; 32 C.W.N. 128. The issue or a refusal to issue by a subordinate Court, a commission to examine witnesses is not an abuse of process warranting an interference by the High Court. 23 I.C. 522=15 M.L.T. 339. Where a Judge uses his discretion to grant or refuse leave to institute a suit he does not act illegally nor with material irregularity nor is any question of jurisdiction involved. 17 I.C. 400=12 M.L.T. 359. As to order imposing condition or security in granting leave to defend under O. 37, R. 3, C.P.C. see 71 M.L.J. 241=43 L.W. 298=161 I.C. 182=1936 M. 246. The High Court will not interfere in revision with an order for payment of adjournment costs for not complying with a provision of law, when the amount awarded is neither excessive nor unreasonable. 57 I.C. 506. Nor with the lower Court's order to amend issues at a late stage. 1928 M.W.N. 836=113 I.C. 313 (1). Where a Court summarily rejects a prayer to try a preliminary issue on a point of law and in its summary jurisdiction has not even expressed any opinion as to whether the question of law would be sufficient to dispose of the case, to refuse to exercise the revisional jurisdiction in such case might give rise to the gravest hardship. 17 P.L.T. 253=1936 P. 250. The High Court's interference with the discretion of a Court is confined only to an ignorant or perverse exercise of it. 20 C.W.N. 1080=1 Pat L.J. 465; 37 I.C. 129=3 Pat L.W. 55, 1927 M.W.N. 838, 52 C.L.J. 23. Where trial Judge, in the exercise of discretion refuses to stay the suit under S. 19 of the Arbitration Act on the ground that complicated questions of law are likely to arise which can better be determined by the Court than by the arbitrators, the High Court will not interfere in revision with the

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discretion exercised by him. 163 I.C. 854=38 P.L.R. 846=1936 L. 904.

ILLUSTRATIVE CASES.—It cannot be laid down as an inflexible rule that a discretionary order cannot be interfered with in revision. Where *amendment of the plaint* was applied for before the trial began but the Court refused the same though plaintiff had good grounds, *held*, in revision that the amendment should be allowed subject to any order for costs that may be made by the lower Court. 37 C.W.N. 1093. See also 38 C.W.N. 1146 On an application under S. 152, the Court is not bound to *correct the decree*. The Court has a discretion to make the amendment or not. And in such cases the applicant has no right in revision proceedings to demand an adjudication upon any point, his right is merely to bring the matter to the notice of the High Court and to leave it to the discretion of the Court to interfere, if interference is necessary in the interests of justice. The High Court will not interfere unless the lower Court has exercised its discretion in such a manner that it was obviously wrong and unjust for it to make the order he did. 10 O.W.N. 958=1933 O. 425 A long delay by the defendants in referring the matter to arbitration justifies the Court in refusing to enforce the clauses of arbitration. And this being a matter of discretion, if no sufficient reason is made out, the High Court will not interfere with it. 1933 L. 1007 (1). Where the Subordinate Judge refused to *issue a commission*, because it was made too late the order cannot be revised on the ground that under R. 57 of the Civil Rules of Practice the Judge ought to have satisfied himself that there were sufficient reasons for not making it at the proper time, even though the High Court might have been taken a different view. (9 M. 256, Ref.) 1933 M.W.N. 648 It is for the trial Court to decide in what *order it will decide the issues* and the High Court will not interfere in revision in order to make a direction on this point. 1933 A. 749 The power to *extend time under S. 5, Limitation Act*, is discretionary. The High Court will not interfere in revision with an order refusing to grant extension based on certain reasons. 35 P.L.R. 374=162 I.C. 416=1936 Pesh. 197 Where a Court *refuses to extend the time fixed for payment of deficient Court-fee* after expiry of time originally fixed, under an erroneous view that it had no power, its order is open to revision, as it has not exercised any discretion in the matter. 149 I.C. 96=35 P.L.R. 45=1934 L. 537. Petitioners paid money to avoid attachment of their moveables in execution of a decree. On their objections, the execution proceedings were set aside and they applied for refund of money paid under S. 151. The Court refused the application, but the lower appellate Court allowed it. In second appeal it was contended that the lower Court

had no jurisdiction to entertain the appeal as the order of lower Court was passed under S. 151. *Held*, that even assuming that no appeal lay, the High Court was competent to *revise the order of the execution Court* and that it was equitable that the benefit received by the decree-holder under the execution proceedings should be restored to the petitioners when those proceedings were set aside. 149 I.C. 1105=1934 L. 108 Order granting extension under S. 43, Provincial Insolvency Act—No revision lies. 59 M.L.J. 710=1931 M. 10 Also an order under S. 41 of the same Act. 132 I.C. 525 (1)=1931 L. 672. An order appointing a person as a trustee of a public trust cannot be revised. 133 I.C. 401=1931 A.L.J. 1071=1931 A. 765. Order under Charitable and Religious Trusts Act—Revision. See 40 L.W. 920=1935 M. 56=68 M.L.J. 55. There is nothing to prevent one Court from notifying to another a particular complicated situation and to suggest to it the advisability of staying proceedings before it. The Court in such a case must no doubt attach due weight to such communication and give reasons for refusing to comply with the request. But the Court has a discretion in the matter and such discretion shall not be interfered with unless there is some flagrant miscarriage of justice. 1935 Pesh. 182.

ELECTION MATTERS—As to interference in election disputes, *see* 90 I.C. 771=49 M.L.J. 381; 1925 M. 707=48 M.L.J. 451; 22 L.W. 24=90 I.C. 1055, 52 M.L.J. 392; 103 I.C. 821=1927 M. 935, 1927 M.W.N. 842; 106 I.C. 398=1928 M. 199 (1); 1929 N. 282 Where a District Judge passes an order which he had jurisdiction to make restraining a returning officer from holding an election, the fact that the order passed will result in great inconvenience to the public does not amount to an illegality or material irregularity in the exercise of his discretion. 143 I.C. 143 (2)=1933 A.L.J. 759=1933 A. 343 In a suit in an election dispute the High Court cannot interfere in revision with the lower Court's order on grounds which involve nothing more nor less than appreciation of evidence, and decide for itself on the question of fact whether the votes were valid or not valid. The High Court has to confine itself to the question of jurisdiction. 1930 M. 225 (2). The District Judge acting under the Mandatory Election Rules and deciding an objection to an election acts as a *persona designata* and his decision is not revisable. 11 R. 1 So also a decision under S. 15 of the Bombay City Municipal Act. 35 Bom.L.R. 89. Orders passed by the District Judge acting under S. 79, Burma Penal Self-Government Act, could not be revised. 10 R. 517 Where a sub-judge passes an order on a certain petition in the capacity of an election commissioner, no revision lies against it. 138 I.C. 459=1932 M. 560 As to revision of order of District Judge under Bengal Municipal Act dismissing election petition. *see* 39 C.W.N. 971.

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EVIDENCE—An application under S. 115 to revise the order of refusal to receive documentary evidence by the lower Court does not lie as such order cannot be construed to be decision of a case nor is there any illegality in exercise of the jurisdiction which is vested by law. 145 I C 810 (1)=10 O W.N. 637=1933 O. 345 (1). Where the lower Court had based its decision on the *opinion of the hand-writing expert* though he had not given sworn testimony in support of the report, *held*, that the objection to the evidence being received could not be taken for the first time in revision. 150 I C. 357=35 P. L R 109=1934 L. 230.

EX PARTE DECREE—Order setting aside *ex parte* decree is open to revision. See 88 I C 46; 52 M L J. 477, 90 I C. 329, 1931 A.L.J. 377=133 I C 129=1931 A. 294 (F B.); 8 C. 832, 53 M L.J. 110, 133 I C. 129=1931 A. L J. 377=1931 A 294 (F B.). especially when after 30 days from date of decree. 100 I C 936=1927 L. 342.

ERROR OF LAW—Error of law by itself is no ground for revision. 75 I C 472=1923 A 465 (2), 106 I C 829=1928 L 102, 107 I.C 273 (1). See also 18 A L.J. 373=58 I.C 182; 83 I C. 334=1924 R. 212. 90 I.C. 430; 1912 M W.N. 993=1 L.W 59; 38 M. 775, 21 M L.J. 1013; 100 I C. 76 (1)=1927 A. 573; 106 I.C. 851=46 C L J 527; 1929 R. 187; 8 O W N. 1235=12 L R. 380 (Rev.), 133 I C. 404=1931 A.L.J 995=1931 A. 667; 8 O W N 999=134 I C 1090=1931 O. 408; 134 I C 463 (A.); 10 O.W.N. 259. Per *Rupchand, A. J C*—An erroneous decision on a question of fact or law does not fall within the purview of S 115. 146 I.C. 777=1933 S. 279 (F. B.). S 115 applies to jurisdiction alone, the irregular exercise or non-exercise of it or the illegal assumption of it. A mere error of law is not an illegality within the meaning of the section. 142 I C 616=10 O W.N. 259=1933 O. 240. The High Court will not entertain a revision petition directed against an alleged wrong conclusion of law, in which no question of jurisdiction is involved. 36 P L R 177. Where a Court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity because it has come to an erroneous decision on a question of fact or even of law. 153 I.C. 996=1934 R. 233. An erroneous decision on a question of law does not amount to an assumption of jurisdiction or to irregular or illegal exercise of jurisdiction. The question whether the Court had wrongly admitted a deed of adoption in evidence without its being properly and duly stamped cannot be raised in revision as it amounts only to an erroneous conclusion on a question of law. 35 P.L R. 683. See also 152 I C 620=1934 L. 825; 1934 R. 233, 10 O.W N 1145=1933 O. 534. Where a lower Court having jurisdiction to decide the case wrongly applied a section of

an Act whereby injustice was perpetrated, the High Court allowed the petition for revision. [11 C 6 (P.C.); 13 C. 225 and 15 C 47, Ref.] 34 P.L.R. 440=1933 L. 335. Error of law is no ground for interference under S. 115 or S 107 of the Government of India Act 35 M L J. 604, 16 C W.N. 1015; 40 M L.J 497=44 M 554 (F.B.). The High Court cannot interfere when the lower Court has fallen into an error of law. It can only interfere in case the lower Court has acted illegally. 30 C 397, 16 C. 482 (486), 17 M 410 (F B.); 6 A. 125, 7 A 345 (350); 24 M. 685; 11 M. 144; 11 M 332, 12 B. 617, 17 M. 37, 28 C. 574, 1932 A.L.J 418=1932 A 379; 137 I C 513 (L) See also 55 A 216=1933 A.L J 110=1933 A 295. Where the Court acted on certain decisions then in vogue, subsequent decisions taking a modified view would not make order revisable. 138 I.C. 146=1932 M 472. An erroneous construction of the rules framed by the High Court as regards costs of proceedings in subordinate Courts is no ground for revision. 3 P.L. T. 314=65 I C. 355. Mere decisions in matters of law and fact are not within the scope of S. 115; Cls. (a) and (b) deal with the question of jurisdiction and Cl (c) refers to illegal processual acts. 52 I C. 767=23 C.W.N 759; 1929 N. 317, 1929 P. 633; 1930 L. 468. See also 64 I C. 563; 52 I C. 4=30 C L J 64; 54 I.C 757; where in the exercise of its jurisdiction the lower Court commits an error of judgment this is not a matter upon which revision can lie. 66 I C. 509=1922 A. 441. See also 145 I C. 380=1933 M 231. The High Court will not interfere in revision on the ground that the Court below has wrongly decided a question of limitation. 55 I C. 871; 47 C L J. 62; 98 I.C 892=1927 L 43, 4 O W.N 1123; 26 L.W 15=101 I C. 514=1927 M 660, 49 A 454=25 A L J 399=100 I C. 638=1927 A. 358, 103 I C 113, 133 I.C. 439=32 P.L R. 410. Erroneous decision on point of limitation may sometimes make interference proper. 21 A L J. 861=46 A. 1173, 24 I C 872; see also 35 I.C. 74=4 L. W 411; 32 I C 3 (1)=3 L W 36, 30 I C 264=2 L W 609; 25 I C. 592=1914 M.W. N 738. It may not be a case merely of an erroneous opinion but a case where the Court has assumed jurisdiction to proceed with the suit which ought to have been put an end to. 27 N L R. 251=130 I C. 145=1931 N. 17. Where the order of the lower Appellate Court overlooks the question of limitation entirely in deciding the appeal the High Court can interfere in revision. 1929 R. 304; 1933 P 132. The High Court will interfere when a Subordinate Court issues an order which is erroneous in law, and as a result of that order the Court acts beyond or in derogation of its jurisdiction. 30 I. C. 38=21 C.L.J. 614. See also 41 I.C 919=27 C.L.J. 294; 37 I.C. 19; 23 C.L.J. 557; 33 I.C. 346=22 C.L.J. 564; 32 I.C. 982, 23 I.C 977=41 C. 323; 19 I.C. 594;

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18 I.C. 715; 34 C.W.N. 733. After a superior Court has decided a question of law in one way, the subordinate Court cannot discuss the matter over again. 140 I.C. 325 (M.). An erroneous decision on a question of limitation or *res judicata* cannot be revised. 20 A. 78, 11 B. 488; 103 I.C. 68; 33 Bom.L.R. 1596=1932 B. 81, 32 P. L.R. 130 (1), 1933 M. 231=145 I.C. 380. Question whether grant was made to one not holding *kudiram* is one of fact—Cannot be gone into either in revision or appeal though decision of the question is necessary to see whether suit lies in Civil Court. 1929 M. 259. The fact that the Court passes a wrong order is not sufficient to justify interference. But when the Court is under a complete misapprehension as to the facts before it, it is a proper case for revision. 132 I.C. 832=1931 R. 111 (2). The fact that a Court has misconstrued the effect of a document is no ground for revision. 16 A. 39; *see also* 107 I.C. 273 (1). Also the fact that document has been considered to be inadmissible in evidence. 23 B. 177 at 179. Refusal to amend a clerical error in the form of probate may be a ground for revision. 27 C. 5. An illegal order passed under O. 31, R. 93 can be revised. 9 M. 437. But not an order rejecting a memorandum of appeal. 7 A. 42. When a Court rejects an application to set aside a sale on the ground that the applicant had no *locus standi*, the case does not fail under this section. 32 C. 5/2. Where a Court reviews its prior order of dismissal for default of a petition under O. 21, R. 58, C. P. Code, the order of review is not revisable. 50 A. 801=1928 A. 392. Where a subordinate Court rejects an application for leave to sue *in forma pauperis* for defective verification and does not offer a chance to the applicant to correct the defect, it amounts to a failure to exercise the jurisdiction vested in it under S. 153 of the C.P. Code, and the High Court can interfere in revision. 55 A. 216=145 I.C. 436=1933 A.L.J. 110=1933 A. 295. Where a Judge has entertained the application for attachment before judgment, issued the preliminary notice, heard the mortgagor, who showed cause against the application, but based his order dismissing the application for attachment before judgment on the mistaken view that an application under O. 38, R. 5, C. P. Code, cannot be made in a mortgage suit, until the mortgaged property has been actually sold, the sale proceeds have proved to be insufficient and the mortgagees apply for a decree over under O. 34, R. 6, there is no failure to exercise jurisdiction and no revision lies. [11 C. 6 (P.C.), Rel. on.] 146 I.C. 838=1933 A.L.J. 1269=1933 A. 557.

ERRONEOUS DECISION.—That the District Judge has given a wrong decision is no ground for interference on revision. 1935

L. 602, 1935 L. 120. In a case under S. 115 even an error of law is not a sufficient ground for interference by the High Court. 11 C. 6. Rel. on. 1936 C. 706; 40 C.W.N. 698, unless it raises a question as to jurisdiction. (1928 L. 140, Rel. on.) 1935 L. 972; 156 I.C. 777=1935 P. 191; 1935 L. 951. Nor even an error on a mixed question of fact and law. 157 I.C. 474 (1)=1935 P. 448, 155 I.C. 419=1935 P. 267. The fact that the High Court, if it had been the trial Court, might have come to a different conclusion, is not sufficient to justify interference under S. 115. 1936 S. 205. The High Court will not interfere in revision with a decision on the merits even if it be erroneous both in law and in fact, if the lower Court had jurisdiction to entertain the dispute between the parties. But if that Court had no jurisdiction whatever in the matter, the High Court, if it finds that the lower Court has made a mistake as to the extent of its jurisdiction, may then interfere. 14 P. 488=155 I.C. 976=16 Pat. L.T. 311=1935 P. 385. If a Judge assumes jurisdiction of the matter and proceeds to decide a question of law, however erroneous this decision may be, the High Court cannot interfere in revision. But if before assuming jurisdiction he determines a question of law or fact to determine the question of jurisdiction, a wrong decision in a case of this kind is certainly revisable by the High Court. 161 I.C. 26=1936 P. 119. *See also* 39 C.W.N. 915. Breach of provision of law—*Ex parte* decree against father and son—Order setting aside against latter and refusing to set aside against former—Revision. 155 I.C. 837. Where a decision disallowing a claim based on the prerogative right of the Crown to be paid its debt in priority to other creditors is fundamentally wrong, a revision petition lies to the High Court and is justified. 42 L.W. 948=69 M.L.J. 832.

ILLEGALITY.—Obvious misreading of law will justify revision. 13 Lah.L.T. 34. Where the Judge omits to apply an obvious principle of law he acts illegally in the exercise of his jurisdiction and therefore revision lies. 1936 Lah. 746. But misconstruction of a section of a statute by the lower Court in deciding a matter which it has jurisdiction to decide does not amount to illegality or material irregularity. 39 C.W.N. 910=62 C.L.J. 349. A Judge acts illegally and with material irregularity in exercise of the jurisdiction vested in him when in defiance of the order of his predecessor he disallows *rateable distribution*. 147 I.C. 1071=11 O.W.N. 161=1934 O. 110. So also where a Court which rejects an appeal for non-payment of deficient Court-fee, without really giving the appellant an opportunity to make good the deficiency. 153 I.C. 503=11 O.W.N. 1555=1935 O. 119. Also

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order sanctioning compromise by guardian injurious to minor's interests. 1935 O W. N. 332=1935 O 287. Order refusing to receive *placet* insufficiently stamped on last day of limitation—When stamps of required denomination not available. 71 M.L.J. 804. Where the lower Court entirely disregards the most important piece of evidence in the case, namely, the original grant in favour of a charity, and bases its order on documents which are either irrelevant or could not have been referred to for interpreting the original grant, the procedure amounts to an illegality or material irregularity which would justify the High Court in interfering in revision under S. 115. The fact that there may be other remedies open is not ground for refusing to exercise the powers under S. 115. 58 B 623=152 I C 781=36 Bom L.R. 687=1934 B 343; 68 M.L.J. 55. *See also* 60 C.L.J. 19, 13 L 761=1933 L 99. Where the lower Court has taken into account the patent facts which are very material in deciding whether the story of a party, on whom the burden of proof lies is true or not, the High Court has no power to revise a decision of the lower Court, although taking the probabilities of the case as the guiding factor the High Court may disagree with it. But if the lower Court has manifestly failed to take into account material and patent facts appearing in the evidence, there is gross and palpable error in the decision and it can be set aside in revision. 1934 R. 356. Where two different suits for rent are hit at by O 2, R 2 the High Court will interfere in revision to declare their invalidity though the trial of the suits has not resulted in injustice. 146 I.C. 351=37 C.W.N. 730=1933 C. 831. To allow a party against whom no proceedings can be taken in execution to be proceeded against, merely because the plaintiffs, who represent a temple knowing the exact rights of the parties and of everyone concerned, made a mistake in exonerating her in the suit, cannot be permitted on any ground of alleged moral right of the temple property, and the order in execution should be interfered in revision. 144 I C 30=1933 M 508. Merely that a leave under S 20 (b) is granted without first issuing notice to opposite party does not amount to acting in the exercise of jurisdiction illegally or with material irregularity so as to justify an interference in revision under S. 115; nor can such an order contemplate any grave or irreparable injustice so as to invoke the provisions of S 107, Government of India Act, 1933 L. 266. Where a Court has jurisdiction to decide a question before it and in fact decides the question, it cannot be regarded as acting in the exercise of its jurisdiction illegally or with material irregularity merely because its decision is erroneous. [11 C. 6 (P.C.), Foll.] 151 I.C. 668=7 R.R. 110=1934 R. 230. *See also* 1935 L 120. Where a lower Court has applied its mind to the case be-

fore it and duly considered the facts and the law applicable, then, although its decision may be erroneous, that error cannot be corrected on revision. (7 R. 339, Foll.) 150 I.C. 1055=1934 R. 306. An order passed under O 9, R. 9 even though made without jurisdiction is not subject to interference by the High Court in revision 143 I C. 222=1933 O 331. A Court had appointed a Receiver of suit properties. It passed an order of ejectment against an occupant of the premises though neither party had a present right to remove him. It was advisable in the circumstances of the case not to eject him. *Held*, that the order of ejectment having been passed with jurisdiction, though wrongly, was not open to revision under S. 115, but could be interfered with under S. 107, Government of India Act. 146 I.C. 258=1933 L. 327. Where the appellate Court has simply come to an erroneous decision on a question which was raised by an appeal properly preferred to it, it cannot be said that the appellate Court has exercised a discretion not vested in it by law and the circumstance that the question related to the jurisdiction of the Court of first instance in no way affects the jurisdiction of the appellate Court. *Held*, that no revision lay against an appellate order confirming the order returning the plaint for presentation to proper Court. 151 I C. 416=1934 L. 536. On this point, *see also* 38 C.W.N. 1001=1934 C 861.

JURISDICTION—Points of jurisdiction, even though not taken in the lower Court, can be argued in the High Court. 154 I.C. 705=1935 M W N. 106=41 L W 20=1935 M 89. The High Court will not exercise revisional powers on a point of jurisdiction whether the suit lies in the Small Cause Side or the Original Side of the Court when such interference will be bringing about an injustice. 154 I.C. 705=41 L.W 20=1935 M 89. Where the lower Court has jurisdiction to decide the question and there has been no illegality or material irregularity in its decision, the application for revision must fail. 156 I.C. 1098 (R.), 1936 N 280. "When a decision is come to in a matter in which the Court has jurisdiction a question of jurisdiction is not involved", Expl. 156 I C. 777=1935 P. 191. Where a Court entertains and decides an appeal which in law does not lie and is incompetent, the High Court will interfere in revision and set aside the decree and judgment passed by such Court. 62 C. L.J. 530, 157 I C 900 (L). Where a regular suit entertains a suit of small cause nature which it has no jurisdiction to entertain or try, and tries it to the exclusion of the Small Cause Court, its decision must be set aside in revision. 18 N L.J. 123. Jurisdiction is entirely independent of the manner of its exercise. The former involves the power to act at all, and is independent of the decision reached in the exercise of that power. The latter is confined to the authority to act in the particular way in which the

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Court does not. Where, therefore, what the Court has done is only to decide the starting point of limitation, it has every power to do so and such an order is not revisable. I.L.R. 1936 N. 73=164 I.C. 848=1936 N. 157.

CASES OF ABSENCE OF JURISDICTION—Order remitting award passed by arbitrator under Co-operative Societies Act, 40 C.W.N. 89. Order allowing objections by third party before attachment. 1935 A.W.R. 246=1935 A. 343. Executing Court—Decision that decree is collusive. 16 P.L.T. 220=1935 P. 230. Addition of party financing litigation—Interference. See C. P. Code, O. 1, R. 10. 68 M.L.J. 236. A Court granting a right of way for the future in absence of any finding that one had existed in the past, and in absence of a plea that a right of way should be granted as an easement of necessity, acts without jurisdiction. 158 I.C. 924=1935 Pesh. 157. Application for leave to appeal *in forma pauperis*—Rejection—Order for payment of court-fee and rejection of appeal for default in payment. 1936 Pesh. 69. Application to continue suit *in forma pauperis*—Dismissal of suit—Court treating application as for leave to sue as pauper and allowing it—Interference in revision. See C. P. Code, S. 11. 60 C.L.J. 587. Order of reference to arbitration in pending suit—Order in anticipation that if award is not filed by fixed date, trial must go on that day—Award not filed—Suit decreed *ex parte*—Jurisdiction—Refusal to set aside *ex parte* decree—Revision—Interference. See C. P. Code, Sch. II, para. 8. 71 M.L.J. 648. Order allowing suit to be withdrawn in contravention of O. 23, R. 1 (2)—Revision. See C. P. Code, O. 23, R. 1 (2). 155 I.C. 210=1935 P. 251. Under S. 115, C. P. Code, in cases where a Court below has failed to exercise jurisdiction vested in it, the High Court may pass such order as it thinks fit, and it is not incumbent upon the High Court to remand the case for exercise of that jurisdiction by the Court below. 154 I.C. 921=1935 Pesh. 21.

CASES OF FAILURE TO EXERCISE JURISDICTION—Application to set aside sale under O. 21, R. 90, by attaching creditor—Rejection on the ground of non-compliance with O. 21, R. 54 (2). 63 C.L.J. 560. Order as to rateable distribution. 1935 P. 201 (2). Award in reference not agreed to by all parties. 1935 S. 212. Where the lower Court did not consider the only question that it had to consider in the case, it must be deemed to have not exercised its jurisdiction, and the High Court will interfere in revision. 157 I.C. 432=1935 P. 454. Where the lower Court on a misconstruction of the order passed by an executing Court on a claim petition refuses to go into the merits of the case. 58 M. 936=1935 M. 547=68 M.L.J. 518. Application under S. 174 (3), proviso (b), B. T. Act—Order requiring deposit before consideration on erroneous construction of

section—Revision. See B. T. Act, S. 174 (3), proviso (b). 39 C.W.N. 1176. An order refusing permission to a minor defendant attaining majority to file an additional written statement is not one with which the High Court will interfere in revision, because there is no refusal to exercise a jurisdiction vested in the lower Court which it was bound to exercise. 41 L.W. 640=68 M.L.J. 155. Where the plaintiff asks for an alternative relief, "in case of failure" (*ba surat digar*) of the primary relief and the alternative relief is granted by the trial Court, primary relief being refused, and the appellate Court dismisses the appeal by the plaintiff without going into the question whether the plaintiff is entitled to the primary relief on the ground that it is not necessary as the alternative relief is granted. 1936 Pesh. 38=162 I.C. 658.

LEAVE TO SUE IN FORMA PAUPERIS—Where an application for leave to sue as pauper is dismissed for non-production of a Succession Certificate, the High Court will interfere. 16 M. 454. A Court has jurisdiction to consider the merits of a case on an application for leave to sue *in forma pauperis* the fact that the Court placed reliance on evidence which might not be relevant to a transfer application is not an irregularity affecting its jurisdiction and no revision lies. 142 I.C. 379=1933 S. 82. In an application for leave to sue *in forma pauperis* a Court acts without jurisdiction in going into the evidence elaborately and trying the question of title in order to see if he has a good cause of action; so also failure to take evidence on the question of pauperism amounts to not exercising jurisdiction vested in it by law and the order can be interfered with in revision. 45 A. 548=73 I.C. 538. No application in revision lies against an order admitting an application for leave to sue *in forma pauperis*. 67 I.C. 641=1922 A. 208, 1933 A. 295=145 I.C. 436=55 A. 216. But see (where it is admitted without notice) 104 I.C. 364=8 P.L.T. 794. On receipt of an application to appeal as a pauper, the Court has first to consider whether *prima facie* there is any ground for its rejection. If it is rejected, the matter ends. But if it is not rejected a notice though not compulsorily should be issued to the Government Pleader and the respondent and on hearing them, the Court has to decide whether the applicant is in a position to pay the Court-fees and further whether the decree is one which is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust. Refusal to hear Government Pleader is revisable. 1934 A.L.J. 827=148 I.C. 624=1934 A. 424. An order rejecting an application for leave to sue *in forma pauperis* is not open to revision. 44 A. 248=65 I.C. 255; 125 I.C. 578 (2). See *contra* 104 I.C. 198. See also 145 I.C. 436=55 A. 436=1933 A. 245. An order rejecting an application for leave to sue in

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forma pauperis is a complete decision of the case so far as the Court rejecting it is considered, and is open to revision under S. 115, C. P. Code, and a finding by the lower Court on evidence that the petitioner is a pauper, is one of fact and final in revision 152 I.C. 417=11 O.W.N. 1356. On this point, see also 1935 M. 230=41 L.W. 135; 105 I.C. 30, 1929 L. 498 (1); 1930 A.L.J. 901; 142 I.C. 379=1933 S. 82 following 32 A. 623 and 48 M. 700, 1933 A. 295=55 A. 216=1933 A.L.J. 110=145 I.C. 436, 9 R. 86=1931 R. 129, 1931 R. 318. (No difference between an order rejecting an application and an order granting it.) See also 34 Bom. L. R. 1273=140 I.C. 381=1932 B. 584. Where a Court rejected an application under O. 44, R. 1 on erroneous grounds, it amounted to material irregularity and the High Court can interfere in revision. 54 A. 394. As to order dismissing application to sue *in forma pauperis* involving decision on a doubtful point of law. See 69 M.L.J. 816. Application for leave to sue as pauper—Death of applicant—Application by him to continue—Refusal—Revision. 1936 P. 591.

LIMITATION.—High Court can interfere in revision under S. 115 where the lower Court allowed an application barred by limitation without at all applying its mind to the question of limitation and deciding that question. There is a distinction between cases in which the lower Court decided the question of limitation and cases in which the lower Court did not apply its mind to that question at all. 144 I.C. 147=1933 P. 132. A wrong decision on a question of limitation is not a material irregularity in the exercise of jurisdiction. 1934 Pesh. 103. Although it is not a matter of law, but it is a matter of uniform practice that civil revisions are entertained only if they are filed within three months of the date of the order sought to be revised. 1933 P. 582.

LIMITATION FOR APPLICATION FOR REVISION

—Legally revision is not governed by any law of limitation. 144 I.C. 482=1933 Pesh. 51.

NEW PLEA.—A question of jurisdiction can be raised even on revision. 162 I.C. 416=1936 Pesh. 97. But if it is dependent on the investigation of facts it cannot for the first time be dealt with by the High Court in revision. 24 I.C. 862. See also 6 P.L.T. 295=87 I.C. 381=1925 P. 461=100 I.C. 37, 103 I.C. 68. Where the appellate Court sets up a new case for defendant it acts with material irregularity. 98 I.C. 867 (2)=1927 L. 73. Where the legal representative of a deceased plaintiff was allowed to set up a claim not open to original plaintiff, the High Court will interfere in revision and set aside the order. 42 M.L.J. 43=68 I.C. 703. A party is not entitled to raise the question of registration in revision simply because it is apparent on the face of it, though it has not

been raised in the Courts below. It is the duty of the plaintiff to have raised this issue. 151 I.C. 105=1934 Pesh. 50. Where in revision the petitioner urged that a new issue which was already covered by the issues under consideration should be framed, he could not be granted a further opportunity of doing that which with common care and attention he must have known he had to do from the start. 164 I.C. 189=1936 Pesh. 157.

REMAND.—The inherent power under S. 115 to remand a case may be exercised when the trial Court has not tried the case properly. Where the appellate Court ought not to give facilities to the parties for adducing further evidence, the fact that the Court desires to do so cannot give it jurisdiction to set aside the decree of the Court below and remand the case for re-trial. 148 I.C. 962=15 P.L.T. 142=1934 P. 284. See also 1933 Pesh. 48, 146 I.C. 777=1932 S. 247 (F.B.). Where the appellate Court set aside the order of the trial Court and remanded the suit for retrial and further reframed an issue and directed the lower Court to take additional evidence on the issue. *Held*, the order was illegal and was not appealable as it was not one under O. 41, R. 23, but that the High Court could set it aside in exercise of its powers under S. 115. 158 I.C. 86=1935 L. 161. An appellate Court acts with material irregularity in the exercise of its jurisdiction in going beyond the pleadings and the grounds of appeal and in remanding a suit for the trial of issues which do not arise in the case. 152 I.C. 133=35 P.L.R. 684=1934 L. 708; 1935 L. 111. The trial Court *held* that it had no jurisdiction to try a case and returned the plaint. The District Court on appeal, *held*, that the trial Court had jurisdiction and remanded the case. *Held*, that the order of remand, even if erroneous, was within the jurisdiction of the District Court and that it could not be interfered with in revision. 34 P.L.R. 771=1933 L. 940. See also 1935 L. 161.

SECURITY FOR COSTS, ORDER AS TO.—See 41 L.W. 135. Where in a suit *in forma pauperis*, the defendant put in a petition under O. 25, R. 1 (3), C. P. Code, for security for costs at the earliest possible opportunity, and had been diligent throughout in his prosecution and the Court after several adjournments finally dismissed the petition on the ground that the suit itself was ready for trial, that the defendant had already incurred the costs and that no useful purpose could be served by directing the plaintiff to furnish security at that stage. *Held*, that although generally an order requiring security under O. 25, R. 1 (3) is entirely a matter of discretion with which the High Court would not interfere, the circumstances of the above case were very peculiar as the Court, instead of disposing of the petition at once on its merits, adopted the wholly unjustifiable course of adjourning it together with the suit, thereby

PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS.

Part to apply only to certain High Courts 116. [S. 631.] This part applies only to High Courts which may hereafter be constituted by His Majesty by Letters Patent].

Application of Code to High Courts. 117. [S. 632.] Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

Execution of decree before ascertainment of costs 118. [S. 634.] Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith except as to so much thereof as relates to the costs;

and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

119. [S. 635.] Nothing in this Code shall be deemed to authorize any

Leg Ref.

¹ For words established under the Indian High Courts Act, 1861 or the Government of India Act, 1915, the words within brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937

Notes.

Intimating the very object of the petition, and finally dealt with it not on its merits, but dismissed it for something which, if true, was not the fault of the petitioner but was entirely due to the position created by the action of the Court itself and that thereby the Court committed an irregularity in the exercise of its jurisdiction 155 I C 317 =1935 M W N 513=41 L W. 135=1935 M 230=69 M L J 38 Order rejecting appeal under O. 41, R. 10 on failure to furnish security ordered 161 I C 233=1936 R 109

WITHDRAWAL OF SUIT.—Where the Court allowed the plaintiff to withdraw his suit with liberty to bring a fresh suit, and the order was supported by good reason, *held*, that the order could not be interfered with in revision. 145 I C 222=10 O W N 311 =1933 O 255 When the Court has applied its mind to the question of permitting the withdrawal of a suit under O. 23, R. 1 (2) and has exercised its discretion the order cannot be interfered with in revision even if it is shown that the discretion has not been exercised properly. 147 I C 441 =1934 A L J 821=1934 A. 214. See also 103 I C 229, 105 I.C. 372 Where a Court permits a plaintiff to withdraw his suit and to bring a fresh suit under O. 23, R. 1, it is unnecessary for the High Court in revision to enquire into the sufficiency of the ground. All that it has to do is to see whether the Court below has or has not applied its mind to the matter before it and if it is apparent that it did apply its mind, even if it has exercised a wrong discretion, the case would not come under S 115,

C P Code 1935 A.W.R. 30=1935 A L. J. 277=153 I.C. 648=1935 A. 284 See also 157 I.C. 673=1935 A L.J. 983=1935 A.W.R. 924=1935 A. 740; 159 I.C. 147 =1935 A L.J. 330=1935 A.W.R. 267=1935 A. 381 In the absence of any grounds such as are contemplated by O. 23, R. 1, C. P. Code, the Court has no jurisdiction to allow a suit to be withdrawn with liberty to bring a fresh suit In any case there can be no doubt that the Court acts with material irregularity in the exercise of its jurisdiction in allowing the suit to be withdrawn 158 I C 280=1935 O W.N. 1066=1935 O 495.

PRACTICE—Contents and frame of application for revision See 68 M L J 218 Appellate order in proceedings under S. 470, Criminal Procedure Code—Revision—Procedure, 11 O W N 1469=1935 O 59 In revision application against order confirming an award and ordering a decree to be drawn up, ordinarily a copy of decree should be annexed to the application But failure to do so is not fatal to the application and it should not be rejected on that ground alone 30 S L R. 271=1936 S 172

L P APPEAL.—No appeal lies against an order made by a single Judge of the High Court under this section.

Sec 116—Code applies to the Vice-Admiralty jurisdiction of High Court. 17 C 66; 17 C 337.

Sec 117—Section applies the provisions of the Code to Chartered High Courts in the exercise of their appellate civil jurisdiction including their jurisdiction in Letters Patent appeals. 53 A 535=132 I C. 24=1931 A L.J. 187=1931 A. 244 (F.B.) [48 C. 481 (P.C.), Rel on; 1 A L.J. 509 and 16 A L J 964, not good law after 48 C. 481 (P.C.)]

Sec. 119.—A rule of Court authorizing one legal practitioner to appoint another to hold his brief and appear for him is valid 9 A 613 An Advocate may perform all

Unauthorised persons not to address Court.

person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

Provisions not applicable to High Court in original, civil or insolvent jurisdiction

120. [S. 638.] (1) The following provisions shall not apply to the High Court in the exercise of its original civil jurisdiction; namely, sections 16, 17 and 20.

[639.] (2) [* * * * *]

PART X.

RULES.

Effect of rules in first Schedule.

121. The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions

of this part.

122. [Cf. S. 652, first para.] High Courts ²[constituted by His Majesty by Letters Patent] ³[and the Chief Courts of Oudh] ⁴[and Sind] ⁵[* * * * *] may, from time to time, after previous publication, make rules regulating their own procedure and the procedure of Civil Courts subject to their

Leg. Ref.

¹ Sub-section (2) omitted by Presidency Towns Insolvency Act III of 1909, S. 127. The old sub-section (2) ran as follows.—"Nothing in this Code shall extend or apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court."

² For words 'established under the Indian High Courts Act, 1861 or the Government of India Act, 1915', the words within brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

³ Inserted by Act XXXII of 1925.

⁴ Inserted by Act XXXIV of 1926

⁵ The words 'the Chief Court of Lower Burma' omitted by Act XI of 1923

Notes.

the duties that may be performed by a pleader. 9 A. 617 A vakil cannot practise on the Original Side of Calcutta High Court. 30 C. 986. S. 119 is not restricted to the admission of advocates, vakil and attorneys and to their professional conduct 109 I.C. 206=1928 M. 472

Sec. 122. POWERS OF HIGH COURT—RULES.—Under S. 122 High Court has power to amend, alter or add to any of the rules in the 1st Sch. to the Code. If a new rule that has been made is to some extent in conflict with the previous existing rule it must, by implication, be deemed to have annulled or altered the old rule. 134 I.C. 836=1931 A.L.J. 865=1931 A. 567 (F.B.) Object of the section is to provide for elasticity in procedure and to enable defects in the Code to be remedied without the dilatory

process of legislation. There is nothing in the Code to say that those rules should not be inconsistent with the Code 57 C. 676=129 I.C. 181=1930 C. 685 But *see also* 128 I.C. 238=1930 A.L.J. 1126=1930 A. 558. High Court has power to alter, amend and add to rules of procedure laid down in the Code, but it has no power to alter the period of limitation provided by the Limitation Act. 68 I.C. 777=1923 L. 96, 1930 R. 228=8 R. 380 (F.B.). S. 5 of the Limitation Act, as it stands, does not extend to application to set aside *ex parte* decrees, but High Court acting under S. 122 can frame a rule making it applicable to the periods of limitation prescribed in that Act 32 I.C. 975. In order to have the effect of varying the rules in the first Schedule to the Code, the rules under S. 122 must first have been considered and submitted by a Rule Committee appointed under S. 123. 74 I.C. 330=1923 P. 19. Under the rules of Lahore High Court framed under S. 122, the memo. in the case of second appeal shall be accompanied by a copy of the first Court's judgment 2 L. 227.

RULE ULTRA VIRES—Under S. 122 Chief Court framed a new rule in place of R. 2. O. 34, which allowed interest at Court rate and not at mortgage rate as stipulated. The new rule was held to be *ultra vires* as it limited the substantive right of the mortgagee to the stipulated rate 12 I.C. 18=4 Bur. L.T. 207. Rule made by High Court in conflict with the sections of C.P. Code is void. 28 O.C. 169=85 I.C. 455=1925 O. 492, 1930 A. 558

superintendence, and may by such rules annul, alter, or add to all or any of the rules in the First Schedule.

Constitution of Rule Committees in certain provinces. 123. (1) A Committee, to be called the Rule Committee, shall be constituted at [the town which is the usual place of sitting of each of the High Courts (and Chief Courts) * * * referred to in S. 122]¹.

(2) Each such Committee shall consist of the following persons, namely:—

(a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or [**] a Divisional Judge for three years.

(b) a barrister practising in that Court,

(c) an advocate (not being a barrister) or vakil or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court, and

(e) in the towns of Calcutta, Madras and Bombay, an attorney

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be President:

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the President of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf; and whenever any member retires, resigns, dies or ceases to reside in the province in which the Committee was constituted, or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee, who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf by ³[the Provincial Government] as the case may be.

Committee to report to High Court 124. Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

Power of other High Courts to make rules. 125. High Courts, other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as ⁴[the Provincial Government] may determine:

Leg. Ref.

¹ The words within square brackets have been substituted for "each of the towns of Calcutta, Madras, Bombay, Allahabad Lahore and Rangoon" by Act XIII of 1916, and the words "of the Chief Court" which were substituted for "Chief Court" by Act XVIII of 1919 were repealed by Act XI of 1923. The words "and the Chief Courts" were inserted by Act XXXII of 1925 and Act XXXIV of 1926.

² The words 'in Burma' were substituted for 'in the Punjab or Burma' by Act XVIII of 1919, and these words were later repealed by Act XI of 1923.

³ For words 'the Governor-General in

Council or by the Local Government', the words within brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

⁴ For words 'in the case of the Court of the Judicial Commissioner of Coorg, the Governor-General in Council, and, in other cases the Local Government' the words within brackets have been substituted by the

Notes.

Sec. 123.—Ss. 122 and 123 do not apply to Patna High Court, and Rules are made under the power, conferred by clause 29 of the Letters Patent. 2 Pat.L.T. 112=5 Pat. L.J. 719

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court

126. (NEW) ¹[Rules made under the foregoing provisions shall be subject to the previous approval of the Government of the Province in which the Court whose procedure the rules regulate is situate or, if that Court is not situate in any Province, to the previous approval of the Governor-General]

127. Rules so made and ²[approved] shall be published in the ³[Official Gazette] and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

128. (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely :—

(a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service;

(b) the maintenance and custody, while under attachment, of live-stock and other moveable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale,

(c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction;

(d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts,

(e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not;

(f) summary procedure—

(1) in suits in which the plaintiff seeks only to recover a debt or liqui-

Leg. Ref

Government of India (Adaptation of Indian Laws) Order, 1937 For the original words 'as the Governor General in Council may determine' the words now repealed were substituted by Act XXXVIII of 1920, Sch I. Now the words 'The Provincial Government' substituted by Government of India (Adaptation of Indian Laws) Orders, 1937, are in force.

¹ S 126 has been substituted for the old section which ran as follows :—

Rules subject to the foregoing provisions shall be subject to the previous approval of the following authorities, namely :—

(a) if the rule is made by a High Court established under the Indian High Courts Act, 1861 [or the Government of India Act, 1915, to the [approval] of the authority prescribed by [the proviso to section 107 of the

latter Act] for rules made under that section;

(b) if the rule is made by any other High Court, to the [approval] of the Local Government "

² Substituted for word 'sanctioned' by Act XXIV of 1917

³ Substituted for words "Gazette of India or in the local official Gazette, as the case may be", by the Government of India (Adaptation of Indian Laws) Order, 1937

Notes.

Sec. 128.—Whether S 128 (1) which allows delegation of judicial duties validates rules which were in existence prior to the Code of 1908 when such delegation was *ultra vires*, see 42 I C 623=21 C.W.N 1052.

Sec 128 (2) (a)—A village headman is not entitled to notice before personal service of warrant on him. 1930 M.W.N 1215.

dated demand in money payable by the defendant, with or without interest, arising—

- on a contract, express or implied; or
- on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or
- on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or
- on a trust; or
- (ii) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant:
 - (g) procedure by way of originating summons;
 - (h) consolidation of suits, appeals and other proceedings;
 - (i) delegation to any Registrar, Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and
 - (j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

129. [S. 652, para. 3] Notwithstanding any thing in this Code, any High Court [constituted by His Majesty by Letters Patent] may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

130. [S. 652, para. 2.] (NEW.). ²[A High Court not constituted by His Majesty by Letters Patent may, with the previous approval of the Provincial Government, make, with respect to any matter other than procedure, any rule which a High Court so constituted might under section 224 of the Government of India Act, 1935, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town]

Leg. Ref.

¹ For the words 'established under the Indian High Courts Act, 1861 or the Government of India Act, 1915,' the words within brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

² S. 130 has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, for the old section which ran as follows—

"A High Court not established under the Indian High Courts Act, 1861 [or the Government of India Act, 1915] may, with the previous [approval] of the Local Government, make, with respect to any matter other than procedure, any rule which any High Court so established might, under section 15 [or section 107, respectively, of those Acts] make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the

limits of a Presidency-town"

Notes.

Sec 129—Rules made by High Court are valid only if they are consistent with the Letters Patent 34 C 619, 624. Object of the section is to provide for elasticity in procedure and to enable defects in the Code to be remedied without the dilatory process of legislation. There is nothing in the Code to say that those rules should not be inconsistent with the Code 37 C 676=129 I C 181=1930 C 685. But see also 128 I C 238=1930 A.L.J. 1126=1930 A. 558. Rule 725 of Rules of Bombay High Court is the governing rule for appeals from the Original Side and not O. 41, R. 10 37 B. 572. S. 129 expressly authorizes Bombay High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. A payment order under R. 874 in favour of a solicitor when validly made can be executed as a decree. 162 I C. 480=38 P L R 1101=1936 L 369

131. [S. 652, para. 4.] Rules made in accordance with section 129 or section 130 shall be published in the 1[Official Gazette] and shall from the date of publication or from such other date as may be specified have the force of law.

PART XI.

MISCELLANEOUS.

Exemption of certain women from personal appearance.

132. [S. 640.] (1) Women who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

133. [S. 641.] (1) The 2[Provincial] Government may, by notification in the 2[* * *] Official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

Leg. Ref.

¹ Substituted for words 'Gazette of India or in the local official Gazette as the case may be' by Government of India (Adaptation of Indian Laws) Order, 1937.

² Substituted for word 'Local' and (2) the word 'local' omitted by Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

Sec 131.—Rules framed under this section come into force from date of publication or from such other date as may be specified. 50 A. 865.

Sec 132: SCOPE AND APPLICATION OF SECTION.—S. 132 applies not merely to witnesses but also to the examination of parties to a suit or proceeding. 11 I C 668. The words "personal appearance" mean "personal attendance" (56 Cal 865 Diss; 1925 M. 905, Rel. on.) 55 A. 666=146 I.C. 885=1933 A.L.J. 1384=1933 A. 551; 159 I.C. 153=1935 S. 208. S. 132 is not confined to *purdanashin* woman strictly so called. An old Hindu lady belonging to a high family but not belonging to the *purdanashin* class ought not to be compelled having regard to her social position and the feeling of her class, to appear in the witness-box, but must be examined on commission, the costs of the commission being costs in the cause. 45 C. 492=22 C.W.N. 147. Court has no power to insist that a *purdanashin* lady must attend and give evidence in Court. She may refuse to attend and say that her statement should be taken on commission. It is immaterial whether she is a party or a witness. (56 C 865, Diss.) 55 A. 666=146 I.C. 885=1933 A.L.J. 1384=1933 A. 551. See also 1928 C 814. A *purdanashin* lady may be included in the statutory description of "women who according to the customs and manners of the country ought not to be compelled to

appear in public". When a transformation of customs has taken place, she can no longer claim, as of right, the statutory exemption. 45 C. 697. A *purdanashin* lady is entitled to be examined on commission although she has previously appeared in public, and has been examined in Court in a *palki*. 45 C. 697, 26 C. 650. Section exempts from appearance and not from attendance in Court. Ladies can be compelled to come to the Court in a *palki* secluded from public gaze. If their examination is made in a room, the public being excluded and they being concealed from the gaze of the officer, it is a perfectly legal manner of examining them. 56 C 865=1929 C 528. But see 55 A. 666=1933 A. 551, 159 I.C. 153=1935 S. 205. An unmarried girl of 12 who belongs to a class, the female members of which never go out in public, is entitled to the privilege afforded by this section. 24 W. R. 375. In the case of a woman who was in mourning, and therefore according to custom, was not to leave her house for two or three years, a commission was refused in 14 B 584. Proof of custom regarding seclusion of recently widowed ladies necessary before issue of commission. 1927 M.W.N. 218. As regards criminal cases, there has, perhaps, been a slight divergence of judicial opinion on the question of the examination of *purdanashin* ladies of commission. 45 C. 697=22 C.W.N. 197. This is a right which the Court has no power to deny. 1928 C 814. Where the allegation that a *purdanashin* lady examined on commission was being tutored by somebody behind the *pardah* is established, the Court has the discretion to exclude the evidence. But there is no justification for the judge to insist on the attendance of the *purdanashin* lady in Court. 55 A. 666=146 I.C. 885=1933 A.L.J. 1384=1933 A. 551.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the 1[Provincial] Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission, unless the party requiring his evidence pays such costs.

Arrest other than in execution of decree

134. The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

Exemption from arrest under civil process

135. [S. 642.] (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning

from, his Court

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognised agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court, while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim

Leg. Ref.

¹ Substituted for the word "local" by Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

Sec 134.—Arrest is made by the duly authorised officer touching the person. Placing the arrest warrant in the hands of person sought to be arrested does not constitute arrest. 7 R. 599

Sec 135 (2) CONSTRUCTION.—Reasonably wide construction must be given to S. 135 (2). It is not the intention of legislature that a person holding an arrest warrant should be able to pounce upon a person the moment the Court which he has been attending rises for the day. 36 C W N 1071. See also 55 B 612, 39 C W N 318. An Income-tax Officer is a "tribunal" within the meaning of S. 135 (2) and a party is exempt from arrest while on his way to appear before that Officer in compliance with a notice issued to him under S. 23 (2) of the Income-tax Act 144 I C 463=1933 L. 214. In order to obtain exemption under this section, party must first satisfy the Court that his attendance in Court is *bona fide* in relation to the matter pending before it, that the Court which he attends has jurisdiction in the matter, or the party believes in good faith that it has such jurisdiction. The exemption enures during such period as is reasonably required in going to the tribunal from his ordinary place of residence, in attending that tribunal, and in returning from it to the ordinary place of residence whence he came. What period is reasonable is a question of

fact. The exemption is forfeited if in going to or in returning from the Court there is an unnecessary or excessive deviation sufficient in the opinion of the Court to forfeit the privilege. No party or witness can claim to return to his ordinary place of residence by any route he likes. (5 H L C 671. + M H C R. 145, 32 A 3; 11 East 439 and 46 A 663, Foll.) 55 B 612=33 Bom L R 44=1931 B. 175. See also 36 C W N 1071. The principle which would apply to a person living in the place in which the Court is situate must be applied to the person who takes up temporary lodgings in that place, i.e., the protection extends only from his temporary lodgings to the Court or from the Court to his temporary lodgings. Hence an arrest effected when he has left his temporary lodgings and is taking a walk is legal. 1935 P. 6=14 P 242=154 I. C. 610=16 P L T. 560. The privilege of exemption from arrest granted under the provisions of S. 135 (2) enures for the benefit of a party while he is going to or attending a Court and lasts till he returns from the Court to his ordinary place of residence. (A. I R. 1931 B 175, Foll. + A. I. R. 1935 P. 6, Not Foll.) 158 I C 507=1935 N 216. The word "tribunal" in S. 135 (2) is used to cover tribunal both of British India as well as of Native State. (*Ibid.*)

Sec. 135 (3).—Sub-section (3) is new and supersedes the decision in 4 M. H C. R. 145. See also 14 Beng. L. R. App. 13; 5 C. 106; + M. 317; 5 C. L. R. 170. Words "other than a process issued for contempt of Court" give effect to the ruling in 4 Beng L. R. O C. 90. Judgment-debtor is protected from arrest in

exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

Exemption of members of legislative bodies from arrest and detention under civil process.

[135-A. (1) No person shall be liable to arrest or detention in prison under civil process—

(a) [if he is a member of a unicameral Legislature or of either Chamber of a bicameral Legislature constituted under the Government of India Act, 1935, during the continuance of any meeting of such Legislature or Chamber]

(b) if he is a member of any committee of such [Legislature or Chamber] during the continuance of any meeting of such committee,

(c) [if he is a member of either Chamber of such a bicameral Legislature, during the continuance of a joint sitting, meeting, conference or joint committee of the Chambers of that Legislature.]

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1).]²

136. [648.] (1) Where an application is made that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of

Procedure where person to be arrested or property to be attached is outside district.

Leg. Ref.

¹ Clauses (a) and (c) and the words 'Chamber or Council' within brackets in clause (b) have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

² Original S. 135-A was inserted by Act XXIII of 1925

Notes.

the circumstances mentioned in the section, and a person who causes arrest and Officer arresting are guilty of an offence under S 342, Penal Code 36 I C. 493=121 P.L.R. 1916 (Cr). Defendant who appears in Court to defend his suit is exempt from arrest under S 135. 37 M.L.J. 435=43 M. 272. Judgment-debtor reaching station in connection with criminal case—Arrest in execution of decree is illegal 6 O.W.N. 809=1929 O 426 (F.B.). A surety for the appearance of the defendant cannot initiate proceedings under O. 38, R. 3 with a view to obtain his discharge when the defendant appears in Court to defend his suit. Appearance of the defendant on that occasion does not amount to a "voluntary surrender" 37 M.L.J. 435=43 M. 272. It is not open to the Court to issue a warrant of arrest against a bankrupt who is in attendance in

Court as witness, but the proceedings need not be set aside for this reason alone. 24 I C 513. Wrongful arrest in contravention of S 135 will not give rise to an *action in torti for damages* unless it has been procured maliciously and without reasonable and probable cause 7 R 598. Allegation by judgment-debtor that he should not be arrested as protected by this section—Process server, if bound to inquire into allegation—Arrest in spite of protest, if offence See 39 C.W.N. 318

Sec. 136—Section does not apply to a case in which defendant resides within same district in which Court issuing a warrant is situate. 2 B 560; 8 M 205. See also 57 C 1280=130 I.C. 252; 50 M L J 401=1926 M 574. It applies only to cases in which decree passed in one district has to be executed in another district. 4 C. 823. Section 136 (1) enables a party to enforce an order of injunction against a person outside the local limits of the jurisdiction of the Court passing the order 57 C. 1280=130 I C. 252=1931 C 279. High Court in its original jurisdiction has power to make an order of injunction and when that is disobeyed, to order the arrest of the person disobeying though he might reside beyond the limits of its ordinary original jurisdiction, and also to transfer the same for execution to a Dis-

whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court, in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or moveable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay, [* * * * *]¹ the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, [and Bombay] as the case may be, and that Court, on receipt of the copy and amount, shall proceed as it it were the District Court.

137 [S. 645.] (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the 2[Provincial] Government otherwise directs.

(2) The 2[Provincial] Government may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English, a translation into the language of the Court shall, at his request, be supplied to him, and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

138. [S 185 A] (1) The 2[High Court] may, by notification in the 4[* * *] Official Gazette, direct, with respect to any judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

Leg. Ref.

¹ The words 'or of the Chief Court of Lower Burma' have been omitted, and (2) for words 'Bombay or Rangoon', the words within brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

² Substituted for word 'Local' by Government of India (Adaptation of Indian Laws) Order, 1937.

³ The words were substituted for words 'Local Government' by Act IV of 1914.

⁴ Word 'local' omitted by Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

strict Judge within whose jurisdiction such person resides. Such orders are not *ultra vires* or without jurisdiction. District Judge who arrests the party in execution of the writ sent to him acts in the lawful exercise of his powers. 61 C. 971=59 C L J 463=38 C.W.N 799=1934 C. 818. Court can order attachment before judgment of property outside local limits of its jurisdiction; it can also order removal of such attachment. 9 R. 561=1931 R. 279 (10 I.C. 794, Foll.) If Court which actually effects attachment before judgment has power to remove it, *see* 9 R. 561. Applicability of

(2) Where a judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

Oath on affidavit by whom to be administered 139. [S. 197.] In the case of any affidavit under this Code—

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the 1[Provincial] Government has generally or specially empowered² in this behalf, may administer the oath to the deponent.

140. [S. 645-A.] (1) In any admiralty or Vice-Admiralty cause of salvage, towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall, upon request of either party to such cause, summon, to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

141. [S. 647.] The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil jurisdiction.

Leg. Ref.

¹ Substituted for word 'Local', by Government of India (Adaptation of Indian Laws) Order, 1937.

² For notification empowering Court of the District Judge in the Punjab to appoint an officer subordinate to itself to administer oaths to process servers, bailiffs, etc., see Punjab Gazette, 1909, Pt I, p 13

Notes.

section—Appointment of receiver—Disobedience of Court's orders—Contempt—Arrest outside jurisdiction See 32 C.W.N. 114

Sec 139 (c).—District Judges have power to appoint commissioners to administer oath on affidavit generally and without restriction to a particular area or class. If a Sheristadar of a Munsif Court receives the affidavit in exercise of the powers conferred on him *ex officio*, then no doubt his jurisdiction is limited to matters arising within and subject to the jurisdiction of that Munsif. But the issue of process of the District Judge's Court through the Nazarat of the Munsif is a matter arising within the Munsif's jurisdiction and Sheristadar can receive an affidavit in such a matter. 1933 Cr C 1536=14 P L.T 635=1933 P 713.

Sec 141: SCOPE OF SECTION.—Procedure prescribed by the Code is applicable as widely as possible to miscellaneous proceedings. 21 C. 479. Section does not apply to applications for execution of a decree which are proceedings in the suit. It applies only to original matters in the nature of suits, i.e., to such matters as applications for appointment of guardians, and for custody of infants, and to proceedings under the Divorce Act, and to recording of evidence in probate cases, and many other similar matters other than suits and appeals 9 A. 36 (41)=I.

L R 1937 B 144=167 I C 750=38 Bom. L R 1303=1937 B 111 See also 18 C 635 at 638; 15 I.C 559=116 P.R 1912, 29 C.W.N 521=1925 C 391 (applicability of section to proceedings before Rent Collector), 106 I.C. 808 (proceedings under the Indian Companies Act) S 141 applicable only to original matters in the nature of suits, such as proceedings in probate, guardianship, and so forth. The expression "original matters" means matters which originate in themselves and not those which spring up from a suit or from some other proceeding or arise in connection therewith. Thus it does not apply to O. 9, R 9 for restoration of a suit dismissed for default 54 C. 405=31 C.W.N. 576=1927 C. 534 See also 148 I.C. 595=1934 M 496=66 M. L J. 310. O. 9 of Code cannot be applied to dismissal of an application under O 21, R 90. But it is open to Court to invoke its inherent jurisdiction under S. 151 to restore such application 1931 A.L.J. 622=1931 A. 594. Power conferred by this section should not be exercised without sufficient cause 8 M. 548 (550) (F B). Section deals with law of procedure alone and does not touch substantive law of arbitration 10 R 563=1928 R. 137. It cannot be held that S 141 makes want of notice for passing of a final decree in a mortgage suit an illegality. It is doubtful if section applies to a matter where a clear procedure is laid down 30 L.W. 551=1929 M.W.N 867. See also notes under S. 151.

MEANING OF TERMS.—Term "suit" applies to suits in the strict sense, and is not intended to cover proceedings for enforcement of rights decreed in suit. 12 A. 392 (F B). "Suit" includes appeal 110 I C. 374=1928 L. 488.

Orders and notices to be in writing.

142. [S. 94.] All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

143. [S. 95.] Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made:

Postage
Provided that the [Provincial] Government, [* * *] may remit such postage, or fee, or both, or may prescribe a scale of Court-fees to be levied in lieu thereof.

144. [S. 583.] (1) Where and in so far as a decree is varied or reversed. the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have

Leg. Ref.

¹ Substituted for word 'Local' by Government of India (Adaptation of Indian Laws) Order, 1937.

² Words 'with the previous sanction of the Governor-General in Council' omitted by Act XXXVIII of 1920

Notes.

PROCEEDINGS TO WHICH SECTION IS APPLICABLE.—Applicable to proceedings in original suit. 4 P.L.T. 735=1924 P. 346. S. 141 is wide enough to make the provisions of S. 10 apply to arbitration proceedings. 66 I.C. 796=1922 S. 6. Where application to sue *in forma pauperis* is dismissed for default, O. 9, R. 9 read with S. 141 enables the Court to restore the application for proper reasons. 1932 M.W.N. 1262=140 I.C. 226=36 L.W. 586. No appeal lies from order rejecting application for restoration of suit dismissed for default. 28 N.L.R. 83=139 I.C. 296=1932 N. 101. Procedure prescribed by S. 98 applies to miscellaneous proceedings. 3 B. 204. Appeal lies under this section against an order of the District Court under S. 5 of the Religious Endowments Act. 4 M. 295. Section is not applicable to a Judge acting under S. 10, Religious Endowments Act. See 29 M.L.J. 671. See also 40 M. 793=44 I.A. 261=33 M.L.J. 69 (P.C.); 37 M.L.J. 162=53 I.C. 56; 38 C.L.J. 358=1924 C. 327. Also to decisions of the Additional Judge appointed to hear cases under the Land Acquisition Act. 16 C. 31. The Court under Companies Act is governed by general provisions of the Code as made applicable by S. 141. 1 L. 187=55 I.C. 820. This section empowers High Court to transfer to its own file proceedings for winding up of a Company under Companies Act. 9 A. 180. Under S. 141 its provisions are applicable to proceedings under the Lunacy Act. 22 C. W.N. 547=27 C.L.J. 205. A procedure to compel registration under the Registration Act is governed by the procedure laid down in the Code. 2 C. 131 (P.C.). A receiver may be appointed in original proceedings as in suits according to O. 40, R. 1 read with

S. 141. 43 C. 986=20 C.W.N. 1009. Under this section an executor can apply for probate *in forma pauperis*, 18 B. 237. Probate proceeding against minor—O. 32 is made applicable. 59 I.C. 664=24 C.W.N. 541. When an application under O. 21, R. 58 is struck off for default, this section enables the claimant to apply under O. 9, R. 9. 10 A. 119. Proceedings under S. 144 are not proceedings in execution. Consequently S. 141 applies to them. 20 A.L.J. 226=44 A. 407. Where application under O. 9, R. 4 is itself dismissed for default, fresh application to restore such application is maintainable. 50 I.C. 401=1 P.L.R. 1919. See also 56 I.C. 25; 1 I. 339=58 I.C. 748, 47 A. 878. Applicability to proceedings under O. 9, R. 9—Appeal. 36 C.L.J. 184=69 I.C. 1003; 47 A. 878=1925 A. 773. *Quaere*.—Whether S. 141 and O. 9, R. 9 apply to an application to set aside an order of dismissal for default of an application to set aside an *ex parte* decree. 1933 R. 406. See also 56 A. 390=147 I.C. 721=1934 A. 86=1934 A.L.J. 331. Under S. 141 application for re-admission can be made if an application to set aside an order dismissing a suit for default. 10 I.C. 705=7 N.L.R. 32. See also 74 I.C. 380=1923 O. 146; 47 A. 878=1925 A. 773. Order returning memorandum of appeal for presentation to proper Court is not appealable though order by Appellate Court returning plaint for return to proper Court is appealable. 32 C. W.N. 693=117 I.C. 849. Sale proceeds of sale found insufficient—Application for personal decree against mortgagor dismissed for default—Second application does not lie—Proper remedy is to set aside the order dismissing the application for default. 8 R. 316=1930 R. 257. Court has power to pass order by way of injunction for the protection of a female minor against an unsuitable marriage. Such an order should issue under O. 39, R. 2 (1) read with S. 141 and disobedience of such order is punishable under O. 39, R. 2 (3). 28 N.L.R. 332.

PROCEEDINGS TO WHICH SECTION IS NOT APPLICABLE.—This section does not apply to

occupied by or for such decree or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for

Notes.

appeal under the Letters Patent. 26 M. 123. As to proceedings under S. 195 of the Cr. P. Code. 30 M. 311. Non-applicability of section to proceedings under S. 105 of the Bengal Tenancy Act. 3 P. 67=1924 P. 104. And to proceedings under the Mamlakat Courts Act. 16 I.C. 675=6 S. L.R. 67. This section does not render an order under S. 5 of the Court-Fees Act appealable as a decree. 12 A. 129. S. 141 does not apply to proceedings under the Guardian and Wards Act. 15 I.C. 559=116 P.R. 1912. See also 9 A. 36; 18 C. 635. Legal Practitioners Act. S. 14—Proceedings under. See 50 I.C. 806=23 C.W.N. 560. See also 1 P.L.T. 576=37 I.C. 484. Where a surety bond is executed by a guardian and his sureties the proper remedy to proceed against the sureties on the bond is to assign the bond to enable the assignee to sue on the bond and not by issuing execution on the strength of this section. 103 I.C. 493.

EXECUTION PROCEEDINGS—S. 141 does not apply to applications for execution. 29 I.C. 395=19 C.W.N. 758. See also 45 A. 148=1923 A. 460; 18 C. 635, 44 A. 407=66 I.C. 144=1922 A. 223; 89 I.C. 360, 52 C. 559; 83 I.C. 749; 48 M.L.J. 89=1925 M. 145; 41 C.L.J. 286=1925 C. 510. S. 141 does not apply to execution proceedings, and they cannot be restored under O. 9. 2 P. 372=71 I.C. 484, 4 P.L.J. 135 (F.B.), 4 P.L.J. 330, 35 I.C. 337. See also 145 I.C. 995=1933 A.L.J. 1032=1933 A. 783 (F.B.). The dismissal of an execution application for default is no bar to a subsequent application. 11 I.C. 385=13 C.L.J. 532. Application to set aside *ex parte* decree—Dismissal for default—Application for restoration—Order rejecting—If appealable. 41 L.W. 811=1935 M. 609=69 M.L.J. 99.

Sec 144: "COURT OF FIRST INSTANCE," MEANING OF—See 61 I.C. 962=13 L.W. 67, 1931 R. 21.

"PARTY," MEANING OF—See 44 A. 555, 98 I.C. 1042=1927 A. 182.

SCOPE AND APPLICATION OF SECTION—S. 144, applies where a decree has been reversed or varied appeal, revision or by a review, but not where the consequence of a decree has been affected by a subsequent decree passed in another suit. 1937 A.L.J. 34=1937 A.W.R. 34=1937 A. 232. See also 39 Bom. L.R. 112=1937 B. 173. S. 144 is confined to cases in which the decree of a trial Court is varied or reversed by some superior Court or by reason of some order passed by a superior Court. 1 P.L.J. 43=34 I.C. 747=3 P.L.W. 95. See also 157 I.C. 677=4 A.W.R. 1331=1935 A. 126. An application under S. 144, being in substance one made for seeking the aid of the Court in working out the final decree should be regarded as an application for execution of the decree

passed in appeal. (7 O.W.N. 1153, Foll.) 160 I.C. 814=1936 O.W.N. 262=1936 O. 185. The right of the auction-purchaser to a refund of the money paid by him arises both under S. 144, and also on principles of equity and justice and if the case does not come under S. 144, the Court can exercise its inherent jurisdiction to direct a refund of the money to the auction-purchaser. 1936 L. 497. The expression "any party" in S. 144, is not confined to parties in the appeal in which the decree has been reversed or modified. It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour of such person. The conditions on which restitution can be granted under S. 144 are: (1) that the applicant must be a party to the litigation which has terminated according to law; (2) that he has lost, or been deprived of, something by reason of the decree or order which has been subsequently varied or reversed; and (3) that on the final pronouncement of his rights, the party applying is entitled to the benefit of restitution. The section does not in terms state or require that the applicant must be a party to the proceeding which has resulted in the original decree being reversed or varied; nor does it require that the final decree should provide for a right in him to apply for restitution. All that is necessary is that the final decree must be such that it would be inequitable to allow his opponent to retain what he has obtained from the former on the strength of a decree which ultimately is held to be erroneous or wrong. A party to the suit from whom costs have been recovered, is therefore entitled to apply for restitution on the reversal of the decree finally in appeal, though he himself has not been a party to the subsequent stages of the litigation in appeal. 1 L.R. 1937 B. 150=38 Bom. L.R. 1326=1937 B. 101. See also 39 Bom. L.R. 112=1937 B. 173. S. 144 does not apply to cases in which the decree is held to be wholly or partially null and void as the result of a decree in some other suit or of other independent proceedings initiated for the purpose. But S. 144 is not exhaustive of the powers of restitution and it is not only permissible, but is imperative, to grant restitution by exercising the *inherent powers vested in the Court* by S. 151, provided the exercise of those powers is necessary for the purpose of preventing injustice and does not contravene any statutory provision. 55 A. 221=144 I.C. 492=1933 A. 218; 103 I.C. 657=1927 L. 635; 118 I.C. 389=1929 L. 657; 34 C.W.N. 746=1931 C. 42; 1933 A.L.J. 60; 33 L.W. 259=1931 M. 81=60 M.L.J. 219; 21 Bom. L.R. 157=43 B. 433 (F.B.); 39 I.C. 763=2 P.L.J. 361; 37 I.C. 863; 84 I.C. 75=1924 A. 713 (decree against minor); 1929

the refund of costs and for the payment of interest, damages, compensation and

Notes.

R. 157; 43 L. W. 773=1936 M. 636; 60 C. L. J. 44. See also 150 I. C. 924=1934 L. 322, 36 P. L. R. 119=1934 L. 1023; 67 M. L. J. 787; 57 M. 849=150 I. C. 934=1934 M. 330=67 M. L. J. 49 (Power of Court to rectify mistaken payment and call back money paid). Thus where the decree is admittedly a nullity, the suit having been instituted against a dead man and the Court having levied execution when there was no decree has inherent power to rectify its own mistake under S. 151, and to allow restitution of money paid in execution 146 I. C. 564=38 L. W. 874=1933 M. 888 (1). See also 146 I. C. 1079=1933 Pesh. 76; 1933 P. 564. (Court can exercise its inherent power to order restitution although the aggrieved party may have another remedy by way of suit). Though S. 144, may not be strictly applicable to a case the Court under S. 151 would be entitled to make such orders as are just and proper for the disposal of the profits enjoyed by the plaintiff under the orders of the Court during the suit and the appeal. 1936 M. W. N. 503=43 L. W. 773=1936 M. 636; 1936 L. 497. S. 144 is not exhaustive of the power of the Court to order restitution. S. 151 saves the inherent power of the Court to act rightly and fairly according to the circumstances towards all parties involved. 42 L. W. 444=1935 M. W. N. 875=1935 M. 783=69 M. L. J. 84, 1936 L. 497; 1936 M. 636. One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. This statement of the law is general enough to cover a case where the executing Court has been made to take a wrong step by an erroneous decision passed by another Court. The non-applicability of S. 144 would not prevent a Court from granting restitution in the exercise of its inherent powers. Where a Court has wrongly paid the money to a person not entitled thereto, it has not only the power but it is also its duty to recover it from him. 167 I. C. 67=1937 M. 95. Power of Court to grant restitution extends to a case where the partition is set aside by virtue of a provision in the decree itself providing for a certain contingency which has occurred. 149 I. C. 365=14 P. L. T. 753=1934 P. 150. Section does not contemplate variation or reversal of a decree under a *private compromise* entered into by the parties whether out of Court or in the course of an execution proceeding. 1933 A. L. J. 724=1933 A. 743. But see 1933 M. W. N. 641 (*contra*); see also 148 I. C. 569=1934 L. 604. Section applies not only to restitution brought about in consequence of a decree passed on contest but also to compromise decrees passed on appeal. Section requires only a variation or a reversal of the decree of the Court of first instance, however that may be effected. 68 M. L. J. 332=156 I. C. 85=41 L. W. 705=

1935 M. 476. The words '*or otherwise*' are inserted only to provide for cases where it is not possible to make restitution in the sense of restoring the very property that was lost to the petitioner and when the Court proceeds to do the next best thing that it could do in the circumstances. For example, where in execution of the decree of the first Court, the suit property is sold in Court-auction and purchased by a stranger, restitution is possible only of the proceeds, and not of the property. 1930 M. W. N. 1245. See also 130 I. C. 353; 1931 R. 21. Application under section whether application for execution of the decree. I. Luck. 40=13 O. L. J. 731, 7 O. W. N. 1153. Right to restitution not restricted to reversal on appeal only. 30 M. L. J. 366=33 I. C. 739; 65 I. C. 797=1922 M. 70. Section applies also to appellate decrees. 38 M. 1120=27 M. L. J. 112. In the matter of restitution power of Court not confined to section. 103 I. C. 657=1927 L. 635; 1929 L. 657; 34 C. W. N. 746. Section does not lay down that where a decree has been varied or reversed the parties are to be placed in the same position in which they were before the suit was brought nor does it direct that other proceedings such as suits are to be ignored. 118 I. C. 519=1929 A. 527. The object of S. 144 is to provide a speedy and simple remedy for any party who has suffered by reason of an erroneous decree made by a Court of first instance and it does not apply to a case where the Court has decided questions of conflicting rights under different decrees which may be very complicated. Section refers only to cases where a decree of the Court of first instance is revoked on appeal for revision. 33 C. W. N. 908=1929 C. 814. Section prescribes a remedy which is separate from and independent of that which is open to a person under O. 21, R. 90. Where an application under O. 21, R. 90 is dismissed and the sale confirmed the aggrieved party can apply under the section. 1931 A. 655. Section is meant to apply ordinarily to the class of cases where a person having obtained a decree executes it and recovers some money or property from the judgment-debtor and then the decree is reversed which necessitates restitution of property or money which the judgment-debtor had to part with at the instance of the Court on the ground that the decree is no longer in force. Where the plaintiff was never in possession of the property and it could not be said that as a result of the decree of the first Court the property was taken out of his possession this section does not apply. 140 I. C. 482=1932 P. 317=11 P. 553. It does not apply to decrees passed before the passing of this Code. 29 I. C. 380. Object of the section is to shorten litigation and afford speedy relief. 17 I. C. 121=16 C. L. J. 135; and to restore the *status quo ante* of the parties. 55 I. C. 356. See also 129

mesne profits are properly consequential on such variation or reversal.

Notes.

1 C.W.N. Application for restitution to be made to Court which passed the decree—*See also* 44 A. 283=20 A.L.J. 15. The power of restitution expressed in S. 144, is inherent in all Courts, Civil or Revenue 46 I.C. 475=11 Bur L.T. 3. Section is imperative and mandatory and no discretion is given to the Court. 42 I. C. 523=6 L.W. 568; 1928 R. 293. A special direction as to restitution is unnecessary when the final decree is in favour of the applicant. 29 I.C. 380. Restitution may be granted even when the decree is set aside on review. 28 A. 665. Although a Court goes beyond the terms of a decree and gives possession, it can order restitution 9 C. W.N. 381. Even if the section does not apply to possession taken on the strength of a declaratory decree which is upset in appeal, the Court can grant restitution. 6 C.W.N. 710. Execution sale—Setting aside—Re-payment of purchase money—Payment of encumbrances by purchaser. 2 P. 10=44 M.L.J. 735=49 I.A. 351 (P.C.). Damages—Wrongful attachment—Sale by Court—Deposit under O. 21, R. 89—Loss from private sale. 1927 M. 353. As to restitution of money paid to a surety, *see* 38 M. 1120=27 M.L.J. 112. Inherent power of restitution exists—Order for re-payment of money mistakenly paid out can be made. 26 C.W.N. 408=64 I.C. 864=35 C.L.J. 53. Execution under mistake—Court can set right the wrong. 72 I.C. 879=1923 O. 16. *See also* 18 N.L.R. 15=67 I.C. 225=1922 N. 62. Excessive execution—Claim to recover over-payment—Remedy. 33 Bom. L.R. 1557. When a man is arrested illegally and in order to save himself from the consequences of illegal arrest he pays up a sum of money he should be put in the same position as though that arrest had not taken place and if it be possible should obtain restitution. 6 O.W.N. 809=119 I.C. 367=1929 O. 426 (F.B.). Suit for restitution can be converted into an application. 67 I.C. 319=1922 N. 198. Payment under decree subsequently declared in a separate suit to be null and void—Failure to ask for payment. 53 I.C. 552=13 S.L.R. 153. On this section, *see also* 67 I.C. 546=42 M.L.J. 473 (Restitution of money paid under rateable distribution); 42 M.L.J. 308=1922 M. 228 (Distribution of proceeds among several decree-holders—Sale subsequently set aside—Right to refund of purchase-money), 42 M.L.J. 315=1922 M. 96 (Reduction of decree amount subsequent to execution sale—Right to refund); 47 I.C. 628=41 M. 467 (Auction-purchaser not a party to suit); 55 I.C. 356 (What evidence has to be taken in proceedings under this section), 1925 L. 177 (Pre-emption decree). Landlord and tenant—Ejectment decree reversed—Tenancy revived. 8 L.R. 319 (Rev.). Section is not confined only to cases where something has been taken from a party in execution of

a decree varied or reversed. 34 C.W.N. 707. As to working equities in restitution, *see* 1934 L. 911. Section not confined to matters in execution. It can be applied to interim orders passed pending the final disposal of a partition suit. 1930 M.W.N. 644.

JURISDICTION.—By virtue of S. 5 of the Provincial Insolvency Act, the *Insolvency Court* has all the powers of a Civil Court. Where the Receiver had in pursuance of an order of Court paid off some of the assets to the creditors, the Court has the power under S. 144, on the reversal of that order by the High Court, to direct the creditors to refund the amount. 143 I.C. 330=1932 A.L.J. 1095=1933 A. 117, 1930 A. 415.

MEASURE OF DAMAGES OR COMPENSATION.—A person who obtains possession of immovable property under and by virtue of orders passed in execution proceedings, based upon what at the time was a valid decree but has subsequently been set aside on appeal, can in no sense be regarded as a trespasser during such period. For that period he is liable to the real owner for compensation or damages and not for mesne profits in the strict sense. But on and after the reversal of the decree he becomes a trespasser if he does not vacate and hand over possession, as in duty bound, and remains liable for mesne profits as such so long as he remains in possession. But the measure of damages or compensation for the first period can on no principle be higher than during the second period. The principle to be followed in awarding compensation or damages by way of restitution under S. 144, C.P. Code, is that the assessment must be on the basis of not what the party in possession could have made, but what he did in fact make or could with reasonable diligence have made. 38 C.W.N. 1197. *See also* 17 N.L.J. 281.

FOR WHOM RESTITUTION CAN BE ORDERED.—Where execution sale is set aside as void the auction-purchaser can demand a refund from the decree-holder. 18 I.C. 381=15 Bom. L.R. 41. *See also* 43 B. 235. But *see contra* 3 R. 251=1925 R. 215. Where judgment-debtor is dispossessed under wrong order of Court subsequently set aside, it is the duty of Court to restore him to possession. 18 N.L.R. 24=1922 N. 82. Execution sale set aside—Purchaser paying revenue. 51 I.C. 706. Where preliminary decree has been reversed or varied by appellate Court it follows that final decree passed thereon and all execution proceedings in pursuance of final decree fall through and there is no necessity for filing an appeal from final decree. 133 I.C. 622 (2)=1931 A. 655. Where assignment takes place even after the appellate decree, which is the basis of the claim for restitution, the assignee is entitled to the benefits of S. 144. 1918 P. 243=46 I.C. 465. *See also* 38 M. 36=23 M.L.J. 513; 30 C. 857. As to maintainability of an application for restitution between

(2) No suit shall be instituted for the purpose of obtaining any restitu-

Notes.

substituted parties, *see* 10 R. 480=1932 R. 148=138 I.C. 260. Where certain alienations were set aside but decree was reversed on appeal by alienor alone, the alienees could apply for restitution. 98 I.C. 1042=1927 A. 182.

AGAINST WHOM RESTITUTION CAN BE ORDERED—A co-plaintiff in whose favour a decree is not passed is not a decree-holder and restitution cannot be ordered against him. 41 I.C. 23. A person who has obtained a merely declaratory decree (as *muttawahi*) which is not capable of execution cannot claim restitution. 161 I.C. 444=1936 L. 48. Attaching decree-holder of original decree is liable for restitution on reversal of original decree by the appellate Court. 59 M.L.J. 225. Restitution cannot be had against a *bona fide* purchaser for value at an auction-sale held by a competent Court even though the decree is set aside on appeal. 38 A. 240=14 A.L.J. 302; 30 M.L.J. 497 (auction-purchaser not a party to suit, *see* 41 M. 467); 1925 L. 176. S. 144, C.P. Code, only applies to parties to the erroneous decree but not to third parties. 16 O.C. 225=21 I.C. 570. But *see* 1929 L. 657=164 I.C. 379=1936 M.W.N. 973=44 L.W. 265=1936 M. 634. Section 144 allows restitution to be made against the decree-holder who obtains any benefit under a decree which is afterwards reversed in appeal. It does not allow restitution against a third party such as a stranger auction-purchaser. 75 I.C. 238=L.R. 4 A. 526. *See also* 48 M. 767=49 M.L.J. 452. In proceedings relating to restitution only a summary inquiry is contemplated and complicated questions of a stranger's rights should not be gone into. 58 C. 1070=134 I.C. 906. *See also* 13 P. 108=146 I.C. 1045=1933 P. 109=15 P.L.T. 491. As to restitution against an assignee decree-holder, *see* 38 M. 36=23 M.L.J. 513, 42 I.C. 527. Restitution under S. 144 can be claimed not only against the opposite party, but also his representatives or persons deriving title from him. The party entitled to restitution is entitled to have his lands restored to him free from all encumbrances, including any tenancy that might have been created in the meantime by the party who was successful in the first Court but eventually was found to have no title to the land. Such tenants are not protected by S. 19 of the Agra Tenancy Act. 152 I.C. 1.C. 663. The party sued for restitution on the reversal of a decree in appeal cannot plead his rights acquired during the pendency of the litigation in some other capacity by way of defence and his remedy to establish such rights is by independent suit. 5 O.W.N. 162=1928 O. 208. Where decree-holder himself is auction-purchaser, sale cannot stand, if decree be subsequently set aside or modified because the purchase is subject to the final result of litigation between the parties. Judgment-debtor seeking to get rid of sale should have relief only on condition that he paid up what was due under the ultimate decree and decree-holder would have a charge on the property for amount ultimately found due by appellate Court on payment of which judgment-debtor would be entitled under S. 144 to have the property restored to him on his depositing the decretal amount in Court. 7 R. 107=117 I.C. 252=1929 R. 157.

INTEREST AND COSTS—The Court has power to award interest on costs which the judgment-debtor may be liable to refund to him. 20 O.C. 327=43 I.C. 337, 153 I.C. 654=68 M.L.J. 168=1935 P.C. 12 (P.C.). *See also* 19 A.L.J. 771=63 I.C. 513. As to right to interest, *see also* 27 B.L.R. 485=1925 B. 313, 16 L.W. 587=1922 M. 70; 41 M. 316; 21 C.W.N. 564=24 C.L.J. 467; 37 M.L.J. 591. *See also* 139 I.C. 348=63 M.L.J. 383. Restitution ordinarily involves interest. The duty of the Court when awarding restitution under that section is imperative. It shall place the applicant in the position in which he would have been if the order had not been made, and for this purpose the Court is armed with powers (the "may" is empowering, not discretionary) as to mesne profits, interest and so forth. 153 I.C. 654=1935 P.C. 12=68 M.L.J. 168 (P.C.). The executing Court has a discretion under S. 144 to allow interest on a sum that is refunded under the provisions of that section. The fact that the refund was occasioned by a compromise between the parties in which no mention of interest was made does not operate to deprive the said Court of such a discretion. 48 I.C. 569 (1)=1934 L. 604 (1). *See also* 1934 A. 13. Where judgment-debtor deposits amount of costs decreed in Court and decree is subsequently reversed in appeal, he is entitled to a refund of amount deposited together with interest thereon from date on which the decree-holder withdrew the money from Court. 35 C.W.N. 1305. If money lies in Court and no person is benefited no interest is payable. 3 R. 251. But *see* 1929 P. 593. A party in whose favour an order has been made directing the repayment of costs paid by him under a decree subsequently reversed is entitled to interest thereon. 131 I.C. 832=61 M.L.J. 34. A party realising costs awarded under a decree must refund the amount on reversal of the decree quite apart from the fact that property in suit was given to a charity or applied to another purpose. 54 I.C. 816. Where Court passes a joint decree for costs against several defendants and one of them deposits the decree amount for himself and on behalf of others, depositor is entitled to a refund of the amount when decree is reversed in appeal and no question of proportionate refund can arise under these circumstances. 35 C.W.N. 1305. *See also* 4 A.W.R. 1331. The fact that the principal only is secured by

tion or otherwise which could be obtained by application under sub-section (1).

Notes.

Effect of suit.—If the executing creditor who withholds the money from Court does not affect his liability to pay interest under this section. 39 I.C. 22=2 P.L.J. 149; 31 L.W. 262 Order of His Majesty in Council—No express direction as to restitution and interest on costs—Executing Court can order the same. 50 A. 767=1928 A. 293

INTEREST AND MESNE PROFITS.—Mesne profits—Interest—Pre-emption decree—Execution of—Reversal on appeal. 19 I.C. 1 As of mesne profits and interest thereon, *see* 2 L.L.J. 207; 153 I.C. 654=1935 P.C. 12=68 M.L.J. 168 (P.C.), 53 I.C. 119, 45 M.L.J. 323=73 I.C. 1041=1924 M. 87; 3 L.W. 405=34 I.C. 2; 17 I.C. 121=16 C.L.J. 135. Mesne profits—Order to pay—Restitution—Power of Court. 38 A. 163=43 I.A. 43 (P.C.). *See also* 1934 L. 991 (Pre-emption suit) Court cannot order mesne profits by way of restitution where it has not been claimed in plaint. 104 I.C. 768=1927 M. 898. Order of remand—Order for mesne profits is not a consequential one 76 I.C. 255=18 N.L.R. 200=1923 N. 101 (1). Execution sale—Delivery of symbolical possession—Application for setting aside sale—Dismissal—Appeal—Compromise—Payment of decree amount by instalments—Restitution—Claim for mesne profits prior to delivery of possession—Sustainability. 56 C. 550.

PEACEFUL POSSESSION NOT IN EXECUTION OF DECREE.—If a decree-holder instead of executing the decree gets possession of the property in question the owner of the property is entitled to restitution on the decree being set aside in appeal. 42 A. 568=57 I.C. 148, 8 L. 41=99 I.C. 952=1927 L. 37 *See also* 27 I.C. 813=21 C.L.J. 75, 26 I.C. 890=19 C.W.N. 1167 But *see contra* in 8 L. 356. A pre-emptor obtained possession of the property on the deposit of amount mentioned in the decree Vendees filed a suit for possession on the ground that the deposit was not made within the time allowed and the trial Court upholding that objection dispossessed the pre-emptor and gave possession to vendees The pre-emptor succeeded in appeal *Held*, that he was entitled to be restored to possession as it was incumbent on the Courts to restore the parties to the *status quo*. 144 I.C. 695=1933 L. 791.

NATURE OF PROCEEDINGS UNDER THE SECTION—EXECUTION PROCEEDINGS.—Proceedings under the section, if proceedings in execution—"Party," meaning of 44 A. 555=20 A.L.J. 456; 1 Luck 40=13 O.L.J. 731; 6 P. 252=102 I.C. 614=1927 P. 278; 1932 L. 527=138 I.C. 260. *See also* 65 C.L.J. 165=41 C.W.N. 157=1937 C. 152; 1937 R.D. 21=3 P. 371=5 P.L.T. 145 (F.B.) (resembles execution only superficially). An application for restitution under S. 144, is essentially a different thing from an appli-

cation for execution. 150 I.C. 1096=1934 A.L.J. 503=1934 A. 696 (F.B.) But *see* 45 B. 1137=23 Bom.L.R. 480. "Party" includes representative of a party. 138 I.C. 260=1932 L. 527. Proceedings under S. 144 of the Code are proceedings in execution of decree 28 C.W.N. 988. Section 141, C.P. Code, applies to restitution proceedings. 44 A. 407=1922 A. 223. *See also* L.R. 3 A. 443; 40 M. 780. An application for restitution under S. 144 is neither a suit nor a proceedings in execution. It is a miscellaneous proceeding to which the rules applicable to execution proceedings do in substance apply. 47 I.C. 47=3 P.L.J. 367.

LIMITATION—CONFLICT OF RULINGS.—*See* 1936 M.W.N. 1119=44 L.W. 798=71 M.L.J. 795 An application for restitution under S. 144, not being an application for execution, Art. 181 of the Limitation Act applies. 8 Bur.L.T. 165=30 I.C. 680; 3 P. 371 (F.B.). The time is to be computed from the date of the final decree in favour of the party, *i.e.*, the date of the decree of the Court of first appeal or the second appeal as the case may be. Right to apply for ascertainment of mesne profits does not accrue until after delivery of possession to the successful party. 7 P. 794=10 P.L.T. 49=1928 P. 598. When a person who was dispossessed in execution of a decree subsequently sues for a declaration and obtains a decree in his favour, his right to recover mesne profits accrues on the day of his wrongful dispossession, *i.e.*, the decree in his suit (or appeal from it as the case may be) which declares him entitled to possession, and it ceases on the day he recovers possession in pursuance of the decree. Because he is entitled to mesne profits up to the date of recovery of possession, it does not follow that his right to mesne profits arises on his taking possession. An application filed by such a person more than three years after the date of the final decree is therefore barred under Art. 181 of the Limitation Act. 17 N.L.J. 281 *See also* 144 I.C. 150=1933 C. 422. Limitation for application for restitution. 19 A.L.J. 549=63 I.C. 184, 21 C.W.N. 564 (dependent judgment). As to limitation in the case of an application for refund of purchase-money by the purchaser, *see* 1931 M.W.N. 1006 An application for restitution under S. 144, is one for execution of decree of the Appellate Court and is thus governed by Art. 182, Limitation Act. 45 B. 1137=23 Bom.L.R. 480 *See also* 13 P. 411=148 I.C. 1180=1934 P. 246 (F.B.). Overruling 3 P. 371; 11 R. 275=1933 R. 180. 22 Bom.L.R. 403=44 B. 702; 2 P. 277=72 I.C. 912; 67 P. R. 1918; 33 M.L.J. 413=42 I.C. 530 *See contra* in 35 C.W.N. 1294. On this point *see also* 146 I.C. 462=14 P.L.T. 609.

SUCCESSIVE APPLICATIONS—Limitation.—Starting point—Limitation Act, Art. 181. 47 I.C. 47=3 P.L.J. 367. *See also* 1931 O.

Enforcement of liability
of surety.

145. [S. 253.] Where any person has become
liable as surety—

Notes.

51=130 I C. 78, 32 I C. 46 and 35 C W. N. 1294=167 I C 458=45 L W 522=1937 M. 173. An application under S 144, is not an application for execution and is governed for the purposes of limitation by Art. 181 of the Limitation Act; and time runs from the date of the decree of the appellate Court when the first Court's order was "reversed" and the right to apply for restitution accrued. 1937 R J 21

BAR TO SUIT—Section 144 exhausts the remedies which a litigant against whom a decree has been given, has, when his property is sold under the decree and the decree is subsequently varied, to have restored to him the property sold in excess of what should have been sold. So no action lies to obtain restitution by getting the sales declared void. He has no other right of action in cases where the sale is not void *ab initio* 134 I C 1151=1931 M. 713. *See also* 158 I.C. 908=1935 A. 873. Where restitution cannot be obtained by application under S 144 (1), there is no bar to the institution of a suit. 44 A. 687=20 A.L.J. 636. *See also* 44 A. 283=20 A.L.J. 13; 101 I.C. 733. Where restitution can be enforced in execution, no separate suit lies. 13 I C 179=22 M.L.J. 146. Consequently a suit for recovery of damages by a successful defendant against an unsuccessful plaintiff for bringing a false suit which involved great injury to the defendant is maintainable. 44 A. 687=20 A.L.J. 636. Bar of suit—Restitution granted under inherent powers—Later suit for mesne profits—Bar 58 C. 465=134 I C 572=1931 C 517

PROCEDURE—Application for restitution may be made in such manner as the nature of each case might require and need not follow in every case the procedure in O. 21, R 11 167 I C 458=45 L W 522=1937 M 173

COURT-FEE—Restitution proceedings are not execution proceedings. They are miscellaneous proceedings in the nature of suits, where large amounts claimed as damages might be involved. A memorandum of appeal from an order refusing restitution must be stamped with *ad valorem* Court-fee under Sch I, Art 1 of the Court Fees Act. Art. 11 of Sch II has no application to the case. 65 C L J 165=41 C W N. 157=1937 C 152

APPEAL—An order passed under this section is a decree, *see* S. 2, and an appeal lies against such order 8 M L J. 276. But *see* 10 P R 1914 (order dismissing application for restitution is not appealable). 20 I C 203. *See also* 13 P 108=146 I.C 1045=1934 P 109. An order under this section is a decree. As to the principle upon which the doctrine of restitution is based, *see* 23 M. 306 (310). Second appeal also lies. 86 I.C. 376=1925 C. 1074. Order of restitu-

tion as against assignee of decree-holder is one under O. 21, R. 97 and as such not appealable 1930 A. 415. Where the Court orders restitution under its inherent powers applying the principle of S. 144, the order is not appealable. 1930 N. 138. Where an application was made under S. 144 and an order passed under S. 144 read with S. 151, it is appealable even though it is subsequently held that S. 144 had no bearing on the case and the application thereunder was incompetent. 140 I C. 482=1932 P. 317. Where property is sold in execution of the decree but in appeal the decree is modified so as to reduce the amount to a lesser figure the judgment-debtor cannot, even though the purchaser be the decree-holder himself, recover the property sold on payment of the decree amount, unless he shows that the prior sale was in substance and truth a consequence of the error in the original decree. (Case-law discussed.) 54 C L.J. 293; 32 P L R. 739.

Secs. 144 and 145.—Joint and several decree against two defendants—Appeal by both—Stay of execution—Deposit of decree amount by one—Amount drawn out by plaintiff on execution of surety bond by sureties—Brand reciting that "if the defendants succeed in the appeal" they would be liable for the amount—Construction—Appeal successful as regards one defendant only—Right of latter to restitution—Liability of sureties, if arises—Undertaking—If to both defendants jointly 166 I C 890=44 L W 835=1937 M 229

Secs 144 and 151—Where a decree has not been varied or reversed, a Court has no power to grant restitution under S. 144, or under its inherent powers, under S. 151. I.L.R. 1937 N. 153=1937 N 151. *See also* 1936 R D 563. Money paid by a defendant in a pauper suit as court-fees due to Government under an order of Court which is reversed on appeal is not money liable to be dealt with by way of restitution under S. 144 and therefore no interest can be awarded on such amount under S. 144. S. 151 will, however, apply to such a case; but that section being discretionary the Court may refuse to award interest in view of the particular circumstances of the case. 44 L W. 873=1937 M 178=(1937) 1 M L J 21.

Sec. 145. SCOPE AND APPLICATION OF SECTION.—S. 145, must be read with S. 128, Contract Act, which makes the liability of the surety co-extensive with that of the principal debtor. After judgment-debtor fails to pay decretal amount, decree-holder is entitled to proceed against surety as if he was his judgment-debtor. 1933 N. 287. *See also* 1933 L. 913. A bond given to the Judge of a Court in pursuance of an order of the Court under O. 32, R. 6, must be enforced by a suit upon the bond. Such a bond is not enforceable by execution in the manner pro-

(C) For the performance of any decree or any part thereof, or

Notes.

Section 145. A suit is the proper means for enforcement. 1936 M.W.N. 1127=44 L.W. 221=1936 M. 953=71 M.L.J. 675. But see 165 I.C. 453=1936 M.W.N. 443=1936 M. 589. A decree against the judgment-debtor can be executed against his surety who has, by means of a statement made before the Court, undertaken to satisfy the liability of the judgment-debtor. It does not matter that the name of the surety is not mentioned in the decree 164 I.C. 281=38 P.L.R. 623=1936 L. 463. An application for execution of a decree against a surety under S. 145, is an application for the enforcement of the bond as such, and even if it is occasioned by and mentions only the breach of one condition execution can be ordered by the Court if, in the course of the proceedings arising out of that application, it appears that a breach of any one or other of the conditions has occurred. 30 S.L.R. 177=1936 S. 244. Section is not applicable to a suit by a surety for recovery of money forfeited owing to non-appearance of party. Section is merely procedural and does not in any way define a surety's liability. 5 R. 494=1927 R. 316. The "person" need not now have become liable as surety, "before the passing of the decree," as was held in 30 B. 506. The words "for the fulfilment of any condition" will supersede the ruling in 8 M.L.J. 199. As to extent of surety's liability, see 1925 L. 170; 7 L.L.J. 343=1925 L. 552; 83 I.C. 870=1925 S. 25, see also 150 I.C. 750=1934 L. 401. A surety under O. 21, R. 40 (3) for production of the judgment-debtor cannot be rendered liable under S. 145 for the debt due. 18 R.D. 243=15 L.R. 285 (Rev.) 84 I.C. 998=1925 R. 135=2 R. 567 (Surety not to be made liable simply because judgment-debtor was produced somewhat late); 89 I.C. 342=19 S.L.R. 390 (Section not applicable to surety under Guardian and Wards Act). Section is applicable even to a person who is surety for himself. 131 I.C. 500=1931 R. 65. Section applies only where surety has rendered himself personally liable for the decretal amount and such liability can only be enforced against him to the extent to which he has become personally liable. 29 I.C. 149=19 C.W.N. 961; see also 57 M. 688=1934 M. 186=66 M.L.J. 248. 22 C.W.N. 919; 19 C.W.N. 178; 17 C.L.J. 267 (F.B.). Section prescribes a summary remedy in execution for the realisation of the security in execution to the extent to which the surety has made himself personally liable. 34 I.C. 407=(1916) 2 M.W.N. 273. 2 I.C. 612. But see 1932 A.L.J. 1060. Where immoveable property is given by a judgment-debtor as security for the due performance of decree the property can be realised by decree-holder in execution and no separate suit is either necessary or maintainable. 34 M.L.J. 84=41 M. 327; 7 R. 352=1929 R.

126; 8 P. 801. *Per Division Bench*—Where security bond creating personal liability and hypothecation of property is executed by surety to the executing Court under O. 41, Rr. 5 and 6, decree-holder can move executing Court to enforce the bond as against surety. 15 L. 282=149 I.C. 300=1934 L. 138 (F.B.). See also 165 I.C. 453=1936 M. 589. But see 1934 O. 139, 66 M.L.J. 540, *infra*. Where sureties gave a security bond under O. 45, R. 7 undertaking personal liability and also charged the property as further security, it is only the personal liability and not the liability of hypothecated property which can be enforced under S. 145, because the words "in the manner herein provided for the execution of decrees" refer to execution in O. 21 and not to cases of sales of mortgaged property. (39 A. 225, Ref.). 11 O.W.N. 376=148 I.C. 864=1934 O. 139. On an application to enforce a security bond executed by certain sureties hypothecating immovable properties in respect of a certain amount drawn by the next friend of the minor plaintiffs on their behalf. *Held*, that (1) S. 145 was not applicable, as the sureties had not made themselves personally liable and the matter was not connected with the execution of a decree and was not a question between parties to the suit; (2) as it was not executed in favour of any named person, it could not be assigned by Court and the only mode of enforcing it was by Court making an order in the suit upon an application to which the sureties are parties and by directing sale of the properties for the realisation of the amount due; (3) no such direction could, however, be made, till the extent of the liability of next friend was determined in a separate suit [46 I.A. 228=32 M.L.J. 302 (P.C.)], Appl] 57 M. 803=1934 M. 262=66 M.L.J. 540. Before proceedings are started under S. 145 it must be established that the person against whom execution is sought has become liable as surety in Court. 71 I.C. 46. See also 41 M. 40. S. 145 does not apply to proceedings for the enforcement of surety bonds taken by the decree-holder outside the Court. The bond has to be enforced by suit. 8 L.W. 507=48 I.C. 940. A condition precedent in a surety bond that the debtor should be produced if he failed to appear after notice is a benefit which the surety may waive. 34 I.C. 407=(1916) 2 M.W.N. 273. Liability of a judgment-debtor's surety should not ordinarily be enforced in execution against any property which he might have mortgaged under the surety bond without a suit for the purpose. 39 A. 225. Though surety bond does not specifically say that the decree should be executed against the surety, execution can be taken against him, if he rendered himself personally liable. 1930 L. 185. See also 38 A. 327; 54 C. 1. But see 1929 L. 393. Court has a discretion to refuse execution

(b) for the restitution of any property taken in execution of a decree, or

Notes.

against the surety 23 Bom L R. 1263=46 B. 702. Decretal amount due from the principal debtor and costs of an application against the surety himself may both be included in one tabular statement in the execution against the surety. 59 C. 1450=139 I.C. 815=36 C.W.N. 749=1932 C. 858.

MEANING OF TERMS.—The expression "any decree" is wide enough to cover a decree that has already been passed as well as a decree that may be passed after the person concerned has become liable as surety. 1935 L. 189.

INHERENT POWERS OF COURT.—Although the case may not fall under S 145 Court has not inherent power to enforce the bond without recourse to a suit, the proper procedure being to get an order from Court, after notice to the sureties, that the bond is forfeited and then to proceed to execute that order (42 A. 158 and 51 M.L.J. 239, *relied on*). 145 I.C. 1004=1933 M. 722=65 M.L.J. 507 *See also* 57 M. 688=1934 M. 249=66 M.L.J. 248; 56 M. 989=1933 M. 691=65 M.L.J. 342=166 I.C. 670=44 L.W. 717=A I R. 1936 M. 990.

CONSTRUCTION OF SURETY BOND.—The rule that a security bond must be strictly construed according to its own terms is certainly true where there is no ambiguity in the terms, but where there is a contradiction in terms, S 95, Evidence Act, allows a reference to antecedent circumstances. Thus where there is any doubt about the true construction of the security bond, the bond must be considered in the light of the order directing security to be given. 61 C. 890=150 I.C. 985 (2)=1934 C. 569. Surety bond must be construed strictly. Surety cannot be held liable except to the extent to which he is clearly bound 52 B. 72=30 Bom.L.R. 12=1928 B. 42. As to true construction of a surety bond, *see* 136 I.C. 629=36 C.W.N. 701=63 M.L.J. 85 (P.C.). *Ex parte* decree, setting aside of. 44 B. 34=21 Bom.L.R. 861. The expression "any decree" is wide enough to cover a decree that has already been passed as well as a decree that may be passed after the person concerned has become liable as surety. 159 I.C. 410=37 P.L.R. 372=1935 L. 189.

EXTENT AND NATURE OF LIABILITY.—Where property is given in security for due performance of decree in particular amount the effect of subsequent transfer of the property is that the decree-holder can enforce the security bond only to the extent of the amount secured thereunder by the sale of the property specified therein, and any sale for more than the amount specified in the bond will be without jurisdiction in the absence of the transferee and will not bind him, and such a sale can be set aside on the alienee depositing the amount due under the bond. 165 I.C. 453=1936 M.W.N. 443=1936 M. 589. Where, by the terms of a

security bond, the surety undertook to be liable if the debtor "failed to pay", the words mean only voluntary non-payment by the debtor. Creditor is not bound to use coercive process by arrest or attachment against the judgment-debtor before proceeding against the surety. 1933 N. 287. Liability of the surety cannot be determined until the time for execution has arrived. Death of defendant for whom the opponent stood as surety does not discharge him. 19 Bom.L.R. 112=41 B. 402. Nor does liability cease if the suit was at one time dismissed for default and then restored. 59 C. 1450=139 I.C. 815. Surety for decretal amount can be made liable for amount enhanced on appeal. 1935 L. 21=150 I.C. 903. A surety bond for performance of a decree or for restitution in case the decree is reversed is enforceable by a regular suit and the obligee need not enforce the bond by a proceeding in execution. 13 Bom.L.R. 909=36 B. 42. Forfeiture of security is to be applied in satisfaction of the decree. 59 I.C. 778=25 C.W.N. 36. Previous notice to surety is essential before attachment of his property. *See* 2 R. 567=89 I.C. 998=1925 R. 135, 1929 L. 205=11 L.L.J. 40. But *see also* 1925 O. 152. Notice under section and warrant of arrest may both be issued simultaneously. 99 I.C. 518 (2)=1927 L. 131. Where sureties agreed to produce the judgment-debtor but did not produce, without further notice, they can be made liable on their bonds for their failure. 75 I.C. 830=1924 M. 241; 1925 O. 152. The liability of a surety for a debt ceases to exist when his principal's debt is extinguished by an act which causes the merger of the estate of the debtor and the creditor 44 M.L.J. 171=1923 M. 340. The mere fact that he deposited the amount in Court does not exclude the personal liability which attaches to every surety. 136 I.C. 318=1932 M. 188. Decree-holder executing decree contrary to terms of agreement with surety—Surety is discharged. 119 I.C. 485=1929 L. 770 *See also* 1932 P. 313, where it was held that the surety was discharged by reason of compromise of the dispute. But *see contra* in 128 I.C. 903=1913 B. 55; 1933 M.W.N. 45=66 M.L.J. 386. (Effect of compromise on the liability of surety is a question of fact in each case.) *See* 1935 N. 258. Surety for performance of decree—Private arrangement between the decree-holder and judgment-debtor granting extension of time—Court may refuse to enforce the liability of the surety. 1930 L. 896—Surety—Discharge of—Execution barred against principal judgment-debtor—Effect of. *See* 40 C.W.N. 465. A third party who has given security for the performance of a decree cannot apply to the executing Court to cancel the bond on the ground that it was obtained by fraud. His remedy is only by

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by no evidence 151 I.C. 501=1936 S. 7 Judgment based on opinions of experts is open to challenge in second appeal 21 A.L.J. 311=75 I.C. 502 But see 1935 A.W.R. 429 157 I.C. 30=1935 A. 501, where finding based on the relative weight of the opinion of the handwriting experts was held to be one of fact The mere question of sufficiency of the evidence adduced to establish a custom is not a ground of second appeal 45 C. 285, 69 I.C. 800 Even from a finding of fact a second appeal may be taken if the finding is not supported by any evidence on record 30 I.C. 375, 65 I.C. 398, 13 L. 399 The sufficiency or insufficiency of evidence as proof of title cannot be debated in second appeal 9 I.C. 427. See also 1928 O. 352 (2)=110 I.C. 531, 1929 A. 557, but a finding on conjectures and presumptions can be questioned in second appeal 8 L.A.L.J. 485=97 I.C. 241 (2)=27 Punj. L.R. 721=1926 L. 659, 7 L.R. 104 (Rev.) See also 145 I.C. 407=1933 M. 163 No also a finding which is based wholly upon surmise without any positive evidence to support it 157 I.C. 1040=1935 M. 190=68 M.L.J. 648 A finding as to the existence of an agreement which has not been pleaded and based on no evidence cannot be accepted as binding 159 I.C. 96=18 N.L.J. 101

(6) MISREADING OF EVIDENCE.—The misapprehension of evidence is no ground for a second appeal 21 I.C. 393 But see 1926 L. 541 But where a finding of fact is arrived at as a result of a complete misreading of a document a second appeal is competent 42 I.C. 218, 1926 P. 725, 1930 L. 712, 134 I.C. 21=1931 A. 499; so also a finding arrived at on an erroneous assumption of an admission by party, who did not make at 1928 O. 333

(7) EXCLUSION OF EVIDENCE.—The High Court is not empowered to interfere in second appeal with an order of the lower appellate Court rejecting an application made to it for the admission of additional evidence. 42 M. 737=37 M.L.J. 125, 1923 L. 30, 32 P.L.R. 813, 131 I.C. 228=1931 L. 506, 1927 M.W.N. 63 (1)=99 I.C. 669 (1)=38 M.L.J. (H.C.) 24 Where evidence is excluded by an Original Court and such exclusion is not objected to in the first appellate Court such objection cannot be allowed in second appeal 161 I.C. 213, 12 I.C. 751=(1911) 2 M.W.N. 495. A finding of fact after ignoring a piece of evidence which is really admissible can be attacked in second appeal 91 I.C. 1026=1926 C. 603; 108 I.C. 191, 54 M.L.J. 600, 1929 L. 145; 112 I.C. 461, 32 P.L.R. 714, 1933 M. 163, 138 I.C. 406=1932 A. 603; 33 P.L.R. 1013, 1933 S. 121. Where the lower appellate Court rejects the oral evidence of possession adduced by one of the parties by applying an erroneous presumption of law, its finding on the question of possession is vitiated by an error of law and the High Court can reverse the finding of fact so arrived at 155 I.C. 1087=1935 O.W.N. 674=1935 O. 394. See also 39 C.W.N. 1233 (Improper rejection by lower appellate Court of Commissioner's plan relied on by trial Court).

(8) CONSTRUCTION OF DOCUMENT.—The expression 'construction' as applied to a document includes two things 'first, the meaning of the words; and secondly, their legal effect. The meaning of the words is a question of fact in all cases. The effect of the words is a question of law. Hence the interpretation placed upon the words in the deed is a clear question of fact. Even if the document admitted of more than one construction, one of which has been adopted by the lower appellate Court, the High Court will not be competent to challenge it 158 I.C. 71=1935 L. 378, 1937 S. 51 The question of the construction of document is a question of law, on which the High Court can entertain a second appeal 43 C. 1104=31 M.L.J. 745 (P.C.), 4 Pat.L.T. 627, 45 M.L.J. 663. See also 35 P.L.R. 578=1934 L. 662, 1926 O. 131, 1928 N. 289. But see 119 I.C. 667, 1926 L. 21; 1926 P. 49; 5 O.W.N. 275=1928 O. 269, 132 I.C. 844 (2)=1931 L. 686. A question of how a document should be construed if it is a document of title and not merely a piece of evidence in the case is a question of law 52 I.C. 119, 18 A. 588, 1926 M. 512, 1926 B. 493, 5 Pat.L.J. 251. See also 1926 M. 652=93 I.C. 307=24 L.W. 18, 149 I.C. 934=1934 L. 35 Unless there has been misconstruction, a mistaken inference from documents is an error, not of law, but of fact 60 I.A. 231=143 I.C. 437=1933 P.C. 171=65 M.L.J. 154 (P.C.) Where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundations of rights, but were merely historical materials, have to be construed for the purpose of deciding that question, and a second appeal would not lie because some portion of the evidence might be contained in a document or documents and the first appellate Court has made a mistake as to its meaning [11 L. 199 (P.C.), Rel. on] 61 C. 45=151 I.C. 813=1934 C. 461, 161 I.C. 165=1936 P. 129, 155 I.C. 833=60 C.L.J. 412=1935 C. 282, 61 C.L.J. 143=39 C.W.N. 581 The question of the construction of a certain documents is a question of law but the question what legal inference may be drawn from a number of documents is a question of fact and not a mere question of law 151 I.C. 362=1931 A. 709 162 I.C. 838=1936 P. 287, 162 I.C. 334=1936 O.W.N. 375=1945 L. 857, 161 I.C. 158=1936 O. 225, 1935 O.W.N. 365=154 I.C. 1017=1935 O. 304 But the question of interpretation of decree is a pure question of fact, the decree not being a document of title. 1935 L. 115 (1) Documents.—Construction of.—Question as to—Law or fact—Documents forming root of title or basis of claim.—Documents forming evidence in the case.—Distinction 56 M.L.J. 1 (P.C.), 1930 L. 691; 134 I.C. 673=1931 N. 189 (48 A. 588, Fall) A wrong construction of a document coupled with a wrong inference from certain facts constitute an error of law where there is no other evidence accepted by the Court 55 I.C. 366=18 A.L.J. 195=20 N.L.J. 39. The deter-

the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the exe-

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Foll.) 145 I.C. 285=38 L.W. 254. Where judgment-debtor under arrest was released on his furnishing security for appearance if his objection under S. 47 of the Code was dismissed and later on after the dismissal of the said petition he appeared in Court and paid the decretal dues in instalments and the decree-holder proceeded against surety for the balance, *held*, that S. 130, Contract Act, applied and that the liability of the surety ceased after judgment-debtor surrendered to the Court on the dismissal of his application. 143 I.C. 322=50 C.L.J. 586=1933 C. 337. *See also* 1935 L. 145. Where judgment-debtor is released on surety furnishing security for his appearance, but owing to the default of decree-holder to appear on due date, the execution petition is dismissed and surety is also discharged, the liability of surety is not automatically revived by the mere restoration of the execution petition. 1934 L. 349. If a creditor agrees to discharge the principal debtor but reserves his rights against surety, the agreement though entered into behind the back of surety only operates as a covenant not to sue between the creditor and the debtor and does not operate to discharge surety, because surety's right of recourse against the debtor is not extinguished. 56 M. 625=1933 M. 309=64 M.L.J. 386. The effect of a compromise on the liability of surety is a question of fact in each case. Where surety undertook liability for the restoration of the property and payment of mesne profits in case the decree of trial Court was reversed on appeal and his liability was not in terms excluded in case of a compromise, the surety is bound by terms of a compromise between the parties although entered into without his knowledge. But if the compromise provides for postponed payment or for the amount being paid for instalments the surety is discharged from his obligations. 56 M. 625=1933 M. 309=64 M.L.J. 386.

LETTERS TO DECREE-HOLDER UNDERTAKING TO DISCHARGE DEBT—ENFORCEABILITY IN EXECUTION.—It is not essential for the purpose of executing a decree against a surety under S. 145 (a), that a contract of suretyship should be in the form of a bond executed in favour of the Court. A letter addressed to the decree-holder undertaking to discharge the decree-debt is sufficient for the purpose, and the surety who so renders himself personally liable may be proceeded against under S. 145 (a). 58 M. 777=1935 M. 209=41 L.W. 144=68 M.L.J. 136.

MISCELLANEOUS.—Extent of surety's liability—Mode of enforcement—Decree-holder asked to furnish security—Mesne profits. 42 A. 158=46 I.A. 228 (P.C.); *see also* 145 I.C. 285=38 L.W. 254, 30 Bom L.R. 19. The assignee-decree-holder can proceed

in execution against the surety. It is not necessary for him to get assignment of the surety bond and institute suit (1928 M. W.N. 681, Ref.) 1932 M.W.N. 1296. Forfeiture of bond—Personal attendance of party—Service of summons. 36 I.C. 73. Where security offered is found to be insufficient opportunity should be given to furnish additional or better security. 1930 A. 87. Surety having once acquiesced by appearing and asking for time to settle with decree-holder when proceedings were started against him cannot afterwards dispute his liability. 1930 L. 80. Surety for appearance of judgment-debtor—Extent of liability. 50 C.L.J. 586=1933 C. 337. Surety for production of moveables of judgment-debtor—Execution against—Procedure. 1933 M. W. N. 185.

APPEAL.—Even under the old Act, the surety had a right to appeal. 12 B. 71. *See also* 56 M. 909=65 M.L.J. 407; 57 M. 803=66 M.L.J. 540. Where animals which were attached in execution of a decree were entrusted to the defendants as supradars who did not produce them for sale before the amrin when required to do so, S. 145 does not prevent decree-holder from bringing suit against the defendants for the value of the animals. 1935 A.L.J. 335; surety cannot by application be discharged of his bail bond and that an order refusing discharge cannot be appealed against. 11 L. L.J. 141=1929 L. 435. *But see* 56 M. 909=1933 M. 780=65 M.L.J. 407. S. 145 provides that any person who has become liable as surety and against whom a decree may be executed shall be deemed for the purposes of appeal to be a party within the meaning of S. 47. Therefore a surety has a right of appeal against an order, directing execution against him. 152 I.C. 693=35 P.L.R. 466=1934 L. 538. *See also* 1931 L. 503. Where after notice to the surety for the judgment-debtor the creditor applied to the Court for an order under S. 55 (4) for realisation of the security and the Court, after hearing the surety, passed an order under S. 55 (4), the order is appealable. 135 I.C. 812=1932 B. 77.

REVISION.—An order under S. 145 passed by a Sub-Judge is open to revision by the High Court although an appeal lies to the District Court from such order and a further appeal from the order of the District Court lies to the High Court. 11 R. 134=144 I.C. 163=1933 R. 64.

RIGHT OF SUIT.—Suit by surety to cancel security on ground of fraud. *See* 26 Punj. L.R. 561=1925 L. 618. *See also* 55 A. 346=142 I.C. 510=1933 A. 269 (F.B.). Surety's property attached and sold in execution—Separate suit to set aside the sale, if lies. 51 A. 346=112 I.C. 534.

LIMITATION FOR EXECUTION AGAINST SURETY.—*See* 1932 M.W.N. 1296. When

cution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47:

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

146. Save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken or

Proceedings by or against representatives.

application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

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an attachment before judgment in the movables of the debtor was made, the surety executed a bond to produce the items attached whenever called upon by the Court and to be bound by such orders as may be passed by the Court. It was dated 7-11-1921. A decree was passed on 7-9-1922. An application for execution was filed by assignee decree-holder on 7-11-1925. Held, that the application was barred under Art. 182; that Art. 65 was not applicable; that limitation on the bond began to run from the date of the decree itself and that the application was barred 142 I.C. 363=37 L.W. 127=1933 M. 219.

PRACTICE AND PROCEDURE—Where the movables of a judgment-debtor are attached and a surety bond is executed for the production of the articles, though a separate suit to enforce the bond is not necessary, action on the bond does not fall under S. 145. The proper procedure for enforcing the bond is to move the Court to make an order calling upon the surety to produce the articles or the money for which he has rendered himself liable. Without such an order under the bond, a petition for the arrest of the surety is premature. 142 I.C. 581=1933 M. 342 (1). An order passed on an application by a next friend to draw out the money paid into Court by judgment-debtor and to have it invested in Government Promissory Notes is one made in "a proceeding consequent to a suit" and where a third party has bound himself as surety for the amount so withdrawn by the next friend, an order for execution can, under S. 145, be made against the surety. (41 M. 40, Dist.) 56 M. 687=1933 M. 678=65 M.L.J. 142 (F.B.). The assignee decree-holder can proceed in execution against the surety. It is not necessary for him to get an assignment of the surety bond and institute a suit (1928 M.W.N. 681, Ref.). 142 I.C. 363=1933 M. 219.

Sec 145 and O. 38, R. 5—Order 38, Rule 5, no doubt contemplates security for the production in Court of property sought to be attached before judgment or its value at a future time when called upon and the amount of the security demanded should ordinarily be commensurate with the value of the property sought to be attached, and not the decretal amount. But the object of the legislature for providing for attachments before judgment was to secure the prospec-

tive decree-holder in matter of realisation of the money that might be eventually found by the Court to be due to him. Where, therefore, a Court makes a demand for and takes security for the prospective decretal amount, at most it is only an irregular manner of the exercise of its jurisdiction. But the surety who has executed the surety bond in that form cannot raise the objection to the bond in the course of execution proceedings started against him under the provisions of S. 145. 162 I.C. 619=1936 C. 143.

Sec 146—Under S. 146 transferee from an auction-purchaser is entitled to delivery of possession 40 A. 216=42 I.C. 936. See also 84 I.C. 665=1924 M. 470. Executing Court cannot go behind the decree and by invoking S. 146, it cannot change a decree passed against R into a decree against his legal representatives. For purposes of rateable distribution the executing Court must take the decrees as they are 159 I.C. 575=40 C.W.N. 26=1935 C. 738 (S. 146 if enlarges scope of S. 73, see *ibid.*). Legal representative not actually brought on record can apply under O. 9, R. 13. 27 O.C. 299=85 I.C. 529=1925 O. 370. **Representative**—Transferee of decree-holder's interest during pendency of suit 17 I.C. 512=1935 L. 119. Expression 'claiming under' is wide enough to cover cases of devolution, etc., mentioned in O. 21, R. 10. 48 I.C. 840=41 M. 510. Execution application by one of several surviving co-parceners though cannot be given effect to as being defective, is yet not altogether invalid. 51 B. 143=100 J.C. 619=1927 B. 123. S. 146 is not intended to apply to a coparcener while the manager or *karta* in a joint Hindu family is alive so as to allow the coparcener to sue in his place. There is no devolution of interest in such a case as is contemplated by S. 146. 30 S.L.R. 467=1937 S. 94. On death of the decree-holder, his legal representatives can continue an execution petition filed by him when he was alive. No fresh execution petition by them is necessary. 123 I.C. 303. See also 134 I.C. 720=1931 B. 423; 1931 M.W.N. 1209. Where merits are on the side of appellant he can be allowed to appeal even though he is a transferee from a party after the decree. 40 I.C. 846=1917 M.W.N. 306. Assignee after decree and before appeal ought to be allowed to join in the appeal under this section. 38 I.C. 511=20 O.C. 31. See also 1935 L. 119;

147. In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of the Court by the persons under disability, next friend or guardian for the suit, have the same force and effect as if such person were under no disability and had given such consent or made such agreement.

148. Where any period is fixed or granted by the Court for the doing of

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69 I.C. 959=3 P.L.T. 625. See on this section 12 M.L.J. 435; 29 C. 33. Where on death of a pauper plaintiff *pendente lite* his heir is brought on record and he is not himself a pauper, application may be made to have him dispaupered 131 I.C. 828=1931 M. 324.

SIMPLE MORTGAGEE SUBSEQUENT TO SUIT—RIGHT TO CONTINUE SUIT—S. 146 is a general residuary provision. It cannot be invoked in a case of devolution of interest which is expressly provided for by O. 22, R. 10 and an application to be impleaded as a party and continue the suit can only be allowed to the extent to which O. 22, R. 10 allows and no more. A simple mortgagee subsequent to suit of the share of a partition suit cannot be allowed to be added as plaintiff and continue suit after original plaintiff has withdrawn the suit, under O. 22, R. 10 or under the residuary provisions of S. 146. He is not a person 'claiming under' a party; his is only a derivative interest. 38 L.W. 280.

Sec. 148.—[See also notes under S. 149] **SCOPE AND APPLICATION.**—A trial Court has power to grant extension of time under S. 148; the appellate Court is not the only Court which can pass an order extending time though the decree has been confirmed on appeal. 1935 R. 500. Section 148 does not authorise the Court to enlarge the period provided by O. 21, R. 58 for the payment of balance of purchase-money. 35 C.W.N. 877 Under O. 21, R. 89 the money to get the sale set aside has got to be deposited within thirty days of date to sale. S. 148 has no application because the period of days is not fixed or granted by Court, it is fixed by the Code and cannot be extended under Limitation Act 1933 R. 8 See also 1935 A.W.R. 967=1935 A. 873 Court cannot extend period originally fixed by a decree. But when application for extension is made before the decree, Court is bound to consider it, and exercise the jurisdiction conferred on it by S. 148 one way or the other. If it fails to consider an application through a mistake of its own, it has inherent jurisdiction to rectify its mistake, even though it means the re-opening of a decree. No party should be allowed to suffer because of Court's negligence 30 N.L.R. 258=149 I.C. 840=1934 N. 109. S. 148 does not apply to extension of time for deposit of printing charges under R. 13 of the Oudh Rules of Practice. 50 I.C. 789=22 O.C. 13. See also 61 C.L.J. 512 (Extension of time for payment of costs made condition precedent

to allowing amendment of plaint). See also 156 I.C. 207=1935 O.W.N. 706; 1936 A.L.J. 566=1936 A. 477 (Conditional order for setting aside *ex parte* decree—Power to grant extension of time) Extension of time for doing acts under mortgage or other decrees does not fall within S. 148, C. P. Code. 39 M. 876=29 M.L.J. 708 See also 34 A. 388; 10 A.L.J. 520; 1 L.W. 882; 24 I.C. 825; 2 Luck. 425=101 I.C. 258. Time fixed by a decree, in a mortgage suit, cannot be extended under S. 148. 28 I.C. 862=18 O.C. 58. When a certain point decided by lower Appellate Court was not appealed against by the party aggrieved in time, but the same point was allowed to be raised in appeal admitted after time, High Court was deemed to have impliedly extended time for appeal. 43 M. 550=47 I.A. 33=38 M.L.J. 444 (P.C.) (affirming 30 I.C. 286=29 M.L.J. 110), 4 P. 190=1925 P. 299. When time granted for any matter to be done by a party is exceeded and there is an application by the party to excuse the delay and enlarge the time and Court acted upon the matter as though it was in time it should be considered that Court had enlarged the time. 34 I.C. 625=20 C.W.N. 615. But see also 1936 A.M.L.J. 110 Time fixed by decree of first Court—Confirmation on appeal—Time runs from date of appellate decree. 70 I.C. 76=34 C.L.J. 415. But see 5 O.W.N. 890=1928 O. 492 Where time is given by the appellate Court by its order of remand for production of documents, the order is not final and so it can be extended by the Court under S. 148. 55 A. 326=142 I.C. 331=1933 A.L.J. 127=1933 A. 262 (F.B.). See also 144 I.C. 129=1933 A. 261 Section does not empower an executing Court to extend time fixed for payment of decretal amount 49 I.C. 840=15 N.L.R. 39. Section applies to proceedings antecedent to passing of the decree but does not enable Court to extend time for doing acts allowed by a decree 87 I.C. 12=21 N.L.R. 111; 44 I.C. 573; 28 I.C. 852=18 O.C. 58; 2 Luck. 425=101 I.C. 258; 27 A.L.J. 968=1929 A. 666. Section allows Insolvency Court to grant extension of time even when made after expiry of period for discharge fixed by the adjudication order 86 I.C. 115=1925 L. 416

CONSTRUCTION OF SECTION—Per King, J. (*Obiter*).—In order to avoid a conflict between O. 45, R. 7 and S. 148, it must be held that O. 45, R. 7 must prevail, both on the principle "*generalia specialibus non derogant*" and on the principle that the general discretion given by S. 148 is a judicial dis-

any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

149 [Cf. S. 582.-A.] Where the whole or any part of any fee prescribed

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cretion which can only be exercised according to law and not in contravention of law 55 A. 432=1933 A.L.J. 207=1933 A. 241 (F.B.)

ILLUSTRATIVE CASES CASES WHERE COURT CAN EXTEND TIME—Where the period of limitation is fixed by statute and not by Court, it cannot be extended under S 148, or under S 5, Limitation Act. 148 I.C. 1082=1934 Pesh. 25 Section 148 gives a Court power to enlarge the period of redemption if it thinks fit 27 I.C. 706. *See also* 28 I.C. 458; 1933 A 157, 27 I.C. 419, 35 A 582, 18 I.C. 86, 64 I.C. 242, 73 I.C. 891, 1923 C. 612, 80 I.C. 397=1925 N. 258. In a redemption suit Court could extend the time fixed in decree for payment of decretal amount to a prior mortgagee only under O. 34, R. 8 and not under S. 148 34 A. 388 *See also* 145 I.C. 591=1933 A. 157; 143 I.C. 903=1933 M. 563=65 M.L.J. 538 As to power of Court to extend time for payment of decretal amount, *see* 42 I.C. 613 =15 A.L.J. 511 Time agreed upon by parties for the payment of decretal amount of mortgage money may be extended by Court in a proper case 50 I.C. 937=23 C.W.N. 439. Where the terms of a compromise decree are not interdependent and each direction stands by itself and is separately enforceable, the fact that decree-holder and judgment-debtor have been guilty of failure to perform their respective obligations under the decree does not disentitle one party from compelling the other to perform his obligations in execution proceedings and in such a case S. 148 does not debar Court from extending time fixed by the decree. 116 I.C. 651=1929 N. 164 *See also* 1934 O 44, 148 I.C. 251, 147 I.C. 559. Application for extension—Maintainability—Interlocutory order—Direction for dismissal of appeal for non-compliance—Effect. 1932 M.W.N. 655.

CASES WHERE COURT CANNOT EXTEND TIME—Court cannot extend period fixed for doing an act after final decree is made 99 P.R. 1912 *See also* 37 M.L.J. 695; 74 I.C. 573. Where Court directs by its decree that unless payment is made within a certain date suit or appeal will stand dismissed, Court has no power to grant extension of time for the payment. 37 C.W.N. 878. Where time has been fixed by a decree of Court for payment of Court-fee, Court has no jurisdiction to amend the decree so as to enlarge the time for payment. 37 C.L.J. 395=27 C.W.N. 720 *See also* 10 I.C. 268=13 C.L.J. 432. In view of S. 148 the time granted to pay deficit Court-fee can be enlarged from time to time. This section expressly empowers the Court to extend

any time fixed by it even after the expiry of the period originally fixed 162 I.C. 689, =40 C.W.N. 747=1936 C. 221. Court cannot enlarge the time for the making of an award when time has expired and award has already been made. 12 I.C. 13=38 C. 522. Court has power under S 148 to extend time fixed for payment of costs on an *ex parte* decree being set aside or to pass a fresh conditional order 36 A. 77. Court has no power to extend time for payment of an instalment of decretal amount. 1935 R. 341. Section 148 does not authorise Court to grant extension of time for doing an act prescribed by Provincial Small Causes Court Act 1 P.L.T. 323=56 I.C. 810. Conditional decree—Time fixed by, cannot be extended. 73 I.C. 922=1923 L. 372, 27 A.L.J. 968=1929 A. 666. *See also* 138 I.C. 121=1932 M. 223 Where decree was granted for possession on payment of a certain amount in a fixed time, Court has no jurisdiction to extend the period. 57 I.C. 16=42 A. 639. *See also* 40 A. 579=47 I.C. 4; 1930 P. 279. Time fixed by compromise decree—Court cannot extend time 66 I.C. 273=1922 O 145 *See also* 6 P.L.T. 511=1925 P. 691, 9 Luck. 387=148 I.C. 251 =11 O.W.N. 92=1934 O. 44, 147 I.C. 559=1934 O 44; 145 I.C. 548=1933 P. 563 Pre-emption decree—Court cannot extend time fixed by 19 N.L.R. 8=1923 N. 210. *See also* 23 O.C. 254=57 I.C. 483; 146 I.C. 171; 1 P.L.J. 92=34 I.C. 38, 2 Luck. 425=101 I.C. 258 (but the appellate Court can); 28 Bom L.R. 1446.

APPEAL—Orders under S 148 are not appealable because they are neither decrees nor included in the list of appealable orders. 1935 R. 500

REVISION—A Court arbitrarily granting an application for restoration of a suit long after period of limitation expired acts without jurisdiction and its order is open to revision. 52 I.C. 439=4 P.L.J. 428.

SECS 148 AND 149—Under Sections 148 and 149, read together, it is always open to Court to extend the time for the payment of deficient Court-fee even after expiry of the time originally fixed for payment and Court has power to extend time in such circumstances even after passing a decree when the direction as to payment of the Court-fee is not incorporated in it Such extension should be granted where the mistake is due to mere accident or inadvertence and on the merits, it is a fit case. 149 I.C. 96 (2)=35 P.L.R. 459=1934 L. 537.

Sec. 149. SCOPE OF SECTION.—[NB—*See also* Notes under S. 148.] Power to allow deficiency of Court-fee to be made up is not confined to Court receiving the insufficiently stamped document. 13 L.L.T. 31. Discre-

Power to make up deficiency of court-fees

for any document by the law for the time being in force relating to court-fees has not been paid, the Court may in its discretion, at any stage, allow the

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tion under S. 149 extends to the whole or any part of any fee prescribed and can be exercised at any stage in the case. 33 C.W.N. 781=117 I.C. 493=57 M.L. 1 281 (P.C.). See also 156 I.C. 405=16 P.L.T. 385=1935 P. 201. The section is intended to remedy the hardship caused by rulings in 20 M. 319; 27 C. 376; 28 A. 310, 10 C.W.N. 844 and follows 29 A. 749 (F.B.). Permission to pay deficient Court-fee is in the discretion of Court but would ordinarily be granted unless there was proved deliberate intention of the person liable to pay the Court-fees to evade obligations. 18 R.D. 44. See also 156 I.C. 405=1935 P. 201, 1936 L. 935. Where appeals presented without the proper Court-fee are accepted by the office without objection, the question of the Court-fee payable not being free from doubt, and the appellants are not guilty of any deliberate attempt to avoid payment of proper Court-fee, they (appellants) are entitled to the grant of time for payment of the same. 159 I.C. 274=1935 L. 448. Where the copies supplied to a pleader who filed an appeal showed the value of the suit at a certain amount which was less than the correct amount, and Court-fee was paid thereon, the mistake is clearly *bona fide*, and the Court should allow the deficiency to be made good and not dismiss the appeal. 38 P.L.R. 262. Where an insufficiently stamped memo. of appeal is presented and deficient Court-fee is paid on a later date, the appeal takes effect from date on which Court-fee was paid. 37 C.W.N. 179=146 I.C. 359=1933 C. 796. Where deficient Court-fee is paid within time allowed by Court but after the period of limitation, suit is not barred. 23 I.C. 408=12 A.L.J. 709. See also 21 A.L.J. 333=1923 A. 349 (1); 45 A. 518, 84 I.C. 946; 4 P. 190, 107 I.C. 223. If Court in its discretion allows time for paying the deficiency in Court-fee and the deficiency is made good, S. 149 enables the defective document to be retrospective in its effect. 1934 A.L.J. 1093=1934 A. 740; 156 I.C. 405=1935 P. 201, 154 I.C. 135=1935 O.W.N. 162=1935 O. 231. S. 149 gives wide and unfettered discretion to the Court to accept Court-fees at any stage, and if the Court receives the Court-fee after the expiry of the period of limitation, the instrument is validated retrospectively as from date of its presentation. 163 I.C. 770=1936 O. 340. See also 37 P.L.R. 199. Where High Court remanded the case with direction that plaintiffs should make good deficiency "within ten days of the case reaching trial Court" and the Sub-Judge who heard the case passed an order directing plaintiffs to appear on a certain date and on the latter date asked them to deposit the requisite Court-fee within ten days from the date and that order was

complied with, *held*, the Court could not subsequently reject the plaint on the ground that Court-fee had been paid out of time. 137 I.C. 76=1932 L. 235. See also 14 L. 312=146 I.C. 909=1923 L. 598. Where within the time allowed proper Court-fee and printing fee are paid up, the document on which Court-fee is so made up must be taken to date back to date on which it was originally presented. 1929 I.C. 147. *Full L.* L. 564. See also 38 P.L.R. 145, 162 I.C. 522=40 C.W.N. 758=1936 C. 245. Inability of a party to raise funds is not ordinarily a sufficient ground which would entitle the Court to exercise its discretion under S. 149, and to permit payment of the deficit Court-fees. But that rule has reference only to normal conditions. But where it is shown that the party seeking the Court's discretion lives in a district where an acute famine prevails and that in consequence he was unable to procure the necessary funds, an exception should be made to the rule, and the Court in such a case will exercise its discretion in his favour under S. 149. 40 C.W.N. 1294. Set-off—Written statement not stamped—Trial Court ordering payment of Court-fee, but not realising full Court-fee—High Court's power to direct payment of deficit Court-fee in second appeal. 1936 C. 277. Where Court-fee stamps were affixed on memorandum of appeal, after the period of limitation, the Bench admitting appeal should be considered to have condoned the delay under S. 149, C. P. Code. 35 P.L.R. 472=1934 L. 701. See also 147 I.C. 342=1934 A.L.J. 533=1934 A. 160. Where Court rejected a plaint on the ground that the deficiency in Court-fee had not been made good and plaintiff subsequently, instead of filing a fresh plaint, asked that suit should be restored, and paid the deficiency of Court-fee on the former plaint. *Held*, that the Court had power to treat the Court-fee already paid as part of the Court-fee and is not compelled to require the plaintiff to pay a full Court-fee on the fresh plaint. 159 I.C. 630=1935 A.L.J. 1127=1935 A. 985. The Court will not in its discretion allow the deficiency of Court-fee to be made up on the day of the hearing unless it is satisfied that some grounds exist for the exercise of its discretion and that a *bona fide* mistake was made. 44 I.C. 398. See also 38 B. 41. In a proper case Court will allow deficiency of Court-fees to be made up even in second appeal. 18 R.D. 44; even in revision, 13 L.L.T. 31. *Bona fide* mistake of pleader—Extension of time to be given. 49 I.C. 188=10 P.R. 1919. But where the pleader, even in spite of the mistake being pointed out by Court persisted in his error. Court refused to extend time for payment. 1934 L. 424. Appellant not caring to find out proper Court-fee payable on memoran-

person, by whom the fee is payable, to pay the whole or part as the case may be, of such Court-fee; and upon such payment the document, in respect of which

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date of appeal—Discretion under S. 149 to allow party to make up deficiency of Court-fee even after expiration of period of limitation for filing of appeal cannot be exercised. 119 I.C. 700=1929 N. 294; 1934 L. 424. In case of gross negligence of pleader, see 28 P.L.R. 338; 33 P.L.R. 187. Where Court-fee cannot be definitely ascertained until record is received or the amount is in doubt, Court may extend time but not where it is purposely not fully paid. 3 P.L.J. 74. Appellant cannot get any indulgence by extending time for payment of Court-fees, the law upon the point being settled, when there could have been no misapprehension as to Court-fees payable. 73 I.C. 788. Under S. 149 Court has a discretion to allow the payment of Court-fee at any time. 26 I.C. 33=27 M.L.J. 677. See also 129 I.C. 732=1931 A. 318. When an application for leave to sue in *forma pauperis* is dismissed, the plaint still remains and may be validated by payment of Court-fees within a time to be fixed by Court. This depends upon the discretion of the Court. 46 M.L.J. 254=76 I.C. 767. See also 55 P.R. 1913=1929 P. 637. But see *contra*, 1933 N. 237 (1922 N. 160 and 1924 M. 118, *Rel. on*, and 1929 P. 637, *Diss.*); 62 C. 711; 1937 N. 36. If an application to sue in *forma pauperis* is filed and pending disposal of that application, the pauper by paying the amount of stamp-fees into Court, admits that he is no longer desirous to sue as pauper, the plaint filed with the application will relate back to the date when the application was filed, always assuming that the application to sue in *forma pauperis* was made *bona fide*. 1935 M.W.N. 863=158 I.C. 790=42 L.W. 655=1935 M. 878 (2 A. 241 P.C. Fol.). See also 62 C. 711; 161 I.C. 954=1936 Pesh. 69; 1936 A. 584 (F B.). Father applying to sue in *forma pauperis*—He dying before passing of final order on his application—Joinder of sons as legal representatives who were willing to pay Court-fees allowed. 151 I.C. 219=1934 M. 467=67 M.L.J. 332. Application to sue in *forma pauperis* withdrawn—Court-fee paid beyond limitation—Suit barred. 1 R. 196=1923 R. 256. Where no suit is instituted but only an application under O. 33 for leave to sue as a pauper is made, S. 149 has no application to validate subsequent payment of Court-fees. 118 I.C. 687=1929 N. 268. Under S. 149 the appellate Court when dismissing an application for leave to appeal as pauper can grant him time to pay requisite Court-fee and if the same is paid within time, the Court will admit the appeal. 40 M. 68=31 M.L.J. 269. Where an application for leave to appeal in *forma pauperis* is rejected and a regularly stamped appeal was filed later on, it is only on the latter date that the appeal

must for purposes of limitation be deemed to have been presented. 5 Bur.L.T. 294=18 I.C. 518. Where an application for leave to appeal in *forma pauperis* accompanied with a memorandum of appeal was filed on a particular date and the Court-fee stamp was paid on a later date and between the two dates the scale of Court-fees had been increased, *held*, that the Court-fee payable was only according to the scale in force on the date the memorandum of appeal was filed. 140 I.C. 190=1932 O. 343. Payment of deficit Court-fees after several orders but in conformity with the last is within S. 149. Discretion exercised properly under S. 149 is unchallengeable in appeal. 24 C.L.J. 88=29 I.C. 571. See also 41 C. 1092; 21 I.C. 866; 1923 L. 629, 56 I.C. 47; or in revision, 89 I.C. 419. Where there is no *bona fide* mistake in payment of a smaller Court-fee and the omission is deliberate, a Court should not extend time to pay up the deficiency. 75 I.C. 667=1923 L. 309. See also 3 P.L.J. 74; 1 L. 234. See in this connection 134 I.C. 127=1931 L. 343. An extension of time will not be allowed for payment of Court-fee for an appeal which has been insufficiently stamped in the absence of satisfactory explanation of the mistake, if any. 67 I.C. 130. See also 67 I.C. 901; 3 L.L.J. 370=57 I.C. 215; 1 L. 234, 67 I.C. 106=1922 L. 440; 1932 M.W.N. 104. Section 149 should not be used so as to allow an appellant who files an appeal on insufficient stamps on account of his poverty to pay the balance at his leisure. 49 I.C. 871. See also 13 R. 50=159 I.C. 468=1935 R. 336; 53 I.C. 256; 56 I.C. 143=2 L.L.J. 486=2 L. 1. Poverty or inability to raise funds to pay Court-fee is not a sufficient ground which would entitle the Court to exercise its discretion and allow time for payment under S. 149. Section should not be construed in such a way as to nullify the express provisions of S. 4, Court-fees Act. 38 C.W.N. 650=61 C. 663=1934 C. 659. Reasons for not paying entire Court-fee must be considered before granting extension. 60 I.C. 493. Appellate Court cannot go into the question as to whether lower Court exercised its discretion in making various orders of payment of Court-fees if the order is not objected to when made or in Court which made it. 56 I.C. 47 (P.). Extension of time for payment of Court-fee, when implied. 5 P.L.J. 544=58 I.C. 216=1 P.L.T. 544. No express order is required for extending time for paying up deficit Court-fee. 5 P.L.J. 544=1 P.L.T. 544. Time fixed by decree—No extension to be given. 72 I.C. 879=1923 O. 16; 85 I.C. 352=1924 R. 375. Time fixed for payment of costs on payment of which appeal was accepted cannot be extended. 1925 P. 153. Order allowing amendment of plaint and directing additional

such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

150. Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

151 Nothing in this Code shall be deemed to limit or otherwise affect the

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Court-fees and costs within specified time—
Extension of time—Permissibility. 140 I. C. 373=30 C.W.N. 869.

FORM OF ORDER—A decree of the type that "plaintiffs should pay deficient Court-fees on Rs 470-8-0 within 15 days or suit shall stand dismissed" is undesirable. The proper course is for Court to fix a time for payment and wait until it expires before passing its decree. The decree should then be a final one dismissing the suit and not contain contingent clauses. (1918 A. 98, Ket.) 30 N.L.R. 258=149 I.C. 840=1934 N. 109

LIMITATION—In case of a suit in which an insufficiently stamped plaint is filed within limitation period, though the deficiency in the Court-fee is made up after limitation period, the suit is deemed to have been instituted on date of the actual filing of the plaint under S 149. 1 P.L.J. 420. Where plaint is filed in time but with an insufficient Court-fee and the deficiency is made good under O 7, R. 11, no question of limitation arises. The law is otherwise as regards memoranda of appeal. 3 P.L.T. 142. See in this connection 133 I.C. 122, 140 I.C. 753=1933 A. 572=1933 A.L.J. 1357

SET OFF—Written statement not bearing requisite Court-fee—Power of Court to decide set-off—Demand of Court-fee at late stage—Legality. 16 P.L.T. 76

REVISION—Where objections were filed against an award without affixing Court-fee stamp, and the Court disposed of the matter without taking any notice of the objections and without giving the objector any opportunity whatsoever to make good the Court-fee stamp. *Held*, in revision, that the Court had acted with material irregularity in the exercise of its jurisdiction in ignoring the provisions of S. 28 of the Court-Fees Act and S. 149, and its order was, therefore, liable to be set aside. 38 P.L.R. 1163.

REVIEW—If plaintiff obtains a grant of time by an entirely false representation, it would be inequitable to allow him to take advantage of his own fraud. An insufficiently stamped plaint was filed on the last day of limitation with an application for granting time for payment of full Court-fee alleging that plaintiff was not possessed of the amount required. The Court granted an extension of time for paying the full stamp and within the time allowed the requisite court-fees were

paid, but subsequently on the date of hearing, the defendant contended that the order obtained by plaintiff on false pretences and the Court reviewed its order granting time, and finding that it was obtained by plaintiff under false pretences, set it aside and dismissed the suit as barred by limitation. *Held* that the Court had power to review its order granting time under S 149 and reject the plaint as barred by limitation. 1937 N. 87

Sec. 150.—Section applies also to cases of partial territorial adjustment of jurisdiction and transfer of business with reference to that part alone to another Court. 46 M. 1=42 M.L.J. 344. See also 61 C.L.J. 543, 34 L.W. 271=1931 M.W.N. 842=61 M.L.J. 307 (following 42 M.L.J. 344 and 43 M.L.J. 713), 1929 A. 677. The word "transfer" is not used in a limited sense of transfers under the special provision of the Code. It implies that the whole business can be transferred to another Court without an order from a superior Court under S 24. When all proceedings are transferred *ipso facto* to the new Court, such new Court has power to continue execution proceedings relating to lands situated in transferred area pending in the former Court at the time of transfer. 37 M. 462=26 M.L.J. 189. See *contra* 42 M. 821=37 M.L.J. 284 (F.B.) and 47 M.L.J. 448. See also 35 I.C. 296=31 M.L.J. 22. Section refers only to cases where business is actually transferred. 114 I.C. 545=53 M. 378=1930 M. 528. Alteration of jurisdiction—Abolition of Court—Execution of decree by new Court—Second Court which acquired territorial jurisdiction by means of the notification could not execute the decree without transmission of the decree from the first to the second Court. 55 M. 801=137 I.C. 305=1932 M. 418=62 M.L.J. 657 (F.B.). Territorial jurisdiction—Transfer of—Execution of decree. 38 I.C. 152. Transfer of jurisdiction—Application to set aside *ex parte* decree. 46 M. 1=42 M.L.J. 344. Injunction—Disobeying of—Transfer of venue—Application for contempt. 43 M.L.J. 713=40 M. 83=86 I.C. 650. See also 26 C.W. N. 216

Sec. 151. SCOPE OF SECTION—INHERENT POWERS OF COURT—Scope of section pointed out. 47 C.L.J. 87. There will be always cases and circumstances which are not covered by the provisions of the Code wherein justice has to be done. 33 C. 927. 33 C. 1094, 40 M. 1069, 1930 C. 20, 36 C. 193,

Saving of inherent powers of Court.

inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

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61 C 711 Legislature can only foresee the most natural and ordinary events and no rules of any Code can be made to regulate for all time to come and for all cases that may happen. 9 W.R. 402 at p. 406, 1925 O. 128 Section 151 does not confer new power on the Court. It simply saves the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court in cases and circumstances which are not covered by the express provisions of the Code which deals only with procedure and not with substantive rights and obligations; by the exercise of inherent power the Court cannot exonerate a litigant from an obligation imposed upon him by the statute 159 I.C. 443=62 C L J 298=1935 C 707, 164 I.C. 200=1936 A L J 736=1936 A 555=158 I.C. 971=1935 Pesh 151. See also 153 I.C. 329=40 L.W. 853=1935 M. 105 (Power to make interim order of maintenance). Ordinarily the preservation of the inherent power would not enable Courts to extend the scope of powers specifically conferred upon them by other provisions of the Code, and S 151 should not be utilised so as to make it supplementary to S 115. The inherent powers, which can be exercised by a superior Court, are ordinarily such powers as are necessary to exercise in relation to proceedings pending before it, and would not include a power similar to power of revision under S. 115, even to cases to which that section is not applicable. 156 I.C. 806=1935 A L J 549=1935 A 599 (F.B.). Court has an inherent power "*ex debito justitiae*" to consolidate, postpone, pending the decision of a selected action, and to advance the hearing of suits, to stay on the ground of convenience cross suits, to ascertain whether the proper parties are before it; to enquire whether plaintiff is entitled to sue as an adult, to entertain application of a third person to be made a party, to add a party; to allow defence in *forma pauperis*, to decide one question and to reserve another for investigation, (the Privy Council pointing out that it did not require any provision of the Code to authorise a Judge to do what in this matter was justice and for the advantage of the parties), to remand a suit in a case to which neither S. 562 nor S. 566 (1882) applies; to stay the drawing up of the Court's own orders or to suspend their operation if the necessities of justice so require, to stay, apart from the question whether the case falls within S. 545, the carrying out of a preliminary order pending appeal; to stay proceedings in a lower Court pending appeal and to appoint temporary guardian of a minor upon such stay, to apply the principles of *res judicata* to cases not falling within Ss. 13 and 14 of the Code

(1882) and so forth" 33 C 927 at p. 932; 6 M J A 393 at pp. 410-411. See also 1915 M 69, 61 C 711. Also for "punishing for contempt of Court committed when the Court is not sitting, deciding questions of jurisdiction though the Court is ultimately found not to have jurisdiction over the suit, directing a party who has applied to leave to appeal to His Majesty in Council to pay costs on the dismissal of his application, amending decrees or orders, granting restitution in cases of reversal of execution sales and orders in execution proceedings, restraining by injunction a person from proceeding with a suit in the Small Cause Court, staying proceedings pursuant to its own order in view of an intended appeal; and treating an application for revision as an appeal and *vice versa*" 40 C 955 at p. 959. See also 61 C 711 "Since laws are general rules, they cannot regulate the time to come so as to make express provision against all inconveniences, which are infinite in number, and so that their dispositions shall express all the cases that may possibly happen. It is the duty of a law-giver to foresee only the most natural and ordinary events, and to form his dispositions in such a manner as that, without entering into the detail of singular cases, he may establish rules common to them all, and next, it is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions, but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law, or within the consequences that may be gathered from it" (Domat's Civil Law cited in 9 W R at p. 406.) Inherent powers are not limited to Ss 151 and 152 1925 C 420 Section 151 does not confer a new power on the Court, but only makes a statutory recognition of the inherent power of the Court to do certain things *ex debito justitiae* 132 I.C. 562=1931 A 427; 139 I.C. 491=1932 A L J 784=1932 A 587; 140 I.C. 412=1932 O. 293. It is not only permissible but imperative on Court to grant restitution under this section, provided it is necessary for preventing injustice and does not contravene any statutory provision. 55 A. 221=144 I.C. 492=1933 A L J 60=1933 A. 218. Court can pass such orders in exercise of its inherent powers as may be necessary for the ends of justice 138 I.C. 328=33 P.L.R. 152=1932 I. 267. See also 132 I.C. 562=1931 A. 427. *Insolvency Courts* possess, as much as other civil Courts, the powers to make orders which may be necessary in the ends of justice and to correct their own errors committed inadvertently or by oversight 15 L. 698. S. 151 is intended for exceptional cases for which there is no remedy except the Court's inherent

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powers. It is not intended to enable Court to evade or ignore the provisions of law which govern procedure. Where after passing a decree, a Court *suo motu* set aside its own decree on the ground it had discovered some documentary evidence on the record the procedure is illegal 21 A.L.J. 447=73 I.C. 494; 86 I.C. 1045 (S). See also 1928 M. 522; 1929 L. 694=119 I.C. 488. Court cannot amend a decree which is in conformity with the judgment 100 I.C. 142=1927 L. 403; 1927 C. 203. Court can amend decrees and orders to correct clerical errors even in cases not covered by S. 152 140 I.C. 412=1932 O. 293. See also 139 I.C. 367=9 O.W.N. 633=1932 O. 291; even after an appeal has been filed against such decree or order 1931 A.L.J. 530=1931 A. 766. See also 134 I.C. 407=1931 O. 346. Remedy by way of appeal may bar exercise of powers under this section 27 Bom. L.R. 1511. A Court is not only entitled but is bound to brush aside a mere technicality which stands in the way of justice and to amend such mistakes, slips or omissions as may appear to prevent justice in order to give effect to the real and substantial right of the parties. Sections 151, 152 and 153 are just as applicable to Courts of first instance as to Courts of appellate jurisdiction and the appellate Court ought to take steps by way of amendments which were clearly open to the first or other lower Court. 34 I.C. 79=38 A. 398, 1 Luck. 187=105 I.C. 146=1927 O. 276. Section 151 empowers Courts to deal with their own decrees and orders and does not give authority to superior Courts by way of conferring jurisdiction over inferior Courts. 42 B. 363=45 I.C. 552. The inherent power of a Court can be invoked only for the attainment of the ends of substantial justice. 19 C.W.N. 835=25 I.C. 267. Court may do what is fair and equitable 84 I.C. 134=48 M. 494; 138 I.C. 328=1932 L. 267. Section 151 is not a general clause validating every act of a Court which cannot otherwise be justified. The Court can act under the section only if it is necessary for the ends of justice or to prevent abuse of the process of the Court. If the Court purports to prevent an abuse it must find what that abuse is. The Court cannot pass an unconsidered order of dismissal leaving it to be inferred, firstly, that there were circumstances warranting its acting under S. 151; and, secondly, that it did so act 54 M.L.J. 665=1928 M. 522. It must not be used to defeat the imperative provisions of S. 3 of the Limitation Act. 66 I.C. 270, 7 L.L.J. 13=1925 L. 321, 142 I.C. 185=1933 R. 90. An application which is barred both by the law of limitation and by the principle of *res judicata* cannot legally be entertained or granted by a Court in the exercise of its inherent powers. 1935 L. 60. The doctrine of inherent power has no scope

for application where there is express statutory provisions on the point in controversy 69 I.C. 718; 75 I.C. 487=1923 L. 506 (2). 106 I.C. 575; 15 I.C. 53=16 C.W.N. 1029. See also 1935 L. 60. It is only when the Court has exhausted its powers under the specific provisions of the Code, that it can fall back upon the residuary power with which it has been vested under S. 151 1935 L. 68, 38 P.L.R. 373. A *reluctant ad absurdum* can be avoided by a Judge under the provisions of this section which is wide enough for the purpose 37 I.C. 382. The inherent powers of a Court are not to be used in order to relieve a party from the consequences of his own mistakes or to enable him to evade the law of limitation 43 M.L.J. 184=70 I.C. 743; 89 I.C. 427. See also 1925 L. 321; 1935 L. 60. Excusing delay to sue as pauper 101 I.C. 320 (1)=1927 N. 197. Refund of excess Court-fee—Application made after long delay—Certificate to apply to Government can be refused 1930 P. 435 (2). Inherent power is that which inheres in a Court by the very fact of its being empowered to exercise any jurisdiction at all so that it comes within the express sense of the law or within the consequences that may be gathered from it 1 L.W. 882=26 I.C. 63. The power mentioned in S. 151 must be used very sparingly and only in the last resort. 67 I.C. 296; 34 I.C. 787; 33 M.L.J. 184=70 I.C. 743=1922 M. 417. If a suit is dismissed by the trial Court for certain reasons, it is open to the Court of appeal to dismiss it for completely different reasons 4 O.W.N. 862=104 I.C. 824=1927 O. 455. Varieties of inherent powers are well recognized and new categories cannot be invented 150 I.C. 446=1934 A.L.J. 1191=1934 A. 585.

APPLICABILITY OF SECTION—Section 151 does not apply where there is an express provision of law 69 I.C. 718; 3 P. 654=82 I.C. 813=1925 P. 47, 4 P. 180, 38 P.L.R. 373; 38 P.L.R. 331, 1935 M. 753=69 M.L.J. 75, 1935 L. 60, 1935 P. 68; 102 I.C. 543=1927 N. 262; 52 M.L.J. 670, 1930 C. 387=34 C.W.N. 222; 122 I.C. 102 (setting aside sale). Where there is right of appeal or revision open to party, resort to the inherent power to disturb the decree or order is not proper 55 A. 548=144 I.C. 731=1933 A. 382. Where plaint was rejected, party can apply under O. 47, R. 1 or file an appeal, and inherent power under this section cannot be invoked 151 I.C. 696=59 C.L.J. 250=1934 C. 623. See also 144 I.C. 147=1933 P. 132. Where summons was returned unserved and plaintiff applied for issue of fresh summons, but the Court rejected the application and dismissed the suit, apparently under its inherent jurisdiction, held, that the Court should have acted under O. 9, Rr. 5 and 6, and that the order of dismissal passed under inherent power should be set aside 1933 P. 582. See

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191, 191 C. 90=1934 A.L.J. 832=4 A.W.R. 55=1934 A. 442; 151 I.C. 356=1934 L.J. 509=18 R.D. 241=3 A.W.R. 673=1934 A. 624 (2); 152 I.C. 288=1934 P. 582; 87 M. 635=148 I.C. 79=39 L.W. 179=1934 M. 199 (2)=66 M.L.J. 498. High Court has inherent power to transfer suits apart from Ss. 22 and 23, C. P. Code. 1933 A.L.J. 1507. Where appellate Court is asked to set aside the proceedings in an appeal on the ground that on the date of hearing of the appeal the respondent was not living, the procedure is to apply within the period of limitation for a review of the judgment passed in the appeal and not to apply under S. 151. 54 I.C. 284. High Court cannot consolidate suits pending in District or other Courts. 39 B. 604=30 I.C. 560, 27 L.W. 366=1928 M.W.N. 271 (consolidation of appeals). Consent of parties not necessary. 40 I.C. 182; 4 P. 448. Inherent power of Court to deal with two appeals together. 45 A. 506=74 I.C. 411. Consolidation is an inherent power in an appellate Court and is not barred by absence of application therefore in lower Court. 45 I.C. 463=34 M.L.J. 279. Consolidation of second appeal—Single memorandum of appeal, vakalatnama and Court-fee—High Court had no inherent power to order such consolidation. (54 M.L.J. 595, overruled.) 53 M. 248=1930 M. 376=58 M.L.J. 510 (F.B.). Consolidation of Civil Revision petitions—Filing single vakalat and paying single process-fee to common respondents—Power of High Court—Consolidated process on payment of fee in each case—Whether can be ordered. 53 M. 262=1930 M. 381=58 M.L.J. 521 (F.B.). A Court has inherent power to consolidate suits and this jurisdiction can be exercised even without the consent of the parties. 3 P.L.T. 584=67 I.C. 1000=1922 P. 566; 3 P.L.J. 446=45 I.C. 551.

As to power to admit evidence, see 138 I.C. 328=33 P.L.R. 152=1932 L. 267. The presence of a witness during the examination of the previous witness may well be termed an abuse of the process of the Court and therefore under S. 151, Court has inherent power to prevent that abuse by refusing to take the evidence of that witness. 152 I.C. 30=1934 A.L.J. 750=3 A.W.R. 790=1934 A. 840. See also the following case: 138 I.C. 524=1932 A. 656 (Power to revise its own order superseding a reference to arbitration). The Court has inherent jurisdiction to deal with allegations of misconduct of arbitrator, even though the award is not made. 1933 P. 566. The holder of a decree for mesne profits which has not yet been ascertained, who has applied for the ascertainment thereof and for attachment under O. 21, R. 42, is entitled under this section and under S. 73, to claim rateable distribution in the assets realised by prior attaching creditor. 151 I.C. 609=40 L.W. 291=1934 M. 604=67 M.L.J. 303.

Where High Court dismisses a suit on the ground that it has no jurisdiction to try it, it can, by virtue of its inherent powers, direct the return of the plaint to the plaintiff for presentation to the proper Court, although O. 7, R. 10, C. P. Code, is not applicable to it. 12 R. 432=1934 R. 342. High Court has inherent power to *restate legal practitioners* who have been dismissed from their profession (38 C. 309, 11 I.C. 997, 1 P. 684, Rel. on.) 148 I.C. 299=11 O.W.N. 368=1934 O. 140 (S.B.). Code has reserved to every Court under S. 151 the inherent power to make such orders as should be made *ex debito justitiae*, and every Court should have in view the shortening of litigation, preventing duplication of proceedings, and saving the parties from harassment and expenses. And delay, by itself, is not sufficient to deprive a party of his remedies, if such delay does not amount to waiver, acquiescence or abandonment of his claim or has not created a corresponding right in his opponent on extinguishment of his own. 61 C. 711.

ENDS OF JUSTICE.—Section recognizes inherent powers of a Court to make orders to prevent a miscarriage of justice. 38 A. 147=36 I.C. 585, 86 I.C. 882=1925 C. 1145. But not for purpose of remedying the effects of negligence. 148 I.C. 496=1934 A. 250. Court is bound to exercise its inherent powers cautiously and with circumspection, and it is not at liberty to do so where the order proposed would contravene any principle of the common law or equity, or would affect a matter in respect of which provision has been made by statute either expressly or according to the true intent thereof. 14 R. 173=163 I.C. 340=1936 R. 208 (F.B.). When the law of the land has provided ample remedies—statutory and otherwise—for the redress of a wrong suffered by a party owing to the conduct of his opponent or the mistakes committed by the Court, a party is not entitled to invoke, and the Court ought not to exercise, the inherent jurisdiction of the Court. 39 Bom. L.R. 112=1937 B. 173. See also 1937 S. 101. It is of course easy in the quiet atmosphere of the Court to say that this and that should be done, and another suit should be brought, but any one who has any experience of the difficulties of litigation in India, particularly where a widow or a minor is concerned, can realize that where two courses are open, one in which the Court can take immediate action in a suit that is before it and the other in which the Court can merely say that another suit should be filed, the Court is bound in the exercise of its duty and in answer to its own conscience to direct that course should be taken which would lessen the difficulties and remove obstructions in the way of widows and orphans. 1937 S. 101. A suit can be stayed under the inherent powers under S. 151 apart from the provisions of S. 10. 10 L.L.J. 470=1929 L. 12, 123 I.C. 50. See also 1 P. 149, 235; 144 I.C. 107.

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=1933 L 50 Cognizance of cases which cut at the root of controversy 98 I C 280=1927 M. 143. S. 151 has been enacted to deal effectually with abuse of process of Court. The institution of a second suit against the same party for the same relief on the same cause of action is not an abuse of the process of the Court 27 M.L.J. 405=25 I C 597. O. 20, R. 3, C. P. Code, is not exhaustive and it is the duty of a Court to invoke its inherent powers to correct errors that have led to injustice through no fault of a party and to do real and substantial justice 152 I C 211=1934 N. 234 Order of Court obtained by misleading it and its process abused—Court can order the party to make good the loss to the other side 1928 M. 610=110 I C 535 A Court in India has power to pass a conditional decree as it can impose a condition doing complete justice to the parties 23 M.L.J. 652=17 I C 987 Where decree-holder is permitted to bid at an auction-sale, subject to certain conditions being fulfilled and he fails to fulfil the condition, the Court has power to refuse to confirm the sale 69 I C 872=1 P 235 See also 143 I C 454=37 L W 484=1933 M 399=64 M.L.J. 586. High Court has full power to pass proper order to give relief to parties and it can set aside an order of a subordinate Court although in the revision petition the petitioner has not moved against it 64 I C 496=2 Pat LT 739 Ends of justice—Wrong execution of decree—Interference 48 I C 107=3 P.L.J. 435 Order based on erroneous view that incorrect procedure has been followed. It cannot be varied for ends of justice, 1929 N 251 (F B), 48 C.L.J. 594=1929 C 162 Objection to execution of decree—Objectors alleging mistakenly that they were in possession—Objection upheld but no order passed for possession to objectors—Power of Court to restore possession. 1934 P. 683 When a situation arises in a case of contest between a life tenant and a remainderman, consequent on the death of the former before the final decision of the Court, the Court has an inherent jurisdiction to make suitable orders for the ends of justice 150 I C 425=11 O W N 917=1934 O. 337

LIMITATIONS ON THE EXERCISE OF COURT'S POWERS.—The section applies only when there is no other express provision of law 30 I C 38=21 C.L.J. 614; 55 C 219=103 I C 864=1927 C 850=47 C.L.J. 69, 1933 P 132, 69 I C 718; 82 I C 813; 1935 L. 60, 16 C.W.N. 1029 Where other remedies are open to the applicant under the C P Code, the inherent powers of Court under this section cannot be invoked 1932 L. 28=136 I C 735, 1932 O 220, 8 O W N. 1238 Court cannot call upon next friend of minor plaintiff to provide for security for costs before hearing 1934 A. 458 (1) There is no inherent jurisdiction in High Court to direct Courts subordinate to it to proceed in a particular manner S 151 does not confer any jurisdiction on the Court which did not already exist. It merely pre-

serves the inherent power of the Court which it may possess. Varieties of inherent jurisdiction are well recognized, and new categories cannot be invented 150 I C 446=1934 A.L.J. 1191=1934 A. 585 Rights conferred by sections of the Code—No provision for working out those rights—Inherent powers can be invoked to apply the provisions of the rules which are nearest in point with such modifications as may be necessary. 131 I C 610=35 L W 359=1931 M 303=61 M.L.J. 628. Court cannot do what is prohibited by the Code 3 P 766=84 I.C. 320=1925 P 36; 100 I C 518=1927 C 420 S 151 does not authorise the Court to override the express provisions of Limitation Act or Bengal Tenancy Act 9 I C 246, 7 L.L.J. 13=86 I C 256, 1 L 363=58 I C 789 See also 57 I C 15, 23 N.L.R. 193. But see 47 C.L.J. 87 Court has no power to grant leave to apply for review in *forma pauperis* 1930 R. 280 In exercising the inherent powers the decision of the Court should be based on general legal principles subject to any special provisions contained in the Code, meeting the necessities of the case in question. 56 I. C 255, 98 I C 70=1927 C 158 Judge passing order rejecting plaint under O. 7, R. 11—His successor in office cannot set it aside under Court's inherent jurisdiction 1929 M. W.N. 140. S 151 cannot be invoked so as to treat an appeal filed on behalf of one party as the appeal of another, simply because it should have been filed on behalf of the other and it was the intention of the pleader filing it to appeal on behalf of the other 151 I.C. 25=3 A.W.R. 737=1934 A 677

WHO CAN MOVE THE COURT.—Inherent powers of a Court cannot be used for the benefit of the litigant who has his remedy under the Code of Civil Procedure, much less for one who having his remedy has lost it by his own delay. 26 I C 46=27 M.L.J. 605 See also 1935 P 68, 1923 L 506, 106 I C 575, 16 C.W.N. 1029; 1935 L 60 A stranger to the litigation cannot intervene after the suit or proceedings are disposed of and claim the protection of S 151 or appeal to the inherent powers of the Court to do justice. 42 M.L.J. 563=68 I C 910 Court can order restitution to surety 28 P.L.R. 525

AMENDMENT.—Where a purely clerical error is brought to the notice of a High Court when it is seized of the matter a Court of appeal it can correct the error 45 A 53 See also 1932 L 267, 1932 O 291, 139 I C 491=1932 A 587 (Section applies to amendment of decrees and not to amendment of plaint But Court can make corrections for ends of justice.) Extensive powers of amendment may be exercised under Ss. 151 and 153 (*Ibid.*) See also 140 I C 113=1933 A 102, 8 O W N. 1238, 141 I C 400=1933 L 135 A Court cannot vary or set aside under S 151 a consent decree made by it when the decree and solehnamah are not at variance 36 I C 239 See also 150 I.C. 969=1934 L 399 The

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Court has inherent powers to amend or vary a perfected order and to make necessary amendments at any time even after an appeal has been preferred against it where the decree is not in accordance with the intention of the Court as gathered from the judgment as a whole 26 I.C. 946=18 C.W.N. 772. Amendment of decree after disposal of appeal 8 Pat L. T. 143. Section 151 would enable a Court to alter a decree when it does not correctly express what the Court actually decided or intended to decide. 73 I.C. 679=1923 L. 147, 157 I.C. 810=1935 O.W.N. 968=1935 O. 461. The Court has always got the power to make an order allowing the amendment of an execution petition in the interests of justice. Its power is not limited by O. 21, R. 17, the Code being not exhaustive. Ss 151 and 152 enable the Court to exercise its inherent powers of amendment when the interests of justice require the same. 39 C.W.N. 1144. As to amendment of plaint and decree see 155 I.C. 236=1935 O.W.N. 471=1935 O. 369. As to power to amend sale certificate, see 156 I.C. 812=41 L.W. 571=1935 M.W.N. 378=1935 M. 420. Where the decree has not been signed the Court has power to make alteration to make decree consistent. 17 L.W. 254=74 I.C. 416, 37 I.C. 352. It is not competent to a Court to amend the decree of another Court transferred to it for execution even though the error may be obvious. 15 L.W. 301=65 I.C. 710, 34 I.C. 787=3 L.W. 499. An application to amend a plaint on the ground that the correct view has subsequently been laid down by the High Court should be allowed. 26 I.C. 383. Where the parties allowed a decree to be enforced for six years before attempting to amend it, it should not be amended specially when there is no clerical or arithmetical mistake. 67 I.C. 320. A Court has inherent power to amend a decree for pre-emption and deduct the amount due to the pre-emptor from the vendee as a charge on the property sold, from the pre-emption money. 54 I.C. 34. Court cannot amend a decree which is in conformity with judgment 100 I.C. 142=1927 L. 403. Where, in a mortgage suit, the boundaries of the mortgaged property are not correctly given by inadvertence and a sale certificate is issued after the sale held after passing of the preliminary and final decrees, the preliminary and final decrees can be amended and if the misdescription has not affected the sale price, the sale proclamation and the sale certificate can also be amended. If, on the other hand, the sale price has been affected by such misdescription, the sale will be set aside and decree-holder will be entitled to bring the properties to a fresh sale. [41 C. 590 (P.C.). Ref.] 1934 L. 29. Where the mortgaged property is incorrectly described in the plaint, in the preliminary decree and in the final decree, an amendment of the description of the property in final decree can be allowed in the exercise of the inherent powers of the Court. 19 C.W.N.

1021, Rel. on, 1935 R. 522. See also 1936 O.W.N. 575=162 I.C. 233. So also where the *khassa* number of the mortgaged property was wrongly given in plaint. 8 Luck. 734=150 I.C. 791=11 O.W.N. 550=1934 O. 352. Where a mistake as to description of property is made in the plaint and is repeated in the judgment and decree Court has power to amend plaint and decree. 153 I.C. 378=1935 O.W.N. 31=1935 O. 92. Even in the case of a compromise decree, Court has ample powers under S. 151, if not under S. 152, to correct its mistake and amend its decree so as to bring it in accordance with the agreement of parties (36 B. 77 and 10 C. 612, R.) 150 I.C. 721=1934 R. 108. See also 36 Bom. L. R. 1217=1935 B. 75. P brought a suit for possession of land against K. Criminal proceedings between the parties were also pending about the same time and possession of a part of the land in suit was restored to P by the Criminal Court. Counsel for P consequently made a statement in Court that his client had received possession of a part of the land in dispute. Counsel for K stated that an appeal had been preferred against the award of possession. The suit proceeded and finally the Judge granted a decree to P for possession of the land in suit excluding that portion given to him by the Criminal Court. Subsequently the owner of Criminal Court was upset in appeal, and P was dispossessed of that land. P applied under Ss 151 and 152 to have this land also included in his decree. Held, that S. 152 was not applicable, but the amendment could be made under S. 151. 1934 L. 735. During pendency of a suit a compromise petition was filed by the parties which stated that the defendant was to pay a certain amount in satisfaction of plaintiff's claim within three months, that as security for such payment defendant had handed over Government Promissory notes to one L who was not a party to the suit and that if within three months the agreed amount or part thereof was not paid, L was to sell the promissory notes or as many of them as necessary and satisfy plaintiff's claim. The petition then prayed that the suit be recorded as compromised. Upon this Court passed the following order: "Let the case and suit be dismissed in terms of compromise." No order was made as to costs nor any decree was prepared. The agreed amount was not paid. L instead of selling promissory notes returned them to defendant. Plaintiff sought execution against defendant, but discovering that no decree was passed applied to Court under Ss 151 and 152 for amendment of the order. Held, that the order of Court dismissing suit was wrong. The plaintiff was entitled to a decree in terms of the compromise petition and failing to realise amount in three months or by sale of promissory notes, he was also entitled to realize it by executing decree against defendant. The liability of the defendant did not cease merely by handing over promissory notes to L who was not a party to the suit. Ss 151 and 152

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applied and the order of Court should be amended (34 I.C. 186, Dist.) 1933 P. 135.

ADDING PARTIES.—Even in cases where the application for addition or substitution of parties does not fall within the language of the rules of the Code, Courts have power to pass the necessary orders for the addition or substitution of parties (1932 C. 783; 1929 M. 268, 44 M.L.J. 322 and 38 M. 406, Rel on) 1933 A.L.J. 1512. An appellate Court has power to implead only such persons as parties to the appeal as were parties in trial Court and were not made parties to appeal but not those who were complete strangers to the suit 56 I.C. 726=31 C.L.J. 130. 67 I.C. 10=34 C.L.J. 405. Court cannot use its inherent powers to extend the scope of a provision which places limitation on it. Appellate Court has therefore no jurisdiction to implead a person against whom an appeal has abated as such a person is not one "interested in the result of the appeal" within O. 41, R. 20. 41 L.W. 111=1935 M. 175. Powers of a Court to implead parties under S. 151 are circumscribed by O. 41, R. 20 and it is only in exceptional circumstances that the inherent powers under S. 151 could be invoked. 73 I.C. 136=1923 L. 490. Also 8 L. 161 (power of High Court to transpose parties) 1927 C. 37.

AFFIDAVIT.—Power to direct particulars to be put in affidavit or petition 40 C.W.N. 913.

ALTERATION OF ORDER PASSED BY PREDECESSOR.—It is not open to a Judge in the exercise of his inherent powers to modify or alter an *ex parte* order of his predecessor passed in the execution proceedings, when the modification or alteration of the order, more than three years after the order was passed, far from furthering the ends of justice would work serious injustice to the interest of the decree-holder 158 I.C. 705=1935 O.W.N. 1091.

ARBITRATION—POWER TO SUPERSEDE ARBITRATION.—There is an inherent jurisdiction in Court to intervene and supersede the arbitration if the case fell under S. 151, viz., where such an order is necessary for the ends of justice or to prevent the abuse of the process of the Court. Where after a reference to arbitration has been made on the agreement of the parties, it is found by the Court that two out of the three arbitrators forming the tribunal are closely connected with one party and that the other party were unaware of the relationship, the circumstances of the case bring the matter within S. 151 and the Court has power to supersede the arbitration 4 A.W.R. 1468=153 I.C. 505=1935 A.L.J. 72=1935 A. 281, 41 L.W. 261=68 M.L.J. 537. The Court cannot revoke its order of reference to arbitration in the exercise of its inherent power under S. 151, C.P. Code. Such a power does not exist apart from the provisions contained in Sch II, C.P. Code 167 & C. 171=1937 A.L.J. 29=1937 A. 141 (F.B.)

See also 1932 A. 655, 41 L.W. 261=71 M.L. 1. 648.

AWARD.—Award under Co-operative Societies Act—Mistakes in—Correction—Jurisdiction of Civil Court executing award to direct rectification See 40 C.W.N. 89.

COMMISSION.—Order of executing Court regarding commission payable to auctioneer—Interference by High Court. See 1935 L. 956.

COMPROMISE DECREE can be set aside in exercise of inherent powers of Court on the ground that the party had not consented to the terms mentioned in the decree. O.W.N. 1207. See also 1933 P. 135, 57 C. 1143=1931 C. 51. Where a compromise decree is passed by a fraud practised upon the Court, it is within the inherent power of the Court to correct its own proceedings. But where a consent has been obtained by the practice of fraud between the parties, the remedy lies by way of suit and not by way of an application. 13 P. 165=148 I.C. 947=15 Pat.L.T. 103=1934 P. 229, compromise effected on behalf of pardanashin lady, by fraud—Court can set aside—No appeal lies. 146 I.C. 933=1934 P. 41. A compromise decree under O. 23, R. 3, could be passed only after there has been an order that the compromise be recorded. This is not a purely formal matter, but is a question of substance. Where, therefore, a Court passes a decree on the basis of a compromise without a formal order for recording the compromise the decree is irregularly passed and such a decree can be set aside on an application under S. 151 14 P. 356=10 Pat.L.T. 536=1935 P. 439.

CONTEMPT OF COURT.—The effect of the section is to give absolute power to Courts to summarily punish contempt by fine or imprisonment 50 I.C. 981=23 C.W.N. 389, 86 I.C. 650=1923 M. 92.

CONSOLIDATION OF SUITS.—See under Applicability of section (*supra*).

CONVERSION OF ONE PETITION INTO ANOTHER.—The petition under S. 151 can be treated as one for review. 43 M.L.J. 290=70 I.C. 425. Restoration application of an application under O. 9, R. 9 dismissed for default can be treated as one for review 54 C. 405=103 I.C. 69=1927 C. 534. High Court can condone misapplications of special provisions; it can convert application for revision into memo of appeal. The High Court's power cannot be exercised if law is not complied with as regards limitation and Court fees 48 I.C. 779.

CONVERSION OF SUIT INTO APPLICATION.—Where legislature provides a procedure of a summary nature by an application without expressly barring any suit in that behalf, it is always within powers of Courts, when instead of application a suit is filed, to treat the suit as an application and decide accordingly 165 I.C. 715=40 C.W.N. 856=1936 C. 342.

DEFENCE, STRIKING OFF.—Court can in exercise of its inherent powers strike off the defence in a fit and proper case. Where

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such order was justified by repeated defaults of defendant. It cannot be interfered with in review. 54 L.W. 864=61 M.L.J. 477.

DISMISSAL FOR DEFAULT.—The Court in a proper case can re-admit an appeal dismissed for default. 45 B 648=60 I.C. 919. See also 1927 C. 76. Where the next friend of a minor appellant is of unsound mind, the minor's absence at the hearing cannot be treated as default and his appeal will be re-admitted by Court in exercise of inherent powers. 45 B 648=60 I.C. 919. A partition suit is not liable to be dismissed for default after the passing of the preliminary decree. 47 M.L.J. 441, relied on. An order by the trial Court dismissing a suit for default after the passing of the preliminary decree cannot be treated as one made under the provisions of O. 9 and although the application to restore the suit has been made under R. 9 it is not in fact governed by the provisions of that Chapter at all but must be deemed to be an application made under S. 151 and, therefore, no appeal lies under O. 13, R. 1 (c) against the order of the Court dismissing such an application. 30 L.W. 979=54 M.L.J. 781. When the application itself shows that it is one for the restoration of a suit, justice should not be denied, simply because there is a technical objection to the word "review" which has been employed in the application. As the Code cannot be said to be exhaustive, it is not necessary in every case to have the support of a section of the Code to pass an order not expressly or impliedly forbidden which is required in the interests of justice. 1 L. 339=58 I.C. 748. Where on the hearing of an application under O. 9, R. 13, the Court finds that no sufficient cause for non-appearance has been made out, it should dismiss the application. The Court has no power in such a case to restore the suit on other grounds under its inherent powers. 62 C.L.J. 268=39 C.W.N. 894. Restoration of execution application dismissed for default. 99 I.C. 954=1927 M. 355=52 M.L.J. 123; 50 M. 67=26 L.W. 878. See also 1935 R.D. 318, 26 A.L.J. 382=117 I.C. 372; 119 I.C. 494, 13 L. 761=142 I.C. 686=34 P.L.R. 70=1933 L. 99, 4 A.W.R. 1025.

COURT-FEE, REFUND OF.—In cases which are not governed by Ss. 13, 14 and 15, Court-Fees Act, the High Court has inherent powers to direct a refund under S. 151, of excess Court-fee, where Court-fee has been paid in excess of the amount payable, and obvious injustice has been done. 163 I.C. 222=39 C.W.N. 1074=1936 C. 347. See also (1937) 1 M.L.J. 21. Where the Court has inherent power to order the refund of excess Court-fees, a direct order for a refund ought to be passed. If the Court does not possess jurisdiction to pass an order for refund, it is not its duty or function to issue eleemosynary recommendations for the purpose of enabling a litigant to present a memorial *ad misericordiam* to the Revenue Authorities. [55 M. 641 and 57 M. 542 (544), Disapp.] 14 R. 173=163 I.C. 340=1936 R. 208 (F.B.). Where

a Court-fee has been paid by a litigant of a larger amount than that exigible under the Court-Fees Act, the Court has inherent jurisdiction to order that the excess Court-fee be refunded *ex debito justitiae*. But where a specific Court-fee exigible under the Court Fees Act has duly been paid, and in the Act express provisions are inserted setting forth the circumstances in which a Court fee can be refunded, the Court has no jurisdiction in the exercise of its inherent powers or otherwise than as therein prescribed to order that the Court fee chargeable and paid shall be refunded to a litigant. Where, therefore, an order of remand passed by the Court does not come within S. 13 of the Court-Fees Act but is one purported to have been passed under its inherent powers, the Court has no jurisdiction either under the Court-Fees Act or in the exercise of its inherent powers to refund the Court-fee paid by the appellant. 14 R. 173=163 I.C. 340=1936 R. 208 (F.B.). See also 154 I.C. 460=1935 Pesh. 8. Plaintiff rejected for deficiency in Court-fee—Plaintiff making good the deficiency and asking for restoration of suit—Power of Court to treat Court-fee already paid as part of Court-fee. See 1935 A.L.J. 1127=1935 A.W.R. 1129=1935 A. 985. Refund of unspent process-fee or custody fee deposited in respect of attachment of moveables. 1937 C. 86. The High Court can under its inherent powers assist an appellant who has erroneously paid excess Court-fee on his memorandum of appeal. What it does judicially in such a case is to decide what is the proper Court-fee and then issue a certificate to the party that excess Court-fee has been levied. It still lies with the Revenue Authorities to decide whether or not they will refund the excess in the circumstances. (Case-law reviewed.) 1932 M. 438=139 I.C. 131=62 M.L.J. 541. See also 7 R. 88=117 I.C. 585. A Court remanding a case under S. 151 is equally competent to order a refund of Court-fee paid on memorandum of appeal. 136 I.C. 559=1932 L. 219, 141 I.C. 400=1933 L. 135=34 P.L.R. 270; 151 I.C. 721=40 L.W. 372=1934 M. 643. Court has the power under S. 151 to grant a certificate for refund of Court fee, in cases not covered by Ss. 13, 14 and 15 of the Court-Fees Act. The discretion of the Court is not barred by the fact that excess fee was paid by the mistake of party and not in consequence of any direction by Court. (55 M. 641, Foll.) 38 L.W. 983. 142 I.C. 633=34 P.L.R. 1=1933 L. 351. See also 152 I.C. 215=38 C.W.N. 185=1934 C. 615, 149 I.C. 1191=39 L.W. 762=1934 M. 409=67 M.L.J. 99. Court has no power, after appeal has been disposed of, to recover deficient Court-fee on memorandum of objections [140 I.C. 191; 46 C. 520; 82 I.C. 588, 51 I.C. 756 (F.B.), Foll.] 142 I.C. 25=1933 M. 321=1933 M.W.N. 330=37 L.W. 300. Provision of S. 151 cannot be invoked in order to grant refund of Court-fees, where it is not allowed by the Court-Fees Act. The Court-Fees Act is a self-contained enactment and exhaustive on the subject. There are

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certain provisions in that Act whereby a refund of Court-fee is mandatory and there are others in which a refund is permissive. To allow refunds under any other circumstances would be in effect adding to the Court-Fees Act, and therefore no refund can be granted when a remand is made under S. 151. 1935 Pesh. 8 If application for refund of Court-fee is made after long unexplained delay, it is open to Court to refuse certificate to apply for refund to Government. 11 Pat L T 476

DEFAULT, which does not amount to waiver, acquiescence or abandonment of claim or has not created rights in the opposite party is no ground to deny relief under this section. 61 C 711

EVIDENCE.—S 151 is not to be lightly invoked or intended to permit a Revenue Court to decide a case against the weight of evidence, even if it appears equitable. 1936 R.D. 457

EX PARTE DECREES AND ORDERS.—High Court can under the section or under its inherent jurisdiction set aside an *ex parte* decree which is shown conclusively to be irregular by the record. 38 I.C. 673=15 A.L.J. 24. See also 16 I.C. 677=34 A. 518; 133 I.C. 65=1931 S. 97 (F.B.) *Contra* 101 I.C. 617=1927 L 312 *Ex parte* decree against lunatic.—Objection by sons of judgment-debtor in execution.—Court has power under S. 151 to reconstitute the suit and award relief. 34 C.W.N. 989 Court which has on an *ex parte* application granted an extension of time to file an appeal can revoke or alter its order before the appeal is admitted. 45 I.C. 725 Where *ex parte* application is made by a party for granting extension of time for filing an appeal it is the duty of the party to show to Court the points of law or fact in his favour as well as against him. 45 I.C. 725 There is no inherent power in Court to set aside an *ex parte* decree by summary procedure and the power of the Court in that connection is limited to the circumstances mentioned in O 9 R 13. 43 M. 94=37 M.L.J. 599, 27 I.C. 812; 98 I.C. 658=1927 N 95, 1930 C 387, 34 C.W.N. 222, 1930 N. 48 Inherent power should be exercised not capriciously or arbitrarily but *ex debito justitiae* on sound general principles and so as not to conflict with the intentions of legislature. 43 M. 94=37 M.L.J. 599, 100 I.C. 518=1927 C 420; 32 C.W.N. 10. Where a definite period of limitation has been prescribed by Art. 164 of the Limitation Act for an application to set aside an *ex parte* decree, Court would not be entitled by purporting to act under S 151 in effect to extend that period. 65 I.C. 341=1 P 277. A Court can set aside an *ex parte* decree passed by an oversight. 60 I.C. 368=2 Pat L J 251. See also 62 I.C. 113=2 Pat. L J. 270 Court can restore to file a suit in which an *ex parte* decree was obtained against a minor without a guardian, which decree was subsequently declared void. 106 I.C. 575.

EXECUTION OF DECREE.—The provisions of

S. 151 should not be applied to execution proceedings. 1936 Pesh. 115. When execution is delayed Court can award mesne profits. 63 I.C. 43 Power to grant time to judgment-debtor for payment of decree amount. 84 I.C. 134=48 M. 494; 31 C.W.N. 653. A Court has authority to set aside its order confirming a sale in favour of a person other than the bidder and there can be no question of limitation. 30 I.C. 230 Where an Act does not provide any clear procedure for execution of an order passed under it the inherent powers of the Court to execute it on its own order should be invoked. 114 I.C. 890=1929 A. 211 See also 39 C.W.N. 1144=39 P.L.R. 218=1937 L 29, 161 I.C. 93=1936 P. 176 (Power to recall order in execution made *ex parte* without notice.)

EXECUTION, STAY OF.—High Court has inherent power to stay execution in view of an intended appeal to the Privy Council. 40 C 955=18 I.C. 207. See also 7 L.L.J. 457 89 I.C. 588. Insolvency Court has no power under S 151 to stay execution proceedings in another Court. 32 I.C. 897=3 L.W. 250. High Court has an inherent jurisdiction to stay any suit which is an abuse of the process of the Court. 27 I.C. 455=27 M.L.J. 645 See also 75 I.C. 419=1923 L 514, 40 C 955=18 I.C. 207. High Court has inherent jurisdiction as a Court of Appeal where appeal is made to it, to stay proceedings in lower Court as ancillary to its powers of reversing the order of the inferior Court. 1919 P 145=52 I.C. 185 Court has inherent power to stay confirmation of sale. 1930 L. 793 (2)

EXTENSION OF TIME.—Extension of time cannot be granted for payment of money under a decree in a suit to set aside a mortgage, the plaintiff should not be allowed to calculate his month from the date he got the copies of the decrees. 42 A. 639=57 I.C. 16 See also 1931 A.L.J. 1049=1931 A. 727 (F.B.). (Extension of time for tendering security in an application under S 17, Provincial Small Cause Courts Act.—Power of Court to extend time in exercise of its inherent powers.) In a partition suit the Court has inherent power to fix time for filing objection to the report of the Commissioner and to reject objections filed afterwards. 50 I.C. 152=17 A.L.J. 498 Section 151 does not give Court any new powers and it cannot extend the time fixed by Art. 163 of the Limitation Act for setting aside dismissal for default. 55 I.C. 55 Courts cannot extend the time for making deposits prescribed by the Code under their inherent powers. 33 I.C. 996=3 L.W. 271 See also 1933 A. 157 In a suit for specific performance of a contract of sale, neither the original nor the appellate Court has jurisdiction to extend the time fixed by a decree for performance of contract. 19 M.L.T. 137=32 I.C. 401=3 L.W. 29. But see 32 I.C. 509=9 Bur L.T. 83. Time fixed by a decree cannot be extended under S. 151. That section is not meant to empower the executing Court to alter the decree, or in any way affect its finality. 49 I.C. 840 Court has power under S 151 to

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extended on an application made after the default for payment of money, if it is necessary for the ends of justice, in a suit for specific performance of a contract to sell 32 I C 509. So also in cases where as a condition for staying delivery of possession in execution, judgment debtor was ordered to pay some money on a certain date every year 144 I C 903=1933 M 563=38 L W. 201=65 M L J. 138. But not where the default is wilful and deliberate 1933 M 879.

EXPUNGING FROM RECORD.—Where judgment of a Subordinate Court has not been brought before High Court on appeal or revision High Court has no power to expunge adverse remarks on the character and credibility of a witness from the judgment 66 I C 1005=44 A 401. High Court has power to expunge irrelevant and scandalous matters in the judgments of Subordinate Courts on an application by a person not a party to the proceeding. The power must be exercised in extremely exceptional cases and with caution 47 I C 981=35 M L J 368. See also 33 I C 608=3 L W 283. Where remarks made by a Judge in a judgment cast a slur on a Government department but was not required for the disposal of the main case and there was no justification for making such remarks, *held*, that those remarks should be ordered to be expunged from the judgment 146 I C 215=34 P L R. 919=1933 L 711.

FRAUD.—Court has inherent power to investigate questions of fraud for preventing injustice. 48 I C. 135=20 Bom L R 929. Not only has Court the power but it is its duty to set aside a consent decree obtained by fraud practised upon the Court when apprized of it. It is an inherent power of every Court to correct its own proceedings when it has been misled 27 I C. 628=19 C W.N. 419. See also 1923 P 197=2 P 731, 6 P. 108; 1 Luck 341. But see 23 L R 79=100 I C 220=1927 N 212; 33 C W N 883=1929 C 470, 1929 N 111. Court can vacate an order obtained by manifest fraud on it, in the exercise of its inherent power 25 I C 213=27 M L J 172.

MISREPRESENTATION.—Order obtained by misrepresentation of facts can be vacated by the Court in exercise of its inherent powers. 131 I C 717=1931 S 111.

MISTAKE.—See under "*Amendment*," *supra*. Court has inherent power to correct its own order passed on a mistaken basis 56 I C 4=31 C L J. 48. See also 19 I C 916=19 C L J 251, 39 C 265=12 I C 151, 47 A. 546=87 I C 225; 38 M. 387=25 M L J. 198; 7 R. 88=1929 R. 158. Where rights of third parties have not intervened, it is not only in the power, but it is the duty of the Court to relieve a party of the injury done to him by it, by reason of its mistakes and defaults or mistakes or defaults of its officers inadvertently committed. 63 C. 1079=40 C.W.N. 680=1936 C. 343. Clerical error in plaint giving rise to error in decree and judgment. 1934 L. 561 (1); 144 I C 901=35 Bom L R 365=

1933 B 200. Judgment pronounced without hearing parties 151 I C. 899=40 L.W. 34=1934 M 506. Order passed under misapprehension of facts 148 I.C. 614=1934 A L J. 862=1934 A. 287. Error apparent on the face of record 1933 M W N. 1309. Court possesses inherent power to correct a mistake that would render infructuous an agreement between the parties which had been approved by Court and made the basis of the decree. Where in a suit for partition a compromise was arrived at on the basis of a map which allowed the plaintiff a passage of 11 inches to his house and none was aware at that time of the mistake and subsequently on an application made to the Court, *held*, that the Court had the power to correct the mistake and was justified in allowing the plaintiff a passage of two feet. 1933 A 608=1933 A L J 509. For the revocation of an erroneous order no sufficient cause other than the irregularity of the order itself need be considered, and the Court has inherent power to rectify its own errors inadvertently committed 145 I C 607=1933 A L J 1318=1933 A 517. See also 40 C.W.N. 1229 (Power of Insolvency Court to rectify omission). Where property is wrongly described in a plaint in a mortgage suit and the mistake is repeated in the preliminary and final decrees, without being noticed either by the parties or by the Court, the Court has ample powers to amend the plaint, the decrees and the judgment and correct the mistakes 153 I C 378=1935 O W N 31=1935 O. 92. But see also 151 I C 959=1934 P. 493, 8 Luck. 734=1934 O 352; 147 I C 633=1934 A 100. But all persons not parties to the action but who have acquired interests on the existing record acting in good faith and being purchaser for valuable consideration without notice of the existence of matters made clear by the amendment, are not prejudiced thereby without hearing by the Court determining that they have no equities as entitled them to be exonerated from the effect of the amendment. 39 C. 265=12 I C 151, 47 A 304=84 I C 746. Where order of a Court fails to give effect to its intention it is the duty of the party to have it corrected. Court has power to do so. 40 M 259=32 M L J 477 (F.B.). In order to set aside the decree passed in pursuance of compromise by a lady whose signature was obtained by mistake or fraud of an agent, the remedy is by way of review petition 43 M L J 290=70 I C 42. Court has inherent power to rectify mistakes in judicial orders arising from the ignorance of the Court or of its subordinate officers 69 I C 112; 39 I C 763=2 Pat L J 861. See also 1935 A.L.J. 1076=157 I C 277=1935 A 914. (Plaint naming X as defendant instead of Y—Application for amendment, if and when can be allowed—Procedure).

GUARDIAN AD LITEM.—To appoint a *guardian ad litem*, without issuing notice to the natural guardian is illegal and the Court has inherent power under S. 151 to correct the errors or mistakes committed by itself 31

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M L T 215=70 I C 867 Guardian giving up relief against one defendant—Court can re-open on application by minor 22 L W. 629

GUARDIAN AND WARD—District Judge has ample powers under S. 151 to recall the records of an order made under the Guardian and Wards Act on being apprised that the order was made on a misrepresentation of facts 26 I C 275=19 C W N 84

IMPLEADING OF PERSON AGAINST WHOM APPEAL HAS ABATED—The Court cannot use its inherent powers to extend the scope of a provision which places limitation on it. An appellate Court has therefore no jurisdiction to implead a person against whom an appeal has abated as such a person is not one "interested in the result of the appeal" within O 41, R. 20 156 I C 110=41 L W. 111=1935 M 175

INJUNCTION—Code is not exhaustive. Court possesses inherent powers to act *ex debito iustitiae*. A person asking Court to exercise its discretionary jurisdiction must make out a strong case and must show that there is no other remedy open to him by which he can protect himself from the consequences of the injury complained of. 55 I C 403=2 L L J 283, 140 I C 843=34 P. L R 51=1933 L. 33 See also 140 I C 843, 1925 L 242, 1925 L 618, 9 L L J 536, 164 I C 16=1936 L 567 Court will issue a temporary injunction if plaintiff shows that injunction is an appropriate relief and unless defendant is forthwith restrained irreparable injury will follow 55 I C 403=2 L L J 283, 24 L W 854=1927 M 210 High Court has inherent power to order an injunction against a person living within the jurisdiction of another High Court when the circumstances so require 57 C. 1280=130 I C 252=1931 C. 279 *P* sued for a declaration that *D* was not entitled to possession of property. According to *P*'s own showing, he had no present right to possession of this property and he would at the most be declared to be entitled to a certain charge on it after the death of a widow. *D* had, on the other hand, purchased the property in execution of a decree *Held*, that, under such circumstances, temporary injunction restraining *D* from obtaining possession of property from purchaser cannot be granted by resorting to S. 151 150 I C. 15=36 P L R 142=1934 L. 79 (2). *P* deliberately chose the Civil Court as the forum for the determination of her claim against *D*. Having done so and having in the process of negotiations for settlement with *D* obtained from *D* a sum of money, he gave the go-by to the Civil Court and attempted to recover money alleged to be due to him under the agreement which was the subject-matter of litigation, by summary procedure under the District Local Boards Act. Thereupon *D* applied for an interim injunction *Held*, that though the application did not fall under O. 39, Rr. 1 and 2, the equities were entirely in favour of *D* and as such the Court should exercise its inherent

power and issue interim injunction to prevent abuse of the process of Court. 1934 S 179.

INSOLVENCY—Insolvency Court has the same jurisdiction that the ordinary Courts of law possess under the Code to correct any mistake either of a clerk or the parties themselves upon a question of fact when a mistake is proved. 51 I C 55 Decree-holder obtaining garnishee order against Official Assignee—Latent paying into Court dividend payable to creditor in insolvency—Decree holder withdrawing amount from Court—Proof of claim of creditor subsequently expunged—Application by Official Assignee for refund—Powers of executing Court 13 R. 722

ISSUES—Court has inherent power to frame issues going to the root of the matter in controversy between the parties at any stage of the case 36 M. 607=23 M L J. 321

JURISDICTION AND PROCEDURE—Court is not justified in applying its powers of inherent jurisdiction to introduce a new form of procedure for which no provision is made by law 1922 C. 1 (1) Suit dismissed under O 17, R. 3—Appeal preferred—During pendency of appeal application for restoration allowed—Appeal dismissed for want of subsisting decree—On revision preferred by defendant order restoring suit was reversed—Application made to revive appeal—Appeal could be revived 122 I C 402=1930 A. 100 Even if an order has been passed it can be recalled if it transpires that it has been made without jurisdiction 20 C L J. 213=26 I C 275 Apart from the power to correct clerical or arithmetical errors or to review a judgment, a Court has no inherent power to alter an order passed in Court 74 I C 110=1924 P 136 The Court can under its inherent powers postpone passing a decree in pursuance of a compromise. 9 P 314 Jurisdiction—Recalling an order passed by the predecessor is beyond jurisdiction and invalid. 69 I C 742=1922 P. 204, 1929 M W N 140

LIMITATION—Inherent powers of Court cannot be invoked to override or evade the Law of Limitation. 1932 O 220=138 I C 149=9 O W N 430, 62 C. 61=156 I C 126=1935 C 336, 13 R. 595=1935 R. 466; 15 P 299=160 I C 976=16 Pat L T. 813=1936 P 48. See also 142 I C 185, 9 I C 246, 1 L 363=58 I C 789; 57 I C 15, 47 C L J 87, 37 L W 48, 142 I C 185; 1935 L 60.

MAINTENANCE—Court has got inherent power to make an interim order of maintenance during the pendency of partition suit 40 L W 853=153 I C. 329=1935 M. 105

PARTITION—When the decree of the lower Court directs partition in an impossible manner, Court has power to set it right in exercise of its inherent power 27 N L R 347. Court has got power to order payment of interim maintenance pending partition suit 40 L W. 853

RECONSTRUCTION OF RECORDS—Where owing to accident or other cause the records

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of a Court of Justice have been destroyed or lost Court has an inherent power to reconstruct its records. Appellate Court has the same power to reconstruct the records of Court from which an appeal lies to it. 46 M 679=44 M L J 673 (F B) Where a judgment has been lost the proper course for the Judge is to write it from memory and from materials before him and place it on record 38 M 488=25 M L J. 445 If any credible witness who read the judgment or the part of the judgment which contained the decision can depose to what he heard a decree can be drawn up. There is nothing in the Code to prevent that. 1923 R 113 Judge could not take evidence regarding the question as to the matter on which a Court of law based its judgment in order to consider whether there was any arithmetical or clerical error in the judgment and he must rely solely on what it contained in the judgment itself 100 I C. 309=1927 C 203

REFUND OF MONEY.—Court has inherent power to re-call money paid out of Court in a land acquisition case 21 I C 111=17 C W.N. 1057. See also 43 C 269=20 C W N 188. One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression "the act of the Court" is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case (1922 P C. 269, Rel. on) 1935 Sind 214. See also 163 I C 121=38 P L R 717=1936 L 212; 68 M L J 205 Where a decree is attached in execution of a decree and portion of proceeds is paid to one of decree-holders of decree attached before satisfaction of the decree of the attaching decree-holder, the Court can order refund under S 151 150 I C 174=36 P L R. 147=1934 L 142 Where a Court-sale of properties in a mortgage suit is set aside on the ground that there was no valid final decree the Court has no power to direct a refund of the poundage paid The most that could be done in such a case would be to give a certificate to the party that the case is a fit one for a refund and leave it to the revenue authorities to comply with it. That is no more than a recommendation 149 I C 1191=39 L W. 762=1934 M 409=67 M L J 99. Court has inherent jurisdiction to order refund of purchase-money allowed to be withdrawn by the auction-purchaser (39 I C 763; 1922 P C 269, Rel. on) 1933 L 850 During the pendency or appeal by petitioners an application was made for an injunction restraining the respondent from executing the decree in O. S 6 of 1911 and drawing the money in deposit and an order was made that he might draw it on furnishing security to the satisfaction of the Ramnad Sub-Court. The security was furnished and the respondent having bound himself by the execution of the bond to obey any orders that may be

passed for its refund withdrew the money After the termination of the appeal, the petitioners applied to the Subordinate Judge of Ramnad for restitution. Held, that S. 144, was inapplicable but as money had been improperly drawn out under the decree it was competent for the Court to rectify the mistake and order restitution in the exercise of its inherent jurisdiction 57 M. 849=30 L W 574=150 I C. 934=1934 M 320=67 M L J 49 The new Code contains no provision for the refund of amount deposited as security, Courts can deal with them under S 151. 22 M. L J 190=12 I C 692 Section 151 empowers the Courts to order refund of Court-fees which was paid by mistake 3 P L J 452=46 I C 271, 1930 A. 471 (1)=122 I C. 188, but not Court-fees paid on an appeal dismissed as not maintainable 6 P 599=105 I C 740

RES JUDICATA—Inherent powers of a Court ought not to be exercised against the express provisions of a statute An application which is barred both by the law of limitation and by the principle of *res judicata* cannot legally be entertained or granted by a Court in the exercise of its inherent powers 1935 L 60

RESTITUTION—As to the power of Court to order restitution, see S 144, *supra*. See also 69 M L J 84, 43 L W 773=1936 M. 636, 1937 M 95, 39 P L R. 210=1937 L. 29, 58 C. 1070=134 I C. 906=35 C W N. 483; 35 C W N 105=53 C L J 49=134 I C 1185=1931 C 779 (2), 1933 A L J 60, 34 C W N 746=130 I C 236=1931 C 62. Execution Court has inherent powers to make restitution orders in cases that may not fall under S 144, it has powers to direct refund of money paid out of Court 35 C L J 53=64 I C 854, 21 C L J 624=30 I C 49, 24 I C 384 Under S 151, Court can apply the principle of S 144 to cases to which it would not ordinarily apply and can order such restitution as may be necessary 63 I C 43. See also 14 I C 456=15 C L J 187, 42 M L J 308=67 I C 369, 42 M L J 473=67 I C. 546, 149 I C 365=14 Pat L T 753=1934 P 150, 150 I C 924=1934 L. 322, 36 P L R. 119=1934 L 1023, 60 C L J 44 Where the High Court passed an order as to mesne profits pending disposal of appeal, the order could be given effect to by the executing Court. 103 I C. 328=1927 L. 346 But S. 151 cannot enlarge the scope of S 144 and cannot convert an application for relief which has nothing to do with restitution into an application for restitution 34 I C 774=4 L W 400. Appellate Court can direct refund where a Subordinate Court mistakenly orders payment to a decree-holder when that order is set aside 21 C L J 624=30 I C 49. Application by the judgment-debtors for compensation during the period they were kept out of possession of their property under an execution sale which they subsequently got set aside does not fall within S. 144 but would be covered by S. 151. 2 Pat L J 206=39 I C 653, 1930 P. 280. A defeated claimant under O 21, R 58, whose properties have been sold in execution of the decree, consequent on his failure to comply with

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Court's order to pay one year's interest as a condition for stay of execution, is nevertheless entitled to apply for restitution under this section from the auction-purchaser, when he ultimately succeeded in appeal from the dismissal of his suit to establish his title by the trial Court. 1933 P 564 (2). Where decree is nullity, as when suit was instituted against a dead man, and execution was levied thereon, Court has inherent power to rectify its mistake and to allow restitution of money paid in execution. 146 I C 564=38 L W 874=1933 M 888 (1). It is not only permissible but imperative for the Court to order restitution in necessary cases. 55 A 221=144 I C. 492=1933 A I J. 60=1933 A 218. An order for restitution of moneys profits passed on an erroneous view of 11th Court passed on an application for stay is open to appeal. 140 I C 301=34 P L R 938=1933 L 485. Petitioners paid money to avoid attachment of their movables in execution of a decree. On their objections, the execution proceedings were set aside and they applied for refund of money paid under S 151. The Court refused the application, but lower appellate Court allowed it. In second appeal it was contended that lower Court had no jurisdiction to entertain the appeal as the order of lower Court was passed under S 151. Held, that even assuming that no appeal lay, High Court was competent to revise the order of the execution Court and that it was equitable that the benefit received by the decree-holder under the execution proceedings should be restored to the petitioners when those proceedings were set aside. 149 I C. 1105=1934 L 108.

REMAND.—Remand (*see also* O 41, Rr 23, 25). 19 A L J 553=63 I C 501, 1925 P 760, 87 I C 575=1925 C 1157, 1930 L 224. Inherent power of appellate Court to remand, when exercisable—Comparison of old and new Code—Power wider under the new Code than under the old Code. *See* 11 L L J. 507=122 I C. 473=1930 L 224. *See also* 134 I C 495=1931 L 299, 37 Bom L R 241=1936 B 222, 154 I C. 859=1935 P. 49, 37 Bom L R 203=1935 B 216; 156 I C 958=41 L W 758=1938 M 715; 156 I C 253=1935 L 555; 37 Bom L R 241; 1935 P 68, 60 M L J. 475=1931 M. 791, 133 I C. 127=1931 L 307, 1933 L. 157=143 I C 685, 1935 P 49, 1935 P. 68. Case where otherwise irreparable injury would result to a party. 122 I C 485=1930 L 441. Where both the primary and the first appellate Court gave a decision in a case without understanding, it is not a proper decision and the High Court should in second appeal remit the case for re-trial. 19 A L J. 553=63 I C 501; 103 I C 854=1927 L 480. An order refusing an adjournment is appealable and the appellate Court has power to set aside the decree and order a re-trial if the adjournment had been wrongly refused. 63 I C 478=23 Bom L R. 769. Appellate Court has the power to order a re-trial and this power is to be adopted in exceptional circum-

stances where the Code does not provide adequate procedure. 64 I C. 599. *See also* 1936 N 140; 1935 P pp. 49 and 68; 139 I C 126=33 P L R 487=1932 L 443; 35 C L J 345=70 I C. 547. Appellate Court has power to make an order of remand under S. 151 when O 41, Rr 23 does not apply. 73 I C 915. *See also* 164 I C 1085=1936 P 491; 138 I C 202=33 P L R 285=1932 L 331, 1932 L 219=130 I C 559=33 P L R 54, 1933 P 706, 41 C 929=41 L C. 598, 100 I C 134=1927 M 335=52 M L J 40, 9 I C. 306 & 101 & 102 law. 52 I C 985=29 C L J 419=54 I C 54. 39 I C 651, 1930 L 441. But the power is one that must be cautiously exercised and there is no appeal from an order of remand in such a case. 3 Pat L J 253=43 I C 950, 50 I C. 834; 37 M L J. 535=53 I C 417, 70 I C. 665. Where the order of remand is held invalid the subsequent judgment after remand will also be invalid. 58 I C. 538. Whether an anomalous order of remand falls under the section. 45 C L J 537. Remand order by subordinate Court—Ultimate decree—Appeal from—High Court whether can go into validity of legal view taken in remand order. 27 A L J. 448=1929 A. 421, no appeal lies against an order of remand under S 151. 1929 L 245; 1929 M 205, 164 I C 1085=1936 P. 491. But *see* 117 I C. 678. The effect of an order of remand for a new trial is entirely to nullify the first decision and to re-open the whole case. This rule however does not apply where the remand is for the determination of a particular point. 14 Pat. L T 138=1933 P 220.

RESTORATION OF SUIT.—Section 151, cannot be invoked for the purpose of restoring to the file a suit which has been dismissed. 48 C L J 590=1929 C 153. But *see* 138 I C 248=34 Bom L R 714=1932 B 271, 13 L 761, 1936 L 759, 165 I C 268=1936 Pesh 191. Application to restore suit time barred—No inherent power to restore suit. 37 L W 48. Where owing to the death of a sole plaintiff before the hearing of the suit there was no appearance for him on that date, it is not competent to the Court to dismiss the suit for default of appearance under O. 9, Rr 8 and 9. If, however, the Court dismisses the suit inadvertently as for default, it has inherent power to set aside the dismissal. The legal representative of the deceased plaintiff could apply to be made a party within six months of the death under Art 176 of the Limitation Act. 35 A. 31=25 M L J 148 (P. C). Where a suit is dismissed for default of plaintiff in ignorance of the plaintiff's death and subsequently an application is filed by his legal representative to bring him on record, the Court can set aside order of dismissal and restore suit to file under S. 151 and substitute the legal representative's name for the deceased plaintiff. 31 N. L. R. 314=158 I C 602=1935 N. 189. *See also* 14 I C. 28; 87 I C 438 (Restoration without notice to the other party); 3 R 488; 89 I C 350=47 A. 878; 27 A L J 1183=1929 A 811. It is open to a District Judge acting under S. 114,

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under the inherent powers of the Court to reconsider an order granting letters of administration. 37 A. 380=29 I.C. 133. Restoration—Suit dismissed for want of letters of administration—Subsequent production of letters. 24 Bom L.R. 738=70 I.C. 910. Court has jurisdiction under its inherent power under S. 151 to restore a suit dismissed for default when it finds that it cannot be restored under O. 9, R. 9. 63 I.C. 440; 32 C.W.N. 811=1929 C. 17. *Contra see* (Regarding dismissal under O. 9, R. 3) 103 I.C. 620=1927 P. 369. (Regarding dismissal under O. 9, R. 8) 143 I.C. 158=1933 Pesh. 59. Restoration—Appeal—Act of Court not to prejudice party. 50 I.C. 4=31 C.L.J. 48. Appellate Court can restore and remand an *ex parte* decree. 32 C.W.N. 191. *See also* 134 I.C. 1169=1931 S. 153 (Power to restore to file appeal dismissed for default of payment of printing charges in time). Suit on P.N. dismissed as a result of decision in another matter between plaintiff and another where the plaintiff's title to the P.N. was negatived. As appeal was filed in the other matter, the Court observed in the dismissal order that the suit may be revived if plaintiff succeeds in the appeal. Plaintiff succeeded in appeal and applied under S. 151 for the restoration of the suit. *Held*, that it cannot be restored as there were other remedies open to plaintiff, add also as defendants were not parties to the appeal. 144 I.C. 103=1933 M. 485.

RESTORATION OF APPLICATIONS—Court can restore claim petition under O. 21, R. 58, dismissed for default. 148 I.C. 584=23 N.L.R. 176=1933 N. 176. But see *contra* 40 L.W. 665=1934 M. 699, 165 I.C. 268=1936 Pesh. 191; 1935 Pesh. 186. Application under O. 21, R. 100, if dismissed for default cannot be restored. 152 I.C. 24=59 C.L.J. 218=1934 C. 653. The Court has jurisdiction to entertain an application made by the judgment debtor for the restoration of his previous application made for setting aside the sale. 27 A.L.J. 1079=119 I.C. 851=1929 A. 721. *See also* 1931 A.L.J. 622=1931 A. 594. Court can under S. 151 restore an application made for the restoration of suit. 118 I.C. 669 (1)=1929 A. 624. 18 R.D. 203=15 L.R. 254 (Rev.). But not where that application itself was time barred, as the Court has no right to interfere with a lawful bar of limitation. 143 I.C. 240=37 L.W. 48=1933 M. 258=65 M.L.J. 193. Where application to set aside an *ex parte* decree is dismissed for default, an application for the restoration of such application can be made, under inherent jurisdiction of the Court. 1929 A. 906, 1933 R. 406. Execution applications can be restored under inherent powers. 13 L. 761=142 I.C. 686=34 P.L.R. 70=1933 L. 99, 4 A.W.R. 1025. Even when the decree was not passed by it but only transferred for execution. 145 I.C. 995=1933 A.L.J. 1032=1933 A. 783 (F.B.).

REVIEW.—Every Court has no inherent power to review an erroneous decision. 53 I.C. 39=30 C.L.J. 1. *See also* 1936 P. 506;

1936 Pesh. 213; 138 I.C. 121=1932 M. 223, 141 I.C. 188=1933 L. 169, 47 I.C. 917; 89 I.C. 946; 2 R. 659=85 I.C. 284, 31 C.W.N. 822; 32 I.C. 527. But see *contra* 141 I.C. 188=34 P. L.R. 88=1933 L. 169. A review if forbidden by code cannot be granted under S. 151. 42 I.C. 711=45 C. 519. The power of a Court to review its order exists only if it is conferred by statute, except possibly in cases where the order is made without jurisdiction. 63 I.C. 56=37 M.L.J. 162. The Court has power to review its order rejecting the petition under O. 7, R. 11. 2 P. 504=72 I.C. 629.

SECURITY FOR COSTS OF PROCEEDING.—The mere fact that a case does not fall within the four corners of O. 25 does not prevent the Court from acting under S. 151 *ex debito justitiae* and to prevent the abuse of its process if there be any occasion for it. It is somewhat difficult to hold that because the legislature has provided for security for costs being ordered in certain specified cases the legislature thereby intended to deprive Court of its inherent jurisdiction to make similar orders in cases not specifically provided for. 26 S.L.R. 21=140 I.C. 233=1932 S. 33.

SURETY BOND.—Respondent and another executed a bond for the production of certain movables attached in execution of a decree by the appellant. The terms of the bond provided that "if any default is made in respect of the properties, ourselves (the sureties) would be liable for all the loss that may be sustained thereby and for any amount that may be directed by the Court." On the failure of the sureties to produce the articles the assignee of the decree applied for the arrest of the second surety. *Held*, that although the case did not fall under S. 145 Court had inherent power to enforce the bond without recourse to a suit, the proper procedure would have been to get an order from Court, after notice to the sureties, that the bond is forfeited and then to proceed to execute that order. (42 A. 158 and 51 M.L.J. 239, relied on.) 145 I.C. 1004=1933 M. 722=38 L.W. 450=65 M.L.J. 507. *See also* 65 M.L.J. 342. Surety bond executed by plaintiff to the Court as condition for temporary injunction—Suit dismissed—Enforceability of bond in execution. *Held*, that (i) as the bond had been executed in favour of the Court and not in favour of any particular officer, it could not be assigned and sued on, (ii) S. 145 did not apply to a case where the executant of the bond was a party to the suit (iii) even if S. 74 was not applicable, the Court had, nevertheless, inherent power to enforce its bond without recourse to a suit. 56 M. 989=145 I.C. 1011=38 L.W. 385=1933 M. 691=65 M.L.J. 342.

MISCELLANEOUS.—Power to stay criminal proceedings pending civil suit. *See* 7 L.L.J. 73=88 I.C. 526. Court could order refund of the Court-fee apart from S. 15, Court-Fees Act. 7 R. 88=117 I.C. 585. The power to discharge and remove or to give directions to a Receiver are inherent in the Court which appointed the Receiver

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and the appellate Court has got all the powers of the original Court. 17 I C 583=1912 M.W.N. 1208 Assuming the Court has jurisdiction to allow an appellant to continue an appeal in *forma pauperis* it can be exercised only if on a perusal of the judgment and decree appealed from and the appeal memorandum the Court is of opinion that that decree is contrary to law. 38 M.L.J. 146=54 I.C. 761 See also 1933 A. 295. Objection to delivery of property not covered by the Court sale certificate is not covered by S. 47 or O. 21, R. 100 but by S. 151 1929 P. 391. See also 1931 L. 344 Appeal relating to part of decree only—Memorandum accompanied by copy of that part of decree only—Copy of unnecessary portions of decree—Power of Court to dispense with. 40 C.W.N. 1298

SETTING ASIDE SALE—There is no inherent power in a Court to set aside a sale outside the provisions of O. 21 1932 A.L.J. 392=1932 A. 403 Court cannot set aside a consent decree in exercise of its inherent powers under S. 151 26 S.L.R. 395 Excessive execution—Sale of entire property in execution of a decree for small amount—Power to set aside sale See 134 I.C. 695=33 Bom.L.R. 611=1931 B. 385 Power to set aside sale held in contravention of order of Court, see 37 L.W. 484 See also 46 M. 583, Foll.; 39 P.L.R. 364=1937 L. 72.

SETTING ASIDE EX PARTE ORDER—See 133 I.C. 65=1931 S. 97 (F.B.) Where no case is made out to satisfy O. 9, R. 13, it is not open to the Court to enlarge the rule by invoking S. 151 128 I.C. 94=34 C.W.N. 419=1930 C. 488

SET OFF—Order 21, R. 18 is exhaustive; and no set off other than those mentioned in R. 18 can be allowed. Inherent powers to allow set off cannot be invoked under S. 151 138 I.C. 284=33 P.L.R. 671=1932 L. 537—Execution—Set off—Equitable set-off Claim arising under same decree—Power of Court. 44 L.W. 34=1936 M. 626 Set-off not falling under O. 21, R. 19—Power of executing Court to entertain 1936 C. 409

STAY OF EXECUTION—Under S. 151, the High Court has power to stay execution of decrees which form the subject-matter of petitions for revision. 1934 L. 909 Where an appeal has been preferred to the Privy Council against a preliminary decree in a mortgage suit, the appellate Court has under S. 151 power to stay further proceedings with regard to preparation of final decree, when no loss would be caused to the decree-holder by the stay of proceedings, e.g., where the judgment-debtors offer security for the decretal amount with interest (1932 L. 271 and 40 C. 955, Rel on, 1919 A. 14, Ref.) 1934 L. 238=150 I.C. 47=36 P.L.R. 138 Where a claimant, after succeeding under O. 21, R. 58, fails in an action brought by the decree-holder to establish his right to sell the property in suit, the Court cannot order stay of execution either under O. 21, R. 29 or O. 41, R. 6 (2), but can order stay in its inherent jurisdiction. If however in such a case stay

is ordered without putting the unsuccessful claimant to terms, the Court acts without jurisdiction 152 I.C. 686=15 Pat.L.T. 783=1934 P. 637. See 54 A. 344 (Power of High Court to order stay of execution of final decree pending appeal from the preliminary decree), 1932 A. 238=136 I.C. 75 See also 1932 A.L.J. 582=1932 A. 655 Court can stay confirmation of sale 123 I.C. 824=1930 A. 131; 1932 A.L.J. 501, 135 I.C. 367=1933 A.L.J. 221=1933 A. 259 (F.L.) (Staying order of High Court suspending advocate from practice on such order being made the subject of appeal to Privy Council) See also 1931 L. 384 The Collector, as representing the Court of Wards which was in possession of the estate of certain Hindu widows, withdrew the suit brought by him just about the expiry of the period of limitation. A revisioner applied to the Court for being permitted to continue the suit. His application was dismissed, but on revision a Bench of the High Court allowed his application and directed that he be brought on the record as the plaintiff in place of the Collector and be permitted to proceed with the suit. Leave to appeal to His Majesty in Council from order passed in revision by High Court was granted under S. 109(c) and the appeal before Privy Council was pending. The defendant applied that the proceedings in the Court below should be stayed till the disposal of the Privy Council appeal, held, that High Court had no jurisdiction to do so. Held further, that even assuming it had such power under S. 107, Government of India Act, on merits no stay should be ordered. O. 45, R. 13, has no application where the party applied for the stay of proceedings in the Court below as distinct from the stay of execution of a decree. 150 I.C. 446=1934 A.L.J. 1191=1934 A. 585 See also "Execution, stay of" noted *supra*

STAY OF SUIT, pending second appeal 133 I.C. 222=53 C.L.J. 619=1931 C. 779; 1933 L. 50 See also 132 I.C. 257 As to stay of suit, see 163 I.C. 895=1936 P. 408 Where one party files a suit for recovery of possession and the opposite party files a counter-suit in the same Court for declaration of title against the first party, the proper action for the Court is that under the inherent powers of Court, the hearing of the possessory suit should be stayed until the question of title to the land has been decided. 1935 R. 355

TRANSFER OF SUIT on the ground that the Judge had expressed a strong opinion on the evidence can be ordered under this section 133 I.C. 876=32 P.L.R. 388 See also 1933 A.L.J. 1507; 12 R. 548=151 I.C. 573=1934 R. 265 (F.B.).

VAKALATNAMA—Court can condone or correct formal defects in a vakalatnama 12 Pat.L.T. 558=133 I.C. 171

APPEAL—No appeal lies against an order under the section 104 I.C. 331=1927 C. 867; 26 P.L.R. 130, 102 I.C. 28 (1)=1927 M.W.N. 286, 12 L. 602=134 I.C. 292=1931 L. 344, 140 I.C. 843; 14 Pat.L.T. 1; 43 L.W. 773=1936 M. 636, 30 S.L.R. 170=165 I.C. 305=1936 S. 166, 163 I.C. 121=38 P.L.R. 717=1936 L. 212;

152. Clerical or arithmetical mistakes in judgments, decrees or orders or

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1930 1. 401, 161 I C. 21, 158 I C. 998; 157 I C. 1083, 117 I C. 372; 1930 L. 468, 122 I C. 102, 12 P. 202=142 I C. 455=14 P.L.T. 1=1933 P. 139, 1933 P. 564, 1934 L. 349 But see 31 C. W.N. 290=100 I C. 735 (2)=1927 C. 285, 6 P. 381 Judge passing orders under O. 32, R. 6 that money deposited should not be withdrawn—Successor's order cancelling it is not appealable 1929 L. 884 An order under S. 151 can be challenged in appeal under S. 105 if it affected the decision of the case on the merits Otherwise the appellate Court is not bound to set it aside 147 I C. 1013=35 P.L.R. 266 =1934 L. 312 An order refusing to grant temporary injunction restraining the decree-holder purchaser from obtaining possession of property purchased is one passed under S. 151 and not under O. 39, R. 1, and as such no appeal lies from such order. 150 I C. 15 =36 P.L.R. 142=1934 L. 79 (2) An appeal against an order of remand under S. 151, C.P. Code, is not competent; but when the lower Court has not exercised the power vested in it under the law, it can be set aside 149 I C. 1050=36 P.L.R. 99=1934 L. 233. Where a suit is disposed of on the merits by the trial Court and on appeal the lower appellate Court remands the case for re-trial after amendment of plaint, the order of remand is one made under the inherent powers of the Court even though the appellate Court orders refund of Court-fee paid on the memo of appeal and the order is not appealable 141 I C. 400=34 P.L.R. 270=1933 L. 135

Review.—Where an order permitting withdrawal of the suit was obtained by practising fraud upon the Court by a defendant acting in collusion with a minor plaintiff's next friend and the Court subsequently vacated its order *Held*, that the Court had power under S. 151, C.P. Code, to vacate an order obtained by misleading and practising fraud upon Court and hence the order of the Court vacating its previous order was right 1937 S. 101

Revision.—Propriety of order under this section cannot generally be questioned in revision under S. 115, C.P. Code. 59 C.L.J. 389=1934 C. 780. But see 140 I C. 843=34 P.L.R. 51=1933 L. 73, 149 I C. 1105=1934 L. 108, 27 A.L.J. 1079=119 I C. 851=1929 A. 721, 1937 N. 151 Even if upon a strict construction of S. 115, High Court is precluded from interfering in revision with an order of a lower Court refusing to amend a decree, it is still open to it to interfere under S. 151 (1935 O.W.N. 968, Rel. on) 167 I C. 586=1937 O.W.N. 268=1937 O. 246

Sec. 152. SCOPE AND APPLICATION OF SECTION.—59 B. 158=154 I C. 329=36 Bom.L.R. 1217=1935 B. 75. According to the section an amendment can be made "at any time" 11 A. 267 at 288 (F.B.), 12 M.L.J. 96, 74 I C. 842=1924 A. 127; even after a lapse of years 60 C. 753=146 I C. 658=37 C.W.N. 500=1933 C. 627; 1937 C. 96 Decree not in conformity with judgment—Application for amend-

ment—Mistake due to office—Amended decree as taking effect from date of original decree, 30 P.L.R. 363=115 I C. 542=1929 J. 664. Distinction between this section and S. 151 See 102 I C. 124=1927 A. 585 A plea that the compromise was obtained by fraud, etc., is not open to a decree holder under a compromise decree in proceedings taken by the judgment-debtor to have the decree amended under S. 152 1929 L. 400 An application under S. 152 to amend the consent decree on the ground of fraud is entirely outside the section. 33 C.W.N. 883=1929 C. 470 Consent decree cannot be amended without consent of parties 57 C. 1143=1931 C. 51; 28 C. 574; 157 I C. 209=1935 Pesh. 104 An unintentional error or accidental omission in an order which incorrectly stated the effect of a decree on compromise can be corrected under this section. 139 I C. 903=13 Pat.L.T. 576=1932 P. 321; 165 I C. 799=1936 O.W.N. 1229=1937 O. 191 Section applies to amendment of decree and not to amendment of plaint or sale certificate 139 J.C. 491=1932 A.L.J. 784=1932 A. 587, 165 I C. 904 An application for amendment of a decree presented long after date of the decree is not sustainable 7 P.L.R. 1915=27 I C. 639=12 P.W.R. 1915, 37 P.L.R. 623 Where there is a long and unexplained delay in applying for correction of decree, the Court may reject the application 139 I C. 528=36 C.W.N. 97=1932 C. 563. See also 1937 C. 96 Clerical mistake can be amended even after decree has been affirmed by the Privy Council 36 C.W.N. 665 See also 15 N.L.J. 124 (Court has got a discretion in allowing amendment, and there is no absolute right in any party to have any clerical error amended) Where the property is wrongly described in a plaint in a mortgage suit and the mistake is repeated in the preliminary and final decrees, without being noticed either by the parties or by the Court, the Court has ample powers to amend the plaint, the decrees and the judgment and correct the mistakes 153 I C. 378=1935 O.W.N. 31=1935 O. 92 Amendment of decree is not to be allowed so as to affect rights of third parties. See 54 M. 184=129 I. C. 818=1931 M. 399=60 M.L.J. 721 See also 1933 C. 627=60 C. 753, 142 I C. 880=15 N.L.J. 124. The test for determination of an application for amendment under S. 152 is whether the decree is or is not in accordance with the intention of the Judge who decided the case 134 I C. 1009=1931 O. 422 Where the entry in the decree to which objection was made by the opposite party had been made deliberately by the Court on the application of the applicant after due consideration of the circumstances *Held*, it may have been right or it may have been wrong, but it was not an error that could be corrected by an order passed under S. 152 behind the back of the applicant without giving him an opportunity of being heard 158 I C. 618=1935 A.L.J. 1015=1935 A. 841; 157 I C. 209=1935 Pesh. 104. See also 15 L.W. 393=1922 M. 192

Amendment of judgments, decrees or orders.

errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any

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(Effect of allowing time for review expire); 33 C.W.N. 958=1929 C. 470; 115 I.C. 161 (2)=1929 N. 34; 157 I.C. 810. *See also* 99 I.C. 655=1927 M. 435. Correction of error is discretionary. 47 A. 44=82 I.C. 1030=1925 A. 187; 1932 C. 563. Amendment not to be refused to be considered on merits on ground of decree having been approved and signed by party's pleader. 2 O.L.J. 141=87 I.C. 333=1925 O. 373. S. 152 is confined to correction of clerical errors made by the Court itself and has no concern with the mistakes of parties. 51 I.C. 55, 50 I.C. 497=4 Pat.L.J. 205. *See also* 157 I.C. 209. Where sums awarded by High Court are those found by the trial Court, whose figures were not impugned in course of the argument in second appeal, it is not open to a party to raise these questions by an application for amendment of decree on the ostensible ground that it is not in conformity with the judgment. 149 I.C. 949 (1)=1934 A. 128. *See also* 44 C. 28=38 I.C. 584, 21 I.C. 540=7 S.L.R. 53. (Court can amend of its own motion), 51 A. 672=1929 A. 337. A Court can correct a clerical error in a plaint in whatever subsequent record it is repeated by slip or inadvertence or by mistake. 62 I.C. 652=14 L.W. 445. *See also* 139 I.C. 491=1932 A. 587. Where a property has been accidentally misdescribed in a mortgage bond and the mistake has been repeated throughout the proceedings to enforce the mortgage but where there is no doubt as to the identity of property mortgaged and the property sold at auction, Court has ample power to amend the decree. 151 I.C. 959=15 Pat.L.T. 805=1934 P. 493. A mistake in the plaint about Khasra number of the mortgaged grove repeated in the judgment and decree can be corrected by Court under Ss. 151 and 152. 8 Luck 734=150 I.C. 791=11 O.W.N. 550=1934 O. 352. *See also* 1935 O. 92. But an amendment allowing a correct description of the property which completely alters the plaint and the decree and also the deed on which the plaint is based cannot be said to be the correction of a clerical mistake in a judgment and cannot be allowed under S. 152. 147 I.C. 633=1934 A. 100. Section does not contemplate a practical reversal of Court's finding even on a formal issue. 24 I.C. 831=7 S.L.R. 186. Court of first instance can amend its decree when an appeal against it is pending. 11 A. 267 at 288, 44 I.C. 248=7 L.W. 8, 28 I.C. 377=17 M.L.T. 244. *See also* 25 Bom.L.R. 888=77 I.C. 171=1924 B. 166, 11 L.L.J. 37=1929 L. 317. Also a successor in office of Judge that passed the decree. 2 Pat.L.T. 290=63 I.C. 840. Where a decree is confirmed on appeal, the only Court competent to amend the decree is the Appellate Court and not the Court against whose decree appeal was preferred. 31 M.L.J. 438=(1916) 2 M.W.N. 249=35 I.C. 891 (24 M. 646, Dist.); 63 I.C. 799, 21 I.C. 540=7 S.L.R. 53; 31 I.C.

320; 28 I.C. 586; 43 I.C. 360, 23 A.L.J. 518=86 I.C. 396=1925 A. 556. S. 152 gives Court power to amend its decree if the amendment is merely of clerical or arithmetical mistake, even though its decree has merged in the decree of the appellate Court. 151 I.C. 568=1934 A.L.J. 937. Appellate Court can amend the decree of the first Court. 19 L.J. 375=62 I.C. 910. *See also* 46 I.C. 37=16 A.L.J. 451; 42 I.C. 970, 31 I.C. 478=1915 M.W.N. 914; 1927 R. 57. Amendment of decree after disposal of appeal, *see* 8 Pat.L.T. 143; 1929 M.W.N. 729=1929 M. 830. *See also* 15 N.L.J. 124. A District Court could not rectify an error in its final decree copied from High Court's preliminary decree. 31 I.C. 320. Errors in High Court decree must be rectified by High Court. 24 I.C. 283=1 L.W. 298. High Court can revise and set aside or modify a decree of a Small Cause Court. 58 I.C. 630; 1 L. 322. Court should not amend its decree except in accordance with this section. 8 A. 377. Courts in India can amend or vary decrees in order to bring them into accord with the judgments even if the amendments do not fall within S. 152. 52 I.C. 574=92 P.R. 1919 (37 C. 649, Ref.) *See also* 36 Bom.L.R. 1217=1935 B. 75, 31 I.C. 478=1915 M.W.N. 914. Clerical error in a decree must be rectified by an application under this section, and not by an application for review. 6 C. 22. An order setting aside an *ex parte* decree is a judgment within the meaning of S. 2 (9) and cannot be lightly set aside save as provided by S. 152 or on review. 145 J. C. 302=1933 O. 385. When order has been made in an improper form, Court can rectify it. 10 B. 104. Clerical errors copied from pleading can be corrected. 22 I.C. 774=1914 M.W.N. 107. *See also* 66 I.C. 693=8 O.L.J. 410, 74 I.C. 1020=1924 R. 104. (Omission of one of the mortgaged properties in plaint): 50 A. 859=1929 A. 147 (inclusion of stranger's property in the suit).

PRINCIPLES ON WHICH AMENDMENTS ARE GRANTED.—The object of empowering the Court to correct decrees and orders is to correct errors and if it may be shown that an alleged mistake falls within the class of errors dealt with by S. 152, it seems to put an unnecessary hindrance upon the power to do justice which the section gives, to say that the only mistakes of which the Court can take cognizance are those made either in the plaint or in subsequent documents in Court. There is nothing which limits the power of the Court under S. 152 to correcting errors, mistakes and omissions, which arise in the suit. Nothing prevents the Court from doing justice in an appropriate case where such mistake arose by reason of copying an erroneous document into the plaint. A suit for rectification of the instrument and decree is not the only remedy, an application for review may be appropriate, but that is no obstacle under S. 162 to an application. 131

of the parties.

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I.C. 6—1951 M. 260=61 M.L.J. 805 (10 C. 538, 1926 M. 516; 12 M.L.J. 96, Dist.; 16 M. 424; 22 I.C. 774, 62 I.C. 652 and 1924 R. 104, Ref.) Under S. 152, there is no right in any party to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of Court and the discretion has to be exercised in view of the peculiar facts of each case. 146 I.C. 310=10 O.W.N. 884=1933 O. 466. There is no right in any party under S. 152 to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court, and the discretion has to be exercised in view of the peculiar facts of each case. Where by the granting of an application to have the mistake corrected the opposite party will be deprived of the advantage they have already gained by the applicant's omission to question the provision in decree in appeal the application should not be granted. 10 O.W.N. 1087=1933 O. 529 A decree can be brought into conformity with the judgment even after the lapse of years, the only limitation is that the Court may deem it inexpedient or inequitable to exercise its powers where third parties have acquired under the erroneous decree without a knowledge of the circumstances which would tend to show that the decree was erroneous. 60 Cal. 753=146 I.C. 658=37 C.W.N. 500=1933 Cal. 627. Court has a discretion in allowing amendment and there is no right in any party to have a clerical mistake corrected. Where, therefore, the applicants, even after they became aware of the defect in the decree, took no effective steps to set matters right but allowed the other party to obtain decrees against them as though there was nothing wrong with the decree, a subsequent application for amendment of the decree cannot be allowed. 142 I.C. 880=15 N.L.J. 124. Where property is wrongly described in a plaint in a mortgage suit and the mistake is repeated in the preliminary and final decrees, without notice either by the parties or by the Court, Court has ample powers to amend the plaint, the decrees and the judgment and correct the mistakes. 153 I.C. 378=1935 O.W.N. 31=1935 O. 92; 1932 A.L.J. 784=1932 A. 587 (Incorrect description of mortgaged property in the deed repeated in plaint, preliminary and final decrees, execution proceedings and sale certificate discovered late in mutation proceedings in Revenue Court can be corrected under this section). 136 I.C. 850=1932 M. 275=62 M. L.J. 350 (Wrong survey number entered in the mortgage deed and copied in plaint and preliminary decree—Correction of). See also 61 M.L.J. 721; 140 I.C. 113 (Omission to describe property sought to be sold—Intention otherwise clear—Amendment allowable); 139 I.C. 367=1932 O. 291 (Erroneous order due to slip of memory can be corrected); 132 I.C. 562=1931 A. 427 (Preliminary and final decrees in mortgage suit—Final decree alone containing clause for sale—

Correction if can be allowed); 132 I.C. 562=1931 A. 427. See also 142 I.C. 880=15 N.L.J. 124. Application for amending decree in accordance with judgment—Whether barred by decree-holder accepting payment under decree—Circumstances disentitling decree-holder for amendment. 1929 M.W.N. 729=1929 M. 836, 13 I.C. 113=11 M.L.T. 33. Mistakes anterior to suit cannot be corrected under this section. 8 N.L.R. 13=14 I.C. 407. Rectification may be ordered for mistake and not where there is gross negligence of the party. 11 I.C. 537; 9 I.C. 433. Where a right has been extinguished by a decree, it cannot be reviewed by any subsequent act of the Court or the party at fault. 19 I.C. 347=16 O.C. 5. Calculation of amount due—Overlooking of order of Court is mistake which can be corrected at any time. 74 I.C. 842=1924 A. 127. Pre-emption decree—Amount entered wrongly—Correct amount paid in time—Decree can be amended even after expiry of time fixed for payment. 2 O.W.N. 218=87 I.C. 987=1925 O. 418. Sale ordered for a sum larger than what was due under the decree—Court has power to set aside sale. 27 Bom.L.R. 657=89 I.C. 569=1925 B. 389. Where there is no variation between decree and judgment no amendment can be allowed. 11 I.C. 896, 101 I.C. 147=1927 L. 403, 103 I.C. 298 (2). But see 25 L.W. 102=99 I.C. 655=1927 M. 435; 1930 L. 210, 42 I.C. 66=4 O.L.J. 475 (obvious error in judgment may be corrected). A consent decree can be varied only by consent. 27 I.C. 830=16 Bom. L.R. 668. See also 27 I.C. 134=16 Bom.L.R. 670 (Note); 50 I.C. 497=4 P.L.J. 205, 21 I.C. 115. A judgment ordering a decree to be entered up in terms of a compromise is not such a judgment as is contemplated by this section. 7 C.W.N. 880. See also 1933 P. 135. Court cannot under this section correct a judgment based on an award wherein the error lies. 103 I.C. 829=1927 M. 726=53 M.L.J. 38. If a compromise decree does not embody all the terms of the compromise the decree could be corrected. 21 I.C. 115. See also 1933 P. 135. 50 I.C. 497=4 Pat.L.J. 205. An application by the plaintiff to amend the decree to bring it in conformity with the judgment must be made to the Court which passed it and not to the Appellate Court. 57 I.C. 710. Any divergence between the decree and the judgment is a matter for amendment of the decree and not for a fresh suit for setting the decree aside. 43 C. 217=31 I.C. 13=19 C.W.N. 1228, 31 I.C. 478=1915 M.W. N. 914. Mere delay in applying for amendment does not amount to gross negligence. 99 I.C. 655. See also 139 I.C. 528=1932 C. 563=36 C.W.N. 97. The exercise of the power of amendment under S. 152 is discretionary, and an application for amendment of a decree should be rejected as too late if the rights of third parties acting in good faith have intervened. 43 M.L.J. 559=1923 M. 57. Mistake in suit record owing to misdescription of suit property in plaint may be

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corrected by the Court under this section. 21 A.L.J. 328=72 I.C. 483=1923 A. 349; 25 L.W. 102=99 I.C. 655=1927 M. 435. It is open to the successor in office of a Judge to rectify an accidental error in the judgment of his predecessor. If the Judge declines to do so, High Court might interfere in revision 18 A.L.J. 501=55 I.C. 963. See also 37 A. 323=29 I.C. 50=13 A.L.J. 449, 2 Pat.L.T. 296=63 I.C. 840. But successor cannot construe judgment and amend decree 1927 P. 25. A decree should not be amended except in the presence of the parties concerned, or after service of notice on them to attend. 2 W.R. (Mis.) 15. See also 8 A. 377, 63 I.C. 799=1921 4 U.B.R. 1 (necessity for notice to other parties). Court can extend time for performance in case of decree for specific performance. 5 R. 615=105 I.C. 467=1927 R. 311.

ILLUSTRATIVE CASES.—A decree against one person cannot be amended by adding another as judgment-debtor when no decree has been passed against him. 40 I.C. 47. The fact that a dead man had been made a party by mistake does not deprive the Court of the power to implead his legal representatives and proceed with the hearing of the appeal. S. 153 allows the Court a discretion to do so in a fit case, e.g., where the mistake is a *bona fide* one. 165 I.C. 201=1936 Pesh. 192. See also 29 S.L.R. 445=163 I.C. 30=1936 S. 53, 1935 O. 369=1935 O.W.N. 471. Where a *munsif* by a clerical error recorded in his final order an order dismissing the suit instead of decreeing it and the decree was prepared accordingly, *held*, that the *munsif* is competent under S. 152 to subsequently correct the error. 29 I.C. 144. See also 22 I.C. 935=1 B.R. 81 (decree for foreclosure inadvertently passed in place of decree for sale). Mere clerical error in the relief claimed and in the decree that was prepared in accordance therewith can be corrected throughout the record. 23 I.C. 344=12 A.L.J. 185. See also 27 I.C. 922=13 A.L.J. 60, 21 I.C. 540=7 S.L.R. 53. Court has no jurisdiction for amendment of a certificate of sale so as to alter the share of the property sold according to the sale proclamation. 18 I.C. 725. A clerical mistake regarding costs can be amended under this section. 6 C. 22; 1904 A.W.N. 94; 54 I.C. 821. But see also 17 I.C. 418=47 P.R. 1913=5 P.W.R. 1913. Court can add costs to judgment already pronounced. 57 I.C. 739, 54 I.C. 821. An amended decree which has not been appealed against cannot be questioned in the course of execution proceedings. 9 C.W.N. 605, 44 I.C. 998=16 A.L.J. 262. Grounds for amendment being change of circumstances—Proper remedy. 27 I.C. 300. Where a decree passed on an award by mistake or inadvertence embodied a relief as to payment of costs not mentioned in the award the defect can be cured only by an appeal or review. 34 I.C. 787=3 L.W. 499. There was an appeal against an interlocutory order passed in a suit, and during the pendency, the plaintiff

died. His legal representative was brought on record. After the disposal of the appeal, the legal representative carried on the litigation, resulting in a decree being passed against the plaintiff, but the decree as drawn up was against the plaintiff. *Held*, that no joinder of the legal representative was necessary in the suit before the decree was passed, as the Court could have brought it in conformity with the appellate decree which contained the names of the legal representatives of the plaintiffs. 45 C. 941 P.C. 1, 501. *Held also* that the decree could be executed against the estate of the deceased in the hands of the legal representative. 120 I.C. 516=1930 S. 96.

RIGHT OF SUIT.—Mistake anterior to suit can be rectified only by separate suit. 8 N.L.R. 13=14 I.C. 407.

BAR TO SUIT.—A suit for amending a judgment or decree passed by a competent Court on the ground of mistake is not maintainable in a Civil Court. 15 C.L.J. 675=14 I.C. 93=17 C.W.N. 82. (10 C.W.N. 1024; 6 C.W.N. 889, 3 C.W.N. 575, Rel., 8 C.W.N. 473, Dist.). See also 133 I.C. 366=1931 P. 296. (8 C.W.N. 473, Diss.).

JURISDICTION.—Where an appeal is summarily dismissed under O. 41, R. 11, the decree remains the decree of the lower Court and not of High Court. So, it is the lower Court and not High Court, that can entertain an application for amendment of the decree. 11 P. 409=138 I.C. 908=1932 P. 238. (21 B. 548, Foll., 24 C. 759, Not Foll.).

APPEAL.—There is no appeal from an amendment under S. 152. 54 I.C. 387, 24 P.R. 1911=101 I.C. 850, 73 I.C. 679=1923 L. 147 (2). But see 3 L.L.J. 341=61 I.C. 992 (appeal lies where the whole system of calculation adopted by the Court was challenged). Where a Court purporting to act under S. 152, wrongly passes a fresh decree, an appeal is competent from that decree. The mere fact that the new decree is wrongly passed does not take away the right to appeal. 35 P.L.R. 610=1934 L. 839. No appeal lies against an order granting an amendment, but an appeal lies against the amended decree. 3 C.L.J. 188; 1 A.L.J. 701; 22 M. 646. No appeal lies to His Majesty in Council, 33 C. 679 nor under the Letters Patent. 14 A. 226 (F.B.). Application for amendment on ground that costs had been assessed on an erroneous principle is bad. Proper remedy is by way of appeal. Amendment would not be granted on ground that an appeal is barred. 25 P.W.R. 1913=17 I.C. 418=47 P.R. 1913. When judgment simply states "decree as prayed for and costs" and the sum awarded in the decree differs from that claimed in the plaint decree can be rectified under this section. 22 B. 370. Appeal lies against an order under this section extending time for performance in the case of a decree for specific performance. 105 I.C. 467=1927 R. 311.

REVISION.—An order under this section is subject to revision. 28 C. 177, 7 A. 876 (F.B.); 31 B. 447, 24 P.R. 1911=101 I.C. 850,

153. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amend-
General power to amend.

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18 A.L.J. 501=55 I.C. 963; 37 A. 323=29 I.C. 50=13 A.L.J. 449 An order to amend the decree is different from the amended decree and a revision lies from the former order. 147 I.C. 633=1934 A. 100 (2) On an application under S. 152, the Court is not bound to correct the decree. Court has a discretion to make the amendment or not. And in such case the applicant has no right in revision proceedings to demand an adjudication upon any point, his right is merely to bring the matter to the notice of High Court and to leave it to the discretion of the Court to interfere, if interference is necessary in the interests of justice. High Court will not interfere unless the lower Court has exercised its discretion in such a manner that it was obviously wrong and unjust for it to make the order it did. 10 O.W.N. 958=1933 O. 425.

REVISION. See 1936 A.M.L.J. 117

REVIEW—Circumstances might, however, arise, which would render amendment necessary on review, as when the description of the mortgaged property as given in the decree differs from that given in the bond, the remedy was one by way of review. See 16 M. 424, 1906 A.W.N. 220, 156 I.C. 585=1935 Pesh. 91 If judgment is attacked the matter is one for review. 5 Pat.L.J. 253=1 Pat.L.T. 219=58 I.C. 510.

LIMITATION—Applications under this section are not governed by the Limitation Act 10 M. 51, 11 B. 284, 21 C. 259; 11 A. 267; 40 C.W.N. 83; 74 I.C. 842=1924 A. 127, 21 I.C. 540=7 S.L.R. 53

Sec. 153 [N.B.—See Notes under Ss. 151 and 152]—Extensive powers are conferred on the Court by Ss. 151 and 153. See 139 I.C. 491=1932 A.L.J. 784=1932 A. 587=1935 O.W.N. 471=1935 O. 369 Under Ss. 99, 152 and 155 the Court has ample powers to afford opportunity to rectify defects in pleadings and under S. 153 is bound to do so. 1933 A.L.J. 110=1933 A. 295 Where plaint was presented by a vakil whose name was omitted from body of his *vakalatnama* and who had signed on the back in token of acceptance, it was held that it was a mere clerical error and that an order of Court, on an application to correct the mistake, that that correction should be made and given retrospective effect, was not without jurisdiction. 3 A.W.R. 603=1934 A. 810. Court ought to give all reasonable indulgence with regard to amending. However negligent or careless the first omission, and however late the proposed amendment, the amendment should be allowed, if it can be allowed with out injustice to the other side. *Per Lopes, L.J.*, in 19 Q.B.D. 394, cited in 32 C. 600. The verification in an application for leave to appeal in *forma pauperis* not being in the manner prescribed by the Code, the Court rejected it. *Held*, in revision, that it was the

duty of the Court to allow the applicant a chance to correct the defect in the verification before rejecting the application itself. 1937 N. 108 The expression "any proceeding" is general enough to include filing of an appeal. 123 I.C. 821=1930 A. 131 To proceed to recall and cancel an invalid order is the duty of the Judge. 5 C.L.J. 611. Also an order improperly or fraudulently obtained. 6 C.L.J. 662 Over-valuing suit to get round a previous decision which will operate as *res judicata*—Decision is an abuse of process of Court. 83 I.C. 1=1925 A. 142 Section allows the Court to give leave for amendment at any time in any proceeding in a suit. 25 Bom. L.R. 888=77 I.C. 171=1924 B. 166 Where a decree is passed if it is final, the original Court is, generally speaking, *functus officio*, and the occasion for amendment of pleading cannot arise. (*Ibid*) Suit on pro-note found to be insufficiently stamped cannot be amended into one on the original cause of action. 138 I.C. 783=34 Bom.L.R. 643=1932 B. 394 (3 R. 183, Not Foll.; 48 C. 32 (P.C.), Rel. on.) Addition of legal representatives in a suit against a dead man is illegal. 45 M.L.J. 231=75 I.C. 739=1924 M. 56 Appeal against dead respondent—Amendment of cause title allowed. 1925 M. 1210=49 M.L.J. 590 (F.B.). The fact that a dead man has been made a party by *bona fide* mistake does not deprive the Court of the power to implead the proper legal representatives and proceed with the hearing of the appeal. See 165 I.C. 201=1936 P. 192 Suit in name of non-existing or non-juristic person—Amendment by substitution—Power of Court. 20 N.L.J. 65=1937 N. 173 Under the provisions of S. 153 a Court may, subject to the provisions of S. 5, Limitation Act, allow the amendment of an appeal against the person who had died before the date of the presentation of the memorandum, although it is found that no appeal in law exists. Such discretion is not however available to a Court where it is sought to substitute a person for the potential appellant who died before the memorandum of appeal was filed. 1934 N. 274. Mistake discovered on appeal may be corrected. 20 A.L.J. 159=66 I.C. 208=1922 A. 81. See also 66 I.C. 693=8 O.L.J. 416 Amendment of sale certificate without notice to judgment-debtor is irregular. 65 I.C. 732=16 L.W. 760=1922 M. 63. Want of signature and verification does not entail rejection of the plaint as they can be supplied at any stage. 25 M.L.J. 171=17 I.C. 580 Application for sale after dismissal of execution application is defective, but can be cured under this section. 25 I.C. 883=1 L.W. 665. On this section, see also 3 Pat.L.T. 149=1922 P. 121 It is open to a party in a suit to invoke the inherent power of the Court to get the judgment and the decree amended under the provisions of Ss. 151, 152 and 153 of the Code quite apart from the limitation applicable to

ments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

154. [S. 3, para. 3.] Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

155. The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

Repeals.

156. [. " " "]1

157. [S. 3, 2nd sentence] Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

158. [S. 3, para. 2.] In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

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Leg. Ref.

¹S. 156 was repealed by Act XVII of 1914.

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the institution of the appeal or review. He has a right to apply but it is for the Court to see whether his application deserves consideration. 6 O W.N. 604=118 I.C. 753=1929 O 385 (F.B.).

Sec. 154.—This section has no bearing on the powers of an appellate Court in dealing with appeals before it 9 I.C. 815 The general law that a right of appeal is more than a matter of procedure and an alteration of law of procedure would not re-act upon the right of appeal is superseded by this section. 6 S.L.R. 168=19 I.C. 348. Where in a suit instituted before the coming into force of the new C. P. Code an order of remand is passed after the new Code has come into force, the right of appeal against the order is regulated by the new and

not by the old Code. 1 P.R. 1913=15 I.C. 725. (21 M.L.J. 631, Diss.). The words "any present right of appeal" in this section mean a right of appeal *in esse*. 1 P.R. 1913=15 I.C. 725.

Sec. 157.—The expression "Rules made" must mean rules properly and validly made, in other words, made with jurisdiction by the proper authority. Rules under old Code which were *ultra vires* then are not valid because they could be made under the new Code. 29 M.L.J. 663=31 I.C. 924. The words "consistent with the Code" mean only consistent with the sections of the Code and not with the rules which are alterable by the High Court. 24 M.L.J. 637=20 I.C. 775=37 M. 17. Rules framed by the Local Government under S. 269 of the old Code are in force until rules are made by the High Court under the power given by S. 128 (2) of the new Code. 24 M.L.J. 637=37 M. 17.

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15. Where service may be on male member of defendant's family [A & O] and [L M & C]

16. Person served to sign acknowledgment.

17. Procedure when defendant refuses to accept service, or cannot be found [C]

18. Endorsement of time and manner of service. [L]

18-A. [M]

19. Examination of serving officer. [C]

19-A. [C]

20. Substituted service.

Effect of substituted service.

Where service substituted, time for appearance to be fixed.

20. [Added by Oudh]

21. Service of summons where defendant resides within jurisdiction of another Court.

21-A. [Added by Rangoon]

22. Service, within Presidency-towns and Rangoon, of summons issued by Courts outside [B]

23. Duty of Court to which summons is sent [R]

24. Service on defendant in prison

25. Service where defendant resides out of British India and has no agent. [M]

25-A. [Added by Allahabad]

26. Service in foreign territory through Political Agent or Court. [M & A]

27. Service on civil public officer or on servant of railway company or local authority [A & M]

28. Service on soldiers. [A M & O]

29. Duty of person to whom summons is delivered or sent for service

29-A. *Service on Public Officer sued in official capacity* [M]

30. Substitution of letter for summons.

31. *Form of application for issue of summons.* [A]

ORDER VI.

PLEADINGS GENERALLY.

1. Pleading.

2. Pleading to state material facts and not evidence.

3. Forms of pleading.

4. Particulars to be given where necessary

5. Further and better statement, or particulars.

6. Condition precedent

7. Departure.

8. Denial of contract.

9. Effect of document to be stated.

RULES.

10. Malice, knowledge, etc.
11. Notice
12. Implied contract, or relation
13. Presumptions of law.
14. Pleading to be signed.
- 14-A. [C]
15. Verification of pleadings.
16. Striking out pleadings
17. Amendment of pleadings
18. Failure to amend after order.

ORDER VII.

PLAINT

1. Particulars to be contained in plaint
2. In money suits [L]
3. Where the subject-matter of the suit is immovable property [C]
4. When plaintiff sues as representative.
5. Defendant's interest and liability to be shown.
6. Grounds of exemption from limitation law.
7. Relief to be specifically stated.
8. Relief founded on separate grounds.
9. Procedure on admitting plaint. [A M & O] [C]
10. Concise statements.
11. Return of plaint.
12. Procedure on returning plaint.
13. Rejection of plaint. [C]
14. Procedure on rejecting plaint.
15. Where rejection of plaint does not preclude presentation of fresh plaint.

DOCUMENTS RELIED ON IN PLAINT.

16. Production of document on which plaintiff sues.
17. List of other documents. [O]
18. Statement in case of documents not in plaintiff's possession or power. [O]
19. Suits on lost negotiable instruments.
20. Production of shop-book
21. Original entry to be marked and returned. [A]
22. Inadmissibility of document not produced when plaint filed
23. *Plaint or original petition to contain address of service for plaintiff* [A] [L]
24. *Address for service to be within the limits of the District* [A] [L]
25. *Dismissal of suit on plaintiffs omission to file address for service.* [A] [L]
26. *Service of notice or process on person not found at the address given for service* [A] [L]
27. *Service on party engaging pleader* [L]
28. *Change of address for service.* [L]
29. *Power of Court to direct mode of service* [L] [A]
30. *Rules inapplicable to notice under O 21, R 22.* [A]
31. 19 to 27 [Added by Oudh]

ORDER VIII

WRITTEN STATEMENT AND SET-OFF.

1. Written statement. [O] [L]
2. New facts must be specially pleaded.
3. Denial to be specific.
4. Evasive denial.
5. Specific denial.
6. Particulars of set-off to be given in written statement.

RULES.

Effect of set-off.

7. Defence or set-off founded on separate grounds.
8. New ground of defence.
9. Subsequent pleadings
10. Procedure when party fails to present written statement called for by Court.
11. *Defendant required to file address for service.* [A] [L]
12. *Applicability of O 7, R 20, 22, 85 and 26* [A] [L]
13. [Added by Oudh]

ORDER IX

APPEARANCE OF PARTIES AND CONSEQUENCES OF NON-APPEARANCE

1. Parties to appear on day fixed in summons for defendant to appear and answer.
2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs
3. Where neither party appears, suit to be dismissed.
4. Plaintiff may bring fresh suit or Court may restore suit to file
5. Dismissal of suit where plaintiff, after summons returned unserved, fails for a year to apply for fresh summons
6. Procedure when only plaintiff appears

When summons duly served.

When summons not duly served.

When summons served, but not in due time.

7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance
8. Procedure where defendant only appears
9. Decree against plaintiff by default bars fresh suit. [L]
10. Procedure in case of non-attendance of one or more of several plaintiffs.
11. Procedure in case of non-attendance of one or more of several defendants.
12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.
13. *Setting aside decrees ex parte.*
14. *Setting aside decree ev parte against defendant.* [A M & O]
15. No decree to be set aside without notice to opposite party.

ORDER X.

EXAMINATION OF PARTIES BY THE COURT

1. Ascertainment whether allegations in pleadings are admitted or denied.
2. Oral examination of party, or companion of party
3. Substance of examination to be written.
4. Consequence of refusal or inability of pleader to answer.

ORDER XI.

DISCOVERY AND INSPECTION.

1. Discovery by interrogatories
2. Particular interrogatories to be submitted.
3. Costs of interrogatories

RULES.

1. Form of interrogatories.
2. Form of answers.
3. Objections to interrogatories by answer.
4. Setting aside and striking out interrogatories.
5. Affidavit in answer, filing.
6. Form of affidavit in answer.
7. No exemption to be taken.
8. Order to answer or answer further.
9. Application for discovery of documents.
10. Affidavit of documents.
11. Production of documents.
12. Inspection of documents referred to in pleadings or affidavits.
13. Notice to produce.
14. Time for inspection when notice given.
15. Order for inspection.
16. Verified copies.
17. Premature discovery.
18. Non-compliance with order for discovery.
19. Using answers to interrogatories at trial.
20. Order to apply to minors.

ORDER XII.

ADMISSIONS.

1. Notice of admission of case.
2. Notice to admit documents.
3. Form of notice.
4. Notice to admit facts.
5. Form of admissions.
6. Judgment on admissions. [M & P]
7. Affidavit of signature.
8. Notice to produce documents.
9. Costs.

ORDER XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

1. Documentary evidence to be produced at first hearing. [O & R]
2. Effect of non-production of documents.
3. Rejection of irrelevant or inadmissible documents.
4. Endorsements on documents admitted in evidence. [R]
5. Endorsements on copies of admitted entries in books, accounts and records. [R]
6. Endorsements on documents rejected as inadmissible in evidence.
7. Recording of admitted and return of rejected documents. [M & R]
8. Court may order any document to be impounded.
9. Return of admitted documents. [B, M & P] [L]
10. Court may send for papers from its own records or from other Courts [R]
11. Provisions as to documents applied to material objects.
12. Translation of document not in English or in Court vernacular to be filed in Court [A]
13. Marking of documents exhibited [A]

RULES.

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES

AGREED UPON.

1. Framing of issues.
2. Issues of law and of fact
3. Materials from which issues may be framed
4. Court may examine witnesses or documents before framing issues.
5. Power to amend and strike out issues.
6. Questions of fact or law may by agreement be stated in form of issues.
7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment

ORDER XV

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

1. Parties not at issue.
2. One of several defendants not at issue. [M]
3. Parties at issue.
4. Failure to produce evidence.

ORDER XVI.

SUMMONING AND ATTENDANCE OF WITNESSES.

1. Summons to attend to give evidence or produce documents. [B]
- 1-A. [B]
2. Expenses of witness to be paid into Court on applying for summons. [A, B, C, L, P & R]
- Experts.
- Scale of expenses [R]
3. Tender of expenses to witness. [B, C, L, P & R]
4. Procedure where insufficient sum paid in. [C]
- Expenses of witnesses detained more than one day [L]
- 4-A. Summons to public Officer [M]
5. Time, place and purposes of attendance to be specified in summons.
6. Summons to produce document.
7. Power to require persons present in Court to give evidence or produce document.
- 7-A. [C]
8. Summons how served. [C]
9. Time for serving summons.
10. Procedure where witness fails to comply with summons.
11. If witness appears, attachment may be withdrawn.
12. Procedure if witness fails to appear.
13. Mode of attachment
14. Court may of its own accord summon as witnesses strangers to suit.
15. Duty of persons summoned to give evidence or produce document.
16. When they may depart.
17. Application of rules 10 to 13.
18. Procedure where witness apprehended cannot give evidence or produce document.
19. No witness to be ordered to attend in person unless resident within certain limits.
20. Consequence of refusal of party to give evidence when called on by Court.
21. Rules as to witnesses to apply to parties summoned.

RULES.

22. *Scale of travelling and other expenses* [A]

ORDER XVII.

ADJOURNMENTS.

1. Court may grant time and adjourn hearing [L]
Costs of adjournment.
2. Procedure if parties fail to appear on day fixed
3. Court may proceed notwithstanding either party fails to produce evidence, etc

ORDER XVIII

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

1. Right to begin.
2. Statement and production of evidence. [M]
3. Evidence where several issues.
4. Witnesses to be examined in open Court.
5. How evidence shall be taken in appealable cases.
6. When deposition to be interpreted.
7. Evidence under section 138.
8. Memorandum when evidence not taken down by Judge.
9. When evidence may be taken in English.
10. Any particular question and answer may be taken down
11. Questions objected to and allowed by Court.
12. Remarks on demeanour of witnesses.
13. Memorandum of evidence in unappealable cases
14. Judge unable to make such memorandum to record reasons of his inability.
15. Power to deal with evidence taken before another Judge.
16. Power to examine witness immediately.
17. Court may recall and examine witness.
18. Power of Court to inspect

ORDER XIX

AFFIDAVITS

1. Power to order any point to be proved by affidavit.
2. Power to order attendance of deponent for cross-examination
3. Matters to which affidavits shall be confined.
4. *Cause title of affidavits.* [A]
5. *Paragraphing and numbering of affidavits.* [A]
6. *Description of deponent.* [A]
7. *Knowledge of deponent or deponents.* [A]
8. *Form of declaration* [A]
9. *Affidavit to be passed on declarant's knowledge or information* [A]
10. *Description of place, person, etc., referred to in affidavit.* [A]
11. *Identification of deponents.* [A]
12. *Identification of purdanashin women.* [A].
13. *Person before whom affidavit is made to ascertain deponent's knowledge of contents of affidavit.* [A]
14. *Time and place where affidavit is*

RULES.

- sworn to be noted at the foot thereof.* [A]
15. *Correction of clerical errors in affidavits.* [A].

ORDER XX.

JUDGMENT AND DECREE

1. Judgment when pronounced [M]
2. Power to pronounce judgment written by Judge's predecessor.
3. Judgment to be signed. [M]
4. Judgment of Small Cause Courts.
5. Judgments of other Courts
6. Court to state its decision on each issue.
7. Contents of decree. [M]
8. Date of decree
9. Procedure where Judge has vacated office before signing decree.
10. Decree for recovery of immoveable property.
11. Decree for delivery of moveable property
12. Decree may direct payment by instalments.

Order, after decree, for payment by instalments.

13. Decree for possession and mesne profits. [M]
14. Decree in administration suit.
15. Decree in pre-emption suit.
16. Decree in suit for dissolution of partnership.
17. Decree in suit for account between principal and agent
18. Special directions as to accounts.
19. Decree in suit for partition of property or separate possession of a share therein
20. Decree when set-off is allowed.
21. Appeal from decree relating to set-off.
22. Certified copies of judgment and decree to be furnished.
23. Notice of drawing up of decree and disposal of objections to draft decree. [A]

ORDER XXI.

EXECUTION OF DECREES AND ORDERS.

Payment under decree.

1. Modes of paying money under decree.
2. Payment out of Court to decree-holder. [M]

COURTS EXECUTING DECREES.

3. Lands situate in more than one jurisdiction.
4. Transfer to Court of Small Causes.
5. Mode of transfer.
6. Procedure where Court desires that its own decree shall be executed by another Court.
7. Court receiving copies of decree, etc., to file same without proof.
8. Execution of decree or order by Court to which it is sent
9. Execution by High Court of decree transferred by other Court
10. APPLICATION FOR EXECUTION.
11. Application for execution.
12. Oral application.
13. Written application. [M]
14. Application for attachment of moveable property not in judgment-debtor's possession.

RULES.

13. Application for attachment of immoveable property to contain certain particulars.

14. Power to require certified extract from Collector's register in certain cases.

15. Application for execution by joint decree-holder.

16. Application for execution by transferee of decree.

17. Procedure on receiving application for execution of decree. [M]

18. Execution in case of cross-decrees.

19. Execution in case of cross-claims under same decree.

20. Cross-decrees and cross-claims in mortgage suits.

21. Simultaneous execution.

22. Notice to show cause against execution in certain cases [M & B]

23. Procedure after issue of notice.

PROCESS FOR EXECUTION

24. Process for execution.

25. Endorsement on process. [M]

STAY OF EXECUTION.

26. When Court may stay execution.

Power to require security from, or impose conditions upon, judgment debtor.

27. Liability of judgment-debtor discharged.

28. Order of Court which passed decree or of appellate Court to be binding upon Court applied to

29. Stay of execution pending suit between decree holder and judgment-debtor

29-A. Stay of execution pending suit under O. 21, R. 63 [P & L]

MODE OF EXECUTION.

30. Decree for payment of money.

31. Decree for specific moveable property.

32. Decree for specific performance, for restitution of conjugal rights or for an injunction

33. Discretion of Court in executing decrees for restitution of conjugal rights.

34. Decree for execution of document, or endorsement of negotiable instrument.

35. Decree for immoveable property.

36. Decree for delivery of immoveable property when in occupancy of tenant

ARREST AND DETENTION IN THE CIVIL PRISON.

37. Discretionary power to permit judgment-debtor to show cause against detention in prison

38. Warrant for arrest to direct judgment-debtor to be brought up.

39. Subsistence allowance. [M]

40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest. [M]

ATTACHMENT OF PROPERTY.

41. Examination of judgment-debtor as to his property.

42. Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

43. Attachment of moveable property, other than agricultural produce, in possession of judgment-debtor. [M]

43-A. Disposal of attached property. [M].

RULES.

43-B. Charges of feeding and maintaining live-stock after attachment. [M]

44. Attachment of agricultural produce.

44-A. Copy of warrant of attachment to be sent to Collector if agricultural produce is attached. [B]

45. Provisions as to agricultural produce under attachment [B]

46. Attachment of debt, share and other property not in possession of judgment-debtor

47. Attachment of share in moveables.

48. Attachment of salary or allowances of public officer or servant of railway company or local authority. [M]

49. Attachment of partnership property

50. Execution of decree against firm.

51. Attachment of negotiable instruments.

52. Attachment of property in custody of Court or public officer.

53. Attachment of decrec. [M]

54. Attachment of immoveable property. [B]

55. Removal of attachment after satisfaction of decree.

56. Order for payment of coin or currency notes to party entitled under decree.

57. Determination of attachment

INVESTIGATION OF CLAIMS AND OBJECTIONS.

58. Investigation of claims to, and objections to attachment of, attached property.

Postponement of sale

59. Evidence to be adduced by claimant.

60. Release of property from attachment

61. Disallowance of claim to property attached

62. Continuance of attachment subject to claim of incumbrancer.

63. Saving of suits to establish right to attached property

SALE GENERALLY.

64. Power to order property attached to be sold and proceeds to be paid to person entitled.

65. Sales by whom conducted and how made

66. Proclamation of sales by public auction.

67. Mode of making proclamation.

68. Time of sale.

69. Adjournment or stoppage of sale. [B]

70. Saving of certain sales.

71. Defaulting purchaser answerable for loss on re-sale.

72. Decree-holder not to bid for or buy property without permission.

Where decree-holder purchases, amount of decree may be taken as payment

72-A. Leave to bid to mortgagee decree-holder to be granted on terms [B]

73. Restriction on bidding or purchase by officers.

SALE OF MOVEABLE PROPERTY.

74. Sale of agricultural produce.

75. Special provisions relating to growing crops. [L]

76. Negotiable instruments and shares in corporations.

77. Sale by public auction.

RULES.

78 Irregularity not to vitiate sale, but any person injured may sue

79 Delivery of moveable property, debts and shares

80 Transfer of negotiable instruments and shares.

81 Vesting order in case of other property

SALE OF IMMOVEABLE PROPERTY

82. What Courts may order sales.

83 Postponement of sale to enable judgment-debtor to raise amount of decree.

84 Deposit by purchaser and re-sale on default.

85 Time for payment in full of purchase-money

86 Procedure in default of payment.

87. Notification on re-sale.

88. Bid of co-sharer to have preference.

89. Application to set aside sale on deposit [M]

90 Application to set aside sale on ground of irregularity or fraud

91. Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.

91-A. [B]

92. Sale when to become absolute or be set aside [M]

93. Return of purchase-money in certain cases

94. Certificate to purchaser.

95 Delivery of property in occupancy of judgment debtor.

96. Delivery of property in occupancy of tenant

RESISTANCE TO DELIVERY OF POSSESSION TO DECREE HOLDER OR PURCHASER

97 Resistance or obstruction to possession of immoveable property

98 Resistance or obstruction by judgment-debtor.

99 Resistance or obstruction by *bona fide* claimant.

100. Dispossession by decree-holder or purchaser

101. *Bona fide* claimant to be restored to possession

102. Rules not applicable to transferee *pendente lite*.

103 Orders conclusive subject to regular suit

104. Mode of service of order. [L]

Entry of result of execution in suit register. [A]

105 Attachment of moveable property to be through Court Amin [A]

106. Encumbrance certificate to be filed before sale of immoveable property. [A]

107. Determination of ancestral character of the land [A]

108 Notice to Collector before sale of revenue-free or revenue-paying land [A]

109. Reports of Collector and Sub-Registrar to be open to public inspection.

110 Results of enquiry under Rule 66 to be made on order of Court in Judge's own hand [A]

111. Notification of material facts not stated in proclamation of sale. [A]

RULES.

112. Costs of proceedings under Rr. 66 108 and 109 [A]

113 Court to inform officer conducting sale, if other decree-holders are entitled to share in proceeds. [A]

114. Procedure in case of sale in execution of house or building within limits of Military Cantonment [A]

115 Procedure on sale of guns, ammunition, etc., requiring licence [1]

116. Decree-holder applying for attachment of livestock to deposit cost of maintenance, etc. [A]

117. Custody of attached livestock.

118. Removal of livestock to the nearest pound [A]

119. Levy of charge for animals committed to the pound. [A]

120. Maintenance charges of animals impounded. [A]

121 Period for which charges are payable [A]

122. Animals impounded not to be released except on order of Court [A]

123. Custody of moveables other than livestock. [A]

124. Persons in special charge of attached property. [A]

125. Fees payable for attendance [A]

126 Attaching officer to certify to attendance. [A]

127 Refund of charges where attachment is withdrawn etc. [A]

128 Fees paid to be entered in register of petty receipts and re-payments [A]

129 Procedure on remitting amount levied to treasury. [A]

130. Cost of attachment and sale to be paid by decree-holder to offices of Court [A]

ORDER XXI-A

(INSERTED BY CALCUTTA)

[Rules 1—17]

ORDER XXII.

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

1 No abatement by party's death, if right to sue survives.

2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.

3 Procedure in case of death of one of several plaintiffs or of sole plaintiff.

4. Procedure in case of death of one of several defendants or of sole defendant. [M]

5. Determination of question as to legal representative [M]

6. No abatement by reason of death after hearing.

7. Suit not abated by marriage of female party.

8 When plaintiff's insolvency bars suit.

Procedure where assignee fails to continue suit or give security.

9. Effect of abatement or dismissal.

10 Procedure in case of assignment before final order in suit

11. Application of Order to appeals. [C]

11-A. Entry of legal representative on the record a quasi-judicial act. [M]

12. Application of Order to proceedings,

RULES.

ORDER XXIII.

WITHDRAWAL AND ADJUSTMENT OF SUITS.

1. Withdrawal of suit or abandonment of part of claim.
2. Limitation law not affected by first suit.
3. Compromise of suit.
4. Proceedings in execution of decrees not affected.

ORDER XXIV.

PAYMENT INTO COURT.

1. Deposit by defendant of amount in satisfaction of claim.
2. Notice of deposit.
3. Interest on deposit not allowed to plaintiff after notice
4. Procedure where plaintiff accepts deposit as satisfaction in part.
5. Procedure where he accepts it as satisfaction in full.

ORDER XXV.

SECURITY FOR COSTS.

1. When security for costs may be required from plaintiff. [A.M.N.]
Residence out of British India.
2. Effect of failure to furnish security.

ORDER XXVI.

COMMISSIONS.

Commissions to examine Witnesses.

1. Cases in which Court may issue commission to examine witness.
2. Order for commission
3. Where witness resides within Court's jurisdiction.
4. Persons for whose examination commission may issue
5. Commission or request to examine witness not within British India.
6. Court to examine witness pursuant to commission.
7. Return of commission with depositions of witnesses.
8. When depositions may be read in evidence.
- 8-A (No security from Crown).
- 8-B (Meaning of 'Crown' and 'Crown pleader').

COMMISSIONS FOR LOCAL INVESTIGATIONS.

9. Commissions to make local investigations.
10. Procedure of Commissioner.
Report and depositions to be evidence in suit.
Commissioner may be examined in person.

COMMISSIONS TO EXAMINE ACCOUNTS.

11. Commission to examine or adjust accounts.
12. Court to give Commissioner necessary instructions.

Proceedings and report to be evidence.

Court may direct further enquiry.

COMMISSIONS TO MAKE PARTITIONS.

13. Commission to make partition of immoveable property.
14. Procedure of Commissioner.

GENERAL PROVISIONS.

15. Expenses of commission to be paid into Court. [M]

RULES.

16. Powers of Commissioners.
17. Attendance and examination of witnesses before Commissioner
18. Parties to appear before Commissioner. [M]
19. to 22. Commissions issued at the instance of foreign tribunals. (*Added by Act X of 1932.*)

ORDER XXVI-A. (M)

1. *Commissions to translate documents.* [M]

ORDER XXVII.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

1. Suits by or against Government.
2. Persons authorized to act for Government.
3. Plaints in suits by or against Government.
4. Agent for Government to receive process.
5. Fixing of day for appearance on behalf of Government. [M]
6. Attendance of person able to answer questions relating to suit against Government.
7. Extension of time to enable public officer to make reference to Government.
8. Procedure in suits against public officer.

ORDER XXVIII.

SUITS BY OR AGAINST MILITARY MEN.

1. Officers or soldiers who cannot obtain leave may authorize any person to sue or defend for them
2. Persons so authorized may act personally or appoint pleader.
3. Service on person so authorized, or on his pleader, to be good service

ORDER XXIX.

SUITS BY OR AGAINST CORPORATIONS.

1. Subscription and verification of pleading.
1-A. *Time to be allowed for appearance in suits against Local Authority.* [M]
2. Service on corporation.
3. Power to require personal attendance of officer of corporation.

ORDER XXX.

SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN

1. Suing of partners in name of firm [L]
2. Disclosure of partners' names.
3. Service.
4. Right of suit on death of partner.
5. Notice in what capacity served.
6. Appearance of partners.
7. No appearance except by partners.
8. Appearance under protest.
9. Suits between co-partners.
10. Suit against person carrying on business in name other than his own.

ORDER XXXI.

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

1. Representation of beneficiaries in

RULES.

suits concerning property vested in trustees, etc.

2. Joinder of trustees, executors and administrators.

3. Husband of married executrix not to join.

ORDER XXXII.

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND

1. Minor to sue by next friend [L]

2. Where suit is instituted without next friend, plaint to be taken off the file.

3. Guardian for the suit to be appointed by Court for minor defendant [L] [M] [B] [N].

4. Who may act as next friend or be appointed guardian for the suit. [L] [M] [N]

5. Representation of minor by next friend or guardian for the suit

6. Receipt by next friend or guardian for the suit of property under decree for minor.

7. Agreement or compromise by next friend or guardian for the suit [M]

8. Retirement of next friend

9. Removal of next friend

10. Stay of proceedings on removal, etc., of next friend.

11. Retirement, removal or death of guardian for the suit

12. Course to be followed by minor plaintiff or applicant on attaining majority.

13. Where minor co-plaintiff attaining majority desires to repudiate suit

14. Unreasonable or improper suit

14-A Appointment of removal of guardian or next friend, a quasi-judicial act [M]

15. Application of rules to persons of unsound mind

16. Saving for Princes and Chiefs

17. Time for appearance where defendant is under the superintendence of the Court of Wards [N]

ORDER XXXIII.

SUITS BY PAUPERS.

1. Suits may be instituted in *forma pauperis* [B]

2. Contents of application

3. Presentation of application

4. Examination of applicant

If presented by agent, Court may order applicant to be examined by commissioner.

5. Rejection of application

6. Notice of day for receiving evidence of applicant's pauperism

7. Procedure at hearing

8. Procedure if application admitted.

9. Dispaupering.

10. Costs where pauper succeeds

11. Procedure where pauper fails.

12. Government may apply for payment of Court-fees

13. Government to be deemed a party

14. Copy of decree to be sent to Collector.

15. Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.

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16. Costs.

ORDER XXXIV.

SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY

1. Parties to suits for foreclosure, sale and redemption

2. Preliminary decree in foreclosure suit. [B]

3. Final decree in foreclosure suit
Power to enlarge time
Discharge of debt

4. Preliminary decree in suit for sale, [B]

Power to decree sale in foreclosure suit.

5. Final decree in suit for sale [B]

6. Recovery of balance due on mortgage in suit for sale.

7. Preliminary decree in redemption suit [B]

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8 A. Recovery of balance due on mortgage in suit for redemption

9. Decree where nothing is found due or where mortgagee has been overpaid.

10. Costs of mortgagee subsequent to decree.

11. Payment of interest.

12. Sale of property subject to prior mortgage

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14. Suit for sale necessary to bring mortgaged property to sale.

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19. Re-admission of appeal dismissed for default. [M]

20. Power to adjourn hearing, and direct persons appearing interested to be made respondents

21. Re-hearing on application of respondent against whom *ex parte* decree made

22. Upon hearing, respondent may object to decree as if he had preferred separate appeal

Form of objection and provisions applicable thereto.

23. Remand of case by Appellate Court.

24. Where evidence on record sufficient, Appellate Court may determine case finally.

25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

26. Findings and evidence to be put on record.

Objections to finding.

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30. Judgment when and where pronounced..

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- 31 Contents, date and signature of judgment [M]
 - 32 What judgment may direct.
 33. Power of Court of appeal.
 34. Dissent to be recorded
- DECREE IN APPEAL.
35. Date and contents of decree
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36. Copies of judgment and decree to be furnished to parties.
 37. Certified copy of decree to be sent to Court whose decree appealed from
 38. Address for service on appeal. [A & L]

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- 1 Rules of O. 41 to apply to appeals to High Court subject to modifications in this order [M]
2. Fees for service of notice to accompany memorandum of appeal [M]
Period for entry of appearance by respondent [M]
- 3 Respondent intending to contest appeal to file memorandum of appearance within prescribed period [M]
Respondent not entering appearance in time not entitled to print records except on application supported by affidavit explaining omission [M]
- 4 Memorandum of appeal and appearance to state address for service on pleader or party in person [M]
- 5 Power of Court to direct service of notice of appeal or other notice by post [M]
6. Sufficiency of service if notice left at address for service [M]
- 7 Notice to be sent by registered post unless otherwise directed by Court [M]
8. Respondents not appearing by same pleader to give notice of appearance to each other. [M]
- 9 List of cases wherein notice is to be issued to respondent to be affixed to notice-board of the Court
- 10 Power of Court to dismiss appeal when records are not printed owing to default of party. Court not bound to read unprinted records [M]
- 11 Costs of application and adjournments [M]
12. Respondent to file copies of memorandum of objections and fees for service. [M]
13. Power of Registrar to dispense with service of copies, if appellant refuses to accept copies tendered by party.
14. Provisions of O. 41, R 31, inapplicable to High Court [M]

ORDER XLI-B [M]

1. Rules of O. 41 A applicable to appeals under Cl 15 of the Letters Patent [M]
2. Notice of appeal [M]

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APPEALS FROM APPELLATE DECREES.

1. Procedure.
- 2 What to accompany memorandum of appeal [M & L]

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1. Appeals from orders.

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2. Procedure. [M]
3. Memorandum of appeal from appellate order. [M]

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- 1 Who may appeal as pauper
Procedure on application for admission of appeal

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- 3 Certificate as to value of fitness.
4. Consolidation of suits.
- 5 Remission of dispute to Court of first instance
- 6 Effect of refusal of certificate
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- 8 Admission of appeal and procedure thereon
9. Revocation of acceptance of security.
- 9-A Power to dispense with notices in case of deceased parties
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- 11 Effect of failure to comply with order.
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- 1 Reference of question to High Court.
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- 3 Judgment of High Court to be transmitted, and case disposed of accordingly.
- 4 Costs of reference to High Court.
5. Power to alter, etc., decree of High Court making reference
- 6 Power to refer to High Court questions as to jurisdiction in small causes.
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- 8 Applicability of O 41, R 38 to proceedings under this order [A]

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- 1 Application for review of judgment
- 2 To whom applications for review may be made.
- 3 Form of applications for review.
- 4 Application where rejected.
Application where granted
5. Application for review in Court consisting of two or more Judges
- 6 Application where rejected
- 7 Order of rejection not appealable
Objections to order granting application. [M]

RULES.

8. Registry of application granted, and order for re-hearing.

9. Bar of certain applications

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MISCELLANEOUS.

1. Process to be served at expense of party issuing. Costs of service.

2. Orders and notices how served.

3. Use of forms in appendices

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1. Who may serve process of High Courts

2. Saving in respect of Chartered High Courts.

3. Application of rules. [B]

ORDER L

PROVINCIAL SMALL CAUSE COURTS

1. Provincial Small Cause Courts

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ORDER LI.

PRESIDENCY SMALL CAUSE COURTS.

1. Presidency Small Cause Courts

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Applicability of O. 41, R. 38 to proceedings under S. 115 [A]

APPENDICES TO THE FIRST SCHEDULE. FORMS.

A.—Pleadings.

1. Titles of suits

2. Description of parties in particular cases

3. Pleadings.

4. Written statements

B.—Process.

C.—Discovery, inspection and admission.

D.—Decrees

E.—Execution

F.—Supplemental Proceedings

G.—Appeal, Reference and Review

H.—Miscellaneous.

THE FIRST SCHEDULE,

ORDER I.

PARTIES TO SUITS.

1. [S. 26.] All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or

Who may be joined as plaintiffs.

Notes.

O. 1, R. 1. SCOPE OF.—The rule is only an enabling one allowing a number of plaintiffs, with the same right to relief, to join in one suit, instead of bringing separate suits 24 C. 385 (388). See also 38 M. 406=28 M.L.J. 535 (P.C.) The words "in respect of the same transaction" are wider than the words "in respect of the same cause of action" 25 M. 745 Suit by one member for recovery of family debt, other members being impleaded as defendants not bad for non joinder. 99 I. C. 565=1927 L. 129 (1), 1927 M. 984=106 I. C. 140

APPLICABILITY—O. 1, R. 1 applies not only to joinder of plaintiffs, but also to joinder of causes of action So under that rule several causes of action can be joined in one suit if some common question of law or fact would arise 41 C.W.N. 27=1936 C. 650. Rule applies to appeals also 75 I.C. 950=1923 L. 638

PERSONS.—A ship is a person. 12 B. 241.

EFFECT OF.—The words "in the alternative" apply to cases in which there is doubt as to who is the person entitled to sue 6 M. 243. See also 18 A. 433

WHO MAY BE JOINED AS PLAINTIFFS.—Where the interests of two plaintiffs are identical and not antagonistic, they can sue jointly. 16 B. 119 Plaintiffs who have separate interests in subject-matter of suit may join. 4 A. 261 (F.B.); 1929 A. 790. All persons having a common cause of action are entitled to join as plaintiffs. 15 B. 309. A plaintiff is entitled to join as co-defendants persons against whom he has different causes

of action in cases where common questions of law and fact are involved 55 C. 164 Suits by different sets of plaintiffs claiming in the alternative is maintainable, provided there is a common question of law or fact. 10 P.R. 1916=32 I.C. 524=43 M.L.J. 277. Several persons having distinct shares in certain properties can join in a suit against a person in possession under a deed of gift sought to be set aside 4 A. 261 (F.B.) See also 33 C. 367. Several persons could not file a joint suit for damages for their wrongful detention in jail after the expiry of their term of imprisonment. 11 C. 524. Suit by several plaintiffs—Each plaintiff having separate cause of action in which others are not interested—Misjoinder of causes of action arises 1926 M.W.N. 723=1926 M. 1140=98 I.C. 463. Parties and causes of action—Misjoinder—Suit by temple servants to set aside order of dismissal by temple trustee if and when bad for misjoinder 1926 M. 57=91 I.C. 525 Joinder of different causes of action permitted by change of phraseology if other conditions are satisfied Co-plaintiffs—All defendants not interested in relief—Joinder of different causes of action Effect of. 17 L.W. 25=69 I.C. 402=1923 M. 331 (2) Same person can be plaintiff and defendant in two distinct capacities in the same suit. 93 I.C. 214=1926 S. 4

CO-MORTGAGEES—Suit for sale by one—Others refusing to join to be added as defendants—Form of decree to be passed. 47 C. 175=46 I.A. 272=37 M.L.J. 483 (P.C.).

CO-SHARERS. Co-sharer landlords can sue tenants collectively even if they collect rent

in the alternative, where if such persons brought separate suits, any common

Notes.

separately and the rent refers to different periods 10 I.C. 891=14 C.L.J. 373 A co-owner of immoveable property can sue for injunction against intending trespassers without joining the other co-owners as parties 35 I.C. 147=3 L.W. 542 Where auction-purchaser of a residuary share of an estate sued the co-sharers for joint possession in separate suits, no secret arrangement among the co-sharers regarding the mode of enjoyment of the property will bind the purchaser and the suits will not be bad for splitting up of claim 44 C.L.J. 293=99 I.C. 177=1927 C. 237. One co-sharer cannot sue for enhancement of his share of rent. 4 C. 96 (F.B.) See also 20 C. 107; 19 C. 610. All co-sharers are necessary parties in a suit for profits for *jerat* land held by defendants in addition to their shares 1 P.L.J. 573=35 I.C. 868 (F.B.). All co-owners must join in a suit to recover their property 10 B. 32. One of several joint proprietors cannot sue in ejectment 4 C. 961 See also 1936 R.D. 85 One of several joint lessors cannot sue for his share of rent, payable under a lease to all the lessors 5 A. 40 See also 4 C. 89

CO-TRUSTEES.—Ordinarily all trustees should be co-plaintiffs, and only such of them should be made defendants as are unwilling to join as plaintiffs, or have done some act precluding them from being plaintiffs. 1932 C. 27=35 C.W.N. 478 (5 C.L.J. 527, Foll., 48 I.A. 302, Ref.) See also 1 P.L.J. 437=24 I.C. 806; 30 M.L.J. 619=33 I.C. 52

CO-PROMISEES.—Suit by one of them—Others joined as co-defendants—Suit not bad when the other promisees have raised pleas contrary to plaintiff. 133 I.C. 871=1931 L. 445.

EJECTMENT.—A plaintiff who has made the co-sharer landlords *pro forma* defendants in a suit for ejectment is entitled to get a decree for recovery of possession of the property in suit to the extent of his share jointly with the *pro forma* defendants in the suit 58 C.L.J. 133 See also 1936 R.D. 85 On a suit for ejectment of a trespasser, all the joint owners are not necessary parties. 1933 L. 999=147 I.C. 505.

JOINT TORT-FEASORS.—Frame of suit against—Single suit by several injured persons, if proper. See 138 I.C. 77=1932 A.L.J. 497=1932 A. 401.

MAINTENANCE SUIT.—Where same decree ordered a person to pay maintenance to mother as well as widow of his deceased nephew, *held*, the two women could jointly sue for arrears of maintenance and it was not necessary that they should file separate suits 1933 P. 644.

SUIT BY OR AGAINST REGISTERED TRADE UNION.—Proper parties in such suit See 1933 L. 203=14 L. 330=34 P.L.R. 203

OTHER ILLUSTRATIVE CASES.—Benamidar for another in a transaction need not be joined in a suit in respect of such transaction. 10 I.C. 779=4 Bur L.T. 74 A trustee of temple properties cannot sue singly for rent without

making other co-trustees parties to the suit 1 P.L.J. 437=24 I.C. 806; 35 C.W.N. 478. But see 30 M.L.J. 619=33 I.C. 52, *contra*. Manager of a joint family can sue on contract entered into by him in his own name without impleading the other members as parties to the suit. 35 M. 685=21 M.L.J. 508; 71 P.R. 1911=13 I.C. 305, 23 Bom.L.R. 1135=40 B. 358 Mortgage suit by manager on behalf of all members is maintainable 39 I.C. 427, 38 I.A. 45=33 A. 272 (P.C.); 35 M. 685 A *khatra* of a Malabar *taluk* can alone sue for the *tarwad* property. 15 M. 19.

WHO ARE NECESSARY PARTIES.—All members of a *tarwad* are necessary parties to suit by one member against the *karnavan* for an increased rate of maintenance 7 M. 428 Receiver is a necessary party to appeal by a claimant whose claim with regard to property sold by Receiver as belonging to an insolvent has been dismissed. 94 I.C. 660 (1)=1926 L. 696 Transferee of property sold in execution is necessary party to set aside the sale if the proceedings have been commenced after transfer. 15 I.C. 176=39 C. 881. Some of the executors under a will cannot maintain an action without impleading the other executors. 44 M.L.J. 249. In suit for accounts of the partnership on death of a partner, all representatives of the deceased partner should join. 33 C. 564. All members of a firm are proper parties to a suit on a pro-note in favour of the firm when the obligation on it was contracted. 15 I.C. 380=11 M.L.T. 246 In an appeal against an order in a partition suit that the property be sold as it was incapable of partition all sharers are necessary parties 100 I.C. 17 (2)=1927 L. 189 See also 91 I.C. 567=1926 C. 741

WHO ARE NOT NECESSARY PARTIES.—A person remotely or indirectly interested is not a necessary party 17 C.W.N. 835=16 C.L.J. 385. See also 59 I.C. 292 In respect of a private water-course, where no relief is asked against Government, the latter is not a necessary party 50 I.C. 299=177 P.W.R. 1918. In a partition suit, persons who have no interest whatsoever in the suit properties need not be made parties. 39 I.C. 160=5 L.W. 207 But all interested parties should be joined either as plaintiffs or as defendants. 23 O.C. 62=56 I.C. 304 A dormant partner is not a necessary party in suit on a contract either with the firm or with one of its members 31 I.C. 913 (2); 38 I.A. 45=21 M.L.J. 378 (P.C.), 33 A. 272 In an appeal by a secured creditor, or an insolvent debtor, where Receiver is a party, it is not necessary to join all creditors. 58 I.C. 10=24 C.W.N. 401 When defendant's tenants in a rent suit plead title of a third person, the third person is not a necessary party to the proceedings. 32 I.C. 553 See also 146 I.C. 15 Suit by one lessee against another lessee for possession is not bad for not joining the landlord as party. 94 I.C. 3=1926 O. 422 In suit under S. 9, Specific Relief Act, the owner who is not in physical possession is not a

question of law or fact would arise.

2 Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

3. [S. 28.] All persons may be joined as defendants against whom any

Notes.

necessary party. 5 B. 208. It is doubtful whether alienees or trespassers on trust property can be joined as parties to a suit under S 92. 38 M. 1064=27 M.L.J. 266. A Hindu widow and her two daughters can sue in one suit for maintenance and for the marriage expenses of the daughters. 6 A. 632 Strangers to the contract claiming adverse possession are not proper parties to a suit for specific performance of the contract. 35 I.C. 871=4 L.W. 397. See also 5 B. 177; 10 C. 1061. Suit under S. 53, Transfer of Property Act, for a declaration that a conveyance is voidable must be brought by or on behalf of all the creditors. 34 C. 999. One of two partners cannot sue in his own name as agent of the firm for breach of contract. 27 M. 80. A person has no right to sue for damages for slander of his sister. 1 M. 383 Neither can a father sue for defamation of his daughter. 11 A. 104. A plaintiff will not be bad as contravening this section, because it prays for a decree in favour of all the plaintiffs on certain allegations, or in the alternative in favour of one of them. 28 M. 500. See also 29 M. 50; 26 M. 647. A suit is not liable to be dismissed because the plaintiff claims in the alternative over the same plot of ground rights—(1) of ownership, and (2) of easement. 34 C. 51 (F.B.). Where a plaintiff joins as defendant a person who ought to have been joined as plaintiff, the suit should not be dismissed merely because plaintiff fails to show that the person so joined refused to appear with him as plaintiff. 24 A. 226 See also 29 M. 302; 26 M. 649 (F.B.). The Political Agent and Superintendent of a State cannot sue for the recovery of property belonging to the State. 2 A. 690. Secretary of State is not necessary party to a suit for setting aside sale under Punjab Excise Act, S. 60. 96 I.C. 927 (1) [25 C. 833 (P.C.), Foll.].

O. 1, R. 2.—See 18 I.C. 181, 21 I.C. 438

O. 1, R. 3: SCOPE OF.—1928 B. 91=30 Bom. L.R. 162. This rule applies to joinder of causes of action as well as joinder of parties. 33 Bom. L.R. 1291 following (1921) 2 K.B. 1, and 55 C. 164. See also 134 I.C. 689=33 Bom. L.R. 624=1931 B. 330, 45 C. 111=21 C.W.N. 794, 41 C.W.N. 27=1936 C. 650 Before a plaintiff can join several defendants in the same suit, both the conditions laid down in the rule must be fulfilled. Under O. 1, R. 3, a plaintiff can in the same suit combine distinct causes of action against several defendants provided that the relief claimed arises from a series of acts or transactions and that there is a common question of law or fact arising in the suit. 144 I.C. 202=1933 M. 622. The plaintiff in order to avail him-

self of the provisions of this rule, has to satisfy two conditions. (1) that the right to relief alleged to exist in him arises out of the same act or same transaction, and (2) that the suit is of a character that if separate suits were instituted against the defendant any common question of law or fact would arise. Both these conditions must co-exist, the two conditions not being in the alternative. 1930 A.L.J. 99=123 I.C. 324; 1934 S. 176, 1933 P. 653. See also 151 I.C. 257=60 C. L.J. 199=1934 C. 405. This rule must be read with Rr. 9 and 10 (2) 27 C. 493, 497. The general principle regarding the joinder of defendants would seem to be that, there must be a cause of action in which all the defendants are more or less interested, although the relief asked against them may vary, and that separate causes of action against separate defendants cannot be joined in one action. 31 B. 516; 49 M. 836 (See also Rr. 5 and 7.) R. 3 relates to a joinder of parties and it assumes the existence of a suit in a proper forum, the Court having jurisdiction to try the suit. 49 C. 895=27 C. W.N. 82. This rule and R. 3 of O. 11 must be read together. 5 A. 163 (170) (F.B.), 11 A. 33. See also 1 C.W.N. 300, 29 C. 257; 8 C. 238 (245); 25 B. 606, 27 B. 41, 12 I.C. 357. Requirements of the rule. 77 I.C. 1028.

APPLICABILITY OF R. 3, CONDITIONS FOR.—Sec 49 M. 836=51 M.L.J. 194 (F.B.). Different mortgages on same property to same person by different mortgagors—Single suit on both joining both mortgagors. See 1937 N. 99.

WHO ARE PROPER PARTIES.—If a person has a right to defend the suit, it is the same thing as saying that he is a necessary party. 146 I.C. 72=1933 M. 664=65 M.L.J. 290. Creditors are proper parties to a suit by sons against a Hindu father for partition and for declaration that the debts contracted by father were not valid and binding on the family. 45 M. 194=42 M.L.J. 97. A single suit against all tenants, where every one of them removes crops on the land and when conspiracy is neither alleged nor proved, is bad for misjoinder of causes of action. 24 I.C. 813=4 L.W. 399 Government is a necessary party to a suit by mirasdars for declaration that the right of fishery leased out by Government to gramattars belonged to them. 38 I.C. 100 So also to a suit by a person claiming certain lands which had been resumed by Government and settled with another party. 11 Bom. L.R. 118 (F.B.). See also 3 M.H.C.R. 134; 15 M. 350. Only the person who prosecutes the plaintiff is liable in an action for malicious prosecution. 12 M.L.J. 389 A suit to obtain a declaration

Who may be joined as defendants. right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the

Notes.

that the plaintiffs possess certain rights in the *shamilat* can be maintained only if all the proprietors have been impleaded as parties. 151 I.C. 225=35 P.L.R. 420=1934 L. 366. In suit for contribution, all the parties liable for contribution are proper parties. 15 M.L.J. 24. In administration suit a person who applies to be made a party defendant as heir of the deceased may be added as a party to avoid multiplicity of suits. 5 R. 159=103 I.C. 22. Where a joint family business is adjudged insolvent and properties vest in the Official Assignee and a widow who has a right of maintenance sues the Official Assignee to enforce her right in the property in his hands by challenging the necessity for incurring the debts, the creditors are also necessary parties. And such a suit lies only with the permission of the Insolvency Court. 1933 L. 901. In a suit upon a lost cheque which has been endorsed over to a third person, the drawer of the cheque is a necessary party. 2 A. 754. All members of a *tarwad* are necessary parties to a suit by one member against the *karnavan* for enhanced maintenance. 7 M. 428. Suit on mortgage—Co-heir of mortgagee admitting payment and claiming independent title to give valid discharge—Joinder as defendant not improper—Questions of title may be gone into in a mortgage suit for giving full relief. 26 N.L.R. 359. In suit for settlement of accounts, the plaintiff's plea was that the defendant was his agent and that a sum of money was due from him on accounts and the defendant's plea was that the accounts had been settled with the plaintiff's brothers who were partners of the firm with the plaintiff. The plaintiff applied to implead the brothers but this application was rejected by the lower Court as being multifarious. *Held*, that the whole question between the parties belonged clearly to the same set of transactions and the plaintiff had a right to join the brothers as parties if he wished to do so, and that there was no multifariousness. 1933 A. 957. See also 1933 A. 147.

WHO ARE NOT NECESSARY OR PROPER PARTIES.—To a suit between rival claimants to an occupancy holding, the landlord is not a necessary party. 70 I.C. 958=1923 A. 11 (2). See also 104 I.C. 845. In a suit by a tenant of *Ghotwadi* land against his landlord, the Secretary of State is not a necessary party. 35 I.C. 788. In suit for a dissolution of partnership sub-partners are not necessary parties and any provision in the decree concerning them is unenforceable. 4 I.W. 10=34 I.C. 543. In suit between landlord and tenant for rent, a third person, who once claimed to be the rightful owner, need not be made a party. 50 I.C. 908. In suit for the administration of an estate, debtors of the estate are not necessary parties. 24 I.W. 425=1926 M. 1110. The receiver of the property

of a party to litigation is not a necessary party, if no attempt is made thereby to interfere with the right of the receiver to the property entrusted to his care, and especially so when the property covered by the suit is not in the possession of the receiver at the time of the suit. 38 C.W.N. 996. In a suit to establish *easement* owners of *servient tenement* not resisting plaintiff's right are not necessary parties. 96 I.C. 605=1926 C. 121. But every person who resists or denies plaintiff's right is a necessary party. 1936 C. 534. There is no justification for the view that all persons interested, no matter what the nature or character of their respective interests may be, are necessary parties. The general rule is that all owners of the *servient tenement* as regards which there is a cause of action and over which the *easement* is claimed should be made parties. For instance, if a co owner is left out, the decree would be infructuous. The same is the case where persons having a possessory interest are not impleaded. 60 C. 1072=1933 C. 882. See also 163 I.C. 630=1936 R. 241. The vendor is not a necessary party to a suit for pre-emption. 26 A. 549. To a suit to enforce a mortgage, persons claiming under a title adverse or paramount to the mortgagor and mortgagee are not proper parties. 33 C. 425. A question of paramount title ought not to be agitated in a mortgage suit, since it introduces a different cause of action, in which only some of the defendants are likely to be substantially interested. 59 C. 548=138 I.C. 671=1932 C. 512. The Secretary of State is not a necessary party to set aside a sale for arrears of revenue. 9 C. 271. See also 11 P. 701 (14 C.W.N. 606, 1 I.C. 313, Foll.) But he would be a necessary party in a suit relating to *act of state*. 11 M.I.A. 517. The Registrar is not a necessary party to a suit to compel registration of a document. 5 C. 445; 8 B. 269. In a suit for a partition of joint family property, mortgagees are not necessary parties. 5 C. 582. An action for slander cannot be brought jointly against several defendants. 15 Bom.L.R. 161. In a suit, under O. 21, R. 61, the different purchasers of the attached property may be joined as defendants. 13 M.L.J. 479. As to suits against a number of allies to recover family property, see 16 A. 279, 7 M.H.C.R. 290. The drawer and acceptor of bills of exchange can be joined as co-defendants in a suit brought by the holder of such bills. C. 541. A suit under S. 73, sub- (2) can be instituted against a number of decree-holders to whom assets have been wrongly distributed. 13 C. 159. A suit for declaration of title, *mesne profits* and possession of the property, purchased by different sets of defendants in different lots in auction sale, is bad for multifariousness. 40 A. 7=42 I.C. 856=15 A.I.J. 809. A suit by the assignee of a bond against the obligor, and in the alternative against the assignor, is

alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise.

4 [Ss. 26, 28.] Judgment may be given without any amendment—

Court may give judgment for or against one or more of joint parties. (a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Defendant need not be interested in all the relief claimed. 5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

6. [S. 29.] The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes.

Joinder of parties liable on same contract.

7. Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

When plaintiff in doubt from whom redress is to be sought.

8. Ss. 30, 32.] (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit on behalf of or for the benefit of all persons so interested. But the Court

One person may sue or defend on behalf of all in same interest.

Notes.

not bad 16 M.L.J. 17 (Recent Cases). A reversioner's suit for possession of properties from several alienees of a widow is not untenable for multifariousness. 36 A. 406=12 A.L.J. 509 A suit for possession on the ground of inheritance can be proceeded against a number of different alienees. 59 P. R. 1918=44 I.C. 549 (33 B. 298; 29 C. 871, Foll.) A claim to direct a trustee to render accounts of trust property for a certain period may be joined with a claim against the trustee and others to render accounts of trust property for another period. 9 M.L.T. 233=9 I.C. 565. (27 M. 80; 29 M. 50; 31 M. 252, Ref.) Strangers to the trust are not proper or necessary parties to a suit under S. 92, for the administration or regulation of the trust 10 R. 342=140 I.C. 317=1932 R. 132. On this rule, see also 33 Bom.L.R. 1291 (Suit for specific performance).

PRACTICE AND PROCEDURE.—The Court has the power to dismiss a suit for multifariousness but its power should generally be exercised with a liberal discretion. O. 1, R. 3 is the provision governing the question of multifariousness; it applies to joinder of causes of action as well as joinder of parties. The question whether joinder is proper or not has to be determined with reference to the facts of each case 57 M. 1031=1934 M. 367=66 M.L.J. 451 Where plaintiff is obstructed from worshipping the village deity by some of the villagers, and he impleads only such villagers as defendants in the suit and not all the villagers, the suit is not bad for non-joinder of all the villagers and a

decree can be passed against the person so impleaded, but he has to take the risk that obstructions may come from some other person who is not bound by the decree. 145 I.C. 1014=38 L.W. 333=1933 M. 726.

O. 1, R. 4.—Where trial Court found that one of the defendants and not the plaintiff was entitled to the suit money and transposed the defendant into the array of plaintiff, such a procedure was in accordance with the rule 105 I.C. 473=1927 O. 484 Suit to recover rent—Transferee and transferor of property joining as plaintiffs—Prayer for decree in favour of transferee alone—Rent prior to date of transfer belongs to transferor but cannot be decreed in his favour without a prayer to that effect—Plaint can be amended 30 Bom.L.R. 1588=1929 B. 51.

O. 1, R. 6.—The drawer and acceptor of bills of exchange can be joined as co-defendants in a suit brought by holder of such bills. 3 C. 541 See also 3 B. 182 The drawer is a necessary party to a case based on a hundi. 25 I.C. 881=243 P.L.R. 1914 It is not incumbent on a person dealing with partners to make them all defendants in suit for recovery of money due by the firm. 21 M. 256. Where several persons are jointly and severally liable for a single liability, all of them are not necessary parties to a suit against some of them only and they may not be added even as "proper" parties when the suit can be decided without them and no multiplicity of suits would arise 1934 Pesh. 94

O. 1, R. 8. SCOPE OF RULE.—The rule is merely an enabling rule and does not prevent

shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or wherefrom the number of

Notes.

a representative suit being brought in any other manner that the law permits. 94 I.C. 47=28 Bom L.R. 309=1926 B 179. *See also* 60 I.A. 278=56 M. 657=65 M.L.J. 87 (P.C.), 150 I.C. 364=58 C.L.J. 534=1934 C 345. R. 8 does in no way debar a member of a community from maintaining a suit in his own right, although the act complained of may also be injurious to the whole community. 60 I.A. 278=56 M. 657=37 C.W.N. 853=1933 P.C. 183=65 M.L.J. 87 (P.C.) The rule requires that the Court should exercise a judicial discretion in permitting some definite person or persons to sue or be sued on behalf of all the persons interested. 17 C. 906 at 910. *See also* 10 P. 568=133 I.C. 463=1931 P. 418. This rule is only intended to enable some of a class of persons (*e.g.*) shareholders of a company to sue on behalf of all of them. It is not intended to enable individuals to sue on behalf of the general public in respect of an encroachment on a public highway. 10 P. 568; 9 M. 463 O 1, R. 8 is merely permissive and is intended to provide a remedy for cases in which it might be difficult or impossible to implead all the persons it is sought to affect. 63 I.C. 963=13 Bur.L.T. 183 O.1, R. 8, C.P. Code, is subordinate to O. 34, R. 1. 36 I.C. 542=1 Pat.L.J. 468. The permission need not be express. 101 I.C. 738=1927 C. 608. An order for representation can be made even when a party objects so to represent. 101 I.C. 738=1927 C. 608. Even when some of the plaintiffs chosen to represent a community go over to the defendant's side and admit the defence, the representative nature of the suit is not altered. 1928 C. 741 O 1, R. 8 if controls S 11, Expl (6) 54 M.L.J. 8 (F.B.). O 1, R. 8 has been enacted for the benefit of the defendants only to this extent, namely, to prevent multiplicity of suits. 27 L.W. 212.

APPLICABILITY OF RULE.—For principle governing representative actions, *see* 27 L.W. 212, 5 P. 539=94 I.C. 433=1926 P. 321. R. 8 is an enabling rule of convenience prescribing the conditions upon which persons when not made parties to a suit may still be bound by the proceedings therein. For the section to apply the absent persons must be numerous, they must have the same interest in the suit, which so far as it is representative, must be brought or prosecuted with the permission of the Court. On such permission being given it becomes the imperative duty of the Court to direct notice to be given to the absent parties in such of the ways prescribed as the Court in each case may require; while liberty is reserved to any represented person to apply to be made a party to the suit. The obtaining of the judicial permission and compliance with the succeeding orders as to notice are the conditions on which the further proceedings in the suit become binding on persons other than those actually parties thereto and their privies. 60

I.A. 278=56 M. 657=37 C.W.N. 853=1933 P.C. 183=65 M.L.J. 87 (P.C.); 44 M.L.J. 116; 151 I.C. 225=35 P.L.R. 420=1934 L. 366. It is a rule of convenience founded on the old Chancery practice to prevent delay, expense and multiplication of suits to establish the same right. The scope of a suit under the rule is essentially different from that of a suit to enforce a claim based on a general right, but in an individual and personal character. Plaintiffs derive their authority to represent others of the class from the Court. 39 C.W.N. 303=157 I.C. 224=60 C.L.J. 556=1935 C. 413. *See also* 17 Pat.L.T. 926. The rule applies only to cases where many persons are jointly interested in obtaining relief, and not to cases in which an individual right has been violated. 7 A. 178 (F.B.). R. 8 is applicable even when the dispute is between two groups *inter se* of the same caste or body. The rule only requires that there should exist a common interest and a common grievance. The rule also allows representation on both the sides in the same suit. 156 I.C. 956=41 L.W. 574=1935 M.W.N. 523=1935 M. 542. The rule applies not only to concurrent interests but also to similar ones, though distinct. 15 I.C. 399=1912 M.W.N. 105. *See also* 98 I.C. 553=1927 A. 96. Where numerous members of a caste seek to enforce rights as against strangers or as against certain other members of the caste, R. 8 applies. 64 I.C. 618, 156 I.C. 956=41 L.W. 574=1935 M. 542. The term "numerous parties" does not mean that the suit should be on behalf of an ascertained or ascertainable body of persons. (20 C. 307, Not Foll.) 143 I.C. 742=34 P.L.R. 608=1933 L. 749. There can be no hard and fast rule as to how many persons should represent the public or the rest of the class of the persons of the same interest. Three persons held to be sufficient. 145 I.C. 387=14 Pat.L.T. 361=1933 P. 302. One or two persons can sue in respect of maladministration of property belonging to the community. 94 I.C. 47=1926 B 179. A suit for a declaration that a certain pathway was a public one, can be maintained with the permission of Court under R. 8. 69 I.C. 910=25 C.W.N. 587. *See also* 62 C. 692=39 C.W.N. 590=61 C.L.J. 182; 17 Pat.L.T. 842.

APPEALS.—Principle of R. 8 can be given effect to in a proper case by the appellate court.—But the appellate Court will not readily take action if an application under the rule had not been made in the trial Court, or if made, had been rejected. 132 I.C. 657=1931 L. 610. Representative suit.—Omission to obtain sanction of Court.—Objection to frame of suit not raised in lower Court cannot be sustained in appeal. 8 O.W.N. 722=1931 O. 375. When a suit is brought in a representative capacity after obtaining the permission of the Court under R. 8 then the representatives appointed by the Court are the only parties to the suit. And when such

persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

Notes.

persons *compromise* the suit and the compromise is given effect to by the Court, others cannot appeal from such decree 1935 L. 33 = 157 I C 733.

ARBITRATION PROCEEDINGS—The provisions of this rule apply to an application under S. 14 of the Arbitration Act to set aside an award on the ground of misconduct of the arbitrator. The Court has power to grant leave under O. 1, R. 8, to a petitioner applying under S. 14, Arbitration Act. A petition under S. 14 is one which can be heard and tried as a suit 60 B. 645=163 I.C. 532=38 Bom.L.R. 380=1936 B 259.

CHANGE IN LAW.—The word "persons" has been substituted for the word "parties" so as to give effect to the opinion expressed in 9 C. 604.

MEANING OF TERMS.—The "numerous persons" mentioned in the rule mean persons capable of being ascertained. The whole Hindu community is incapable of being ascertained and a suit on their behalf if relating to any public trust, can only be instituted under Ss. 91 and 92. 20 C. 397, 407 See also 9 M 463; 33 C. 905.

PERMISSION WHEN TO BE OBTAINED.—Permission may be obtained before the commencement of the suit or after its commencement. 21 B 784 (F B) ; 22 A. 269; 23 M. 29; 25 M. 399; 21 C. 180 (188). See also 29 C. 100; 17 C 906, 910. The permission may be given even after the filing of the suit 47 B. 809=25 Bom.L.R. 689=1923 B 305, 105 I.C. 113. See also 101 I.C 200 (2)=1927 R 134 (1). The permission to allow the plaintiffs to bring a suit in a representative capacity may be inferred from the proceedings in the trial Court. 143 I C 742=34 P L R. 608=1933 L 749. It is not necessary that all the persons having a common interest should agree before one of them should be allowed to bring a suit as their representative. The mere fact that a member of a society objects to the institution of a suit does not show that he has not the same interest as other members in the suit or that it is not for his benefit as such member. 1934 R 347. Leave to file a suit may be granted on behalf of a whole community or body of persons, though some persons object to it. 45 I.C. 423=8 L.W. 160. No person is obliged to have his name added as plaintiff in a suit without his consent, as, if the suit is improper, he might be made liable for costs. In such a case the proper course is to make him a *pro forma* defendant. 1934 R 347 Before instituting a suit under O. 1, R. 8 leave of the Court must be obtained and the requirements of the rule must be complied with before the suit can be proceeded with and unless this is done the suit must be dismissed See 1929 A 806 But its provisions may be complied with subsequent to the filing of the suit and when that has been done the suit cannot be dismissed. 44 C. 258=21 C.W.N 1144. Once the permission of the Court had been obtained

further permission in the Court of appeal is not necessary. 51 I C 437=46 P R. 1919; 101 I.C 738=1927 C. 608.

DEATH OF ONE OF THE PARTIES.—When the authority is conferred to more persons than one, they in a body represent the class; and when one of such persons dies, his legal representative cannot come in his right of succession. If he falls within the class, he can come only by obtaining the permission of the Court to represent the class or under R. 8 (2). 39 C.W.N. 303=60 C L J. 556=1935 C 413. See also 17 Pat L.T. 926. Representative suit—Death of one of the parties—Procedure—Heirs of the deceased person not competent to continue suit—Proper procedure is for the remaining parties to apply to the Court for directions as to whether the remaining party is sufficient or whether it is necessary, whether additional parties who need not necessarily be the legal representatives of the deceased person should be joined. 54 M. 527=1931 M 452=61 M L.J. 135. See also 54 M. 770=132 I C. 289=60 M L J. 135 (On death of a plaintiff, suit does not abate—Any person interested on whose behalf suit was filed may apply to be made a party—Art. 181, Limitation Act, applies to such an application). See also 1 L. 582, 53 C. 844; 9 L.W 166; 59 C. 961=55 C L J 8=1932 C. 275

CHANGE IN PERSONNEL OF COMMITTEE—In a suit against a school, all members of the managing committee on date of suit were impleaded. A member who came into the committee subsequently owing to a change in the personnel of the committee was added as a party only long after the time in the appeal. *Held*, that O 1, R. 8 did not apply to the case and that as the committee stood in law for the school, the decree against them binds the school irrespective of the change in the personnel of the committee 37 C W N. 495=1933 C 329=60 C 794

NOTICE.—Notice under this rule is required and the provisions of the rule are mandatory. 47 B 809=1923 B. 305. The Court is bound to give notice at the plaintiff's expense of the institution of the suit to all such persons whom the plaintiffs purport to represent either by personal service or by public advertisement as the Court may in each case direct 145 I C. 387=14 Pat L.T. 361=1933 P. 302 The issue of a proper notice and its service either personally or by public advertisement on the persons concerned is an indispensable preliminary to the trial of the suit under this rule. If there was no proper notice, the irregularity vitiates the entire proceedings in the lower Court and cannot be condoned under S. 99. The insertion of a notice in a newspaper published in English and having little or no circulation among the class of persons to which the members of the Sabha belonged could not be said to be effective service in accordance with the provisions of this rule. 143 I.C 742=34 P.L.R. 608=1933 L. 749. Notice must include the

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

Notes.

names of the persons who have been permitted to represent others 17 C 906 (910). Even a defective notice will bind those who have appeared and contested the suit. 101 I. C. 738=1927 C. 608. Even where plaintiffs claimed a right for themselves as well as for others, but took no notice as ordered by Court, the suit can be decreed at least, so far as the plaintiffs on record are concerned. 101 I. C. 500=8 Pat L. T. 267=1927 P. 221. There is no warrant in the Code for the suit to be dismissed especially by the appellate Court on the ground that the notice under R. 8 was defective. The proper course would be for the appellate Court to send the case back to the trial Court with direction to take up the proceedings from the state at which it ought to have issued the notice. 143 I. C. 742=34 P. L. R. 608=1933 L. 749. A president of a community authorised to file suits cannot sue in his own name and notice under R. 8 to all the members of the community must be given. Permission also is necessary under R. 8 46 B 132=1922 B. 109. See also 101 I. C. 375=1927 M. 666.

ILLUSTRATIVE CASES.—One member of an unincorporated association cannot sue in damages on behalf of the other members where all such members are alleged each to have suffered damage by reason of the publication of the same libel nor can he maintain such a suit on behalf of the incorporated association by subsequently getting it registered 1930 R. 177. See also 54 M. 527=1931 M. 452=61 M. L. J. 135 (representative suit relating to declaration of right to communal land, e.g., *Kalam puramboke*). The Mahomedan Association of Meerut cannot institute a suit in its own name by its Secretary. The Association should follow the provisions of this rule 6 A. 284. See also 49 C. L. J. 357=1929 C. 445 (Brahmo Samaj); 1929 M. 633 (a trading committee). But see 52 C. L. J. 54=59 M. L. J. 134 (P. C.). In a suit by a junior member of a Malabar tarwad to cancel certain mortgages executed by their *karnavan*, all members of the tarwad should be joined actually or constructively under this rule 10 M. 322. See also 10 M. 79; 1929 M. 451. But see 2 M. 328. Fishermen in a village who want to establish their right to fish in a creek, can proceed under this rule. 12 B. 221. On this rule, see also 11 C. 213; 11 C. 33, 20 C. 810 (816); 19 B. 391; 22 B. 646; 22 B. 729, 23 M. 99. Rent suit—Rival claimant to tenant's right—He ought to be impleaded 1930 P. 592. A mortgagee is not a necessary party to a *partition suit*, provided the question of the mortgagor's interest is not in controversy. 134 I. C. 307=35 C. W. N. 296=1931 C. 594. Religious endowment—Right to make trust in favour of idol derived by defendants—Procedure. See 138 I. C. 433=34 Bom. L. R. 415=1932 B. 305. Where the plaintiff brought a suit on a pro-

missory note executed by five persons who, he alleged, were managers appointed by the community and invested with powers of borrowing and dealing with the common property, it is open to the Court to allow the defendants to be sued as representatives of the community. The question, if the managers were competent to contract the debt or bind the common property, being an issue in the case, no substantive rights of the plaintiffs have not been impleaded are affected by this order 136 I. C. 315=1932 M. 163.

EXECUTION OF DECREES IN SUITS UNDER THIS RULE.—As to how decrees in suits instituted under this rule are to be executed, see 14 M. 57; 12 M. 356. An injunction in cases falling under R. 8 does not bind persons not parties on record. 36 M. 414=22 M. L. J. 109=12 I. C. 1006. Where a plaintiff is allowed to represent the public, a judgment by consent will not bind the public, even if the consent was not purchased and *a fortiori* if such consent was purchased. 23 I. C. 72=26 M. L. J. 315. A private individual cannot obtain a declaration that a right is a public one, but he can sue for damages for injury sustained by him in the exercise of his privileges connected with a public right 44 I. C. 367=8 L. W. 377. An individual worshipper can sue anybody interfering with his right to worship in a Mahomedan mosque 35 A. 197. The devotees of a *mutt* have a sufficient interest under R. 8 to maintain a representative suit 41 M. 124=33 M. L. J. 367. A *mutwalli* of a *waqf* in respect of a mosque need not obtain the permission of Court to maintain a suit on behalf of the trust 63 I. C. 171. A reversionary suit to set aside an alienation is a representative suit. 17 I. C. 101=8 N. L. R. 113. Suit under R. 8—Provisions of section not complied with—Decree passed by Court—Same binding on actual defendants before Court but not on community. 7 P. 197=9 Pat. L. T. 113. Where a suit is not properly a representative suit, a Court cannot adjudicate upon a public right claimed on behalf of a community 42 I. C. 543. Where a person was permitted to represent the public and he knew of it even though he did not contest the suit as representing the public, the public will be deemed to have been well represented. 101 I. C. 738=1927 C. 608. The consent of defendants on the record is not necessary to enable a Court to allow a plaintiff to sue persons as representing themselves and others, having the same interest in the subject-matter of the suit. 36 M. 418. Suit against trespassers for recovering land can be brought by one of several co-owners on behalf of all 37 I. C. 384. Addition of plaintiffs after decree, if competent. 72 I. C. 284. Leave to defend granted on behalf of a number of defendants—Effect of—Death of respondents—Legal representatives to be impleaded in time 1926 L. 31.

9. [S. 31.] No suit shall be defeated by reason of the misjoinder or non-

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PROCEDURE.—Where Court proceeded to act *suo motu* under R. 8 without being moved by the plaintiff to that effect, *held*, the procedure was misconceived. 138 I.C. 509=33 P.L.R. 221. Permission granted under R. 8—Subsequent objection to representative suit by some other members of the community—Proper procedure is for the Court to allow those persons to be brought on record under R. 8 (2) and not to dismiss the suit. 135 I.C. 806=33 Bom.L.R. 1575=1932 B. 65. Representative suit—Suit against villagers—Decree passed—Appeal—Death of one appellant and withdrawal by others—Continuance of suit—Procedure. In such a case Court ought to enquire whether the parties that remained on record were competent to represent the whole village and if it thought they were competent it could proceed with the appeal after expressing that opinion. If however it thought that some more persons were necessary to represent the village it should give an opportunity to the particular party to supplement the existing number by the addition of other persons according to the directions of the Court. 150 I.C. 26=1934 M. 202 (2)=66 M.L.J. 175. See also 39 C.W. N. 303. Frame of suit under T. P. Act, S. 53, to avoid fraudulent alienation—Objection in appeal. See 1935 R. 275.

COSTS.—The object of instituting a representative suit under R. 8, is to create the bar of *res judicata* by reason of Expl. (6) to S. 11. But in any case the persons whom the plaintiff represents cannot be saddled with the costs of the suit if the plaintiff should fail to win his case. 155 I.C. 236=1935 O. W.N. 471=1935 O. 369.

REVISION.—Where an application under R. 8, sub-R. (2) has been made *mala fide*, apparently with a view to defeat the claim against a *quondam* trustee in respect of a public trust the order of the Court dismissing application is not liable to interference by High Court under S. 115, notwithstanding the fact that the reasons for the order were not correct. The powers under S. 115 are intended to be exercised with a view to subserve and not to defeat the ends of justice. 144 I.C. 904=1933 A. 154.

ABATEMENT.—In a representative suit under this section, death of some of the plaintiffs would not result in the abatement wholly or in part of the suit. 146 I.C. 841=34 P.L.R. 1035=1933 L. 654; 150 I.C. 26=66 M.L.J. 175=1934 M. 202.

O. 1, R. 9. SCOPE OF THE RULE.—R. 9 is confined to cases where the Court can deal with the matter in controversy with regard to the rights and interests of the parties actually before it. 52 I.C. 18; 95 I.C. 856=24 L.W. 181=1926 M. 806. This rule presupposes that there are certain parties properly before the Court and certain other necessary parties are not before the Court. It has no application to a case where there is no party on the one side present in Court at all. 9 L. 375=1928 L. 375. R. 9 does not do

away with the necessity for bringing a necessary party on the record. If a necessary party is not on record the proper course is to apply to have him joined. If he is not brought on record at all, or if when he is brought on record the suit as against him is barred by limitation, the suit will be dismissed, especially where the defendant has taken the objection even at the earliest possible moment and the plaintiff has not asked for amendment of the plaint for bringing on record such party. 1936 C. 193. See also 62 C. 324=1935 Cal. 269.

NON-JOINDER OF PARTIES.—IF FATAL.—RULE AND THE EXCEPTIONS STATED.—The general rule is that no suit shall be defeated by reason of non-joinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. There is an exception to this general rule, *vis*, that a Court will refrain from passing a decree which would be ineffective and infructuous. The inability of the Court to pass an effective decree, when all the parties interested in the subject-matter of the suit are not before it, may be due either to the nature of the action or to the nature of the interest that the person, who is not made a party to the action, has in the subject-matter of this suit. An illustration of the former class of cases is furnished by suits for partition or dissolution of partnership and rendition of accounts. An illustration of the latter class of cases is furnished by suits with respect to some property belonging to a joint Hindu family when all the coparceners are not made parties. But these rules have no application to cases in which the interest of the person, who has not been impleaded as a party in the subject-matter of the suit, is ascertained or ascertainable, as in such cases the decree, while binding the interests of the persons who are parties to the decree, cannot adversely affect the separate and distinct right of the person who has not been made a party to the suit. 152 I.C. 1008=1934 A.L.J. 1006. In cases of misjoinder or non-joinder of parties, R. 9 provides against the dismissal of the suit. The only course open to the Court under such circumstances is formally to call upon the plaintiff to make his election and confine the suit to one set of defendants. 142 I.C. 542=15 N.L.J. 111. In a suit against the legal representatives of a deceased debtor, it is sufficient if the plaintiff sues those persons whom he considers to be the legal representatives after enquiry. If such persons are sued, the suit is a good one and the decree will be effective to the extent of the property of the deceased which has reached their hands. A suit of this nature cannot be defeated by reason of the fact that some of the legal representatives have not been impleaded though the legal representatives who are not impleaded will not be bound by the decree. 35 P.L.R. 598=1934 L. 657. Where a suit is instituted against a trustee, all the trustees should be impleaded.

Misjoinder and non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

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If not, no decree can be made against any of the trustees R 9 which provides that no suit can fail for non-joinder of parties does not mean that only one trustee may be sued in contravention of O. 31, R. 2, and a decree passed against the trustee singled out for the suit 55 A. 687=1933 A L J 1933

APPLICATION OF RULE.—R 9 applies to a mortgage suit as well as to other suits 54 C L J. 113=134 I C 1068. *See also* 36 C W N. 1138, 148 I C 903=11 O W N. 524 In the case of mortgage suits R 9 is controlled by O. 34, R. 1 60 C. 777 *See also* 1934 O. 220

CONSTRUCTION.—Rr 9 and 10 should be construed together. 39 I C. 160=5 L W 207. R. 9 does not do away with the obligation to bring a necessary party on the record. 20 I C. 262. The rule amounts to a direction to the Court not to dismiss a suit on the ground of non-joinder. 21 M 373 (382). *See also* 11 A 104; 26 M 647; 28 B. 94. But *see* 44 C L J. 557=99 I C 901=1927 C 238.

WHO ARE NECESSARY PARTIES.—Under R. 9 a person who is a necessary party to a suit is a necessary party to the appeal. 3 Pat L T. 456=66 I C. 780. In a suit for a declaration of an easement right to dam up a stream, the riparian proprietors are proper parties. 26 M L J 385=24 I C 547 Plaintiff brought a suit to eject the defendant from a site and to remove a pial erected by him thereon The plea of defendant was that the land belonged to the Municipal Council, that he put up a pial with its permission and that Municipal Council was a necessary party to the suit The trial Court held that, as plaintiff claimed the suit property as his, it was unnecessary to implead Municipality on the contention of defendant *Held*, that Municipality was a necessary party to the suit and not having been made one, in spite of objection taken from the start, the suit must be dismissed. (Case-law reviewed) 146 I C. 72=1933 M. 664=65 M L J 290. Suit for recovery of *khas* possession.—Dismissed as against minor defendants for steps not being taken to have proper guardians on record—Suit not maintainable against other defendants in the absence of minor defendants who are necessary parties. 33 C W N. 742=1929 C. 669. Suit for specific performance against father—Son impleaded as having joined father in alienating the property in breach of contract to sell—Son is a necessary and proper party. 33 C W N 687=1929 C 667. *See also* 36 C.W.N. 1138 R 9 does not apply to an appeal in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings, and he has had ample opportunity of remedying it in the previous stages which, however, he failed to avail himself of. 134 I C 654=35 C.W.N. 977=1931 P.C 229=61 M L J 294

(P C). *See also* 1933 L 93=145 I C 178=20 N L J 65

WHO ARE NOT NECESSARY PARTIES.—In a suit by one of the several heirs of a deceased Muhammadan to recover her share in the property left by the deceased, the other heirs are not necessary parties 20 I C 548=11 A, L J. 619 *See also* 44 C L J 293=99 I C 177=1927 C. 237 On this point, *see also* 144 I C. 753=1933 P. 259. Suit by a manager of a joint Hindu family does not necessarily fail, because of his omission to implead other members of the family in the suit 34 A. 572. Grandsons of a member of a joint Hindu family are proper though not necessary parties to a suit and a suit by a stranger is not defeated by mere non-joinder of the grandsons where all the sons have been already made defendants. 1930 S. 147. As regards non-joinder, the objection as to procedure to be followed is disposed of by the application of S 99. 42 M L J 133=1922 M. 317.

PARTITION SUIT.—Grandsons not necessary but proper parties 67 I C 156=3 Pat L T. 238; nor a mortgagee 35 C.W.N 296=1931 C. 594

SUIT BY MANAGER OF JOINT HINDU FAMILY.—It is not the form in which the manager sues which determines his capacity to sue on behalf of the joint family but the fact that nobody except him has the right to interfere in the business of the joint Hindu family or to give a discharge or a receipt for a debt due to or from that joint family which confers the capacity on the manager It is a question of fact whether he is the manager or not and not the form in which he sues which determines the question. It is not necessary that the manager must sue as such in order to bind, or to be capable of suing on behalf of, the joint family Where a suit for recovery of money due to a joint family which was instituted by the manager along with some other members of the family was dismissed for non-joinder of a grandson, *held*, that the suit as brought by the manager was properly framed and that it should not have been dismissed (Case-law discussed.) 12 L. 428=133 I C 116=1931 L 559.

EFFECT OF NON-JOINDER.—A suit cannot be defeated for non-joinder of parties 25 I C. 480=3 P R 1915, 1929 A 439, nor of causes of action 25 I C 438=19 C L J. 316 *See also* 15 R D 657; 14 I C. 35=9 A L J. 410 A Court should not dismiss a suit for non-joinder of necessary parties, but should add them, of its own motion, or direct the plaintiff to do so 63 I C. 548; 10 I C 212. A court should not dismiss a suit for non-joinder or misjoinder where plaintiff by amendment can remedy the defect. 41 I C. 615=21 C.W.N. 939, 1930 A L J. 247=122 I C 597 (2); 1930 R 295. The plaintiff should be given an opportunity to amend it. 10 I C. 737=7 N L R 43. Or

10. [S. 27.] (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and

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elect to confine the suit against one set of defendants or one set of causes of action. 15 N.L.J. 111. Where a plaintiff is ordered to add necessary parties and he refuses to do so, Court can dismiss the suit. 63 I.C. 548 = 19 A.L.J. 525. An appeal cannot be dismissed for non-joinder of parties. 32 I.C. 749. But see 44 C.L.J. 557 = 99 I.C. 901 = 1927 C. 238. Where there is a misjoinder of either plaintiffs or causes of action, proper course is to return the plaint for amendment and not to reject it. 18 I.C. 181 = 5 Bur. L.T. 234. A suit for declaration of title to land entered in the Survey Khatian as *ghair mazrui* is not bad for non-joinder of parties, if the general public are not made parties to it. 72 I.C. 634 = 1922 P. 447. Court can decide question of misjoinder or non-joinder in so far as the parties are actually before it. 13 I.C. 123 = 16 C.W.N. 639. Whether the entire mortgage suit is to be dismissed for impleading a puisne mortgagee beyond limitation time, see 101 I.C. 775 = 1927 A. 488.

PLEA BY WHOM TO BE RAISED.—Plea of non-joinder of others as plaintiffs can be raised only by the defendants who have an interest in the subject-matter of the suit and not by those found subsequently not to have any interest therein. 22 I.C. 129.

SECOND APPEAL.—High Court cannot make any person a party in second appeal, when he was not a party in the lower appellate Court. 37 A. 57. Plea of non-joinder cannot be raised in second appeal for the first time. 1930 R. 295 = 129 I.C. 508. The expression "all questions involved in the suit" can only be questions as between parties to the litigation. (*Ibid.*).

REVISION.—Where an application under R. 8, sub-R. (2) has been made *mala fide* apparently with a view to defeat the claim against a *quondam* trustee in respect of a public trust, the order of Court dismissing the application is not liable to interference by High Court under S. 115, notwithstanding the fact that the reasons for the order were not correct. The powers under S. 115 are intended to be exercised with a view to subvert and not to defeat the ends of justice. 1933 A. 154 = 144 I.C. 904.

PRACTICE.—Where in a suit for rent proper parties are not added, Court should give an opportunity to bring them on record and not dismiss the suit. 15 R.D. 657. See also 15 N.L.J. 111.

BURDEN OF PROOF.—Where a party to a suit contends that the suit is defective for want of parties, the party that puts forward this point has to show which, if any, of the parties are absent from the record. 1934 P. 44.

O. 1, R. 10: SCOPE OF RULE.—Clause (2) of R. 10 cannot be read as requiring that all persons who have or claim to have or are

likely to have any sort of right, title or interest in respect of any portion of the subject-matter of a suit should be made parties. 1926 M. 836 = 95 I.C. 214. See also 59 C. 329 = 18 I.C. 104 = 1932 C. 448. Where a person applies to be made a party the Court ought to see whether there is anything which cannot be determined owing to his absence or whether he will be prejudiced by his not being joined as a party. 116 I.C. 137 (2) = 1929 M. 291. "Questions involved in the suit" refer only to questions between parties to the suit. Further, they refer only to questions as between plaintiffs and defendants, and not to questions which may arise between co-plaintiffs or between co-defendants *inter se*. 158 I.C. 814 = 1935 S. 194. Even in cases where the application for addition or substitution of parties does not fall within the language of the rules of the Code, Courts have power to pass necessary orders for the addition or substitution of parties. 55 A. 825 = 1913 A.L.J. 1512 = 1934 A. 40. Court can impose terms on a person who seeks to be added as a party to the suit. Court can also allow a party to be added on the condition that he can only intervene at a particular stage in a suit and cannot question an order passed before he applied to the Court. 1931 C. 580 = 58 C. 801 = 35 C.W.N. 122. R. 10 draws a distinction between two classes of persons, namely, persons who ought to have been joined and persons whose presence is necessary to enable the Court to completely and effectively adjudicate upon and settle all questions involved in the suit. The first part deals with *necessary* parties, the second with *proper* parties. Even against the plaintiffs' consent a new party may be impleaded as a defendant and he may be so added though he may thereby be in a position to counter claim against the plaintiff. 29 L.W. 753 = 118 I.C. 780 = 1929 M. 443. See also 1934 P. 106. Order 1, R. 10 (2) is wide enough to give a Court power to add any person, *i.e.*, whether already a party or not, so as to enable it effectually and completely to adjudicate upon and settle all the questions involved in the suit. 59 I.C. 233 = 12 L.W. 25, 24 L.W. 738 = 51 M.L.J. 148. A Court has large discretion under the rule and any attempt to diminish that discretion ought to be deprecated (circumstances justifying joinder of plaintiffs discussed). 105 I.C. 114 = 53 M.L.J. 264, also 29 Bom. L.R. 418 = 103 I.C. 225 = 1927 B. 424. As a general rule a plaintiff cannot be added without the consent of the existing plaintiffs more so in the case of substitution. A simple rent suit cannot by adding of parties be converted into a title suit. 45 C.L.J. 146 = 101 I.C. 527 = 1927 C. 340. Court has no power to join a person, as a co-plaintiff, who is a stranger and has no personal interest in any of the reliefs claimed by the plaintiffs. 120 I.C.

that it is necessary for the determination of the real matter in dispute so to do,

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517=1930 S. 73. Where the prayer for *khas* possession is not maintainable by reason of the fact that all the persons who should have joined as plaintiffs in the suit were not on record, Court should not allow an amendment of the plaint so as to enable some of the parties to claim joint possession. 145 I.C. 170=37 C.W. v. 138=1933 C. 498. Joinder of party after preliminary decree in mortgage suit See 49 A. 664=25 A.L.J. 369, 17 N.L.J. 266; 1935 R. 23. As to the scope of the rule in general, see 50 M. 34 (P.C.) (addition after limitation). See 60 M.L.J. 229 (Case of addition in a suit for partition in a Hindu joint family). Rule 10 covers the case of an application made to implead as parties to a suit the legal representatives of a deceased defendant (wrongly impleaded as such) in their individual capacity and not as such legal representatives 32 I.C. 320. *Scheme suit*—Addition of party defendants—Whether permission of Government Advocate necessary. 5 R. 263 See also 133 I.C. 823=1931 B. 388 The rule covers a case where a major is wrongly assumed as a minor and the suit is brought by a next friend 41 I.C. 510=40 M. 743. R. 10 refers to any stage short of decree. 39 I.C. 849=13 N.L.R. 69 Suit is to be dismissed in entirety where a necessary party is added after period of limitation. 100 I.C. 859=1928 L. 33, 1929 C. 591 See also 104 I.C. 526. In a suit for *dissolution of partnership* and accounts, a person who was not in partnership as a member of the firm, but possibly in a superior partnership of which he was one side and the whole firm as a suit was on the other side, is not a necessary party 31 C.W.N. 857=1927 P.C. 70=53 M.L.J. 245 (P.C.) Where the suit is not for *partition* of the properties between all the alleged coparceners *inter se* but what is prayed for is a division between the two branches of the family, the really necessary parties are the heads of each branch of the family. It is not obligatory on the plaintiffs to implead all the members of the two branches 1932 L. 641

APPLICABILITY—Under R. 10 a person may be added as a party to a suit in the following two cases: (1) When he ought to have been joined as plaintiff or defendant, and not so joined, or (2) when without his presence, the question in suit cannot be completely decided. Where by allowing a person to be impleaded as a party the nature of the suit will be altered the application should not be allowed. 158 I.C. 814=1935 S. 194 The rule does not apply to the case of substitution, dismissal, or addition of parties, in divorce proceedings. 30 C. 489; see 6 C. 370. The existence of a valid plaint or memorandum of appeal is a *sine qua non* for the application of the provisions of R. 10 (1) 148 I.C. 241 (2)=1934 N. 55 The rule applies to suits under S. 92. The son of a hereditary

trustee can be made a party to a suit for the removal of a hereditary trustee. 6 L.W. 9=38 I.C. 133=1917 M.W.N. 550 See also 1937 N. 121 (Son in joint Hindu family). Where a person, who has wrongly filed a suit in his name, does not desire to clothe himself with a right to sue, but by an application he expressly divests himself of any claim and prays for the substitution of a person who has a cause of action, admitting that he himself has none, the case clearly falls within R. 10 150 I.C. 895=1934 N. 159 Court has no power to add parties after the passing of a preliminary decree in a suit for partition although the parties sought to be added might have been proper parties if joined before The words "any stage of the proceedings" in R. 10 (2), mean proceedings not concluded by a decree. 17 N.L.J. 266. See also 1937 P. 49.

"AT ANY STAGE".—The power given by the rule ought to be exercised before the first hearing of the case 6 C. 370; 166 I.C. 794=18 Pat.L.T. 278=1937 P. 40; 17 N.L.J. 266. But see 27 B. 157, 39 I.C. 849=13 N.L.R. 69. An order directing a party to be added can be made before the suit terminates. 32 C. 483 See also 17 N.L.J. 266=1935 N. 64. A Court has a discretion to order the addition of necessary parties at any stage of the proceedings, and plainly this discretion always ought to be exercised when its exercise will tend to finality of the litigation Parties can be added to a suit after a preliminary decree therein has been passed 154 I.C. 465=1935 R. 23. See also 40 C.W.N. 1173 (even after final decree in mortgage suit)

PARTY WHEN TO BE ADDED—Under R. 10, Court may, at any stage of the proceedings, order the addition of any person as party to the suit 35 B. 393 It authorizes the Court to make an order for transfer of a party from the category of defendant to that of plaintiff at any stage of the proceedings. 24 C.W.N. 110, 105 I.C. 473=1927 O. 484; 97 I.C. 1023 A person who would be represented by a party on the record and bound by the decision against that party is entitled to be impleaded under R. 10, Cl. (2), to protect his interest. 44 M.L.J. 322=1923 M. 521 A party may be added on his own application. 13 C. 90. It is not desirable to add or substitute as parties persons whose right to sue has already become time-barred. 25 A.L.J. 991. A substitute can only be added to enforce a single right pleaded in a suit and not to bolster up a suit by pleading his own individual right 120 I.C. 517=1930 S. 73. Person financing litigation is not a necessary party. 68 M.L.J. 236. The mere fact that a person might be affected by the result of the suit, whether by dismissal after contest or by a collusive withdrawal, is no ground for allowing him to be added as a plaintiff in the suit. 41 L.W. 126=1935 M. 394=68 M.L.J. 236. Suit for damages for rashly driving motor car—Employer added

order any other person to be substituted or added as plaintiff upon such terms

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as a party defendant—Defence that some third person was the master—Amendment of plaint so as to add such third party might be granted 30 Bom L.R. 162=1928 B. 91. See also 148 I.C. 909=11 O.W.N. 630=1934 O. 347. Firm—Sole proprietor filing suit in firm name—Objection to form of suit—Amendment. 134 I.C. 1200=1931 C. 770 Rights of party added under R. 10 (2) are safeguarded by Limitation Act, S. 22. 55 I.A. 7=6 R. 29=54 M.L.J. 88 (P.C.) Where judgment-debtor appellant became insolvent pending appeal to set aside an auction sale and the Official Assignee elected not to prosecute the appeal, *held*, that a mortgagee from the judgment-debtor who had not taken any steps to assert his rights till that stage could not be allowed to step in and prosecute the appeal 32 C.W.N. 304 Suit filed in the name of Chairman of District Board—Amendment in appeal allowing substitution of District Board as plaintiff—Permissible. 32 C.W.N. 396. A general question which is of interest to the whole community cannot be effectually and completely adjudicated and settled in a suit by adopting the expedient of joining a member of that community to the suit as a plaintiff 120 I.C. 517=1930 S. 73.

MISDESCRIPTION.—A suit for rent had been brought against the proper person who was misdescribed owing to his own action in giving his son's name instead of his own when he rented the premises and who had since been refusing to receive the summons on the ground that he was not the proper person. He was the proper person against whom the decree had been rightly made. On an application in execution proceedings to bring on record the real judgment-debtor's name, *held*, that the record could be corrected by virtue of the powers under S. 151 if not under O. I, R. 10 144 I.C. 903=35 Bom L.R. 365=1933 B. 200

SUIT AGAINST A DEAD PERSON.—A suit against a dead person is a nullity and no question of adding a party arises. 6 L.W. 359=33 M.L.J. 418. See also 1937 S. 47. A plaintiff cannot claim the benefit of the institution of a suit against a dead person for the purpose of extending the period of limitation against his heirs 47 I.C. 894=5 O.L.J. 596. Though suit in the name of a dead person as sole plaintiff cannot be amended a suit in the name of two plaintiffs one of whom is dead, it can be amended. 104 I.C. 623=1927 C. 880 The words "wrong person" appearing in R. 10, cannot be construed to mean a "dead person". 148 I.C. 241 (2)=1934 N. 55

TRANSPPOSITION OF PARTIES.—A Court can make a transposition of parties 34 I.C. 186=20 C.W.N. 752; 32 C. 483; 97 I.C. 1023; 1927 O. 484=105 I.C. 473=(1937) 1 M.L.J. 672, 24 C.W.N. 110 But it cannot transpose a defendant to the array of plaintiffs without the

party's consent and in the absence of an application to that effect. 58 C.L.J. 240. R. 10 is in the widest possible language and transposition of a defendant to the side of the plaintiff should be adopted in all cases where it is necessary for the complete adjudication upon the question involved in the suit and to avoid multiplicity of proceedings. 1932 Pat. 346, Ref. 160 I.C. 149=1936 P. 107. It is no good reason for refusing the transposition of a *pro forma* defendant into a plaintiff that the effect would be to assist the plaintiff, nor is it necessary before making an order under R. 10 to determine whether the suit as constituted is bad. The transposition cannot also be disallowed on the ground that it would affect limitation since the object of S. 22 (2) of the Limitation Act is to provide for cases of this nature 14 Pat. L.T. 252=1933 P. 239. In a *partition suit*, the Court can make a defendant a plaintiff and continue the suit. 45 B. 983=23 Bom.L.R. 391. Where in a *suit on a promissory note*, the plaintiff alleged that he was the real beneficiary and that the holder who was impleaded as a defendant was a mere benamidar for the plaintiff, and for the purpose of giving a valid discharge, the holder desires to be transposed as a plaintiff, the Court ought to allow him to do so, even if the transposition is applied for a date when a suit by the holder would be barred. The provisions of S. 22 (1) of the Limitation Act are inapplicable to a case of transposition of parties. 11 P. 616=140 I.C. 572=1932 P. 346 (9 Pat L.T. 288, Diss.). In a *suit on a pro-note* in the name of the son by the father of the payee, the note having been allotted to the father in a partition between the father and son, the son having been impleaded as a party defendant, *held*, that the case was a fit one in which the Court should exercise its powers under R. 10, in appeal, and transpose the defendant son as a plaintiff-appellant and that the suit should not fail for want of an endorsement by the son in favour of the father. 36 Bom. L.R. 807=1934 B. 356. As to the object of transposition of parties, see 58 I.A. 229=1931 P.C. 162=61 M.L.J. 612 (P.C.). Withdrawal of part of claim by the plaintiff—Transposition of some of the defendants as parties can be ordered. 12 L.W. 563. In *administration suits*, a person originally arraigned as a defendant can be made plaintiff to claim his shares 1918 M.W.N. 929=9 L.W. 79=49 I.C. 130. The *appellate Court* has the power to transpose a respondent to the category of appellants in order to further the ends of justice 44 C.L.J. 243=1927 C. 37. See also 1930 A.L.J. 926.

STRUCK OUT.—Where no cause of action is mentioned against a party to a suit and no relief is claimed against him it will be improper and unnecessary to retain him and he may be struck off from the suit 133 I.C. 507=61 M.L.J. 563. See also 39 P.L.R. 342=1937 L. 67. When a Court makes an order strik-

as the Court thinks just.

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ing the names of certain persons off the record, it is immaterial whether their names are actually removed or not. 32 C. 315 (P.C.) An order striking out a defendant from the record cannot be made after the first hearing. 18 A. 53; 20 M. 360 (362). An order striking off the names of a party is appropriate to cases of actual misjoinder under R. 10, and not to cases of voluntary abandonment by a plaintiff of his claim against a particular defendant, where the proper order to pass is an order of dismissal. 1934 L. 737. Where a cause of action against a defendant is specifically pleaded and a distinct relief has been claimed against him, order directing the removal of his name from the array of the parties is in substance although not in form a decree, because the effect of the order is the refusal to grant the relief to plaintiff which he had prayed for. The proper remedy for the party aggrieved from the order is to file an appeal from it and not an application in revision under S. 115. 131 I.C. 548=1931 A. 333 (2); 50 M.L.J. 387; 45 M.L.J. 703, Dist.

POWER OF COURTS TO PASS ORDERS UNDER RULE.—Nothing in the Code affects the inherent power of Court to make such orders as may be necessary for the ends of justice. 35 B. 393. Court has, under R. 10, power to bring on record any person as a party at any stage. 61 I.C. 378=31 Bom L.R. 476=1929 B. 337. Court has power under R. 10 (1), to substitute a right plaintiff in the place of a wrong one, only if the right to sue is not barred under S. 22 of the Limitation on the date of the substitution. 58 B. 536=36 Bom L.R. 814=1934 B. 385. Court has no power for addition of plaintiffs after passing of decree. 44 M.L.J. 222. Neither R. 10 nor R. 8 empowers the Court to join a person as plaintiff, who could not have been originally joined. 57 I.C. 784. In a *representative suit* it is not open to the plaintiff to put an end to the litigation by merely withdrawing the suit. He may go out of the suit, but that does not put an end to the litigation where other people are interested in it and have a right to come in and continue it. Thus where a trustee brings a suit for the benefit of the beneficiaries and then wants to nullify the result of the litigation, the beneficiary may be properly brought on the record to continue the litigation. Similarly, the junior members of a Malabar Tarwad have been allowed to prosecute a second appeal which the head was anxious to compromise. So also where in a suit instituted by the Collector representing the estate of the last male owner under the Court of Wards Act he sued for the recovery of certain properties but subsequently wanted to withdraw the suit, *held*, that the suit was a representative suit instituted for the benefit of the two widows of the last male owner and a reversioner to that estate and

that in such a case it was open to the Court to allow the reversioner to be made a party and then to allow the Collector to go out of the suit, if he did not want to prosecute it. 1934 A. 4=1933 A.L.J. 1512. Mortgage suit—Administratrix creating mortgage without sanction of Court—Beneficiaries are necessary parties to mortgage suit. 28 B.L.R. 1360. Person financing the litigation has no right to be impleaded as a party. 41 L.W. 126=68 M.L.J. 236. Suit on mortgage by benamidar—Real owner can be added as party under this rule. 55 M.L.J. 856. As to the object of the rule, *see* 5 M. 52. *See also* 9 A. 447(449); 2 A. 738; 13 M. 32. A receiver cannot be made a party without the leave of the Court appointing him. 30 C. 724. Court can allow a party to be added on the condition that he can only intervene at a particular stage in the suit and cannot question an order or orders passed before he applies to the Court. 58 C. 801=35 C.W.N. 122. Party unnecessarily added at defendant's instance. That party's costs may be made payable by the defendant. 1930 M.W.N. 679. *See also* 1933 B. 304=35 Bom L.R. 569. Persons improperly impleaded. The proper course is to strike out their names and not to dismiss the suit as against them. 1930 M. 817=54 M. 81=59 M.L.J. 932 (F.B.).

PARTY WHETHER CAN BE ADDED IN APPEAL.

—A person, if he is not made plaintiff or defendant, in the Courts below, cannot claim to be made a party in appeal. 31 I.C. 27. A necessary party to an appeal should be added before deciding it. 31 I.C. 814. Application to add his legal representative as parties in an appeal against a dead man is covered by S. 153 and O. 1, R. 10. 45 M.L.J. 231, 102 I.C. 710 (2). This rule applies to appeals, but there is no power in the Code to make a party to a suit a co-appellant. 10 R. 227, 2 A. 487, 18 A. 332; 2 A.L.J. 516, 12 M.L.J. 355. But *see* 1927 C. 880. Where parties are allowed to intervene in an appeal, they should be joined as parties to the suit, and not to the appeal. 12 M.L.J. 355. Appellate Court will not interfere with the trial Court's discretion in changing plaintiff to defendant or *vice versa*. 95 I.C. 171=1926 N. 393. In some circumstances, it may be right and proper that the Court should add as parties to the proceedings, even at the appellate stage, persons who were not amongst the original parties to the suit. But the circumstances must be exceptional and such as renders it really necessary in the interest of the original parties to the suit, that some other persons should be added to the proceeding, so that the matters originally in dispute may be properly adjudicated upon and finally determined as between the original parties to the suit. 59 C. 329=138 I.C. 104=1932 C. 448. *See also* 38 L.W. 539=1933 M. 806=65 M.L.J. 548. A person who does not consent to be added as plaintiff may be added as a defendant. 7 C. 242. No question of limitation can arise with respect to the

(2) [S. 32.] The Court may, at any stage of the proceedings, either upon or without the application of either party, and

Court may strike out or add parties.

on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Notes.

Court's power to make an order adding a party defendant to a suit. 12 C 642 (651), 24 C. 640; 27 C 540; 17 M. 12. See also 28 B 11 (18). There is considerable doubt as to whether S. 32 of the Code of 1882 authorises the addition of a party to a suit after decree. 42 C. 72=41 I A. 251 (P.C.) A suit might be continued even where the original plaintiff had no right to sue, provided that the defective institution was due to a *bona fide* mistake (30 M 419; 43 M 707, Rel.); 69 I C. 413=1923 M 180 (1) A mistake can be called *bona fide* even if it was made without the exercise of due care and caution, provided it was honestly made 27 N.L.R. 335. Valid but wrong substitution of legal representatives in appeal—Case remanded for fresh decision—Order of remand not a nullity—Application to bring true legal representatives on record before passing of final decree should be granted 1928 P 197. See also 1930 M. 930=129 I.C. 469=60 M.L.J 97 Addition of parties—Remand by appellate Court for the purpose of—Indicating order to be passed by trial Court—Impropriety 136 I.C 632=63 M.L.J 369 (P.C.) Where a suit for sole possession is not maintainable for want of certain necessary parties Court cannot allow the suit to be amended as one for joint possession as such amendment will materially alter the nature of the suit. 37 C.W.N. 138. Person claiming as adopted son of plaintiff's husband is not a necessary party to a suit on mortgage 1928 M. 978=113 I.C. 310. A suit filed by the Karnavan of a Malabar Tarwad as such is a representative suit. Consequently where it appears that the Karnavan is not acting *bona fide* in the interests of the tarwad in seeking to withdraw an appeal, it is open to the Court to permit the Anandravans to be added as supplemental appellants before the Karnavan is permitted to withdraw the appeal In such a case the appeal as originally filed should be taken to be pending till orders are passed on the application for its withdrawal 34 L.W 548=61 M.L.J. 549

PROPER PARTY.—In a suit on a promissory note by an endorsee, an application was put in by the endorser that he should be joined as a co-plaintiff He alleged that he endorsed the pro note to the plaintiff merely for collection, and that the plaintiff was dishonestly claiming that he was a holder for valuable consideration. *Held*, that as one of the original payees of the promissory note was the applicant and in order to enable the Court effectually and completely to adjudicate

upon and settle all the questions involved in the suit between the plaintiff and the defendants, the applicant was a proper party He was added as defendant though not added as co-plaintiff 1934 S 182 See also 150 I.C. 670=36 P.L.R. 217=1934 L 328 The *Secretary of State* is not a proper or necessary party to every suit in which any question is raised with regard to the legality of any statute. 1926 M. 836=95 I.C. 214 See also 51 M.L.J 148=24 L.W. 738; 1931 C. 580=58 C 801. Addition of parties—Claim to vacate site against Municipality—Plea of title in Government—Latter—If necessary party—Addition as party justified. (1937) 1 M.L.J. 597 When a *pro forma* defendant becomes on his own application a co plaintiff, he adopts all the statements made in the plaint which support the cause of action and those statements only He does not adopt statements made therein which are not essential to the cause of action as stated in the plaint 41 C.W.N. 501

EJECTMENT SUIT—Landlord and tenant—Proper parties. 59 C. 739=35 C.W.N. 1132; 129 I.C 860=1931 C 76=58 C. 561. See also 139 I.C 679=1932 M 688 A suit instituted by an assignee of a bond under an assignment which is void under S. 136, T P. Act, can be said to have been instituted in the name of a wrong person, and where the assignee has acted under a *bona fide* mistake, the Court can remove the name of the assignee and order substitution of the name of the assignor as plaintiff under R 10. 162 I C 229=1936 O.W.N. 414=1936 O 275.

MORTGAGE SUIT—Under R 10 (2) Court has power to add parties in two cases only. The first is when he ought to have been joined and has not been joined. In a suit upon a mortgage, the plaintiff is not bound to join everybody who chooses to set up a title to the property unless he chooses. If, then, he is given an option to join them or not and he chooses to exercise that option by ignoring them, it is impossible to say he ought to have joined them The clause can apply only when he was bound to join them and has not done so. The second case in which a party may be added under R 10 is when his presence is necessary to enable the Court to make a complete adjudication upon the questions involved in the suit. If a full and final adjudication is possible between the existing parties of all questions involved in the suit, the Court has no jurisdiction to add parties. Further it is often undesirable in a mortgage suit to change its character altogether and convert it into a genera

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) [S 33.] Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

Notes.

administration suit. 148 I.C. 720=1934 N. 228

The Court has ample power under O. 1, R. 10, even after the passing of the final decree in a mortgage suit to order that a person whose presence may be necessary to enable the Court effectually and completely to adjudicate upon the questions involved in the suit be added as a party to the proceedings. If it appears that there is an equitable mortgagee who, under O. 34, R. 1 was a necessary party, and that he ought to be joined as a party, the Court can add him as a party although the final judgment has been passed in the suit. 40 C.W.N. 1173

MAINTENANCE SUIT.—See 1937 M. 338.

PARTIES TO REDEMPTION SUIT.—1936 M. W.N. 1184=44 L.W. 563=1936 M. 960=71 M. L.J. 614. Powers of Court—Mortgage suit—Omission to implead interested party—If fatal. 1936 P. 153 Suit on mortgage—Holder of money decree against mortgagor getting receiver appointed in execution—Power of Court to implead him as party in mortgage suit. 40 C.W.N. 974

PARTITION SUIT.—Sale of property in execution of mortgage decree during pendency of suit—Mortgage-purchaser if proper party to partition suit 35 C.W.N. 296=1931 C. 594

POSSESSORY SUIT.—R. 10 enables the Court to add a third party where it is necessary so to do in order to enable the Court to effectually adjudicate and settle all the questions involved in the suit. In a suit for possession of the subject-matter of a sale, by the purchaser against his vendor and tenant, a third party alleged that the vendor had no right to sell the whole property, and that he was entitled only to a half share and applied to be made a party. He had also filed a suit against the purchaser, the vendor and the tenant claiming half the property. Held, that the proper course was to join the third party as a party to the suit for possession by the purchaser, in order that the Court might properly work out the rights as between the parties and avoid possible conflict of decisions. 1929 M. 268 and 5 M. 52, Ref. 1935 M. 353

SUIT AGAINST FIRM.—Where a suit was brought in a firm's name which had only a sole proprietor and the defendant had notice at the very outset of this and such proprietor was examined on commission and no objection was taken till the trial was over regarding the maintainability of suit in firm's name. Held, that the amendment of plaint by substituting the name of the proprietor for the name of the firm should be allowed

as it was only a change in form and not in substance and that the appellate Court could order such amendment in plaint, judgment and decree without ordering a remand to the original Court for rehearing. 159 I.C. 138=1935 R. 240 In a suit against a firm under O. 30, C. P. Code, it is not possible for a person who has not been served with a writ but who apprehends that at some future time the plaintiff will eventually seek to hold him liable in execution proceedings on the basis of partnership, to enter appearance and defend the suit on the merits unless he admits that he is not in fact a partner. But when such person is interested in some way or other in the assets of the firm, and denies that he is a partner in the firm, he can apply to the Court under O. 1, R. 10, and it will be proper for the Court to add him as a party to the suit even in opposition to the wishes of the plaintiff. 40 C.W.N. 677.

SETTING ASIDE EX PARTE DECREE.—Where a suit is decreed *ex parte* and persons entitled to be added as parties to the suit make an application to add them as parties and to set aside the *ex parte* decree, Court should add them as parties and give them an opportunity to set aside the *ex parte* decree. 166 I.C. 794=18 Pat L.T. 278=1937 P. 49.

ORDER WHETHER APPEALABLE.—An application of plaintiff to be added as co-plaintiff cannot be treated as an application under O. 22, R. 10. An order passed under O. 1 is not appealable. An application to be added as co-plaintiffs cannot be treated as one under O. 22, R. 10. 36 I.C. 919. An order rejecting an application to be made a party is not appealable. 13 C. 100; 2 A. 904, But see 12 M. 489. Order under O. 1, R. 10 does not come within the definition of "decree" in S. 2 (2) and there can be no appeal. 42 M.L.J. 97=45 M. 194.

APPEAL.—Where an application is made under O. 1, R. 10 but it is dealt with by the Court also under O. 22, R. 10, an appeal lies against the order on the application. 1937 M. 200 No appeal lies from an order awarding costs under O. 1, R. 10 (2). 39 P.L.R. 342=1937 L. 67

REVISION.—An order refusing to add a party as a defendant is not subject to revision under S. 115, but the High Court may interfere under S. 107 of the Government of India Act, 1915, if there is a denial of the right of fair trial. 13 C. 90, 4 P. 723=93 I. C. 32. See also 156 I.C. 628=41 L.W. 126=1935 M. 394=68 M.L.J. 236. Ordinarily High Court is reluctant to interfere with an order refusing to make certain persons parties to the suit. But where the lower

(5) [S. 32.] Subject to the provisions of the Indian Limitation Act, 1877, S. 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

Conduct of suit.

11. [S. 32.] The Court may give the conduct of the suit to such person as it deems proper.

12. [S. 35.] (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them

Appearance of one of several plaintiffs or defendants for others.

may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

13. [S. 34] All objections on the ground of non-joinder or misjoinder

Notes.

Court instead of addressing itself to the important question, whether the addition of the petitioners as parties was necessary in order to enable the Court to effectually and completely adjudicate and settle all the questions involved in the suit, rejected the petition of the sons of a full sister of the deceased owner of certain properties on the ground that it was opposed by the step-sisters on record, *held*, that the entire responsibility in the matter of adding parties was with the Court and did not depend upon the wishes of the parties on record, the order of the lower Court really amounted to a refusal to exercise a jurisdiction vested in it and that it should be set aside in revision. 148 I.C. 347=15 Pat.L.T. 602=1934 P. 425 The trial Court is vested with wide discretion and where that Court has acted in aid of justice to prevent the suit being defeated upon a more or less technical ground, the High Court would not interfere. 152 I.C. 778 (2)=1934 P. 370

ADDITION OF PARTY, WHAT AMOUNTS TO—An amendment of the plaint, by leave of the Judge, that the plaintiff is suing in a representative capacity as a shebat, does not amount to an addition or substitution of a new plaintiff within the rule 28 I.C. 818=19 C.W.N. 1193. In a suit to enforce rights of trust by persons interested in the trust, addition of more representatives out of time, does not bar the suit 33 A. 272; 25 M.L.J. 452 (17 B. 413, Foll.) But see 43 I.A. 113 See also 9 L.W. 377=50 I.C. 358 A *pro forma* defendant is not known to law. 41 I.C. 468=2 Pat L W 108

O. 1, R. 10(5)—The proviso applies only as regards limitation Where a person is added as party defendant under R. 10 the proceedings should be taken to have commenced against him from the date he was impleaded as party 50 C.L.J. 208 See also 1930 L. 747, 55 I.A. 7=6 R. 29=54 M.L.J. 88 (P.C.). For other purposes such as calculation of costs, etc., the date on which summons is served will be the starting point. 8 L.R. 79 (Rev).

Costs.—Where parties are added as defendants at the instance of a co-

defendant, and no cause of action is found against them, the proper order to pass is to strike off the names of those defendants under R. 10 (2), and not to discharge them. When such defendants are struck off under R. 10 (2) as being improperly added, Court can impose such terms as it considers proper and can order the party to pay costs to such defendants. This power of the Court is analogous to its power of adjourning proceedings in which case the Court is empowered to make the defaulting party to pay costs to other party and there is no limitation as to the amount which can be awarded under such circumstances. 39 P.L.R. 342=1937 L. 67.

O. 1, R. 11.—The question of conduct is one of discretion, and the appellate Court will not as a rule interfere. See *Dowbiggin v Trotter*, 20 W.R. 1024 (Eng.). Suit by one trustee—Death of plaintiff—Co-trustee can be made plaintiff. 40 M.L.J. 218=52 I.C. 560 The word "person" in R. 11, means a party to the suit and a person who is a stranger to the suit cannot be given the conduct of the suit within the meaning of the rule. 106 I.C. 854=46 C.L.J. 530

O. 1, R. 13: GENERAL.—The words "unless the ground of objection has subsequently arisen" have been added to give effect to the rulings in 5 B. 609, 7 C. 603. No person (including a corporate body) can be made a plaintiff without his consent expressly given 46 P.R. 191=10 I.C. 515.

OBJECTIONS AS TO NON-JOINDER WHEN SHOULD BE TAKEN.—An objection as to non-joinder of parties should be taken before the settlement of issues. The rule applies even in cases where the plaintiff claims a joint right along with others but does not make the latter parties to the suit 41 C. 527 (25 B. 433, Dist., 25 I.C. 122, Foll.) See also 35 P.L.R. 616=1934 L. 459; 143 I.C. 838=1933 O. 129 Objections as to misjoinder and jurisdiction owing to undervaluation, when not raised in Court of first instance are no ground for reversing a decree when they do not affect the merits of the case 25 I.C. 25. (36 C. 780, 17 I.C. 97, 22 M.L.J. 25; 7 M.L.T. 78, 9 M.L.T. 173, Foll.) An objection as to non-joinder cannot be taken for first time

Objections as to non-joinder or misjoinder. of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

ORDER II.

FRAME OF SUIT.

1. [S. 42.] Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.
2. [S. 43.] (1) Every suit shall include the whole of the claim which the

Notes.

in revision before High Court. 46 I.C. 648. See also 13 I.C. 123=16 C.W.N. 639, 25 I.C. 122, 16 B. 119; 10 M. 322; 17 C. 580. Where no objection as to suit being bad for defect of parties has been taken in the written statement, or in the grounds of appeal in lower Court, it cannot be raised in second appeal. 145 I.C. 325=1933 P. 270. When objection to want of parties is not raised by the defendant, it must be deemed to have been waived. But Court can add any one as a party if it thinks it necessary. 3 A. L. J. 474. Where a defendant is permitted to file an additional written statement and he therein raises an objection as to non-joinder, which is later on made the subject matter of a fresh issue, the provisions of R. 13 are not infringed. 137 I.C. 274=1932 M. 583=62 M.L.J. 154. Where objection as to non-joinder of necessary parties is taken at the very outset and plaintiffs do not implead them, the suit may be dismissed. 1933 L. 93=145 I.C. 178 (1923 M. 337; 61 M.L.J. 294, Ref.)

O. 1, R. 10 and O. 6, R. 17—Powers of Court—Plaint instituted by living person in name of and verified on behalf of, dead person—Substitution of name of living person—Permissibility—Gross neglect—Effect of. See 1937 S. 92.

O. 2, R. 1. OBJECT OF.—The object of this rule is to give effect to the maxim *interest rei publicae ut sit finis litium*. 27 B. 382. See also 9 C. 919; 2 M.H.C.R. 131; 26 M. 760 (763); 28 A. 482 (P.C.); 26 A. 236, 9 C.W.N. 498, 4 C.L.J. 367. The intention of the legislature is that all matters in dispute should be disposed of in the same suit. 25 C. 371, 31 M. 385.

SCOPE OF.—R. 1 has reference mainly to joinder of causes of action rather than to joinder of parties. 25 I.C. 480=3 P.R. 1915. "Subject in dispute", meaning of. See 23 L.W. 13=91 I.C. 660=1926 M. 234. Under this rule and R. 2 plaintiffs must bring their entire claim, and every remedy enforceable in respect of that claim, into Court at once. 9 C. 919; 2 M.H.C.R. 131. But all causes of action need not be joined. 59 I.C. 517. On this rule, see also 132 I.C. 684=35 C.W.N. 307=1931 C. 670; 1935 N. 226. (Holder of two mortgages—Right to sue separately on each.)

O. 2, Rr 1 and 6: PLAINTIFF JOINING IN ONE SUIT TWO INDEPENDENT CLAIMS—DUTY OF COURT TO ASK PLAINTIFF TO ELECT—Where the plaintiff sues in one suit for a declaration of his title as proprietor in respect of a portion in certain land and for partition of his share after declaration of his title and also sues in the same suit the admitted *raiyats* of the land, calling upon them to remove a building from his holding and thus joins two claims and causes of action which are absolutely independent and unconcerned with one another, the suit should not be tried in the form in which it is instituted. The Court should ask the plaintiff to elect to proceed with one of the claims. 161 I.C. 695=1936 P. 142.

O. 2, R. 2 SCOPE AND OBJECT OF THE RULE.—R. 2 is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one action of different causes of action even though they arise from the same transactions. 41 I.A. 142=18 C.W.N. 617 (P.C.). 38 M. 1162, 45 B. 805; 30 C.W.N. 873=97 I.C. 73=1926 C. 1022, 110 I.C. 554=1928 M. 840=56 M.L.J. 52, 1930 L. 688=122 I.C. 733. See also 1935 L. 156, 1935 L. 842. R. 2, when it operates as a bar merely deprives the claimant of his remedy by suit founded on the same cause of action. It cannot have the effect of vesting any right in any of the defendants. 1933 A. 228=144 I.C. 152. See also 161 I.C. 820=1936 R. 167. A plaintiff is not obliged to put forward in one suit every claim which he may have against the defendant, as the causes of action in such cases may be different, but he must include the whole claim based on the particular cause of action. 1936 N. 268. R. 2 does not bar *per se* a subsequent suit brought on a different cause of action. It only purports to bar suits for claim omitted from former suits and arising from the transaction under which the claim was made in the former suit and splitting up of the reliefs in respect of the same cause of action. It does not require that where several causes of action arise from one transaction, the plaintiff should sue for all of them in one suit. The rule is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they

Suit to include the whole claim
 plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

Notes.

arise from the same transaction. 101 I.C. 820=1930 R. 167. R. 2 refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of a claim and a decree has been made in that suit. 45 C. 305=22 C.W.N. 611. Rule requires that every suit shall include the whole of the claim arising from one and the same cause of action and not that every suit shall include every claim or every cause of action arising out of the same transaction. 1929 P. 241=120 I.C. 479 See also 48 C.L.J. 368=1929 C. 93. R. 2 is directed against two evils—the splitting of claims and the splitting of remedies. 1926 L. 509=97 I.C. 396. The rule only prevents the splitting up of claims and does not bar a subsequent suit on the whole claim against a different person. 18 C.W.N. 129=19 C.L.J. 191. It does not contemplate claims under separate causes of action as well as claims affecting different defendants. 40 B. 351=18 Bom.L.R. 45, 104 I.C. 820, 1 Luck. 1=91 I.C. 976=1926 O. 77; 161 I.C. 820=1936 R. 167. It bars only those suits where the causes of action and defendants are the same. The dispossession of plaintiff from two properties held under different titles gives rise to two causes of action. 7 A.L.J. 658=50 I.C. 905. See also 25 B. 161. R. 2 is framed to protect the defendant being twice vexed for one and the same cause. 41 C. 825. This rule does not debar a plaintiff from including in his claim certain additional profits omitted in a previous suit under a misapprehension that the profits were paid annually and not, as was subsequently ascertained to be the fact half yearly. 65 I.C. 585=1923 A. 230. Two reliefs can be joined in the same suit, the parties being the same. 75 I.C. 597=1923 A. 306. Suit to declare a person mutually—Declaration of the ownership of the property as an essential part of the plaintiff's claim. 1 Luck. 592=1928 O. 67=109 I.C. 895. The rule does not apply when the prior suit was withdrawn with liberty to bring a fresh suit. 1930 L. 634.

APPLICATION OF THE RULE—This rule cannot apply to defendants at all and can only apply to plaintiffs. 1933 L. 569=148 I.C. 484. It applies only where the defendant in the subsequent suit was the defendant in the previous suit. It does not apply where the subsequent suit is brought against a different defendant. 47 I.C. 896. See 17 I.C. 434=1912 M.W.N. 1071; 1929 M. 96=116 I.C. 116. As to suit on alternative causes of action, see 103 I.C. 888. It applies not only to cases of deliberate relinquishments but also of accidental or involuntary omission. 35 C.L.J. 304=1922 C. 161. Rule does not apply to proceedings in the Revenue Court. 38 A. 302=14 A.L.J. 373, 1927 O. 498. Nor to proceedings under S. 144 of the C. P. Code.

53 I.C. 552, 47 I.C. 47=3 P.L.J. 367. Nor to proceedings in execution of decree. 62 I.C. 507; 19 A. 98 (F.B.), 18 C. 515, 53 C. 582=1926 C. 1019. Nor to a plea raised in defence. 57 I.C. 348 (L.), 7 L. 297=1926 L. 494=96 I.C. 360, 1926 L. 21. Nor to any part of a dismissed claim abandoned in appeal. 54 I.C. 655. Nor to the amendment of plaintiff by the addition of claim which had been omitted. 45 C. 305=22 C.W.N. 611. See also 52 I.C. 464=84 P.R. 1919. The rule does not apply where the previous suit was not a regular suit, but an application for leave to sue in *forma pauperis* which was rejected. 21 A. 359. Nor where the cause of action for a prior and a subsequent suit in respect of the same property are different. 41 C. 80, 104 I.C. 820. See also 153 I.C. 73=1935 A. 174. A person is not affected by R. 2 if at the time he brought his former suit, he was not in a position to know all his rights. 21 O.C. 307=49 I.C. 54. It cannot be said that the rule has no application to a suit where plaintiff is a minor. 22 M. 309. There is a distinction between splitting of the same cause of action into two or more suits, and instituting different suits upon distinct causes of action. 11 M. 210. On this section, see also 1933 B. 437=35 Bom.L.R. 946.

MEANING OF THE TERMS.—The word "claim" is treated as something arising out of a "cause of action" and as something distinct from the term "cause of action." 17 A. 535. The claim and the remedy mentioned in this rule have reference to the cause of action litigated in the previous suit. 10 M. 350. It has to be construed with reference to the substance, rather than the form of action. 19 C. 372. "The cause of action" for a suit is the sum total of the facts and circumstances which the plaintiff has to prove in order to entitle him to the relief claimed. 38 A. 217=14 A.L.J. 257; 13 O.L.J. 448=93 I.C. 269.

"CAUSE OF ACTION" includes every fact which it would be necessary for the plaintiff, to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. 16 A. 65 (F.B.) See also 18 A. 131; 45 A. 376=21 A.L.J. 267; 1 R. 694=1924 R. 145; 93 I.C. 269=1926 O. 365; 152 I.C. 199=4 A.W.R. 744. "Cause of action" in R. 2 is used more comprehensively than in S. 17. 25 I.C. 579. It does not depend upon the character of the relief prayed for but refers to the *media* upon which a Court is asked to come to a conclusion. 38 B. 444; 60 I.C. 596=1921 P. 125, 52 I.C. 929. It has no relation to the defence set up by the defendant nor does it depend on the character of the relief prayed for. 52 I.C. 929. An event to which no legal effect attaches, cannot enter as an element into the creation of a cause of action. 31 C.

Relinquishment of part of claim. (2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

Notes.

283 Every adjustment of account is a new cause of action. 11 I.C. 540=15 C.W.N. 862. Every alienation by Hindu widow gives a separate cause of action to reversioners. 66 I.C. 455=1922 O 171. If the cause of action in the subsequent suit is different from that in the first suit, the subsequent suit is not barred. 77 I.C. 590. Suits for *kattubadi* due in successive years—*Kattubadi* not fixed in money or kind but on gross produce—Causes of action are different and suits are not barred under O 2, R. 2. 147 I.C. 756=39 L.W. 65=1934 M. 46. First suit for declaration of title dismissed—Second suit for refund of purchase money—Causes of action different. 1933 L. 1017=147 I.C. 651. Where a suit is brought either on a non-existent cause of action or upon a false cause of action it will not disable a plaintiff from filing a fresh suit on the true cause of action. 7 L.W. 557=45 I.C. 969.

RELINQUISHMENT OF PORTION OF CLAIM.—There is no reference in this rule to the jurisdiction of the Court trying the claims. Where a person chooses a Court by relinquishing a part of his claim, a subsequent suit for the relinquished portion of the claim will be barred by this rule. The fact that the two suits are triable for two different Courts is immaterial. 14 Pat.L.T. 663=1933 P. 715. A person must be taken to have relinquished or abandoned his claim on the real cause of action, when he files his suit on another known to him to be false. 6 M.L.J. 5. But see 26 M. 777. The relinquishment by a plaintiff of a portion of the claim under R. 2 applies primarily to relinquishment before institution of the suit. 54 I.C. 655. Amendment of plaint, on objection, omitting one relief—Effect of on subsequent suit for relief omitted. 104 I.C. 370=1927 R. 237. The possession of a right, without knowledge of it, cannot be said to be a portion of his claim, which can be intentionally relinquished. 37 I.C. 119=94 P.R. 1916 [15 C. 800 (P.C.), Ref.] A statement in the plaint that a portion of the claim which is not sued upon is not relinquished is of no effect. 2 N.W.P. 90. Relinquishment may be either accidental or involuntary, as well as deliberate. 11 M.A. 551.

"OMITS TO SUE"—The words "to sue" mean to make a legal claim or to take legal proceedings. It does not necessarily mean to file a suit by means of a plaint. 7 Bom.L.R. 138, 38 A. 217. The constitute an *omission to sue* it is necessary that the claim must be known to the plaintiff. It is only a claim or remedy known at the time of the institution of the suit, which if omitted will be barred under O 2, R. 2. Actual knowledge of the claim, and not constructive knowledge, is necessary in order that the relief may be barred in a subsequent suit. Where a plaintiff

is unaware of a claim at the time of his suit, though he may, by proper inquiry make himself aware of its existence, the non-inclusion of that claim will not preclude him from subsequently suing in respect of that claim. 161 I.C. 717=44 L.W. 379=1936 M. 699=71 M.L.J. 264. It is not necessary to determine whether the omission arose from a mistake or otherwise. 3 Beng.L.R. 265. Casual omission to include some items of property from the schedule to the plaint does not mean abandonment of claim by plaintiff with respect to those items. 50 I.C. 331.

"PORTION OF CLAIM."—The right which a litigant possesses without knowing or ever having known that he possesses it can hardly be regarded as a "portion of his claim." 15 C. 808 (P.C.).

"SHALL NOT AFTERWARDS SUE."—It is only remedy of suing which is barred. The right subsists. 7 Bom.L.R. 138. This rule is laid down with reference to suits brought under this Code. 9 C. at 46. See also 21 M. 236. It has reference to the subject-matter of the claim, and not to the persons against whom it may be brought. 10 C. at 929. See also 19 A. at 384. A set-off is subject, as a claim in a cross-suit would be, to the provisions of this rule. 32 C. 654.

TEST.—Whether the causes of action in two suits are different or identical can be ascertained by the test whether the same evidence will maintain both actions. 40 B. 351=33 I.C. 950=18 Bom.L.R. 45. If the cause of action in the subsequent suit is different from that in the first suit the subsequent suit is not barred by R. 2. 66 I.C. 923=34 C.L.J. 465, 114 I.C. 871, 1930 A. 116=121 I.C. 827. The mere fact that the title to the property in dispute in both suits is the same and that the property is the same does not necessarily show that the cause of action is the same. 59 I.C. 517.

PLEADINGS, PROOF AND PRACTICE—A plea of bar under R. 2 must be specifically pleaded and established to the Court's satisfaction. 46 I.C. 119. A statement made in a previous suit by a party that he reserved the right of bringing another suit for damages cannot avoid the operation of the rule of limitation or of R. 2. 34 I.C. 51. Two suits presented on the same day must be presumed to be presented and admitted in the order in which their numbers appear on the register. 1 R. 682=1924 R. 161; 1937 R.D. 86. But see 49 M. 809=51 M.L.J. 351. Where it has been held that the numbering is not *prima facie* evidence of respective dates of admission and it could not be said that the suit bearing the later number was afterwards presented within the meaning of R. 2. Held also, that the plaintiff may elect as to which of the two suits should be held to be barred (*Ibid.*) A second suit will not be barred by the rule unless the same cause of action is to be

- (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
- (Omission to sue for one of several reliefs)

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found within the four corners of the plaint in the first suit. 28 I.C. 301=82 P.L.R. 1915 Subsequent suit on alternate cause of action. 103 I.C. 888=1927 N. 322.

SPECIAL CASES: ACCOUNTS, SUIT FOR.—Where in a former suit between the parties, for accounts of a dissolved partnership, the Court on the basis of a Commissioner's report found that there was a certain amount due to a defendant therein, who, however, remained *ex parte* and did not choose to ask for a decree in his favour for that amount, though he could have done so, and the judgment in the former suit is capable of being read as declaring the rights of all parties, it is not right to say that that party has no right to make a claim on the basis of the prior judgments or, to obtain a decree for the amount in a suit instituted for the purpose. 67 M.L.J. 413=40 L.W. 792=1934 M. 665. See 158 I.C. 378=1935 L. 321. A suit for accounts brought subsequent to a suit for dissolution of partnership is not barred under R. 2 as the two suits are not based on the same cause of action. 39 P.L.R. 197. Suit to set aside purchase of mortgage-deed and for reconveyance of properties—Claim for accounts not pressed—Subsequent suit for accounts barred by O. 2, R. 2. 35 C.W. N. 977=1931 P.C. 229=61 M.L.J. 294 (P.C.). Where careful perusal of the plaint in the first case indicated that the plaintiff was confining his claim to certain specific items said to have been appropriated by the respondent quite apart from his liability to render accounts as an agent which was the subject-matter of the second suit. *Held*, that the second suit was not barred under R. 2. 145 I.C. 1010=34 P.L.R. 905=1933 L. 542. Accounts of a partnership can only be taken and must be taken once for all in a suit to which all partners or their representatives are parties, and the law does not contemplate successive suits for accounts taking at the instance of the various partners. 40 L.W. 792=1934 M. 665=67 M.L.J. 413.

ALIENATION.—A plaintiff may either file a single suit or separate suits to set aside alienations made by a widow. 12 M.L.J. 103. See also 16 A. 279; 7 M.H.C.R. 290, 1 Luck. 1; 1930 N. 3=26 N.L.R. 121.

COMPROMISE.—When a suit is compromised, and the compromise provides for possession being given, a suit for possession based on the compromise is not barred. 2 A. L.J. 680. The fact that the previous suit is compromised is no bar to the application of the rule. 22 W.R. 424. See also 7 B. 182.

CONTRACT.—Where there are two breaches of one term in one contract, and both occur before any suit is brought, the cause of action

is non-performance of the promise, and only one suit will lie. 12 C. at 348. But see also 135 I.C. 801=33 Bom.L.R. 1563=1932 B. 86, 19 C. 372. It is only when the party complaining of the breach of contract suffers damage that a cause of action is said to arise and till then only a term of the contract is broken. 38 M.L.J. 470. A cause of action might include claims upon several contracts provided they form part of a continuous course of dealing. 26 I.C. 209=41 C. 825. Suit on account—Different members of a joint Hindu family executing different khats—Suit on one specific khata—Running account produced referring to all khats—Subsequent suit on another khata—Bar. 54 B. 11=122 I.C. 417=1930 B. 60. When one instrument contains two separate contracts and performance of each is secured in a different manner each gives rise to a separate cause of action, although they may be joined in the same suit. 58 I.C. 18=16 N.L.R. 136. Second suit is not barred when the former suit was one for an injunction and value of fodder taken away and the second suit is one for a refund of money advanced and damages for breach. 2 L.L.J. 304. (25 M. 669, Foll.).

CONTRIBUTION.—Where one of several debtors satisfies the debt, his cause of action for contribution accrues against all at one and the same time. The contributories may all be included as defendants in one plaint. 3 M.H.C.R. 187. See also 12 A. 110. First suit as manager for rendition of accounts against heirs of brother—Second suit for contribution towards joint liability—Suit not barred. 152 I.C. 199.

DAMAGES.—Where A sued B on the 2nd June, 1879, for damages for not having made over possession of certain leasehold properties during 1875-1876, and got a decree, a subsequent suit on the 14th June, 1880, for damages for 1876-77 to 1878-79 is barred. 9 C. 143. Prior suit for possession does not bar subsequent suit for compensation. 11 L.J. 64=1928 L. 534 (1). The same set of facts cannot give ground for two actions, i.e., for a tort and a conspiracy to cause damage. The one excludes the other. 40 C. 898=23 I. C. 25=18 C.W. N. 185. First suit for damages for failure to repair a motor car—Subsequent suit for the price of the car refused to be returned—Maintainability. 122 I.C. 733=1930 L. 688.

DIVORCE.—A suit for divorce based on the wife's misconduct does not bar a subsequent suit for partition of the common properties of the husband and wife. 38 C. 629=15 C.W. N. 766 (P.C.).

EJECTMENT.—Suit for ejectment of tenant from one plot—Subsequent suit regarding other plots in the same holding barred. 14 R.D. 632. The fact that the plaintiffs brought

Explanation.—For the purposes of this rule an obligation and a collateral

Notes.

a previous suit for ejecting defendants from some of the plots in the plaintiff's holding is no bar to a second suit for ejecting the defendants from the remaining plots omitted in the first suit. For this purpose it makes no difference if the previous suit was withdrawn or dismissed for default or the plaintiffs omitted a portion of their claim. 17 R. D. 114. Where one of the proprietors reclaims *shamlat* land and a suit for ejectment by the proprietary body is dismissed and the former reclaims a further piece of *shamlat* land, a subsequent suit to eject him from the land reclaimed subsequently is not barred under R. 2. 158 I.C. 112=1935 L. 156. Where two separate and unconnected buildings are erected on a land and the plaintiff's suit for demolition of one of the buildings and possession of land underneath is dismissed, a subsequent suit for demolition of the other construction and for possession of land lying underneath it is not barred either by R. 2 or by *res judicata*. Each construction gives rise to a separate cause of action. 158 I.C. 620=1935 A.L.J. 948=1935 A. 790. See also 14 L.R. 134 (Rev.)=17 R.D. 176.

EXECUTION APPLICATION—R. 2 does not apply to applications for execution. Application for partial execution is no bar to a subsequent application for execution of the rest of the decree. 28 N.L.R. 77=130 I.C. 120=1932 N. 89.

INSTALLMENT BOND—An *instalment bond* containing a provision that on default of payment of any two instalments, the whole amount would become payable and the creditors would be at liberty to sue for the entire amount, gives an option to the creditor either to sue for the whole amount in case of two successive defaults or to sue for the instalments only. If the creditor exercises his option of suing for the instalments only and waives the right to sue for the whole amount there is no longer any cause of action left to him for suing for the whole amount. It follows that at the time when the suit is brought, he disentitles himself from suing for the whole amount, and therefore R. 2 would not be a bar to a future claim brought by him when further instalments fall due. As a matter of fact R. 2 does not deal with cases where there is an option to sue for the whole amount and the option is waived before the suit is brought. 158 I.C. 53=1935 A.L.J. 456=1935 A. 461. See also 157 I.C. 643=1929 M.W.N. 204. Omission to sue for instalments which had accrued due bars subsequent suit therefor. 44 A. 663. But see also 1931 M.W.N. 1246. Two or more causes of action to recover money may be joined, but only if they arose within the jurisdiction of the Court in which the suit is brought. 12 M.L.J. 11. As to money suits, see also 8 C. 483 (F.B.), 7 B. 134; 5 C. 597; 12 B.L.R. 37, 28 B. 447. "Claim for a portion does not bar another claim for balance." 29 M.L.J. 474. On this point, see also 1931 M.W.N. 1246=35 L.W. 424=138 I.C. 340.

MAINTENANCE—A subsequent suit for a declaration that the maintenance decreed in a former suit is a charge on certain property, is barred. 12 M. 285. See also 11 M. 127. The mere ground that the wife entertains any apprehension as regards the husband's transferring his property would not afford her a new cause of action for the relief sought for by her in the second suit. 167 I.C. 123=1937 A. 56. A subsequent suit for maintenance at an increased rate is not barred. 22 M. 175. Where under the terms of a will an amount is payable from the income of a property by way of maintenance, a suit for recovery of arrears of such maintenance can be framed as such, without framing it on the charge of the property left by the will. See 132 I.C. 684=35 C.W.N. 307=1931 C. 670.

SUIT ON MORTGAGE—21 B. 267; 18 M. 257; 20 A. 322; also 24 A. 429 (P.C.) and 24 M. at 109, 30 B. 156, 10 Bom. H.C. 369; 6 Bom. H.C. (A.C.) 97; 7 B. 377, 3 A. 857. Two mortgages—Each can be sued on separately. 33 C.L.J. 232. A person holding two mortgages on a property can sue for sale on the second mortgage reserving his rights under the first. Each mortgage is a separate cause of action and the mortgagee is not bound to sue on them all. 38 M. 927=29 M.L.J. 195 (F.B.). This was held by a Full Bench of the Madras High Court. It is not now good law since the enactment of S. 67-A of the Transfer of Property Act by the Amending Act of 1929. Option to sue—Mortgagee authorized to sue for interest or for possession in default by mortgagor—Suit for interest—Subsequent suit for possession not barred. 2 L. 13 (F.B.). See also 44 M.L.J. 123=38 C.L.J. 126=4 L. 32=50 I.A. 115 (P.C.), 44 A. 121=49 I.A. 9 (P.C.), 26 A.L.J. 57; 102 I.C. 187=1927 M. 580=52 M.L.J. 636. Where the deed of anomalous mortgage contained a covenant by which the mortgagor undertook to pay interest yearly, a suit by the mortgagee to recover the interest only due under the document is maintainable. (4 Luck. 32 and 64 I.C. 953, Rel. on.) 152 I.C. 494=1934 R. 159. Suit for sale on mortgage—Court gave a decree declaring plaintiff's mortgage right and giving him liberty to enforce his right in a separate suit—Second suit for enforcing the mortgage right not barred. 1931 M.W.N. 1008=1931 M. 830. First suit for sale of mortgaged property for interest only may bar a second suit for recovering principal and balance of interest. The question whether any default accelerates the claim on which the principal money can be called in would depend entirely on the wording of the mortgage. English cases are not proper guides for deciding Indian cases. 6 R. 771=115 I.C. 671=1929 R. 71. A mortgage deed provided that the principal money would be payable on the expiry of four years. Interest was payable at 9 per cent. monthly and if it remained unpaid for three months, the mortgagee was entitled to compound interest and also

security for its performance and successive claims arising under the same

Notes.

if he chose, to realise the whole amount of principal and interest. During the third year, interest fell in arrears and the mortgagee brought a suit for interest and realised it. After the expiry of four years, he brought the present suit for principal. *Held*, that the default clause was one for the benefit of the mortgagee, which he was entitled to waive and as in the previous suit instituted before the expiry of four years, the principal was not recoverable, the present suit was not barred under R. 2. (Case-law ref.) 141 I.C. 613=34 P.L.R. 520=1933 L. 463 Mortgage-deed containing provision for recovering interest only—Suit for interest after mortgage amount became payable—Personal relief claimed—Subsequent suit to recover mortgage amount—Bar. 27 A.L.J. 1045=119 I.C. 50 (2). Mortgage deed providing for instalment payment—Default clause for payment of enhanced interest and whole amount—Default of mortgagor—Suit to recover instalment and enhanced interest—Subsequent suit to recover entire mortgage amount—Bar. 1929 M. 371=56 M.L.J. 580. Covenant to pay interest unless distinct from and independent of claim for principal cannot be basis of suit. 117 I.C. 61=1929 R. 96 (2). See 39 A. 506; 97 I.C. 285=1926 L. 66=6 O.W.N. 960 Mortgage and lease—Suit for rent—Subsequent suit on mortgage is no bar. 3 L. 1=1922 L. 111. See also 69 I.C. 54=1924 L. 190 Mortgage by tenant with possession—*Malguar* suing mortgagee for declaring mortgage as void—Subsequent suit for possession—If barred. 122 I.C. 697=1930 N. 119. Where a mortgage and lease form one transaction and the lease is only a mode for realizing the interest due on the mortgage, a suit on the mortgage cannot be brought subsequent to a suit for rent on the lease. 63 I.C. 928=3 Lah.L.J. 390 Where the mortgagee brought a suit for principal and interest a subsequent suit for possession is barred 97 I.C. 396=1926 L. 559=8 L. L.J. 381 The right of the mortgagee to recover the money from the mortgagor personally arises out of the covenant to repay the loan and his right to realise the security, *viz.*, to have the mortgaged property sold to satisfy his claim, accrues from the hypothecation. Each of these two rights furnishes an independent and distinct cause of action to the mortgagees. R. 2 makes it obligatory on the plaintiff to include in the suit the whole of the claim and all the reliefs which he is entitled to make and pray for only in respect of the cause of action. It therefore follows that a mortgagee is not bound to sue for the realisation of his security in a suit to enforce the personal covenants of the mortgagor to pay the overdue interest as the two claims arise out of distinct causes of action. 16 L. 640=158 I.C. 238 (2)=1935 Lah. 672 (F.B.) Where the original obligation is single and entire, but when one party has chosen to execute separate documents for portions of the obligation and the other party

has chosen to accept the said documents each document constitutes a distinct cause of action. Hence where in pursuance of a settlement of accounts promissory notes and mortgage are executed, and a suit is filed only on the promissory notes, a subsequent suit on the mortgage is not barred by R. 2 as the notes and mortgage constitute distinct causes of action, even though made in settlement of single debt 159 I.C. 720=1935 R. 365 Suit for return of mortgage money on the ground of failure of security is barred under R. 2, if the mortgagee first sues for possession and having failed there, institutes the second suit for the money (1924 O. 147; 1925 O. 524; 1932 L. 523, 1921 L. 309 and 1926 Pat. 87, Foll.) 161 I.C. 698=1936 Pesh. 86. Suit on mortgage impleading Hindu mortgagor, his sons and grandsons—Court passing money decree against mortgagor alone—Suit dismissed against the rest—Interest of sons and grandsons—Liability to attachment and sale in execution. 1935 O.W.N. 1113. As regards the application of the rule to mortgage suits, see also 140 I.C. 181; 57 B. 316=34 Bom.L.R. 1615, 138 I.C. 270=1932 L. 523, 1932 M. 466=63 M.L.J. 672, 40 C.W.N. 627, 163 I.C. 834=1936 M. 473=70 M.L.J. 506, 1935 Pesh. 84; 1937 N. 99; 166 I.C. 996=64 C.L.J. 62=1937 Cal. 57

MORTGAGE, REDEMPTION OF.—A suit for redemption is barred when the plaintiff had first sued for recovery of excess balance realised by the mortgagee 48 I.C. 799, 103 I.C. 290=1927 N. 302. In a redemption suit all claims between the mortgagor and the mortgagee should be settled. 24 I.C. 688; 1927 N. 302 See also 152 I.C. 921=1935 A.L.J. 115=1935 A. 96; 161 I.C. 820=1936 R. 167. The dismissal of a suit for redemption according to the terms of a mortgage is no bar to suit for redemption on a subsequent agreement. 27 I.C. 732 Suit by mortgagee for possession—Second suit for possession barred 67 I.C. 281=2 L.L.J. 678 See also 103 I.C. 289. Causes of action for the redemption suit and the subsequent suit for contribution against the person who had the part of the equity of redemption are different 27 A.L.J. 1162=1929 A. 696.

MESNE PROFITS, SUIT FOR—19 C. 615; 17 A. 533, 11 M. 151; 11 M. 210; 11 M.L.J. 332 See also 3 A. at 663, 24 A. 501, R. 2 does not bar a suit for mesne profits brought subsequently to a suit for possession, as a claim for mesne profits is based on a cause of action distinct from a claim for possession. 60 I.C. 65. See also 1931 A.L.J. 606, 152 I.C. 921=1935 A.L.J. 115=1935 A. 96; 161 I.C. 820=1936 Rang. 167, 158 I.C. 1119=18 M.L.J. 76; 10 P. 329, 133 I.C. 766=1931 P. 233; 1931 O. 57, 54 A. 65=1932 A. 510, 133 I.C. 298=1931 A.L.J. 673=1931 A. 429 (S.B.). (Suit for mesne profits accruing after institution of previous suit, not barred (Case-law discussed.) 1931 A. 429 A claim for mesne profits for the period covered by a prior partition suit is a claim based on a different cause of action and is not barred by

obligation shall be deemed respectively to constitute but one cause of action.

Notes.

the provisions of R. 2. [1931 A.L.J. 673 (F. B.); Foll.] 3 A.W.R. 735. See also 59 B. 454=157 I.C. 634=37 Bom L.R. 336=1935 B. 306, 156 I.C. 672=31 N.L.R. 304=1935 N. 137. A previous application for restoration of possession does not bar a subsequent claim for mesne profits by way of restitution. 38 C.W.N. 1197. Suit for redemption followed by decree and deposit of decretal amount—Failure of defendant to deliver possession—Fresh suit for mesne profits from final decree to delivery of possession not barred. 152 I.C. 921=1935 A.L.J. 115=1935 A. 96. Decree by consent for mesne profits up to date of judgment—Defendant wrongfully continuing in possession—Suit for subsequent mesne profits not barred. 56 B. 292=34 Bom L.R. 447=138 I.C. 578=1932 B. 222. But see 49 A. 597=25 A.L.J. 409. Where in a prior suit for possession and future mesne profits the Court did not purport to decide the question of future mesne profits a subsequent suit for mesne profits *pendente lite* is not barred. 40 A. 292. A prior suit for partition and possession does not bar a subsequent suit for mesne profits in respect of the same property. 4 R. 103=95 I.C. 380=1926 R. 137. A prior suit for possession does not bar a suit for mesne profits due for a period subsequent to the institution of the prior suit. 71 I.C. 972=1923 C. 442, 12 L.L.J. 152. Claims for possession and claims for mesne profits are separate causes of action. 38 M. 828=28 M.L.J. 127 (F.B.). Suit for profits accrued between date of deposit of mortgage-money and delivery of possession is maintainable. 35 I.C. 799. A party is not bound to include mesne profits after the institution of suit though he is required to do so for profits before suit. 32 I.C. 696. See also 49 A. 597=25 A.L.J. 409. The institution of a suit for mesne profits only consequent on dispossession is a bar to a subsequent suit for possession. 29 I.C. 939=9 S.L.R. 23. A suit for proprietary profits against a lambardar does not bar a subsequent suit for mesne profits against the same lambardar and other trespassers. 41 A. 286. PROFITS.—Where a plaintiff in a suit for one year's profits was not re-presented after being returned, a subsequent suit for account is not barred under R. 2. 40 M. 291=30 M.L.J. 341.

PARTNERSHIP SUIT.—When a suit for accounts of a partnership has been instituted no second suit for accounts is maintainable in connection with the same partnership, when the claim involved in the second suit could have been included in the prior suit. 158 I.C. 378=1935 L. 321. See also 67 M.L.J. 413.

PARTITION SUIT.—See 20 C. 385; 23 B. 597, 8 M.L.J. 92, 7 B. 182; 23 A. 216, 28 A. 39; 28 A. 50. A subsequent suit for partition of property in one district is not barred merely because the plaintiff had sued for partition and possession of some property in another district. 16 I.C. 383. See also 134 I.C. 803=

34 L.W. 277=1931 M. 705; 7 B. 182; 3 M. H.C. 376; 38 A. 217. A suit for partial partition though dismissed does not bar a suit for partition of all joint properties. 87 P.R. 1915=31 I.C. 463. Second suit for partition of lands not included in the first suit by mistake or fraud of the defendant is not barred either on the principle of *res judicata* or R. 2. 130 I.C. 552=1931 S. 27. But not so where there was intentional omission. 9 I.C. 424. Suit for partition—Subsequent suit for rent barred except as regards rent for the period subsequent to the prior partition suit. 137 I.C. 775=1932 L. 448. Where a property is inherited from the collaterals of the parties to a previous suit for partition, there is no bar to a fresh suit for partitioning the property held by them jointly with other collaterals. 15 I.C. 214. An omission in a suit by the next friend of a minor of a portion of the property to which the minor is entitled, will not bar a second suit by the minor for the partition of property omitted. 45 B. 805. 14 I.C. 95. Where the first suit to set aside order for re-delivery under O. 21, R. 101, is decided against plaintiff a subsequent suit for partition is not barred. 49 M. 596=50 M.L.J. 681=1926 M. 683. A fresh suit for mesne profits is not barred under R. 2, by reason of the plaintiff having already sued and got a decree for partition and separate possession, when in the prior suit the plaintiff did not pray for mesne profits, past or future, and the decree therein said nothing about the same. 59 B. 454=157 I.C. 634=37 Bom L.R. 336=1935 B. 306. See also 156 I.C. 672=31 N.L.R. 304=1935 N. 137. Suit for partition of property obtained under a will—Subsequent suit for partition of property inherited—Maintainability. 122 I.C. 403=1930 A. 371.

POSSESSION, SUIT FOR.—See 21 C. 157 (P. C.), 4 A. 171; 27 B. at 389, 10 C.W.N. 8; 13 M.L.J. 475. The cause of action in a suit for a declaration and in a suit for possession are different. 38 M. 247=25 M.L.J. 125. See also 167 I.C. 414=1937 O. 263. A dismissal of a declaratory suit by reason of the plaintiff not being in possession at the time of suit does not bar his subsequent suit for recovery of possession. 9 L.B.R. 37=37 I.C. 15=10 Bur. L.T. 189. Suit for bare declaration—Subsequent suit for possession not barred. 95 I.C. 892=1926 R. 123, 120 I.C. 509. Suit for mere declaration that property unattachable—Subsequent suit to recover damages for wrongful attachment is not barred. 95 I.C. 219. A suit for possession of property will not be barred by reason of the dismissal of a previous suit for declaration and injunction. 52 I.C. 434; 34 A. 172=13 I.C. 154=9 A.L.J. 111. Suit by daughter to establish reversion to her father's estate—Subsequent suit for specific property, if barred. 50 I.A. 267=51 A. 439=1929 P.C. 166=57 M.L.J. 160 (P.C.) Property in the possession of second defendant—Suit claiming property from first defendant—Second suit claiming that property from the second defendant not main-

Illustration.

A lets a house to *B* at a yearly rent of Rs. 1,200 The rent for the whole of the years

Notes

tainable. 129 I.C. 737=32 Bom. L.R. 1473=1931 B. 114. First suit for certain items bequeathed, plaintiff having no knowledge of the items bequeathed to him—Subsequent suit for further items bequeathed to him but left out in the prior suit is maintainable. 23 L.W. 415=93 I.C. 1 (2)=1926 M.W.N. 94. Where a suit is based on certain title to certain property the plaintiff is not debarred from recovering some other property on some other ground in a subsequent suit. 38 M. 1162=16 M.L.T. 310=26 I.C. 232=27 M.L.J. 520. (26 A. 238; 23 W.R. 314; 29 M. 48, 12 C.L.J. 336, 13 B. 34, *Foll.*) See also 39 C. 704, 28 M. 560; 12 M. 134; 17 C. 933, 1 A. 688 (P.C.); 19 W.R. 133 (P.C.). Where the plaintiff, in a suit for possession on the basis of a lease, omits to include a relief for demolition of the building standing on a portion of the property, and obtains a decree for possession, he cannot afterwards bring a separate suit for that purpose. 155 I.C. 268=1935 P. 222. Where the right to recover possession would arise only on the sale being set aside the plaintiff suing for cancellation of the sale need not pray for possession and a fresh suit for the latter relief will not be barred by S. 11 or O. 2, R. 2. 57 B. 456=35 Bom. L.R. 630=1933 B. 398. Purchaser at a Court-sale can recover separate lots of property purchased from different sets of defendants in separate suit. 44 B. 352. A decree in a suit for the specific performance of an agreement to lease does not bar a fresh suit for possession of the properties. 48 I.C. 188=14 N.L.R. 176. See also 38 M. 693. A claim for possession can be joined to a claim for specific performance of a contract for sale of immoveable property against the vendor but not a claim for possession against the usufructuary mortgagee of the vendor. 32 I.C. 237=(1916) 1 M.W.N. 77. See also 98 I.C. 160=1927 R. 197. Claim to recover part of the property as owner and to pre-empt the rest, if maintainable. 49 A. 219=25 A.L.J. 48. A party suing on a negotiable instrument can ask for a decree on the original consideration for the note. 46 C. 663=36 M.L.J. 429 (P.C.); 94 I. C. 628=1925 R. 304. Suit under O. 21, R. 63 by unsuccessful claimant is not a bar to a second suit by him for recovery of property from purchaser at Court-auction held subsequent to first suit. 110 I.C. 554=1928 M. 840=56 M.L.J. 52. Prior suit for declaration and possession of certain share—Partition by Collector before decree—Fresh suit for distribution of decreed share to newly formed estates. 15 P.L.T. 747=1934 P. 515. Applicability—Former suit to recover moveables—Same occasioned by order of Magistrate—Later suit to recover possession of immoveable property—Defendants the same in the suits—Causes of action different—Subsequent suit if barred. 31 Bom. L.R. 1123=1929 B. 460. Applicability—Prior suit to recover one item of property in the adverse enjoyment of one member—Subsequent

suit for remaining property on the basis of tenancy-in-common—Bar. 113 I.C. 785=1929 O. 1. Earlier suit based on a conveyance for difference of the area of the land mentioned in conveyance and actual area is no bar under O. 2, R. 2 to a second suit for a different land on an agreement to convey. 1929 R. 285.

RENT, SUIT FOR.—See 15 C. 145 (F.B.) See also 21 M. 236, 6 C. 791; 12 C. 50; 5 M. H.C.R. 419; 5 C. 24, 27 M. 116; 16 M.L.J. 24. A prior suit for account of rents bars a subsequent suit for rent due prior to the date of the first suit. 46 B. 229=23 B.L.R. 1086, 103 I.C. 74=192 M. 791. Where rent is in arrears for several months the landlord cannot maintain separate suits for the several instalments but should institute a single suit, the cause of action being the same. The fact that payment is pleaded in one of the suits does not render the separate suits maintainable. Where separate suits are erroneously instituted the effect is that the moment one of the two suits is decreed the other suit must fail. 146 I.C. 351=37 C. W.N. 730=1933 C. 821. The non-inclusion of a claim for rent in the previous suit for possession is not a bar to a subsequent suit for rent. 35 A. 512, 101 I.C. 816 (2), 25 L. W. 11=100 I.C. 40=1927 M. 273. A suit to recover arrears of rent is not barred by reason of an earlier suit for ejectment. 63 I.C. 978. The relationship of owner and trespasser and that of mortgagor and mortgagee are different and the dismissal of a suit for ejectment is no bar to a suit to enforce a right to redeem as mortgagor. 63 I.C. 684. Suit for rent—Second suit for possession and future mesne profits—Suit for mesne profits for the period between the two suits not barred. 97 I.C. 389=1926 M. 1015=51 M.L.J. 252. (38 M. 829, *Foll.*)

SPECIFIC PERFORMANCE, SUIT FOR.—See 158 I.C. 1119=18 N.L.J. 76

SUCCESSION CERTIFICATE.—The executors under a will declined to pay a legacy to the legal representatives of the legatee, except on production of a succession certificate, but agreed to pay interest thereon. Legal representatives, after first suing for interest alone, subsequently sued for the amount of the legacy after getting succession certificate. *Held*, R. 2 was no bar to the second suit. 132 I.C. 196=1931 M. 313 [51 A. 439 (P.C.), *Rel. on*; 8 C. 422, 21 B. 267; 48 M. 703, 18 M. 466, 1922 P.C. 23, *Ref.*]

RESTITUTION.—Previous application for restitution of a sum of money recovered in execution does not bar a subsequent application for interest due on the said sum. 40 M. 780. The bar which the Code provides in O. 2, R. 2 and S. 11, Expl. 4 in regard to suits does not apply to the case of an application for restitution under S. 144. Therefore an application by the judgment-debtor for restitution of the principal amount under S. 144 does not bar a second application by him to recover interest for the period

1905, 1906 and 1907 is due and unpaid *A* sues *B* in 1908 only for the rent due for 1906. *A* shall not afterwards sue *B* for the rent due for 1905 or 1907.

3. [S. 45.] (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same

Joinder of causes of
action.

defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are

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during which the decree-holder had the use of the money. 153 I.C. 572=1935 A. 195

WAGES.—A suit for damages for wrongful dismissal bars a subsequent suit for wages. 6 C.L.R. 91.

WAY, RIGHT OF.—The fact that a right of way was not claimed in a previous title suit does not bar a subsequent suit for declaration of a right of way. 57 I.C. 852.

BURDEN OF PROOF.—Plaintiff sued on a running account for a particular period and obtained a decree. Subsequently he brought a suit on an account for a prior period alleging that the accounts in the two suits were separate. *Held*, that it was for the defendant to prove that the cause of action in both the suits was the same, in order that second suit may be barred under R. 2. 1933 A. 852.

COURT-FEE.—Dismissal of suit—Rejection of plaint after refusal of permission to withdraw—Failure to give proper valuation and to pay deficit court-fee—Subsequent suit on the same cause of action—If barred. 40 C. W.N. 1390. *See also* 1935 C. 764.

O. 2, R. 2, O. 9, R. 9 and O. 23, R. 1.—On an application by the plaintiff, an amendment of plaint by addition of a relief for possession of the suit property was allowed and he was directed to give the value of the property to put in the deficit court-fee in view of the relief claimed. On his failure to comply with the order, the Court dismissed his suit in default, on refusing permission to withdraw under O. 23, R. 1, C. P. Code. *Held* that the proper order in the circumstances would not be a dismissal of the suit, but the rejection of the plaint under O. 7, R. 11, C. P. Code. *Held also*, that the effect of the order of dismissal would be the same if the Court had passed the order in correct form, namely, an order rejecting a plaint. A fresh suit was therefore not barred either by O. 9, R. 9, O. 23, R. 1 or O. 2, R. 2, C. P. Code. 1935 C. 764. *See also* 40 C.W.N. 1380.

O. 2, R. 3: MEANING OF TERMS.—The expression "cause of action" means causes of action which are distinct upon the fact or facts as stated in the plaint itself, or as proved at the hearing. Facts alleged by defendant need not be considered. 7 Bom.L.R. 925; 6 A. 106. *See also* 5 A. 163 (F.B.) The policy of the rule is to avoid needless expense where it can be done without injustice to any one. 103 I.C. 811 [(1910) 2 K.B. 1021; 1921 K.B. 1, Rel on]. The words "jointly interested" do not mean jointly interested as a matter of affection, but jointly interested as to the subject-matter of the suit which the causes of action have in contemplation. 6 M. 239, (242). *See also* 103 I.C. 811; 140 I.C. 317=1932 R. 132.

SCOPE OF RULE.—Rr 3 to 6 allow a plaintiff to unite in the same suit several causes of action against the same defendant and to order separate trials if necessary. 75 I.C. 438=5 Pat.L.T. 49 Under R. 3 a plaintiff cannot join in the same suit several causes of action against several defendants unless they are all jointly interested in each separate cause of action. 52 I.C. 927=12 Bur.L.T. 106. *See also* 55 C. 164. A plaint presented by two or more plaintiffs claiming different reliefs against the defendant is not improperly framed nor is it bad for misjoinder of causes of action. 26 M.L.J. 343. *See also* 140 I.C. 317=1932 R. 132.

APPLICATION.—The rule does not apply to suits for rent under the N.-W.P. Rent Act 29 A. 18. A good test to see whether two suits filed separately ought to have been filed together is to see if they could have been filed as one without a misjoinder of defendants. 1 R. 682=1924 R. 161. The cause of action for a personal decree upon the promissory note is incompatible with, and could not be joined to, a cause of action upon the mortgage, for the relief sought in respect of the claim based on a promissory note is a personal decree against the promisors, whereas the decree in a mortgage suit does not impose any personal obligation upon the mortgagor to pay the mortgage debt. 158 I.C. 828=1935 R. 315.

REQUISITES.—Joint interest in the main question raised in the litigation is a condition precedent to the joinder of several causes of action against several defendants. 6 A. 106. Claims against different estates cannot be joined in one suit merely because all such estates are represented by the same person, unless they are based on the same instrument affecting plaintiff's rights against all the estates. 50 I.C. 528=11 Bur.L.T. 222. Though the plaintiffs satisfied two different claims against themselves and the defendant separately, on two different occasions, the causes of action, which were different could be joined in one suit for contribution. 51 I.C. 826. A single suit lies against several alienees to whom different portions of an estate are alienated, although defendants set up different titles to the various portions held by them. 29 A. 267. *See also* 1901 A.W.N. 115; 29 C. 871. But *see* 7 B. 290. In a suit for partition and for setting aside a number of alienations, the best course is to order separate trials in respect of each alienation. 8 M. 75. A suit for both enhancement and arrears of rent at an enhanced rate is maintainable. 5 C.W.N. 88. A suit against several persons to whom assets have been wrongfully distributed in execution is valid. 13 C. 159. A suit on several mortgages executed in favour of plaintiff on various items

jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Only certain claims to be joined for recovery of immovable property

4. [S. 44] No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property except—

(a) claims for mesne profits or arrears of rent in respect of the property claimed or any part thereof;

(b) claims for damages for breach of any contract under which the property or any part thereof is held, and

(c) claims in which the relief sought is based on the same cause of action:

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

5. [S. 44-b.] No claim by or against an executor, administrator or heir,

Claims by or against executor, administrator or heir.

as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as

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of family properties of defendants is not bad. 17 M.L.J. 515 For other illustrative cases, *see* 35 B. 297; 12 I.C. 684=15 C.L.J. 258.

O. 2, R. 4.—The rule prohibits not the joinder of several causes of action entitling a plaintiff to recover immovable property, but a joinder with such causes of action, of causes of action of a different character, except as excepted in the rule. 5 M. 161. *See also* 10 C. 1061; 31 C. 262; 1925 P. 674, 17 M.L.J. 135; 51 B. 800=29 Bom.L.R. 937 A mortgagee who purchases part of the mortgaged property in execution of his decree is entitled in a suit for partition and separate possession of his share, to claim also rendition of accounts regarding that share from those in possession. 159 I.C. 463=1935 Pesh. 161. The new cl. (c) has been inserted in order to avoid the possibility of mistake and to make it clear that there is nothing irregular in seeking to recover in one suit immovable and movable property if the cause of action is the same in both. 19 I.C. 981=4 P.R. 1914. Where in a suit for possession of immovable property and for mesne profits different claims have been made in consequence of separate orders having been passed in respect of different parcels of the same property but all these claims are based on the same cause of action, namely, the assertion of the adverse title by the defendant all these claims fall within the purview of cl. (c), R. 4, and the suit is therefore clearly a suit which is permissible under R. 4 without leave of the Court. 156 I.C. 702=1935 S. 129.

APPEAL—No appeal lies from an order rejecting an application for leave. 3 A. 191.

O. 2, R. 5: SCORE OF.—The case contemplated by R. 5 is one where the causes of

action joined in the same suit are essentially different. 36 I.C. 29. It is contrary to the principle of R. 5 to attach money in the hands of an executor, administrator or heir as such, in execution of a decree against him personally, though the executor is a legatee and the money in his hands is due to him personally as legatee. 38 I.C. 563=9 Bur.L. T. 226

MEANING OF TERMS.—The word "estate" means not only the "estate" rightly and properly held by executors but also the "estate" in its physical sense. 41 I.C. 615=21 C.W.N. 939. The words "arises with reference to" are very general, and cover a case where the plaintiff's personal claim can only be determined after calculating the amount due to him as administrator. 43 M.L.J. 218=1922 M. 436. A suit by a Hindu widow against the surviving coparceners of her deceased husband to recover stridhanam illegally detained by them and to enforce her right to maintenance is not bad for misjoinder. 38 B. 120 Where promissory notes are passed in the name of a Hindu, his son cannot after his death institute a suit to recover the amounts due thereunder, basing his claim on being the sole surviving coparcener of an undivided family or in the alternative on his being the sole heir and legal representative of his deceased father. The two claims cannot be joined together under the terms of R. 5, and it makes no difference that the second claim is in the alternative to the first. 59 B. 573=158 I.C. 145=37 Bom.L.R. 405=1935 B. 343. A suit by the assignee of a Mahomedan widow, for the recovery of part of the assignor's dower and of part of the estate of the assignor's late husband, does not contravene the provisions of the rule. 18 A. 256. On this rule, *see also* 31 B. 105 A claim against an executor as such can be joined

executor, administrator or heir, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.

6. [S. 45.] Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

Power of Court to order separate trials.

7. [Cf. S. 46.] All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

Objections as to misjoinder.

Loc Am —[Lahore] After Rule 7 of Order 2 insert.—

"8 (1) Where an objection duly taken has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed, the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the court-fees that may be necessary. Should the plaintiff not comply with the Court's order the Court shall proceed as provided in Rule 18 of Order 6 and as required by the provisions of the Court-Fees Act."

ORDER III.

RECOGNIZED AGENTS AND PLEADERS.

1. [S. 36.] Any appearance, application or act in or to any Court,

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with a claim against him personally when both the claims arise in reference to the same estate. 41 I.C. 615=21 C.W.N. 939 In an administration suit there can be an enquiry as to accounts of a partnership in which the deceased was a partner and of question of misjoinder of causes of action under O 2, Rr. 4, 5 and 7. 51 B. 800=29 Bom.L.R. 937=1927 B. 470.

O 2, R. 6 —On this rule, see 8 M. 75, 8 B. 616. As to the scope of the rule, see 27 M. 80. As to what course the Judge ought to pursue where there has been a misjoinder of causes of action, see 8 W.R. 15; 9 Bom.L.R. 241, 113 I.C. 865=1928 M. 764 An objection as to misjoinder cannot be taken for first time in second appeal 5 Bom.L.R. 185. As to waiver of objection, see 49 C. 37. Court cannot select one claim on which to proceed when plaintiff insists on pressing all. 2 Beng.L.R. at 343. Suit in ejectment of two holdings of different classes—Discretion of Court to order separate trials. 7 L.R. 139 (Rev.)

TRUST —Suit for removal of trustee and for possession of trust property wrongfully alienated—Alienees also made defendants—Separate suits if to be instituted 112 I.C. 649=1928 C. 514.

O. 2, R. 7 —The principle of the exception to the rule against multifariousness recognised before 1908 and now embodied in the rule is that where a party has, without objection, gone to trial on issues on the merits, he will not be allowed to plead after failing on the merits that his was a paramount title and one that ought not to have been adjudicated in the mortgage suit. 10 P. 234=1931 P. 64

See also 33 Bom.L.R. 603, 13 Bom.L.R. 56 (P.C.), 18 Bom.L.R. 763 Issue unnecessary or inappropriate—Raising of, by consent of both parties—Striking of issue subsequently at instance of one party without consent of the other—Power of Court—Mortgage suit—Paramount title—Issue as to 113 I.C. 865=1928 M. 764

O. 3, R. 1 —This rule contemplates appearance not as a man but as a party with the intention of acting as a party in the suit 1926 M. 971=97 I.C. 517=51 M.L.J. 290. The language of this rule means no more than that a recognised agent can appear, make applications and take such steps as may be necessary in the course of the litigation for the purpose of the case of the principal being properly laid before the Court. It cannot justify his being allowed to argue and plead. 161 I.C. 538=1936 O.W.N. 351=1936 O. 261 It is intended primarily for the *moffussil* Court. It does not authorise an attorney of the High Court to file an appearance for a limited purpose only in an ordinary case under the civil jurisdiction of the High Court. 36 Bom.L.R. 987=1934 B. 450 An advocate can "act" on behalf of his client and perform all the duties of a pleader. 4 P. 766; 9 A. 617 One pleader can appoint another to hold his brief. 9 A. 613; but the legality of this practice was doubted in 20 B. 293. Pleadings can perform certain ministerial duties through their clerks 15 C. 638 See also 101 I.C. 205=1927 L. 428 (accepting notice on behalf of client). Pleader appointed by recognised agent of party is a duly appointed pleader. 44 M. 736=48 I.A. 584=41 M.L.J. 645=26 C.W.N. 376 (P.C.); 25 I.C. 136=7 Bur.L.T. 199.

Appearances, etc., may be in person, by recognized agent or by pleader.

required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader¹ [appearing, applying or acting as the case may be] on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

Recognized agents

2. [S. 37.] The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

Leg. Ref.

¹ Substituted for words 'duly appointed to act' by Act XXII of 1926

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PRESENTATION OF PLAINT.—As there is no specific rule either requiring or expressly authorising the plaintiff to present the plaint in possession, it is doubtful whether O. 3, R. 1 would apply to such a case. If it does not apply the presentation by a person orally authorized to do so would be valid 134 I.C. 26=1931 A.L.J. 777=1931 A. 507 (S.B.).

POWER OF PLEADER.—A pleader duly appointed to act for a party can make any application including an application for a reference to arbitration. 34 I.C. 845=9 S.L.R. 183 (14 B. 455, Dis) A pleader who appears on behalf of a duly empowered pleader, has no power, in the absence of specific authorization, to join in a reference to arbitration. 136 I.C. 712=1932 L. 373. A recognised agent as such has no right of audience 28 I.C. 838=19 C.W.N. 64. There is no law which requires the vakalat to be dated. 26 M. 197 (199). Power not signed by party or his agent—Subsequent signing cures defect. 55 I.C. 990. See also 22 A. 55; 40 A. 147; 36 A. 46. Where a vakalatnama bore the signature of the vakil presenting it, but his name did not appear in the body the power is not valid. 102 I.C. 255. But a petition of appeal presented without a vakalatnama has not been legally presented at all 55 I.C. 271; 28 Bom.L.R. 538=95 I.C. 266. Objection as to the validity of power of attorney cannot be raised for the first time in appeal 69 I.C. 365. Technical irregularities in vakalatnama, effect of See 102 I.C. 476=1927 L. 552. A person alleged to be a lunatic may appear either by vakil or in person. 7 C. 242. Where the power of attorney in favour of the director of a company authorised him "to appear for and on behalf of the company, to conduct and represent the company in the proceedings in the application in the High Court and for the proper prosecution of the proceedings to do all acts as he may deem necessary," held, that the director had no right of audience in Court. The power only authorised him to appear and not to plead (19 C.W.N. 64, Foll) 61 C. 324=151 I.C. 753 (1)=1934 C. 563. When an appeal is dismissed for default a fresh vakalat is not needed to enable the

vakil to have the appeal re-heard. 15 A. 55. Omission or failure to obtain leave before hand for signing and verifying plaint as plaintiff's agent is only an irregularity. 1925 M. 660=48 M.L.J. 721. Pleader has no power to bind his client by the oath of the opposite party. 34 C.W.N. 310=1930 C. 463. On this section, see also 65 M.L.J. 734=1933 M. 821.

O. 3, Rr 1 and 4.—The presentation of a plaint by a pleader who is not authorised in writing is not a valid presentation in law. A *vakalatnama* accepted by the pleader but not signed by the plaintiff is not a proper authority. The omission by the Amending Act of 1926 of the words "duly appointed to act" in R. 1 does not make oral authorisation sufficient. The effect of O. 3, R. 4 read with rule is to make a written authority filed in Court the one and only manner in which the authority of a pleader can be brought to the notice of the Court 39 C.W.N. 534=62 C.L.J. 277.

O. 3, R. 2: **RECOGNIZED AGENTS**—A political agent appointed as the agent of the estate of a minor chief is not a recognized agent. 11 B. 53. A *gumasta* of a firm ceases to be a recognized agent when the business ceases. 5. Beng.L.R. App. 11. But if engaged in collecting the assets of the firm, he is a recognised agent 9 Bom.H.C.R. 427. Person looking after Zamindari property of a judgment-debtor is not his recognized agent. 132 I.C. 808=1931 A.L.J. 404=1931 A. 449. O. 3, R. 2 is applicable to proceedings under the Madras Estates Land Act. A person who is looking after a factory on behalf of his master and is doing general business for him in the off season cannot be regarded as a recognised agent of his master for the purpose of presenting an application on behalf of that another under S. 131 of the Madras Estates Land Act to set aside a sale of a holding for arrears of rent. Such a person cannot be held to be a person "carrying on business" under R. 2, in respect of the management of the land of his master, so as to entitle him to apply on behalf of his master under S. 131 of the Estates Land Act. An application to set aside the sale presented by such a person is not validly presented. 1936. M.W.N. 1175=44 L.W. 567=71 M.L.J. 607.

POWER OF ATTORNEY—CONSTRUCTION— AUTHORITY TO FILE APPEAL—An appeal is a proceeding in a suit and the prosecution of a suit includes the prosecution of all the

Loc Am.—[Bombay] O. 3, R. 2, cl. (a) amended to read as follows.—“Persons holding general powers-of-attorney, or in the case proceedings on the original side of the Bombay High Court, Attorneys holding the requisite special powers of Attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done authorizing them to make and to do such appearances, applications and acts on behalf of such parties.”

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

3. [S 38.] (1) Processes served on the recognized agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

14. (1) No pleader shall act for any person in any Court, unless he has

Leg. Ref.

¹ Thus R 4 was substituted by Act XXII of 1926

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proceedings till a final decree is passed. Where a power of attorney authorises the agent to “prosecute the claim”, it confers an authority on him to file an appeal. 36 P.L.R. 135=1934 L. 973 (1). See also 151 I.C. 753=61 C. 324=1934 C. 563, 145 I.C. 760, 146 I.C. 363. But where a *vakalatnama* contains a clause to the effect that fresh power would be necessary to enable the Counsel to act in an appellate Court, the pleader is appointed only for the purpose of performing acts, necessary for proceedings in the first Court and it does not authorize the pleader to file an appeal. 145 I.C. 760=29 N.L.R. 295=1933 N. 219. A *vakalat* filed by a pleader engaged by an applicant for leave to sue as a pauper under O. 33 is not a *vakalat* merely for the petition, but becomes a *vakalat* for the purposes of the suit also, when the petition becomes converted into a suit by operation of law. No fresh *vakalat* is necessary to conduct the suit, unless the original *vakalat* is distinctly confined to the pauper application alone. 152 I.C. 132=1934 M. 690=67 M.L.J. 594. Each of two *vakalatnamas* in the usual form were on two sheets of paper, attached together, the typewritten portion of the authorisation continuing from the first page on to the second. On the first page, appeared the signatures of three petitioners and the second page bore the signature of the fourth. It was beyond question that the first three who had signed on the first page had never seen the second page, the fourth petitioner who had signed the second page had never seen the first page, but in both cases it was equally clear that the device was adopted to save time, that all of them knew what the other sheet was and the purport of what they were signing. *Held*, that the *vakalatnama* was the act of all the four of them and perfectly in order. 149 I.C. 596=15 Pat.L.T. 233=1934 P. 290

O. 3, R. 2 (b).—The agent contemplated by cl. (b) is one who has an initiative and

independent discretion. 4 B. 416. See also 16 A. 241 (F.B.); 28 A. 135, 14 M.L.J. 223. A power-of-attorney authorising an agent to do all acts relating to the execution of the decree in favour of the principal is a general power-of-attorney and the agent under the power can act. 38 M. 134=24 M.L.J. 180; 1929 L. 759. See also 33 I.C. 661=18 O.C. 372. Where the *vakalat* executed by the agent within the period of limitation without the knowledge or approval of the principal has, however, been subsequently ratified by the principal, it is in order even though the ratification was made beyond the period of limitation. 149 I.C. 596=15 Pat.L.T. 233=1934 P. 290 (2). Where a power of attorney does not confer the power to confess judgment, a pleader appointed by the power of attorney agent has no such power either. 102 I.C. 470=1927 O. 222. Under Bombay High Court rules a person holding general power of attorney can act. 72 I.C. 1003=1923 B. 41 (1). See also 41 B. 40=18 Bom.L.R. 821. A recognized agent cannot prosecute or defend a suit in his own name. 5 Beng.L.R. App. 11, 12 B. 68; 15 W.R. 245. As to filing suit and signing plaint by recognized agent, see 101 I.C. 698=1927 A. 514, 138 I.C. 797=34 Bom.L.R. 628=1932 B. 367.

“CARRYING ON BUSINESS”—MEANING OF.—The expression “carrying on business” in R. 2 (b) must be interpreted in a restricted sense, *viz*, as relating to commercial business as in S. 20. The appearance, application or act made or done must relate to matters connected with the trade or business only. 44 L.W. 567=71 M.L.J. 607. The management of an estate is “business” and the service of summons on the *Karinda* who carries on the management of the estate under the instructions of the proprietor is sufficient. But he cannot be regarded as an agent authorised by himself to file objections to a Commissioner’s report. 12 L.L.T. 13.

O. 3, R. 3 (1).—See R. 5.

O. 3, R. 4: SCOPE OF.—Rule only provides in what manner and till what time a pleader should be appointed. 48 M. 676=49 M.L.J. 366=92 I.C. 300=1925 M. 1201. O. 3, R. 4

Appointment of pleader been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power-of-attorney to make such appointment.

(2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.

Notes.

does not lay down an absolute rule, but is subject to the rules of the High Court regulating procedure. 59 C 370=35 C.W.N. 1100=1932 C 1. See also 1935 Pesh. 2. An advocate unlike a pleader can be verbally appointed to act on behalf of his client. 4 P. 766=1926 P. 73=92 I C 179, 94 I.C. 841=1926 P 246=5 P. 255. See also 1935 Pesh. 2. An Advocate acts when he files a memorandum of appeal or cross-objections or any other document in a case other than a memorandum of appearance under O. 3, R. 4 (5) 4 R 249=98 I.C. 15=1926 R. 215. An unqualified person cannot practice under cover of special powers of attorney from the parties. 25 I C 163=7 Bur.L.T. 206. Power of guardian *ad litem* to appoint for minor party. 6 L.W. 272. The next friend of an infant plaintiff can change his attorney so long as he continues to act in that capacity. 28 C. 264. The acceptance of a power of attorney must be in writing. 84 I.C. 518=1923 L. 402. Acceptance of *vakalatnama* need not be in writing. 43 C 884=20 C.W.N. 287, 61 C.L.J. 193=62 C. 642. See also 91 I.C. 30=6 L. 461=1926 L. 32. But see *contra* 20 C.W.N. 283. A pleader did not accept the *vakalatnama* in writing, but his name appeared in it and was allowed to appear and conduct the case. *Held*, there was an acceptance of the *vakalatnama* by him, and that he had all the powers which are mentioned in the *vakalatnama*. 61 C.L.J. 193=39 C.W.N. 938=62 C. 642. See also 153 I.C. 937=1935 Pesh. 2; 1937 A.W.R. 80; 1937 R.D. 5. An application for execution of a decree duly signed and verified by the decree holder was filed in Court and acted on by the Court. The pleader had not, however, filed a *vakalatnama* along with the petition and on the omission being noticed he filed a *vakalatnama* duly stamped, but without having been accepted by him. Later the omission was made good, the pleader signing his acceptance in the back of the *vakalatnama* with the permission of the Court. *Held*, that the application was in order and was duly filed on the date it was presented to the Court, and that there was nothing wrong about it. 63 C 713=40 C.W.N. 730. The acceptance must be unconditional. 14 W.R. 7. The writing need not be dated. 26 M. 197 (199). Where a pleader's name appears in a *vakalat*, it can be accepted even after filing in Court. 3 Pat.L.T. 447=68 I.C. 659. Where in a *vakalatnama* the pleader's name has been omitted by oversight, there is no due appointment of the pleader. 37 I.C. 103=12 N.L.R. 189; 36 A. 46=23 I.C. 464. But see 41 I.C.

685. A mere error can be rectified by permitting the party to put the name. See also 133 I.C. 171=12 Pat.L.T. 588 (Omission of pleader's name in the *vakalat* is not a fatal error. It can be rectified by inserting the proper name). But see *contra* 132 I.C. 566=1931 A.L.J. 983=1931 A. 767. See also 71 I.C. 436=1923 N. 182, 55 I.C. 415. Where a *vakalatnama* was signed by the party and also by the Vakil who was actually intended by him to act on his behalf and who did, in fact, so act, the fact that by an error the name of another vakil remained in the body of the document is a formal defect of no importance. 164 I.C. 725=1936 A.L.J. 586=1936 A. 636. Appointment of pleader for "prosecution" of all proceedings empowers him to file an execution petition. 1936 A. M.L.J. 138. Where a power of attorney in favour of a pleader is not in proper form the Court may extend the time for appeal in order to have the error rectified. 150 I.C. 731=1934 L. 444 (2). Where a power of attorney filed in Court did not contain the signature of the party due to an accidental omission, the Court can allow the party to sign it. 116 I.C. 184. Where a plaint is filed by a pleader, in whose favour a valid *vakalatnama* has not been executed, the proper course is to return the plaint to the pleader who presented it. 132 I.C. 566=1931 A.L.J. 983=1931 A. 767. Where any one of the joint defendants against whom the decree is passed, can appeal from the decree, any one of them can sign the power of attorney in favour of the pleader. All that is necessary is that all the others should be made respondents and not appellants. 120 I.C. 318=1930 L. 101. A fresh *vakalat* is not necessary to enable a vakil to appear in an application for a new trial. 12 W.R. 465. Where a counsel is engaged for the conduct of a suit and the suit is dismissed for default, his duties do not come to an end. As such no fresh power of attorney is necessary to make an application for the restoration of the suit as he is authorized to do all acts necessary for its prosecution. 10 L. 570=114 I.C. 76=1929 L. 96. Also in an application for leave to appeal to the Privy Council. 8 W.R. 92. As to when the duties of a pleader terminate. See 49 C 732=35 C.L.J. 356, See also 67 I.C. 554=1922 O. 75, 2 Pat.L.J. 259=41 I.C. 328. Power of attorney to counsel terminates with death of party. 133 I.C. 877=33 P.L.R. 389. Return of plaint does not terminate authority. 67 I.C. 296=1922 N. 125. On a *vakalat* given in a suit a vakil can act in a claim case. 5 Bom.H.C. (A.C.) 83. Vakil cannot say after accepting engagement

Loc. Ams.—[Madras.] In sub-rules (1) and (2) to R. 4, substitute the words "a document subscribed with his signature in his own hand" for "in writing signed".

(3) For the purposes of sub-rule (2) an application for review of judgment, an application under section 144 or section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.

[Bombay] In sub-rule (3) the words "on any application relating to such appeal" shall be inserted between the words "order in the suit" and "and any application or act".

(4) The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.

[Patna.] Substitute for O. 3, R. 4 (4):—Notwithstanding anything contained in O. 3, R. 4 (3) of the First Schedule of the Code of Civil Procedure, 1908, no advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognised agent or by some other agent duly authorised by power of attorney to act in this behalf; or unless he is instructed by an attorney or pleader duly authorised to act on behalf of such person.

Notes.

that, unless a large sum is paid to him, he will not continue the conduct of the case. 29 C. 63. A vakalat remains in force until all proceedings in the suit are closed. Application for execution are proceedings in the suit. 20 B 190. Withdrawal of pleader. 47 M. 819=47 M.L.J. 398 (F.B.) R. 4 takes no notice of the termination of an appointment of a pleader by mutual consent between him and his client unless and until the Court is apprised of the fact by writing in the manner stated in the rule and leave of the Court obtained. 1930 L. 134=31 P.L.R. 551. A pleader who appears on behalf of another pleader engaged by a party, can appear for the latter pleader only "to plead" on behalf of the party, but he has no power "to act" on his behalf without a document in writing being executed in his favour in the manner prescribed by R. 4. The presentation of an appeal amounts to "acting" and not "pleading". If the appellant engages a certain Advocate for filing the appeal and duly executes a power of attorney in his favour, he alone could present the appeal. Where the memorandum of appeal presented in Court is not signed by him but by another Advocate for him, there is no proper appeal before the Court. 17 L. 610=163 I.C. 141=1936 L. 500. A party appointed a general agent to conduct litigation on his behalf and gave him all powers necessary for conduct of case. The agent appointed a pleader by a vakalatnama duly signed and filed and gave him power to appoint another pleader if necessary. The pleader in his turn appointed another pleader by a vakalatnama duly signed by himself and such pleader filed the appeal. Held, that the appeal was properly constituted as the agent was duly authorized under the power of attorney to give a pleader a power to appoint another pleader and the pleader who filed the appeal had been duly authorized by the pleader engaged by the

agent. 19 N.L.J. 207=1937 N. 65. See also 1936 A.M.L.J. 138.

REFERENCE TO ARBITRATION.—As to power of pleader to join in reference to arbitration, see 136 I.C. 712=1932 L. 373, 34 I.C. 845, cited under O. 3, R. 1, *supra*.

LIMITATION.—The appellant's advocate filed the appeal on the last day of limitation with a telegram attached to it authorising him to file the appeal and stating that the power of attorney was being sent by post. Nine days later the power of attorney was filed. Held, that the appeal was not presented within time. 33 P.L.R. 517 (1). A pleader who has not been appointed by a document in writing as required by R. 4, is wanting in capacity or competence to act. If a pleader purports to do something which he has no power or capacity to do, it can have no legal effect. The presentation of an execution petition by a pleader who holds no vakalat from the decree-holder is a nullity. An execution petition presented by such a pleader though in proper form and duly signed by the decree-holder is not an application "in accordance with law" within the meaning of Art. 182 (5) of the Limitation Act, and cannot therefore operate as a step-in-aid, especially when the application was ultimately withdrawn and dismissed without any execution really taking place. *Quære*: Whether if anything has really been done upon such an application, it can be treated as mere waste paper. 165 I.C. 659=44 I.W. 528=71 M.L.J. 604. See also 1937 R.D. 99. It is contrary to the spirit of justice that a litigant should fail simply because, through some perfectly bona fide and reasonable mistake, the Counsel appearing for a party is not duly authorized. Where it appears that he is not duly authorized, it will doubtless be the duty of the Court in question to treat the proceedings that he has set on foot as of no effect; still the Court should so far as is possible, safeguard the litigant from

[(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating—

- (a) the names of the parties to the suit,
- (b) the name of the party for whom he appears, and
- (c) the name of the person by whom he is authorized to appear:

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party.”]

[Madras.] Insert as cl. (6) to O. 3, R. 4, C. P. Code—

“(6) No Government or other pleader appearing on behalf of the Secretary of State for India in Council, or on behalf of any public servant sued in his official capacity, shall be required to present any document empowering him to act.”

5. [S. 40.] Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

Loc. Ams.—[Madras.] At the end of rule add—

Explanation—Service on a pleader who does not act for his client shall not raise the presumption under this rule.

[Nagpur.] In Rule 5 substitute the words “on a pleader who has been appointed to act for any party” for the words “on the pleader of any party”.

[Oudh.] For “on the pleader of any party” read “on a pleader who has been appointed to act for any party”.

[Patna.] 5-B.—Notwithstanding anything contained in Order 3, sub-rules (2) and (3) of Rule 4 of the First Schedule of the Code of Civil Procedure, 1908, no pleader shall act for any person in the High Court, unless he has been appointed for the purpose in the manner prescribed by sub-rule (1) and the appointment has been filed in the High Court.

Notes.

his litigation coming to so unsatisfactory a conclusion, by pointing out to him the desirability of making the necessary application to set the matter on foot again, and, if an application is made, be indulgent as regards time, and should give effect to the provisions, in a suitable case, of S. 5, Limitation Act. 1937 N. 65.

AUTHORITY OF PLEADER ENGAGED IN TRIAL COURT—AUTHORITY IN APPEAL.—R. 4 (2) provides that every appointment of a pleader shall be filed in Court and shall be deemed to be in force until all proceedings in the suit are ended so far as the client is concerned. So where a pleader validly represents a party in the trial Court, he can present a memorandum of appeal on behalf of his client and prosecute the appeal 165 I.C. 274=1936 L. 583. If the appointment of a pleader is not specifically revoked and the engagement is not specifically limited to acting in the trial Court, the statutory provisions of R. 4 apply and the counsel must be held to have been duly authorised to appear in the appellate Court. 146 I.C. 363=1933 Pesh. 67. See also 36 P.L.R. 135=1934 L. 973, 151 I.C. 753=61 C. 324=1934 C. 563; 145 I.C. 760=29 N.L.R. 295=1933 N. 219.

O. 3, R. 4 (5).—See 5 Bur. L. J. 221.

O. 3, R. 4 (5) is inconsistent with the rules of the Calcutta High Court framed under S. 37, Letters Patent, and O. 3, R. 4 (5) being contrary to rules, under S. 37 the latter must prevail. 1932 C. 1=59 C. 370=35 C.W. N. 1100.

TERMINATION OF POWER OF ATTORNEY—TRANSFEREE COURT, IF EMPOWERED TO GRANT LEAVE.—The Court which is contemplated by O. 3, R. 4 (2) includes not only the Court where the original power of attorney is filed but also in view of the provisions of S. 150, the Court to which a case is subsequently transferred. A Court which has ceased to exercise jurisdiction in a case cannot grant leave to determine a power of attorney. 158 I.C. 922=1935 Pesh. 145.

O. 3, R. 5. NOTICE SERVED TO PLEADER—PRESUMPTION OF COMMUNICATION OF CLIENT.—Under R. 5, there is a presumption that notice which was served on the pleader is communicated to the client. The only method by which a pleader can avoid his duty of communicating notices served upon him is to file a document in writing under R. 4, sub-Cl. (2) showing that his authority is determined. Else the irrebuttable presumption under R. 5 arises. 152 I.C. 589 (1)=1934 P. 592.

6. [S. 41.] (1) Besides the recognized agents described in Rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

Loc. Am —[Sind] Add the following as sub-rule (3) to Rule 6 of Order 3 —

"(3) The Court may at any stage of a suit and whether upon application made to it or of its own motion, direct any party to the suit, not having a recognised agent residing within the jurisdiction of the Court, to appoint within a time to be specified, an agent within the jurisdiction of the Court to accept service of process on his behalf. To every appointment made under the sub-rule the provisions of sub-rule (2) shall be applicable."

ORDER IV.

INSTITUTION OF SUITS.

1. [S. 48.] (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

Loc. Am —[Allahabad.] Order 4, Rule 1 —(1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint, together with a true copy for service with the summons upon each defendant unless the Court for good cause shown allows time for filing such copies.

(2) The Court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for.

Notes.

O. 4, R. 1.—The date on which the plaint is presented to the Court or to the officer appointed in that behalf is the date on which it is instituted, although it is not admitted until a subsequent date owing to insufficiency of Court-fee. In this respect the language of O. 4 is in conformity with S. 3 of the Limitation Act. The date of presentation of the plaint, and not the date of its admission, is the date of institution for purposes of S. 10. The entry in the Register of suits as to the date of presentation is only *prima facie* evidence of the date of presentation, but not conclusive. 62 C 1115. The absence of signature or verification or for the matter of that the absence of presentation on the part of some of the plaintiffs out of several does not affect the jurisdiction of the Court and the suit must be deemed to have been duly instituted on their behalf if it was filed with their knowledge and authority. 134 I. C 26=1931 A L J. 777=1931 A. 507 (S B). The omission to comply with the provisions regarding presentation of plaint is a mere irregularity and not an absence of jurisdiction, and if a person presenting it is not properly authorized the presentation would be irregular and the Court would have the discretion to allow the irregularity to be cured. If the plaintiff has acted in good faith and without gross negligence and it is fair and just to allow the defect to be cured, the Court would do so by directing an amendment of the plaint (*Ibid*). Presentation of plaint at residence of Judge after

Court hours is valid. 65 I C 674=1922 N 167; 20 L.W. 655=82 I C. 928, 47 M. 312=46 M.L.J. 78. But see 7 N.W.P.H.C.R. 5 (*contra*). The placing a petition on the table when the officer is not present, is not a presentation to him. 3 N.W.P. 341. The presentation of petition to clerk not valid. 14 I.C. 221. But presentation to the Head Ministerial Officer is legal and proper where authorised to receive plaints. 40 I.C. 587=6 L.W. 18. See also 40 M.L.J. 229=13 L.W. 321. Presentation out of office hours. See 23 I.C. 360, 82 I.C. 928=20 L.W. 655. The reception of a plaint on a Sunday or other holidays is not illegal. 11 W.R. 537; 16 W.R. 231. Presentation of plaint—Time and place—Presentation to clerk outside Court house and outside Court buildings—Validity. 38 Bom.L.R. 1196=1937 B. 25. District Court is not competent to receive the plaint which is to be presented to Sub-Court. 10 B.H.C. 495. A Nazir of a Court of Small Causes is not authorised to receive plaints, 18 W.R. 172. Also a karkum left in charge of a Court during the vacation. 6 B.H.C. (A.C.) 254. Where according to the practice laid down in Vol. 1, Ch. I-B, R. 4 of the Rules and Orders of the High Court of Lahore, a plaintiff presents his plaint to the District Judge and the District Judge then sends it for disposal to a Subordinate Court, the real date of presentation of the plaint is the date on which it is presented to the District Judge and not the date on which it is sent to the Subordinate Court. 1935 S 225

Sub-rule (2) will be sub-rule (3).

[Oudh.] 1. (1) Same as original sub-rule (1) of the Allahabad High Court.

(2) To the above sub-rule (3), add the following words—"and, except with the permission of the presiding officer, for reasons to be recorded, no plaint shall be admitted unless the necessary process-fee has been paid into Court."

[Nagpur.] Rule 1.—Substitute the following for Rule 1 (1).—

"1 (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint, together with as many true copies on plain paper of the plaint as there are defendants, for service with the summons upon each defendant; unless the Court, for good cause shown, allows time for filing such copies."

Add the following as sub-rule (2) to Rule 1 and re-number the present sub-rule (2) as sub-rule (3).—

"(2) The Court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed, and in the case of all other proceedings when the process is applied for."

2. [S. 58, last para.] The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

ORDER V.

ISSUE AND SERVICE OF SUMMONS.

Issue of Summons.

1. [S. 64] When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified:

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear—

(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

Loc. Am.—[Oudh.] Order 5 (1-A).—A party shall file with his application for the issue of a summons to the defendant or opposite party a printed summons form, in duplicate, one part being in the Urdu and the other in the Nagri character, duly filled up, except in respect of the date of appearance and of the summons, in a bold, clear and easily legible handwriting, provided that—

(a) if the party to be served is a European British subject, the party applying for the issue of the summons shall file a special form which shall be filled up in English, and

Notes.

O. 5, R. 1.—It is the duty of a Judge on receiving a plaint to issue a summons on a defendant even if he is a minor 14 C. at 217. But see 26 C 267. Appearance by pleader instructed only to apply for an adjournment is not appearance in person or by pleader. 24 M.L.J. 235=18 I C 360; 92 I.C. 517=1926 M. 971=51 M.L.J. 290; 99 I C 717=1927 R. 46; 4 R. 408. The onus of proof of service is on plaintiff. 52 C 453. The report of a peon that a summons or notice was served on a person is not evidence as to service unless the person is examined and the report is proved. 91 I.C. 711=1926 C. 539.

'APPEARANCE.'—All that appears to be necessary for a party to 'appear' is for the party to be present in Court. If the appear-

ance is by a pleader, unless he is able to answer all material questions or is accompanied by some one who can, there is no appearance, and, for this reason, when the only representative of the party in Court is a pleader who is only instructed to ask for an adjournment, there is no appearance in the case itself, because directly the Court leaves the question of adjournment aside and goes on to deal with the main question there is no appearance by the party or by any properly instructed pleader. But where both the pleader and party appear and the pleader withdrew from the case on the refusal of the Court to grant adjournment, the party must be deemed to have appeared. The purpose for which he appears or the action which he takes on appearance is immaterial. 1935 R. 123.

(b) the presiding officer may, in his discretion, direct that such forms in general; or that any such particular form be filled up entirely in the office of the Court.

Copy or statement annexed to summons.

2. [S. 65.] Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

Loc. Am.—[Allahabad and Oudh.] In Order 5, Rule 2, omit the words "or, if so permitted by a concise statement"

Court may order defendant or plaintiff to appear in person.

3. [S. 66.] (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

No party to be ordered to appear in person unless resident within certain limits.

4. [S. 67.] No party shall be ordered to appear in person unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

Loc. Am.—[Allahabad.] Order 5, Rule 4-A —Except otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement. (Added by Allahabad High Court.)

Summons to be either to settle issues or for final disposal.

5. [S. 68.] The Court shall determine, at the time of the issuing the summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a

direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

Loc. Am.—[Madras] Delete the first paragraph of Rule 5 in Order 5 and substitute the following in lieu thereof —

"5. The Court shall determine at the time of issuing the summons, whether it shall be—

(1) for the settlement of issues only, or (2) for the defendant to appear and state whether he contests or does not contest the claim and directing him if he contests to receive directions as to the date on which he has to file his written statement, the date of trial and other matters, and if he does not contest for final disposal of the suit at once; or (3) for the final disposal of the suit, and the summons shall contain a direction accordingly."

6. [S. 69.] The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons, and the

Fixing day for appearance of defendant.

day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

Notes.

O. 5, R. 3.—There are only two cases in which the personal appearance of the plaintiff can be required and these fall under O. 5, R. 3 and O. 10, R. 4. 140 I.C. 716=1932 N. 135. R. 3 is confined to those cases in which the Court before issues are framed desires the personal attendance of a party. Besides, a Court acting under R. 3 cannot

compel the attendance of a party who is pardanashin. Such an order would be against the provisions of S. 132. 55 A. 666=1933 A.L.J. 1384=1933 A. 551.

O. 5, R. 6—Where the time allowed is manifestly insufficient, the appellate Court will interfere. 3 M.H.C. 167. See also 9 B.H.C. 138.

Summons to order defendant to produce documents relied on by him.

On issue of summons for final disposal, defendant to be directed to produce his witnesses

7. [S. 70] The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

8. [S. 71.] Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence he intends to rely in support of his case.

Service of Summons.

9. [S. 72. (1)] Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct

10. [S. 73.] Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in his behalf, and sealed with the seal of the Court.

Loc Am —[Lahore] To R. 10 of O. 5 the following proviso should be added —“Provided that in any case if the plaintiff so wishes, the Court may attempt to serve the summons in the first instance by registered post instead of in the mode of service laid down in this rule and provided always that should the defendant not appear in answer to the summons so issued, the Court shall have service effected in accordance with the provisions of this order.”

Service on several defendants.

11. [S. 74] Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant.

Service to be on defendant in person when practicable or on his agent.

12. [S. 75] Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient

Notes.

O 5, R. 9.—Residence is not synonymous with ownership for purposes of the service of summons. 38 C 394 In mofussil Courts the “proper officer” is the Nazir. 13 B. 500. A special bailiff cannot be sent to serve a civil process in foreign territory. 2 B.L.R. (A.C.) 59 If a plaintiff in an action gives a wrong address of the defendant and takes no part in serving the summons on the defendant the giving of the wrong address by itself would not prevent the defendant from appearing before the Court to defend the suit. 60 C. 98 =1933 C 274=143 I.C. 710

O 5, R. 10—Service is complete when it is tendered to the witness and his refusal to sign the original makes no difference 39 M. 561=28 M.L.J. 505; 38 I.C. 545=13 N.L.R. 46. See also 46 I.C. 277 As to service on the sons of a deceased defendant pending suit, see 135 I.C. 110=1932 P 150 Order by Court to deposit process fees and postal charges—Dismissal of suit for failure to comply with—Order not legal. 99 I.C. 909

=1927 L. 157. *Punjab proviso*—Service of summons by registered post—Non-appearance—Procedure. 101 I.C. 615=1927 L 376. Need for copy of plaint accompanying summons (*Ibid*) As to the mode of service of summons on a pardanashin lady, see 1935 A. L.J. 632=1935 A 660=155 I.C. 676

O. 5, R. 11.—When one of the defendants is a minor, summons should be served on his guardian 26 C at 273. But see 14 C at 217.

O. 5, R. 12.—Defendant at first residing in British India, residing outside British India at the time of suit—Service should be effected by affixing the summons to his last known place of residence in British India and by registered post. 32 I.C. 820. Service of summons on the chela of a person is not valid. 57 I.C. 568=23 O.C. 104. Service on a pardanashin lady, affixing a copy of summons at her residence, if sufficient service. 57 I.C. 594. Pardanashin lady—service of summons on husband is not proper service. 4 Pat L.T. 89=72 I.C. 910. Summons addressed to B can be refused by A. But if A poses

13. [S. 76.] (1) In a suit relating to any business or work against a person who does not reside within the local limits of the jurisdiction of the Court from which the summons is issued, service on any manager or agent who at the time of service personally carries on such business or work for such person within such limits shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

14. [S. 77.] Where in a suit to obtain relief respecting, or compensation for wrong to, immoveable property, service cannot be made on the defendant in person and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

15. [S. 78.] Where in any suit the defendant cannot be found and has no agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

Explanation.—A servant is not a member of the family within the meaning of this rule.

Loc Am —[Allahabad.] For the words "where in any suit the defendant cannot be found" read "when the defendant is absent or cannot be personally served"

[Calcutta.] Order 5, R. 15 —Substitute the following —

"15 Where in any suit the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time then unless he has an agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him"

Notes.

as B and knows that it is intended for him, then it is sufficient notice if the summons is served on A. 3 R 515=93 I.C. 91=1926 R 73.

O. 5, R. 13—Sub-Rule (2) follows the ruling in 7 B.H.C. (O.C.) 97. This rule is controlled by R. 3 of O. 32. 26 C 267 This rule and R. 2 of O. 3 are to be read together 4 B 416 Service on agent—When valid 43 C.L.J. 576=97 I.C. 286=1926 C. 1030

O 5, R 15—PARDANASHIN LADY—MODE OF SERVICE OF SUMMONS—A pardanashin lady cannot be considered to be a person who cannot be "personally served," even though it may not be possible for the process-server to have access to her. It is the duty of the process-server to make an attempt to find ways and means of delivering or tendering the summons to the pardanashin lady for whom it is intended. He can very often find some one living with her or in the neighbourhood, male or female, who can take the summons to her. If the pardanashin lady accepts service, it is personal service as contemplated by Rr. 10 and 15 of O 5. He should in ordinary cases obtain the attestation of the witness taking the summons to the pardanashin woman concerned which should also be done in case of refusal by her to accept the summons. If the process-server cannot find any one, male or female, who can take the summons to her, it may be a case referred to in R. 15, namely, that the defendant cannot be personally served.

155 I.C. 676=1935 A.L.J. 632=1935 A. 660 Pardanashin lady may come under the expression "cannot be found" under O 5, Rr. 15 and 17. 4 Pat.L.T. 89=72 I.C. 910 Service made on brother and no attempt made to effect personal service is not proper service. 9 I.C. 763=9 M.L.T. 358 Service of summons on paternal uncle of defendant when proper 35 A 556 "Adult," meaning of, see 34 C 787 Service on son when sufficient to bind father 26 C.W.N. 359=35 C.L.J. 203 =68 I.C. 991 Service by registered post called in question—Slight evidence will displace it 113 I.C. 698

IRREGULAR SERVICE OF NOTICE—Where from evidence it did not appear that the service peon had used any diligence at all in serving a notice under O. 5, R. 17 and where also it appeared that the house on which the notice was stuck up was not within O 5, R. 17 Held, the service was irregular 13 P. 467=15 Pat.L.T. 273=1934 P. 274. Where in a suit for ejectment, there are several defendants living in different villages, service of process on one tenant in one village is insufficient to fix the others with notice 14 L.R. 500 (Rev.)=17 R.D. 608. Where a service of summons to father was effected on his son in the father's absence but the son was not residing with the father Held, that the summons was not duly served on the father (1932 P. 150 and 43 C. 447, Ref.) 146 I.C. 474 (2)=34 P.L.R. 963=1933 L. 797. See also 35 C.L.J. 203=68 I.C. 991.

Provided that where such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Art. 164 of Sch. 1 of the Limitation Act, 1908, not to have been duly served.

Explanation—A servant is not a member of the family within the meaning of this rule.

[Lahore.] In R. 15 after the words "where in any suit the defendant cannot be found" the following words were inserted—

"or is absent from his residence."

[Madras.] In R. 15 of O. 5, delete the words "the defendant cannot be found" and in lieu thereof insert the words "the defendant is absent." R. O. C. 1810-26, vide *Fort St. George Gazette*, dated 20-12-1927, Part II, p. 1801.

[Nagpur.] In R. 15 substitute the words "When the defendant is absent or cannot be personally served" for the words "Where in any suit the defendant cannot be found".

[Oudh.] Order 5, R. 15 In Oudh for the words "where in . . . found" substitute "Where a summons has been issued to a defendant on the institution of a suit and he is absent from the address stated in the summons."

[Rangoon.] For the words "where in any suit the defendant cannot be found" in the first line of R. 15, substitute the words "where the defendant is absent".

Omit the word "male" between the word "adult" and the word "member" in the third line of R. 15.

16. [S. 79.] Where the serving officer delivers or tenders a copy of the

Persons served to sign acknowledgment

summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

17. [S. 80.] Where the defendant or his agent or such other person as

Procedure when defendant refuses to accept service, or cannot be found.

aforsaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service or summons on his behalf, nor any other person on whom service can be made, the

Notes.

O. 5, R. 16.—Service is not proper when no signature or mark of the defendant is affixed on the original summons on the ground that he could not write. 8 Bom.L.R. 584.

O. 5, R. 17.—The provisions as to service of process in the Code must be strictly observed. 39 I.C. 544. See also 1937 M. 84; 13 P. 467=149 I.C. 828=1934 P. 274. A simple delivery of the copy of the summons personally to the defendant is not complete service. It is the duty of the process-server to take the signature of the defendant to its acknowledgment. If the defendant refuses to sign the acknowledgment, it is incumbent to effect service under R. 17 and without that the service is not complete. (46 I.C. 277, Diss. from.) 144 I.C. 1019=1933 A.L.J. 165=1933 A. 165. Where a person refuses to accept the summons when tendered by the process-server and the proceedings are taken *ex parte* against him, the fact that the summons has not been affixed on the outer-door of his house as required by this rule would be at the most an irregularity and would not affect the validity of the service. 1935 L. 171. For serving summons upon the defendant, proper enquiries and real and substantial effort should be made as to when and where the defendant is likely to be found. 23 C.L.J. 183=43 C. 447. See also 50 I.C. 555. Affixing

a copy of summons on the outer-door is sufficient service, if the defendant is absent and it is not known when he would return. 21 M.L.J. 978=12 I.C. 420; 49 M.L.J. 445=1926 M. 31; 124 I.C. 673=1930 L. 192. Summons returned by the serving officer because the defendant was not in the village, cannot be said to have been duly served. 1914 M.W.N. 79=22 I.C. 498. Fixation of summons on door when a person is temporarily away and is traceable is no service on him. 32 I.C. 826 (24 A. 302). Leaving the summons on the teapoy in defendant's residence does not constitute "affixing" and is therefore no service of summons. 118 I.C. 792=31 Bom.L.R. 424=1929 B. 257. Where a process-server visits the villages no fewer than five times to serve the summons on the defendant, it may reasonably be held that every effort was made to effect service upon the defendant and that he was evading service, and it should be held that the process-server used all due and reasonable diligence. When, then, the summons was affixed to his house, the service of the summons is good. 27 N.L.R. 50=134 I.C. 268=1931 N. 122 (2 N.L.R. 63, 24 A. 302, Dist.). As to how the Court is to act on a return under this rule. see R. 19. See 7 Bom.L.R. 159. See also 43 I.C. 632. As to modes of service of summons, see 99 P.R. 1918=48 I.C. 28.

CANNOT FIND.—The question whether

serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Loc. Am.—[Calcutta.] Order 5 R. 17—*Substitute the following*—

17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

[Nagpur.] In R. 17 of O. 5, the following proviso shall be inserted, namely:—

"Provided that where a special service has been issued and the defendant refuses to sign the acknowledgment it shall not be necessary to affix a copy as directed hereinbefore."

18. [S 81]. The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

Loc. Am.—[Madras.] Insert the following as R. 18-A—

"A District Judge, within the meaning of the Madras Civil Courts Act, 1873, may delegate to the Chief Ministerial Officer of the District Court the power to order the issue of fresh summons to a defendant when the return on the previous summons is to the effect that the defendant was not served and the plaintiff does not object to the issue of fresh summons within seven days after the return has been notified on the notice board."

Vide P. Dis. No. 777 of 1929.

19. [S. 82. para. 1.] Where a summons is returned under rule 17, the

Notes.

serving officer "cannot find" the defendant must be determined with reference to the circumstances of each case. 21 M. 324. See also 26 C. at 102. "Due and reasonable diligence". See 91 I. C. 965=1926 C. 327.

ORDINARILY RESIDES.—It is necessary that the defendant should be residing in the house in such a manner as to make it probable that knowledge of the service of the summons will reach him. 5 M.H.C.R. 101, 21 W.R. 242. See also 41 I.C. 181.

AFFIDAVIT OF SERVICE.—An affidavit in support of service of a summons under this rule should show that proper efforts have been made to find out when and where the defendant is likely to be found. 19 C. 201. See also 20 I. C. 318=11 A.L.J. 540.

AFFIX A COPY.—Where there is no affixture, there is no proper service. 16 B. 117. For illustrative cases, see 21 M. at 421; 10 B. at 204 21 B. 223. See also 24 A. 302 and 18 M.L.J. 14; 30 B. 623; 20 C. 358. All available steps to effect personal service should be

taken before resort is had to the provisions of O. 5, R. 17. 52 C. 179=88 I.C. 508. Affixture on outer door of house whether good service. 22 L.W. 423=49 M.L.J. 445=1926 M. 31.

AGENT is not invariably entitled to refuse summons. 23 N.L.R. 166.

O 5, R. 18.—The report of the Nazir is not enough. 12 W.R. 365. The Court is not bound by the return. It is not evidence of the service. 7 C. 34; 10 W.R. 3.

O. 5, R. 19.—There must be strict compliance with the rule as to propriety of service in cases where the service is the basis of the plea of constructive *res judicata*. 103 I.C. 822=26 L.W. 481=1927 M. 813. The declaration required by R. 19 of above service may in a proper case be implied or inferred. 9 O.W.N. 896=1932 O. 326. The provision of R. 19 will apply to all cases in which return of summons is made under R. 17 whether due to absence or refusal of person to be served. Even in the case of a refusal, unless there is a declaration by the Court

Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may if it has been so verified, examine the serving officer, on oath or cause him to be so examined by another Court, touching his proceedings and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit. **Loc. Am. [Calcutta]**

Order 5, R. 19 — *Substitute the following —*

19 Where a summons is returned under R. 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer on oath or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

Order 5, R. 19-A — *Add after R. 19 —*

19-A.—A declaration made, and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons.

20. [S. 82, para. 2] (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

Notes.

that the service under R. 17, is sufficient as required by the provisions of R. 19 any order passed by the Court in the absence of judgment-debtor will not constitute as *res judicata*. 1937 M. 84. See also 71 M.L.J. 317 (Summons not personally served—Omission to declare service sufficient—Effect).

PRINCIPLE OF CONSTRUCTIVE *res judicata*—APPLICABILITY OF—When a notice of an execution application is ordered by Court to be served on the defendant and the notice has to be affixed to the door of the dwelling-house owing to the reported absence of the defendant, the Court must either declare it sufficient or order such service as it thinks fit, as it is imperatively required to do so under R. 19 and in a case where it is sought to apply the constructive principle of *res judicata* against the defendant, the omission of the Court to make such a declaration as enjoined by the Code is fatal. 1933 M. 466=64 M.L.J. 329. Where the notice of the application for arrest was fixed on the outer-door of the defendant's residence when he was absent and there was no declaration by the Court under R. 19, that the notice was duly served. *Held*, that it was not due service for the purpose of creating constructive *res judicata* and that the defendant was not precluded from showing that the application was out of time. (1927 M. 813; 55 M. 233 and 40 M. 1016, Foll.) 142 I.C. 765=1933 M. 406=64 M.L.J. 637.

O. 5, R. 20.—The advisability of effecting service by substituted service is a matter primarily for the trial Court and if it is satisfied on the matters set out in R. 20, it

should order substituted service, which is as effectual as if service was made personally. An appellate Court has no power to go into the question whether the substituted service ought to have been ordered unless the trial Court has made some error of law. All that the appellate Court can see is whether the summons is issued according to law. 131 I.C. 344=1931 L. 118 (102 I.C. 243, Foll.) Substituted service when to be ordered. 69 I.C. 467=48 I.C. 304=120 I.C. 594. See also 138 I.C. 146=1932 M. 472. If at the time substituted service is ordered the Court is satisfied as to the grounds for the order, it is doubtful, if it can be invalidated by showing that its belief was erroneous. 138 I.C. 146=1932 M. 472. Affixing of summons on outer-door is not sufficient service. 29 I.C. 26. Copy attached to tree near house if sufficient. 69 I.C. 549=1923 N. 13. Where the Court finds that the defendants evaded service and refused postal notices, a finding that there was no due service is inconsistent. 1930 M. W.N. 1227. When substituted service is ordered, sufficient time ought to be given for notice of the fact to reach the defendant, wherever he may be. 2 B. 449. The publication of a notice in a newspaper in Lahore requiring a party at Hardoi to appear in Gurdaspur Court on the next day of issue of the paper is not valid substituted service. 116 I.C. 620=1929 L. 235. The mode of substituted service must be settled according to the circumstances of each case. 10 B. at 205. Notice affixed to the judgment-debtor's house occupied by other members of his family is good service. 130 I.C. 485=1931 A.L.J. 62=1931 A. 159. Substituted service—If personal service. 116 I.C. 363; see 1931 L. 397. See

Effect of substituted service.

[S. 83.] (2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Where service substituted time for appearance to be fixed.

[S. 84.] (3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

Loc. Ams.—[Oudh.] Order 5, R. 20-A —

20-A. (1) Where the defendant resides in British India outside the province of Oudh or within the limits of headquarters town of a district in that province, a summons may be served on him by registered post, and in this case, where an acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service has been received, the process, shall, unless the contrary is proved, be deemed to have been served.

(2) Where the registered address of the defendant or opposite party, as defined in O. 8, R. 11, is within the limits of a headquarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served. [Added by Oudh Chief Court.]

[Rangoon.] After R. 20, the following shall be inserted as R. 20-A, namely—

"20-A (1) Every plaintiff, appellant or applicant on presenting or on entering an appearance to prosecute a plaint, memorandum of appeal, or originating petition or application, shall at the same time file in Court a proceeding stating his address for service.

(2) Every defendant or respondent who intends to appear and defend any suit, appeal or originating petition or application shall on or before the date fixed for his appearance in the summons or notice served on him file in Court a proceeding stating his address for service.

(3) Such address for service shall be within the local limits of the jurisdiction of the Court in which the suit, appeal, or petition or application is filed or of the District Court within whose jurisdiction the party ordinarily resides.

Notes.

also 132 I.C. 778=1931 O. 369 (1). The rule that substituted service is to be taken as effectual as personal service only means that the Court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. But if for no fault of the defendant a defendant was never put in a position to know that a suit had been instituted against him whatever steps might have been taken for serving the summons on him, these steps can never be taken as amounting to "due service". It is therefore open to the defendant, when he appears to show that the method employed was not calculated to effect the purpose of informing the defendant of the institution of the suit, and in order to see whether there was due service or not, the Court must consider all the circumstances of the case, for example, the place where the defendant was when the summons was issued to him and where and how the summons was served. 1931 A.L.J. 1049=1931 A. 727 (F.B.). Even if the defendant is served personally, it is open to him to come to the Court and show that that was not really due service because it did not really give him knowledge of a claim against him. *A fortiori* it is open to the defendant who is served only by the inference through substituted service to show that he was never properly served at all and that he had no knowledge of the claim. 134 I.C. 1202=1931 M. 813=61 M.L.J. 920. Nor is the defendant precluded from afterwards showing that in fact there had been no service on him at all and that the order for substituted service was procured on misrepresentation of facts. Nor will an order recorded by the Court to

the effect that substituted service was effected on the defendant preclude the Court from entering into the merits of the defendant's application in spite of such order. 152 I.C. 830=38 C.W.N. 1066=1934 C. 745. When the order for substituted service is procured and such service is effected on misrepresentation of fact, the service so effected is not due service (*Ibid*). Substituted service obtained by fraud is not due and proper service. 153 I.C. 80=1935 L. 129.

PROCEDURE.—Granting of order for substituted service is at the discretion of the trial Court. Appellate Court will not interfere with such discretion. 102 I.C. 243=1927 M. 507=52 N.L.J. 472. See also 1935 L. 169. Service of summons whenever it is practicable, must be in person and it is only when reasonable grounds exist for believing that the defendant is keeping out of the way to avoid service, or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered. Mere affixing the summons to the defendant's house is not sufficient service. 134 I.C. 279=1931 N. 119 (29 M. 324; 21 M. 419, 2 N.L.R. 62, Foll.) Application to set aside *ex parte* decree rejected—Appeal—Court, if can consider legality of order as to substituted service. 1935 L. 169. Substituted service obtained by fraud—If due service. 153 I.C. 80=1935 L. 129.

REFUSAL TO ACCEPT SERVICE.—SUBSTITUTED SERVICE, IF NECESSARY.—It is obligatory on the Court to effect substituted service under R. 20, only if the summons could not be served in the ordinary way. Where the process-server and the postal peon had reported that the appellant had refused to

(4) Where any party fails to file an address for service as required by sub-rule (1) or sub-rule (2), he shall, if a plaintiff, appellant or applicant, be liable to have his suit; appeal, petition or application, dismissed for want of prosecution, and if a defendant or respondent, be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. Any party may apply for such an order against an opposite party, and the Court may on such application make such order as it thinks just.

(5) Where a party is not found at the address given by him for service, and no agent or adult member of his family on whom a notice or process can be served is found at the address, a copy of the notice or process shall be affixed on the outer door or some other conspicuous part of the house or place which has been given as the address for service; and such service shall be deemed to be as effectual as if the notice or process had been personally served on the party.

(6) Where a party is represented by an advocate or pleader notices or processes for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at the address for service given by such party.

(7) A party who desires to change the address for service given by him under sub-rule (1) or sub-rule (2) shall present a verified petition to that effect, and the Court may direct the amendment of the record accordingly. Notice of every such petition shall be given to all other parties to the proceedings.

(8) Nothing in this rule shall prevent the Court from directing the service of a notice or process in any other manner if it thinks fit to do so.

21. [S. 85, para. 1.] A summons may be sent by the Court by which it is issued, whether within or without the province, either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides.

Service of summons where a defendant resides within jurisdiction of another Court.

Loc Ams.—[Bombay.] O. 5, R. 21.—The following shall be inserted as R. 21-A in O. 5.—

"21-A. Where the plaintiff so desires, the Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing and sent to him by registered post prepaid for acknowledgment provided that such place is at a town or village in British India which is the headquarters of a District or recognised sub-division of a district, such as a taluka, tahsil, or mahal, or in which a municipality has been established, or to which the provisions of this rule may from time to time be extended by a Notification by the High Court published in the *Bombay Government Gazette*. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

Service of summons by prepaid post wherever the defendant may be residing, if plaintiff so desires.

[Rangoon.] In O. 5, the following shall be inserted as R. 21-A —

"21-A. When any summons is sent for service by a Court to any Court situated beyond the limits of Burma, it shall, unless it is written in English, be accompanied by a translation in English or in the language of the locality in which it is to be served."

Notes.

accept the service and the Court was satisfied about the correctness of their reports. *Held*, that the Court was entitled to hold that the appellant had been duly served and to proceed *ex parte* against him. 1935 L. 171.

SUBSTITUTED SERVICE.—STATEMENT OF PROCESS-SERVER AS TO—PRESUMPTION FROM—IF REBUTTABLE.—Where the trial Court was careful to obtain the statement on oath of the process-server before passing the *ex parte* decree, and the trial Court was satisfied that substituted service had been duly effected. *Held*, that this did not raise any un rebuttable presumption and it was open to the appellant to prove, if he can, that in fact substituted service was not duly effected. However difficult that task may be and how-

ever strong the presumption that there was proper substituted service, he must be given an opportunity to rebut the presumption. 157 I.C. 878=1935 Pesh. 112.

TRANSFER OF CASE.—Where the first summons was duly served, and it appeared that he intentionally neglected to ascertain the dates of hearing after the suit was transferred, *held*, that the *ex parte* decree passed by the transferee Court could not be set aside for want of due service. 139 I.C. 354=1932 L. 539.

O. 5, R. 21.—Service outside jurisdiction can only be done by an officer of the Court, with an order from a Court having jurisdiction over the place where he resides. 3 R. 239=89 I C. 870=1925 R. 325.

Service within Presidency towns¹ [* *] of summons issued by Courts outside.

22. [S. 85.] Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras¹ and Bombay¹ [* * *] is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

Loc. Ams.—[Bombay.] The following proviso be added to O 5, R. 22:—

"Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such inquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

[Rangoon.] The following proviso shall be added, namely,—

"Provided that where such summons is to be served within limits of the Town of Rangoon, the Court may, in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place within such limits where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof."

23. [S 85, para. 2.] The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return

Duty of Court to which summons is sent.

the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

Loc. Am.—[Rangoon.] The following shall be added to O 5, as R. 23-A —

"23-A. (1) Before re-transmitting a summons, received from another Court for service, the Court shall either take down the deposition of the peon serving the summons as to the time when and the manner in which the summons was served, or cause the peon to make an affidavit before the bailiff if the bailiff has been empowered to administer oaths, and shall transmit the same, together with the summons, to the Court whence the summons originally issued. In the case of processes received from other provinces the deposition or affidavit of the peon serving the summons, if not recorded in English, shall be translated into English, before the summons is returned to the issuing Court.

"(2) In the case of process received from India if the person on whom the summons is to be served is not personally known to the process-server an affidavit or deposition by the person who pointed out to the process-server the said person or his ordinary residence or place of business shall also be attached to the summons.

"(3) When a process is forwarded for service by one Court in Burma to another Court in Burma and when the person on whom the process is to be served is not personally known to the process-server, the case in connection with which the process was issued shall not be heard *ex parte* without an affidavit or deposition of some person who pointed out to the process-server the person to be served or his ordinary residence. The onus shall be upon the person at whose instance the summons is issued, either himself or by an agent, to point out to the process-server the person on whom the process is to be served or his ordinary residence or place of business.

"(4) When the summons has been returned by the process-server under Rule 17, a declaration of due service or of failure to serve shall be recorded in Form (Civil) 47, and sent with the summons to the Court by which it was issued."

24. [Ss. 87 and 88.] Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer in charge of the prison for service on the defendant.

Service on defendant in prison.

Leg. Ref.

¹The words 'and Rangoon' have been omitted, and the word 'and' was inserted between 'Madras' & 'Bombay' by the Government of India (Adaptation of Indian Laws

order, 1937.

Notes.

O 5, R. 24.—The Court shall take judicial notice of the signature of the jailor on the return. 4 B.L.R. O.C. 51.

25. [S. 89.] Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post if there is postal communication between such place and the place where the Court is situate.

Service where defendant resides out of British India and has no agent.

Loc. Ams.—[Allahabad, Oudh and Nagpur.] For the word "shall" in the third line read the word "may".

[Allahabad.] Rule 25-A.—When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh, the Court may, in addition to or in substitution for any other mode of service, send the summons by post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service. (Added by Allahabad High Court.)

[Madras.] *Substitute* the following for R. 25 in O. 5—"25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

"Provided that if by any arrangement between the Local Government of the province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon."

[Nagpur.] *Add* the following as R. 25-A—

"25-A. Where the defendant resides in British India but outside the limits of the Central Provinces, the Court may, in addition to any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by him, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service."

[Rangoon.] In R. 25 the words "may be addressed" shall be *substituted* for the words "shall be addressed"

After R. 25 the following shall be *inserted* as R. 25-A, namely,

"25-A. Where the defendant resides in British India, but outside the limits of the Province of Burma, the Court may in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof."

Service in foreign territory through Political Agent or Court

26. [S. 90.] Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in [the Central Government or the Crown Representative] a Political Agent has been appointed or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

2[(b) 1(the Provincial Government) has, by notification in the 1(Official

Leg. Ref.

¹ In cl. (a) for words 'the Governor-General in Council' the words 'the Central Government or the Crown Representative'; in cl. b) for words 'the Governor-General in Council' the words 'the Provincial Government', for words 'Gazette of India' the words 'official gazette' and for words 'issued by a Court under this Code' the words 'issued under the Code by a Court of the Province' have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

² The portion within brackets substituted by Act XVII of 1914, Section 2 and Sch. I.

Notes.

O. 5, R. 25.—A summons cannot be sent by post to any place to which letters are not registered by a post office. 2 B.L.R. (A.C.) 59. The summons should be sent by post under a registered cover. 15 W.R. 31, 1930 L. 439=121 I.C. 382. A person refusing a registered letter cannot afterwards plead ignorance of its contents. 16 W.R. 223. But see 18 B. 606. See also 23 A. 99-35 B. 213=13 Bom.L.R. 323=11 I.C. 351.

There is no law by which witnesses in Native States which have made arrangements for mutual service of processes with British India can be compelled to obey the processes,

Gazette) declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons ¹(issued under this Code by a Court of the Province) shall be deemed to be valid service], the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

Loc. Ams.—[Allahabad] After the words "the summons may" insert the words "in addition to, or in substitution for the method permitted by R. 25".

[Madras] Substitute the following for R. 26, O. 5—

"26 Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Governor-General in Council has, by notification in the *Gazette of India*, declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory,

the summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant, and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service."

[Nagpur] In R. 26 insert the words "in addition to or in substitution for the method permitted by R. 25" between the words "may" and "be sent"

[Oudh] In R. 26 (b) after the words "the summons may" insert the words "in addition to, or in substitution for, the method permitted by R. 25"

27. [S. 422.] Where the defendant is a public officer (not belonging to His Majesty's military ²[naval or air] forces ³[* * *], or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served, send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant.

Loc. Ams.—[Allahabad] To O. 5, R. 27, add the following as notes 1 and note 2—

"1. A list of heads of officers to whom summonses shall be sent for service on the servants of Railway Companies working in whole or in part in these provinces is given in Appendix II of the General Rules (Civil) of 1911.

2 In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under O. 16, simultaneously with the issue of the summons, notice shall be sent to the head of the office in which the person concerned is employed, in order that arrangements may be made for the performance of the duties of such persons.

Illustration—If the Court sees fit to issue a summons to a *kanungo* or *patwar* it

Leg. Ref.

¹ *Vide* ft. note 1 at p. 636

² Inserted by Act X of 1927.

³ The words 'or His Majesty's Indian Marine Service' omitted by Act XXXV of 1934.

Notes.

i.e., punished if they fail to do so If the

witnesses so summoned fail to appear the only way to take their evidence is by commission. The rule as to 200 miles is not applicable in such a case 142 I.C. 201=61 M.L.J. 334

O. 5, R. 27.—Mode of service of summons on a public servant. See 9 O.W.N. 896=1932 O. 326

shall inform the Collector of the District, and if to a Sub-Registrar it shall inform the District Registrar by whom the Sub-Registrar is subordinate."

[Madras.] In O. 5, R. 27 after the words "send it" insert the words "by registered post pre-paid for acknowledgment".

28. [S. 468.] Where the defendant is a soldier ¹[sailor] ²[or airman] the Court shall send the summons for service to his Commanding officer together with a copy to be retained by the defendant.

Service on soldiers.

Loc. Ams. [Allahabad.] The present R. 28 shall be numbered 28 (1).

Add the following as R. 28 (2).—

"(2) Where the address of such Commanding Officer is not known, the Court may apply to the officer commanding the station in which the defendant was serving when the cause of action arose to supply the address, in the manner prescribed in sub-rule (4) of this rule

(3) Where the defendant is an officer of His Majesty's military forces, wherever it is practicable, service shall be made on the defendant in person.

(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted, or outside British India, the Court may apply over the seal and signature of the Court to the officer commanding the station in which the defendant was residing when the cause of action arose, for the address of such defendant, and the officer commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give, as may lead to the discovery of his address.

(5) Where personal service is not practicable, the Court shall issue the summons to the defendant at the address so supplied by registered post.

[Madras.] In O. 5, R. 28 after the words "shall send" insert the words "by registered post pre-paid for acknowledgment".

[Oudh.] Add the following as 28 (a) and re-number the present rule as (b).

28 (a) Where the defendant is an officer in His Majesty's military, naval or air forces, the Court shall send the summons direct to him for service together with a copy to be retained by him.

29. [S. 468.] (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

Loc. Ams. —[Allahabad.] In R. 29, Sub-R. (1) for the words "R. 28" read "R. 28 (1)".

[Madras.] Insert as R. 29-A to O. 5, R. 29—

"29-A. Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's military or naval forces or His Majesty's Indian marine service) sued in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post pre-paid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons."

30. [S. 91.] (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

Substitution of letter for summons

Leg. Ref.

¹ Inserted by Act XXXV of 1934.

² Inserted by Act X of 1927.

Notes.

O. 5, R. 29.—The Commanding Officer

must serve the summons (10 M. 319), although the defendant is entitled to the privilege given by S. 144 of the Army Act, 1882. 11 M. 475. The words "such signature shall be deemed to be evidence of service" give effect to the ruling in 11 B.L.R. App. 43.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

[S. 92.] (3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent

Loc. Ams.—[Allahabad] To O 5, add the following as Rr. 31 and 32.—

"31 An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court."

"32 Ordinarily every process, except those that are to be served on Europeans, shall be written in the Court vernacular. But where a process is sent for execution to the Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation."

[Sind.] Add the following as R. 31 in O. 5 —

"33. If a summons issued to a defendant residing in British India is returned unserved, the Court may, while issuing a fresh summons for personal service or ordering substituted service of summons, also order that a copy of the summons addressed to the defendant at the place where he is residing be sent to him by registered post, if there is postal communication between such place and the place where the Court is situate."

ORDER VI.

PLEADINGS GENERALLY.

1. "Pleading" shall mean Pleading. statement. plaint or written

2. [Cf. S. 114.] Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

Notes.

O 6.—The provisions of O. 6 apply to petitions under O. 33 138 I C. 652=1932 L 548

O 6, R 1.—Pleadings in Indian Courts must not be construed with the same strictness as in English Courts. 6 A 406. They must be very liberally construed 5 C L J. 25 An amendment of the pleadings can be allowed at any stage of the proceedings where the sole result of the refusal would be to drive the plaintiff to a separate suit, to avoid which is one of the principal objects of the much wider rule as to amendment which has been introduced into the present Code. A plaint in a suit for rent and possession may be allowed to be amended by the addition of a prayer for declaration of title. 113 I C. 296=1929 M 273. A statement by a pleader is not a pleading under O 6, R 1, C. P. Code. 1141 C 113=1929 O 204.

O 6, Rr 1 and 4. SCOPE.—The Court, under its inherent jurisdiction, is entitled to interfere and direct particulars if it considers that a litigant is substantially embarrassed owing to lack of precision in a petition or affidavit, and a party disregarding this opponent's request for particulars will be doing so at his own risk. Any relevant statement which could have been incorporated in the petition or furnished by way

of particulars will not, on failure to furnish particulars, be allowed to be imported in an affidavit in reply at the hearing of the petition 165 I C 24=40 C W N 913.

O 6, R. 2.—As to frame of plaint in collision cases, see 25 C W N 519=34 C L J. 178. In election enquiry under Municipal Act, in which allegation of corrupt practice is made. See 39 C W N 910. The law of pleadings may be tersely summarised in four words "Plead facts not law". It is the duty of the parties to state only the facts on which they rely for their claim. It is for the Court to declare the law arising out of those facts. 1933 S 103=143 I C 713; 1926 N. 265 Every practitioner when pleading should have particular regard to R. 2. Nearly all pleadings in this country offend against this rule in one way or another. Either they lack conciseness or they state immaterial facts and a mistake, which is frequently made, is to include in the pleading either directly or indirectly by reference to some document annexed, the evidence by which material facts are to be proved. 58 C. 418=134 I C 538=1931 C. 458

ESSENTIALS OF PLAINT.—What it should contain. 22 C L J. 254=20 C W N. 310. The object of pleadings is to bring the parties to an issue. 25 M L J 329. Inconsistent pleas are not prohibited. 1925 O. 120=27 O C.

3. The forms in Appendix A when applicable, and where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.

Forms of pleadings.

4. In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

5. A further and better statement of the nature of the claim or defence,

Notes.

175. Pleas and facts constituting them should be clearly expressed 6 Pat.L.T. 465 =1925 P 168. Pleadings are confined to facts and a point of law need not be raised in the pleadings 92 I.C. 920=1926 N 265. See also 1933 S 103. In a suit for damages for breach of contract, the defendant may be allowed to give evidence of a previous contract between the parties, although it is not pleaded. The fact can be proved as part of the circumstances, and when the defendant does not rely on it except as evidence, it is not necessary to plead it. 152 I.C. 117=38 C.W.N. 908

O 6, R 3.—Evidence has no place in pleading: 1925 P 410.

O 6, R 4.—In an action for damages for injury done, the nature of the injury ought to be set out. 13 W.R. 246; 10 Bom H.C. 182. In a suit for money advanced, defendant pleading illegality of contract must clearly plead and prove illegality 3 R. 275=1925 R. 275. [23 M. 227 (P.C.), Foll.] A custom should be specifically pleaded and all the essential requisites to its validity and binding effect should be proved. 66 I.C. 640=34 C.L.J. 319. Ordinarily a party should not be allowed to prove a custom different from that set up by him. Where plaintiffs set up a particular custom and the defendants in terms deny the custom set up by the plaintiffs and go on to plead different custom it is not permissible in such a case to split up the custom but the case as regards the custom set up either by the plaintiffs or by the defendants must be taken as a whole and not piecemeal 114 I.C. 113=1929 O 204. A plea of a special nature must be distinctly pleaded and made the subject of a distinct issue. 25 I.C. 729=18 C.W.N. 622. See also 60 C. 733=146 I.C. 671=37 C.W.N. 504=1933 C. 632. A pleading charging fraud must set forth particulars and general allegations, however strong the words may be, cannot be noticed. 15 C. 533 (P.C.), 23 C.W.N. 1045 =31 C.L.J. 3; 35 I.C. 339=20 C.W.N. 819; 35 I.C. 284=20 C.W.N. 638, 20 I.C. 753, 92 I.C. 322=1926 L. 96; 40 C. 898; 2 Pat.L.T. 528=6 P.L.J. 373 (F.B.); 58 I.C. 317, 46 I.C. 342; 30 I.C. 20=8 I.B.R. 185, 144 I.C. 1013=1933 R. 123, 146 I.C. 954=1933 R. 169, 1935 R. 73 (2) =13 R. 175=155 I.C. 890, 1935 L. 222. But the omission to set forth particulars and details of the conspiracy, by which the plaintiff has been fraudulently deprived of his property, does not contravene the provisions

of R. 4, when the transactions alleged by the plaintiff speak for themselves and furnish internal proof of a well-thought-out design on the part of the defendants to deprive the plaintiff of his property. 152 I.C. 468=11 O.W.N. 1323. Points as to fraud or forgery shall be specifically pleaded 31 C.W.N. 538 =97 I.C. 543=1926 P.C. 109 (P.C.). Fraud of one kind alleged—Relief of another ground cannot be given 34 C.L.J. 529=26 C.W.N. 177. See also 24 C.W.N. 662 =30 C.L.J. 475. Charges of fraud and collusion must be proved by those who make them by established facts or inferences legitimately drawn from those facts taken together as a whole. 29 I.C. 482; 45 M.L.J. 363=39 C.L.J. 165=1923 P.C. 73 (P.C.). Suit for money advanced—Defendant pleading illegality of contract—Defendant must clearly plead and prove illegality. 92 I.C. 270=1925 R. 275. Coercion, undue influence, fraud and misrepresentation are all separate categories in law. 39 B. 441=42 I.A. 135 (P.C.). (15 I.A. 119, Ref.) If there are facts on the record to justify the inference of undue influence, the omission to make an allegation of undue influence specifically is not fatal to the plaintiff's case. All that the Court has to see is that there is no surprise to the defendant 132 I.C. 452=1931 N. 63. Where fraud or coercion or misrepresentation is alleged, it must be supported by particulars, 39 B. 149; and also strictly proved. 13 R. 175=155 I.C. 890=1935 R. 73, 1935 L. 222. New case of fraud must not be allowed to be set up on appeal. 26 Bom L.R. 622. Plea of estoppel should preferably be raised and issue framed. 1926 M. 1052=96 I.C. 915 (2). Special damage—Particulars to be given 91 I.C. 728=1926 C. 549. Suit on settled accounts—Order for inspection to be allowed—Lateness of application may be dealt with by an order as to costs 137 I.C. 636=1932 M. 284=62 M.L.J. 226. Suit relating to easements—Plea of lost grant or immemorial user not specifically stated—Inference of lost grant may be made—Plaint allegations to be liberally construed. 1933 C. 215=142 I.C. 458=56 C.L.J. 274.

O 6, R 5—If averments in a plaint are not precise, the defendant can apply for particulars. Failure to do so operates as estoppel in second appeal. 1 Pat.L.T. 34=52 I.C. 964. On this rule, see also 137 I.C. 842. It is not open to a defendant to make a grievance of any vagueness in the plaintiff's pleadings at an appellate stage because if

Further and better statement, or particulars or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

6. Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

7. No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

8. Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

9. Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

10. Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.

11. Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.

12. Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

Notes.

they so desired, it would be open to them to apply for further and better particulars under R 5. 11 L.R. (1937) 1 C 491=167 1 C 461=41 C W N 88=1937 C. 51

O 6, R. 6—Scope of contract—Condition precedent—Specific plea necessary. 94 1 C 304=1926 L 318

O 6, R. 7.—A plaintiff must be limited to the case which he puts forward in his plaint. 54 1 C. 43 Statement made by a party on being questioned by Court before framing issues is in the nature of a supplementary pleading and no plea inconsistent with it can be raised at a later stage except by way of amendment of pleading 117 1 C 813=1929 L 165. Court can ignore subsequent plead-

ings. 57 1 C 684. Amendment of plaint should not be allowed where the object is to get round the effect of some admissions made by the plaintiff himself 80 1 C. 355 (2). Alternative plea not raised in trial Court cannot be allowed to be set up on appeal. 8 L.R. 156 (Rev.).

O 6, R. 8.—Plea of want of consideration can be raised even when execution of the document is denied 4 Bur.L T. 24=9 1 C. 469; 5 C 684; 13 M 549; 18 A. 125.

O 6, R. 10—Allegations of fraud must be taken in the pleadings and must not be allowed to be made at a later stage of the suit. (1916) 1 M W N 180; 15 C. 533 (P C). Mere want of diligence is not fraud 61 1 C 823=2 Pat L.T 401

13. Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (*e.g.*, consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim).

14. [S. 15.] Every pleading shall be signed by the party and his pleader (if any). Provided that where a party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

Loc. Am.—[Calcutta.] O 6, R. 14-A—*added* after R. 14—

"14-A. Every pleading when filed shall be accompanied by a statement in a prescribed form, signed as provided in R. 14 of this Order, of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purposes of execution and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause of matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat."

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O. 6, R. 13.—*See* 49 I.C. 538=1927 L. 83. Flaw in title appearing from pleadings of person bound to prove it—Objection can be raised on such disclosure—Pleadings. 1929 P.C. 303.

O 6, R. 14.—Strict proof of pleadings having been read out and explained to Purdannah ladies should be had, before they are accepted as satisfactory proof of the contents. 38 A. 627=31 M.L.J. 607=43 I.A. 215 (P.C.), reversing 13 I.C. 882. This rule has no application to cases falling under O. 29, R. 1. 21 C. 60 (P.C.). What is required by this rule is that the plaint must be in existence before the signature is put in. 15 A. at 60. *See also* 22 A. 55; 6 M.L.J. 213; 17 C. at 582 (P.C.). There is no rule providing that a person named as co-plaintiff is not to be treated as a plaintiff unless he signs the plaint. 17 C. at 582 (P.C.); 80 I.C. 141=1925 S. 159.

SIGNATURE, OBJECT OF.—The object of the signature to a plaint is to prevent as far as possible disputes as to whether a suit was instituted with the plaintiff's knowledge and authority or not. 87 I.C. 1002=1925 S. 275; 139 I.C. 114=1932 S. 9. Such authority may be established by other means than the signature. 139 I.C. 114=1932 S. 9. The provisions of R. 14 relate to a mere matter of procedure and any mistake or omission therein may be amended at any time subsequent to the institution of the suit. (*Ibid.*) *See also* 80 I.C. 141, 104 I.C. 747; 167 I.C. 158=1937 Pesh. 17. There is no rule that a person named as a co-plaintiff is not to be treated as plaintiff unless he signs and verifies the plaint. 139 I.C. 114=1932 S. 9, 167 I.C. 158=1937 Pesh. 17. The plain terms of O 6, R. 14 apply to a company and are not excluded by reason of the provision of O 29, R. 1 in case of corporations. 32 Bom.L.R. 1305. *See also* 32

P.L.R. 655, 134 I.C. 1170=1931 S. 178 [following 21 C. 60 (P.C.) and 55 B. 151]. The use of a stamp bearing the name of the party is sufficient for the purpose of signing even in cases where he is able to sign. 54 M.L.J. 65. Plaint valid if signed by person instructed by plaintiff to sign. 1925 L. 144 (1), 4 B. 468; 75 I.C. 880. Plaint filed on behalf of person exempted from personal appearance in Court—Plaint signed by his servant—Subsequent power of attorney to servant by plaintiff ratifies prior acts of servant. 104 I.C. 747. A plaint is properly signed when it is signed by a person specially authorized to do so by a Company, which is incorporated in a foreign country. 8 P.R. 1912=10 I.C. 141. As to filing pleading on behalf of corporation, *see* 31 C.W.N. 1030=105 I.C. 568=1927 C. 780. A prisoner in jail, who is unable to sign a plaint, may authorize some other person under R. 14 to sign it for him, and the plaint so signed will be a valid plaint. 40 A. 147=16 A.L.J. 64. An omission by the plaintiff to sign the plaint is no ground for rejecting it, the plaint ought to be returned for amendment. 80 I.C. 141; 11 I.C. 842=254 P.L.R. 1911. A defect in the signature of a plaint or even the absence of any signature, it being found that the suit was filed with the knowledge and consent of the plaintiff, is not ordinarily a ground for interference in appeal. Much less is it a ground for interference by a District Munsif under S. 73 of the Village Courts Act or by the High Court in exercise of its powers of revision, if petitioner cannot assert any specific prejudice to himself arising out of the irregularity. 30 L.W. 499=1929 M. 790. *See also* 134 I.C. 26=1931 A.L.J. 777=1931 A. 507 (S.B.); 139 I.C. 114=1932 S. 9.

O 6, R. 14 and 15.—Suit by limited company—Plaint signed and verified by Secretary—Sufficiency—Affidavit testifying to Secre-

15. [Ss 51 and 52.] (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

16. The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit.

17. [Cf. S. 53.] The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all

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tary's fitness to verify—Necessity. 40 C.W. N. 930

O. 6, R. 15.—As to importance of verification, *see* 19 I.C. 993=41 C. 113. A verification to the effect that the statements made in the plaint were true to the information and belief of the plaintiff is in accordance with R. 15 though it does not disclose the sources of his information 59 C.L.J. 391=38 C.W.N. 551=1934 C. 632. When a pleading does not conform to this rule, the defect is a mere irregularity that can be cured by amendment 31 C.W.N. 397=101 I.C. 573=54 C. 480=1927 C. 376. Plant when amended takes effect from the date of original institution. (*Ibid.*) The absence of verification by some of the plaintiffs does not affect the jurisdiction of the Court. 134 I.C. 26=1931 A.L.J. 777=1931 A. 507 (S.B.). *See also* 133 I.C. 626. The verification should be made by some person acquainted with the facts of the case. 9 A. 188. *See also* 4 B. 468. Paragraphs raising legal points need not be verified. 138 I.C. 335=1932 L. 328. A petition by the Administrator-General for Letters of Administration is sufficiently verified by his signature. 20 C. 879. When a plaint contains numerous allegations of fraud, the defendant might require the plaintiff to verify the plaint himself 9 A. 505. *See also* 8 C. 855. In case the verification is defective, it can be amended. 20 A. 442. *See also* 18 A. 396 (F. B.). A plaint which is not verified cannot be treated as waste paper. 22 A. 55 Also a written statement. 11 C.W.N. 871. But *see* 46 A. 637=22 A.L.J. 690. If the verification is found to be false the suit cannot be dismissed 24 W.R. 71. Sub-R. (2) follows the ruling in 15 A. 59

O. 6, R. 16: SCOPE OF THE RULE.—92 I.C. 920=1926 N. 265. The jurisdiction given to the Court under R. 16 is one which ought to be exercised with great care and caution. 29 C.W.N. 670=88 I.C. 435. Inconsistent rights claimed alternatively may be permitted except when they are destructive of each other. 22 C.L.J. 254=20 C.W.N. 310. *See also* 17 C.W.N. 565=16 C.L.J. 404. Pleadings

disrespectful to the Court may be struck out. 22 M. 155; 42 I.C. 620=2 Pat.L.W. 226. A Court can at any stage of the proceedings direct that any matter in any pleading which may tend to prejudice, embarrass or delay the fair trial of a suit be amended or struck out. 20 O.C. 192=41 I.C. 903; 75 I.C. 433=1923 P. 357, 1924 P. 280. In a suit by son disputing alienation by a Hindu father, general allegation as to immorality without particulars must be struck out 140 I.C. 535=1932 A.L.J. 309=1932 A. 467. When the trial Court is not moved to strike out inconsistent defences which are embarrassing, retrial cannot be claimed on the ground of embarrassment in second appeal 32 L.W. 61=1930 M. 814. When an order is made under R. 5 of O. 6, for delivery of particulars and the defendant makes default, it is open to the Court to direct that the defence should be struck out even though it was not a term of the original order that the defence should be struck out. In such a case the defaulting party comes within the reach of this rule. 53 M. 645=59 M.L.J. 22=1930 M. 473.

O. 6, R. 17. SCOPE OF THE RULE.—Under this rule the powers of amendment vested in the Court are very wide. 10 M.L.T. 116=12 I.C. 119; 3 L. 382, 96 I.C. 79, 1925 M. 585 (2)=48 M.L.J. 349, 49 I.C. 441; 87 I.C. 950=1925 O. 692; 29 I.C. 132; 84 P.R. 1919=52 I.C. 464; 58 I.C. 665=24 C.W.N. 749, 100 I.C. 469=1927 C. 477; 1931 L. 595. *See also* 36 P.L.R. 253=1934 L. 1009; 155 I.C. 1016=41 L.W. 429=1935 M. 286. A Court has no right to direct the amendment of a plaint when it has no jurisdiction over the subject-matter of the plaint. Hence where a suit is filed in a Court for a sum beyond the jurisdiction of the Court, the Court has no right to allow amendment of the plaint reducing the amount claimed so as to bring it within the pecuniary jurisdiction of the Court. (33 M. 262, Rel. on) 158 I.C. 516=1935 A.L.J. 981=1935 A. 842. To allow or not to allow an amendment is in the Court's discretion which must be liberally exercised. 1925 M. 794=48 M.L.J. 489; 1925 N. 9; 25 I.C. 567=19 C.L.J. 518; 13 I.C. 128=15 C.L.J. 439, 11 I.C. 481=14 C.L.J. 188;

such amendments shall be made as may be necessary for the purpose of

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91 C. 267; 45 I.C. 649, 37 I.C. 914; 34 C.L.J. 529=26 C.W.N. 77, 27 M. 80. It must be exercised in a judicial manner and according to well-settled principles. 1931 L. 595=133 I.C. 640. An amendment which only seeks to develop the original cause of action without varying it can well be allowed. 41 L.W. 37=1935 M. 137. As to conditions which should be satisfied before granting amendment, see 103 I.C. 455=23 N.L.R. 81=1927 N. 310; 103 I.C. 670=1927 M. 859, 92 I.C. 926; 55 I.A. 360=55 M.L.J. 523=52 B. 597 (P.C.), 1930 N. 295. A written application is not necessary to move the Court for an order allowing an amendment. An oral application is sufficient. 52 I.C. 758. Discretion in allowing amendment should be freely exercised but not where the suit by amendment would relate to a different subject-matter. 32 I.C. 624=(1916) 1 M.W.N. 171.

LEAVE TO AMEND WHEN GIVEN.—Principles as to allowing amendment. See 132 I.C. 311=1931 M. 1=60 M.L.J. 713. The nature of the defence can be looked into for the purpose of seeing whether an amendment of the plaint should be allowed. 154 I.C. 720=41 L.W. 37=1935 M. 137. The only thing which must not be altered by an amendment is the fundamental character of the suit which expression refers to the foundation on which the suit is based and not the prayer in the plaint. Hence when a plaintiff leaves the foundation of the case entirely unchanged but seeks to amend the plaint by asking for a different relief, the amendment may be allowed. 1933 R. 247. If the plaintiff had put forward one ground of exemption from limitation, he is not precluded from applying at the hearing of the suit to amend the plaint claiming exemption on another and not inconsistent ground of exemption. 156 I.C. 531=37 Bom.L.R. 165=1935 B. 213. In a case where it appeared that the appeal was authorised by the Government the Court allowed the amendment of cause title by substituting the words "The Secretary of State for India in Council" for "Karachi Municipality (The Special Land Acquisition Officer, Karachi)". 131 I.C. 118=1931 S. 63. Amendment to change the date when cause of action arose and not to change the cause of action itself should be allowed. 1925 M.W.N. 781, 30 I.C. 391. See also 48 C. 932 (P.C.); 15 R.D. 293. One distinct cause of action cannot be substituted for another. 133 I.C. 646=1931 L. 595. Where a person, an heir of M, claims that the mortgages in question were assigned to him by way of a family partition as his share of inheritance but being unable to rely on that deed, as it was not registered, he subsequently desires to bring the suit as heir to M since deceased, and he has joined the other heirs as defendants as they did not wish to be plaintiffs, it cannot be said that one distinct cause of action has been substituted for another nor that the subject-matter of the suit has been changed. The proposed amendment is purely an amendment and not a

transformation and the amendment should be allowed. 1934 R. 234. Plaintiff sued her deceased husband's brother and his sons for an injunction to restrain them from trespassing on her land, claiming title to the land as heir to her husband who got the same on a partition between him and the defendants. The defendants admitted the partition but denied that the land was family property at any time. Before trial, plaintiff applied for an amendment of the plaint by further basing her title on adverse possession against the defendants and asking for a declaration that the land belonged to her and was in her possession and enjoyment. It was *held*, the amendment ought to be allowed. There is no objection to amendments which just develop the original cause of action so long as they do not vary it. 154 I.C. 720=41 L.W. 37=1935 M. 137. Cause of action can be amended if the frame of the suit is thereby not altered. 14 L.R. 60 (Rev.). All amendments necessary for deciding points in dispute should be allowed—Revision lies against improper refusal. 21 L.W. 639=87 I.C. 90=48 M.L.J. 349; 85 I.C. 344, 22 L.W. 26=1925 M. 950, 1930 L. 278 (2). The Court ought to give all reasonable indulgence with regard to amending. 32 C. 582 (600). Amendments of plaint should be allowed to avoid multiplicity of suits. 86 I.C. 615=1925 C. 944, 45 A. 220, 19 I.C. 250=11 A.L.J. 423, 56 I.C. 115, 64 I.C. 99, 28 P.L.R. 15=1927 L. 103; 155 I.C. 1016=41 L.W. 429=1935 M.W.N. 56=1935 M. 286. Suit in firm name by sole proprietor may be allowed to be amended on terms by inserting the words "(plaintiff) carrying on business under the name and style of (firm)". 35 C.W.N. 432=134 I.C. 1200=1931 C. 770. See also 1935 A.M.L.J. 11. (Amendment to insert statement that the suit is on behalf of the family). When the amendment is only asked for out of abundant caution because of a conflict of decisions on the point it should be allowed as it does not injure the defendant and prevents plaintiff being formally driven to a fresh suit on the same matter. Where a minor files a suit for accounts of the partnership alleging that the release deed by his mother was not binding on him as his mother was neither *de jure* nor *de facto* his guardian in executing it, an amendment of adding a specific prayer for a declaration that the release deed executed by his mother as his guardian is not valid or binding against plaintiff should be allowed. (1925 M. 188, Foll.; 1930 M. 322, 1927 M. 973 and 1927 M. 182, Dist.) 148 I.C. 869=39 L.W. 476=1934 M. 267. A prayer for confirmation of possession can be changed into one for recovery of possession on the same facts. 35 C.W.N. 620. So also a prayer for declaration of plaintiff's right to an office in a temple by terms and for possession of the same for a particular year, can after the lapse of the year, without the suit being taken up for hearing be changed into a prayer for possession during alternative years. 155 I.C. 1016=41 L.W. 429=1935 M. 286. Amendment should not be refused on

determining the real questions in controversy between the parties.

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the ground that a fresh party shall have to be joined. 10 I.C. 737=7 N.L.R. 43

LEAVE TO AMEND WHEN REFUSED—Mere delay is not an adequate ground for refusing amendment. 157 I.C. 64=1935 P. 463, 70 I.C. 1033=1935 O. 291=26 N.L.R. 353. But amendment sought for at a very late stage would be disallowed. 51 B. 749=29 Bom.L.R. 1071=104 I.C. 685=1927 B. 521; 1930 C. 721 (1). Amendment of plaint is not allowed if it alters the nature of the suit. 35 C.L.J. 25=26 C.W.N. 73; 51 I.C. 435; 35 I.C. 91, 10 I.C. 250, 54 I.A. 55=6 P. 323=1927 P.C. 18=52 M.L.J. 402 (P.C.), 101 C. 218; 1931 L. 595; 154 I.C. 103=1935 P. 86 Especially when the new claim is barred by limitation. 133 I.C. 497=1931 M. 542=61 M.L.J. 316. Substitution of one plaintiff for another cannot be allowed by amendment. 27 Bom.L.R. 277. It is not enough for a plaintiff to show that the amendment does not alter the character of the suit. 21 B. 571. The test is whether the evidence to be offered after the amendment will be substantially the same as that offered if the plaint stood as originally framed. 3 C. 654 at 661 Amendment of plaint so as to make out an inconsistent case is not allowed. 101 I.C. 280. See also 33 Bom.L.R. 1385=1931 B. 590. It is not an inflexible rule to disallow an amendment which modifies to some extent the original cause of action or adds another. 122 I.C. 174, 30 L.W. 557. See also 1937 A. M.L.J. 16 The main point in considering whether leave should be granted to any party to amend his pleading is whether the amendment is necessary for the determination of the real questions in controversy But the Court will not allow an amendment that would involve a complete change of front in the defence 157 I.C. 764=1935 P. 463. Improbability of defence is no ground for refusing permission to raise it by amendment of pleadings 157 I.C. 764=1935 P. 463. An application for amendment of plaint was dismissed on merits, subsequently plaintiff put in another application similarly worded and no further fact was mentioned on the merits. *Held*, that no reasonable ground was made out for granting the application. 1934 S. 193. Amendment seeking to introduce a new claim would not be allowed where no cause is shown for introducing new matter which was not included in the original plaint. See 4 O. W.N. 1219 The fact that an issue would have to be tried again is no ground for refusing an amendment. 1906 A.W.N. 220. In the absence of special circumstances leave to amend a plaint ought not to be given where the effect of the amendment is to deprive the opposing party of an acquired right. 145 I.C. 630=35 Bom.L.R. 929=1933 B. 450, 154 I.C. 103=1935 P. 86. See also 40 C.W.N. 1233 (Suit for declaration that a patni sale is collusive and fraudulent—Objection that suit is not maintainable as contravening the procedure prescribed in S. 14 of the Bengal Patni Regulation—Amendment at late

stage not allowed. 40 C.W.N. 1233.) Amendment changing plaintiff's name from temple to idol not applied for in trial Court—Amendment cannot be allowed. See also 6 O.W.N. 1036; 30 P.L.R. 41=9 L. 588. Declaratory suit—Consequential relief not asked though objected—Subsequent amendment to ask the relief should not be allowed. 115 I.C. 911. A suit based on adoption cannot be treated as a suit for partition of undivided family property 21 I.C. 737=1913 M.W.N. 828 An alteration in the relief claimed does not alter the character of the suit 20 C. 805 at 808. The addition of a prayer ancillary to the principal one does not alter the character of the suit. 5 C.W.N. 273. See also 1902 A.W.N. 114. Amendment applied for an appeal—Suit for declaration as to invalidity of adoption—Trial Court dismissing suit on ground of limitation—Appeal—Death of widow pending—Application for amendments so as to convert suit into one for possession—Permissibility 30 L.W. 507. Different causes of action—Mortgage suit—Dismissal for want of proof of mortgage—Mortgage deed not executed—Application in second appeal to convert suit into one for possession—Maintainability. 7 R. 140=117 I.C. 577=1929 R. 179 Plaint verbose and unintelligible—Suit for breach of contract—Details of contract and special damage not alleged—Striking off of plaint and ordering amendment of the same 114 I.C. 906=27 A.L.J. 496. A suit by plaintiff as reversioner to the estate of the last male holder cannot be converted into a suit by him as heir to the widow of the last male holder on the basis that the properties were her stridhanam properties when the new claim set up is time-barred 132 I.C. 311=1931 M. 1=60 M.L.J. 713 In this case the defendants had no merits at all They had taken the money of an old pardanashin lady, they had refused to pay it on demand; and the only ground upon which they resisted payment was purely a technical one under the Limitation Act. *Held*, that an application by defendant for permission to amend pleadings to include the plea ought to be dismissed. 3 A.W.R. 176=1934 A. 11.

SUIT ON PRO-NOTE—Suit on promissory note, insufficiently stamped—Amendment can be allowed to sue on original consideration 1922 L. 394 (1), 52 I.C. 758; 99 I.C. 625=1927 M. 378. Such amendment can be allowed even after limitation. 14 R. 383=165 I.C. 810=1936 R. 508 See also 165 I.C. 503=44 L.W. 267=1936 M. 632=71 M.L.J. 166. (Suit pro-note contravening the provisions of Paper Currency Act. But see *contra* 138 I.C. 783=34 Bom.L.R. 643=1932 B. 394 Where the facts are fully stated in the plaint on an insufficiently stamped promissory note, the suit cannot fail on the original consideration merely because the plaint is formally amended 1933 N. 57. See also 61 C. 433=150 I.C. 982=1934 C. 554; 158 I.C. 533=1935 R. 282. Where all the facts of the original loan and all its terms are set out in the plaint

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but the plaintiff is based on a promissory note which is either insufficiently stamped or barred by limitation, the plaintiff is entitled to succeed alternatively on the original loan, although there is no such prayer in the plaint. Where in a suit on a promissory note executed in settlement of accounts between the parties the defendant pleads discharge and limitation, but the discharge is found against, and the claim is found to be in time on account of certain payments made by the defendant, though the promissory note itself may be barred, the defendant cannot in any way be prejudiced by allowing an amendment of the plaint so as to include a prayer for a decree in the original cause of action, irrespective of the promissory note. Such an amendment ought to be allowed and the plaintiff given a decree on that basis. 165 I.C. 301=44 L.W. 258=1936 M. 785=71 M.L.J. 250 (F.B.). Where liability of the members of a joint Hindu family is disputed in a suit on a promissory note because of Ss. 20 and 27 of the Negotiable Instruments Act, it is permissible to amend the plaint so as to base the suit on the original consideration. 32 Bom.L.R. 1035=1930 B. 424. See also 130 I.C. 347=1931 O. 54, 131 I.C. 1=1931 M. 533 (Plaintiff order to pay Court-fee afresh). Suit on pro-note signed by one partner in his name only—Creditor contending to hold all partners liable—No clear indication in plaint whether creditor based his suit on independent liability—Amendment of plaint. 1930 M. 168=123 I.C. 358. An amendment of plaint in a suit on a promissory note with a view to base the cause of action on the loan itself, cannot be allowed, when the application is made for such amendment not only after the claim had become barred by limitation, but after the trial and before delivery of judgment—Anticipating an adverse finding on the genuineness of the pro-note—On the ground that the defendant had deceived the plaintiff. A suit on a pro-note cannot be converted into one based on fraud or deceit and that at a late stage. 153 I.C. 266=1935 M. 50=67 M.L.J. 918. Where at the time of a loan two documents are executed, a promissory note and a voucher containing all the terms of the loan, and intended to be the record of the transaction, and the promissory note is given only as a collateral security, if the promissory note is under-stamped and inadmissible in evidence the creditor can fall back on his cause of action based on the voucher independently of the promissory note; and he can prove it and obtain a decree on the same. In such a case, the plaint in a suit based on the promissory note alone ought to be allowed to be amended and the claim decreed on the basis of the voucher, notwithstanding that on the date of such amendment the claim is barred by limitation, especially when the defendant is not in any way prejudiced, when his defence is a total denial of the whole transaction. Such an amendment when refused in the trial Court was allowed by the High Court on appeal. 39 C.W.N.

1235. In a suit to recover money lent under a promissory note executed by the karta of a joint Hindu family, the plaintiff's case substantially being that the loan was taken by the joint family through the manager for purposes of the joint family and the joint family business, the suit cannot be regarded as one simply for recovery of the amount on the note only; and when the other members of the family are also impleaded as defendants to the suit, the suit must be taken as one on the promissory note as well as on the original consideration, namely, the debt incurred by the manager for the purpose of the family and the family business. In such a case if the plaintiff applies for an amendment of the plaint so as to avoid any future dispute as regards the real nature of the claim, the plaintiff ought to be allowed leave to amend the plaint and should also be allowed to adduce evidence relevant to the alternative claim. Even if the plaint contains only a claim on the note only, leave to amend ought to be given, especially when the defendant has raised no objection to the issues about the purpose of the loan and has not been taken by surprise. The question of limitation does not arise and will not be bar to the amendment, when the original consideration is already included in the plaint. 60 C.L.J. 91=38 C.W.N. 1146. The cause of action based on dealings between the parties is distinct from that based on a promissory note for the amount due in respect of such dealings. It cannot be laid down as a proposition of law that in a suit on a promissory note an amendment claiming in the alternative on the consideration for the note should never be allowed at the trial; whether such an amendment should be allowed or not depends on the circumstances of the case and various other considerations. 35 Bom.L.R. 965=1933 B. 476.

AMENDMENT WHEN MAY BE ALLOWED IN APPEAL—An amendment which is not of such a character as to be objectionable either as changing the subject-matter of the suit or as being otherwise unfair is within the competence of the Court under O. 6, R. 17 and can be made even in appeal. 16 P. 149=166 I.C. 649=45 L.W. 191=41 C.W.N. 418=1937 P.C. 42 (P.C.), 144 I.C. 168=1933 L. 395. Amendments involving an entire change in the form and character of a suit cannot be allowed in second appeal. 9 I.C. 774=4 Bur. L.T. 47; 12 I.C. 200=4 Bur. L.T. 244, 180 P.W.R. 1913=20 I.C. 501=292 P.L.R. 1913; 14 C.W.N. 128; 93 I.C. 871=1926 L. 453, 42 I.C. 455, 1935 R. 88. A Court of second appeal if and when can order amendment of a plaint. 59 P.L.R. 1916=30 I.C. 387, 20 I.C. 501=292 P.L.R. 1913; 50 I.C. 180, 98 I.C. 39=51 M.L.J. 418; 52 M.L.J. 253; 1935 R. 88. Amendment can be allowed in second appeal if the error is *bona fide*. 21 M.L.J. 475=10 I.C. 218; 33 B. 644, 3 L. 382, 2 P. 919=5 Pat. L.T. 315. Omission to state in plaint—Ground of exemption from limitation—Subsequent amendment in second appeal—Permissibility. See 20 N.L.J. 42. The discretion exercised by the

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lower Courts in rejecting an application for amendment will not be intertered with in second appeal. 40 C.W.N. 1233 Where the plaintiff-appellant prays in appeal for amendment of the plaint on the ground of mistake having been made in the typing of the draft plaint, but no sufficient explanation is offered why the alleged mistake was not discovered by the plaintiff till after the disposal of the case by the lower Court, it is not a case in which the High Court would in appeal exercise its discretion in allowing the amendment. 161 I.C. 862=1936 P. 191 Where a District Judge exercises his discretion and refuses to allow an amendment of pleading, the High Court will not interfere with his order unless a strong case is made out for such interference. 1933 L. 867. New cause of action—Suit on Ilundi—Application in appeal to amend point so as to introduce claim for moneys lent—Permissibility. 115 I.C. 400. It is open to the appellate Court to allow an amendment of the plaint so as to convert a suit for a declaration into one for possession 157 I.C. 1024=1935 L. 91. The plaintiff sued for a mere declaration though on the facts it appeared that consequential relief was necessary. The plaintiff persisted in the above course in the appeal *Held*, that the Court need not allow an amendment of the plaint so as to include consequential relief 35 P. L.R. 136=1934 L. 235 Where a suit for injunction is found to be not maintainable for want of a prayer for a declaration, it is not proper that the suit should be dismissed. The plaintiff who desires an amendment of the plaint in the appellate Court and is willing to pay the costs to the other side, must be allowed to amend his plaint by inserting the prayer for declaration on payment of costs 152 I.C. 340=1934 M. 600=67 M.L.J. 245 *Per Aston and Rupchand, A.Js*—A suit for possession of land was dismissed with costs on the ground that the defendants were not licensees as alleged and that the defendants had been in adverse possession for more than the statutory period It was not made a ground of appeal that plaintiff had not understood the defence, but the appellate Court granted the plaintiff's application for an amendment of the plaint and directed a retrial of the suit on the basis of the defendants being trespassers. *Held*, that the Court of first appeal was in error in allowing the applications for amendment of the pleadings and in permitting the plaintiffs to reargue the same questions and lead further evidence by resorting to the device of asking for amendment of the pleadings; it was a gross abuse of the process of the Court to permit the plaintiff to do so 146 I.C. 777=1933 S. 279 (F.B.) Where in a suit by a sub-mortgagee for foreclosure of the original mortgage the suit was dismissed by the first Court on the ground that the proceedings were defective under Regulation XVII of 1806 and therefore the plaintiffs had not acquired the rights of the original mortgagees, the plaintiffs cannot be allowed in appeal to amend

the plaint so as to enable them to sue on the sub-mortgage, because, apart from delay, that would be to introduce an entirely different cause of action. 14 L. 640=1933 L. 676. Principles governing amendment of plaint in appeal. *See* 54 I.A. 55=1927 P.C. 18=52 M. L.J. 402 (P.C.), 165 I.C. 737=1936 M.W.N. 411=1936 M. 545. *See also* 9 L.L.J. 152=102 I.C. 194; 1927 M.W.N. 175=1927 M. 504 1 Luck 33=91 I.C. 927

SUIT AGAINST DEAD PERSON—A suit filed against a dead person is no suit at all and no question of amendment of the plaint arises Such a suit cannot be maintained by substituting the representatives of the deceased. 31 M. 86; 42 I.C. 539; 30 I.C. 679=2 L.W. 828. But *see* 105 I.C. 284. *See also* 9 L.L.J. 152 Where a suit is filed against several defendants, one of whom was dead at the time, the suit cannot be considered to have been instituted against the dead person, but it cannot be said that there is no validly instituted suit against any one. In such a case the Court can exercise all the powers which the C.P. Code confers on it as regards addition of parties and amendment of the plaint. 147 I.C. 782=1934 A.L.J. 126=1934 A. 25

PAUPER SUITS—An order directing a plaintiff to pay in cash the costs of an amendment of the plaint, after he has been found to be a pauper, is improper 24 Bom. L.R. 924=47 B. 104.

PARTITION SUITS—Failure to include certain items in partition suit—Amendment—Permissibility 6 O.W.N. 142=117 I.C. 412=1929 O. 162.

PRE-EMPTION SUIT—A pre-emption suit should state the ground on which right is claimed, and though the Court has discretion to allow amendment in all cases where it may be just and proper to do so, where the effect of the amendment of the plaint by which plaintiff seeks to change the ground on which his right is claimed is to take away from the defendant a legal right which has accrued to him by lapse of time, such amendment should not be allowed (83 P.R. 1917, Rel. on.) 144 I.C. 822=1933 L. 774 (1).

REDEMPTION SUIT—A suit for redemption can be converted into one in ejectment 28 B. at 161; 24 A. 456; 5 B. 496; 7 B. 146; 9 B. 355; 3 B. 222 A suit for redemption cannot be amended when the action is instituted for purposes absolutely inconsistent with redemption 5 C.L.J. 653. *See also* 5 C. 269 Suit for redemption—Alleged mortgage not proved—Another and different mortgage cannot be substituted 96 I.C. 304. *See also* 53 M. L.J. 647.

RENT SUITS—A suit for rent may be amended into one for damages for use and occupation. 30 I.C. 753=8 Bur. L.T. 234. But *see contra* 1927 M. 182=99 I.C. 977=52 M.L.J. 399 *See also* 1927 O. 505; 11 I.C. 863=4 Bur. L.T. 197.

EJECTMENT SUIT—A suit in ejectment cannot be converted into one for partition. 37 M. 529=23 M.L.J. 189 Where in a suit in ejectment, the landlord based his cause of

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action on illegal sub-letting by the tenant and by a subsequent amendment he was allowed to plead illegal transfer by way of mortgage in the place of sub-letting as his cause of action, the frame of the suit is not thereby altered and for the purposes of limitation, the suit must be deemed to have been filed on the original date and not on the date of amendment. 14 L.R. 60 (Rev.)=17 R.D. 71. Suit for ejectment and for damages for use and occupation—Death of original defendant and his legal representative setting up possession in his own right—Amendment to include prayer in the alternative for possession on title. 1935 A.M.L.J. 100

SUIT FOR ACCOUNTS.—A suit for dissolution of an alleged partnership and rendition of accounts cannot be converted into a suit for remuneration as an agent or servant of defendant as it would necessitate the altering of the whole nature and frame of the suit. 148 I.C. 253=1934 L. 38 (2). See also 161 I.C. 505=1936 S. 9 where such amendment was refused in the circumstances of the case. The plaintiff as originally presented was one for a specific sum ascertained on the striking of a balance of the accounts of a dissolved partnership. The plaintiff subsequently amended his plaint to the effect that the accounts were settled between the parties, and the defendant agreed to pay his share. *Held*, that the amendment that the balance had been struck was not one altering the nature of the suit as the suit was one for a balance of the partnership account whether the balance was struck or no. 29 N.L.R. 115=1933 N. 82. *A* and *B* were partners in cloth business. *A* brought a suit against *B* wherein he averred that the partnership was started in April, 1921, and prayed for an order directing that partnership accounts be taken. But later on it was found that the partnership was started in December, 1919. *A* accordingly applied for an amendment which was opposed and disallowed. *Held*, that the suit being essentially one for accounts there was no splitting of the causes of action, and under such circumstances even if *A* had not sought the amendment it was open for him whilst in the witness-box or even earlier to intimate to the Court that there had been a mistake in the plaint with regard to the date. 144 I.C. 250=1933 S. 131

INSOLVENCY PROCEEDINGS.—Section 5 of the Provincial Insolvency Act makes the provisions of O. 6, R. 17, C. P. Code, applicable to proceedings in insolvency. An insolvency petition by a creditor, which sets out clearly the acts of insolvency but is formally defective owing to the omission of the words "with intent to defeat and delay his creditors," may be amended so as to add the said words. And it makes no difference, because the amendment is made more than three months after the alleged acts of insolvency, whether the said period of three months be regarded as a condition precedent or as a period of limitation. 67 M.L.J. 924. Ordinarily an application for amendment

should not be granted where it deprives the opposite party opportunity of raising the plea of limitation but under special circumstances it can be allowed. The petitioning creditor was not aware of the several acts alleged to have been committed by the debtor with the object of defeating his creditors. Immediately on his becoming aware of the acts relied upon by him in the insolvency application, he came to the Court. He was subsequently apprised of the fact that another transfer was also made with the like intent and he came to Court within three months of the date of the transfer and applied for amendment of application. If instead of applying for amendment, he had presented a fresh petition on that day incorporating this act as an additional act of insolvency and had craved leave to withdraw the original petition he would have been justified in doing so. *Held*, that the amendment should be allowed. 148 I.C. 974=1934 S. 33

DECLARATORY SUITS.—A suit for declaration of title cannot be changed into one for specific performance. 133 I.C. 646=1931 L. 595. Plaintiff in a suit for declaration can be allowed to be amended by including a prayer for setting aside the decree. See 33 Bom L.R. 141=131 I.C. 886=1931 B. 218. Declaratory suit, if can be permitted to be changed into one for recovery of possession. 24 M.L.J. 455=19 I.C. 672; 1935 L. 91. See also 8 L. 531=1927 L. 499; 2 Pat L.J. 379=40 I.C. 174; 93 I.C. 871=1926 L. 453, 139 I.C. 678=34 Bom L.R. 125=1932 B. 175, 1 I.L.R. 1937 N. 151=168 I.C. 351=1937 N. 84

OTHER ILLUSTRATIVE CASES.—In a suit for injunction, an addition of subsequent prayer for possession can be allowed by way of amendment. 105 I.C. 784=1927 O. 513. Where plaintiff prays for exclusive possession amendment claiming joint possession may be allowed. 104 I.C. 325. Claim for possession as reversioner—Amendment into a claim in plaintiff's own right. 52 M.L.J. 253. Different cause of action not to be introduced by amendment. 52 I.C. 961. *Suit for possession* by a person admittedly a sharer—Amendment of suit into one for partition to be allowed. 23 L.W. 468=92 I.C. 396=1926 M. 909. *Suit to recover purchase-money* on the basis of vendor's lien—Amendment into a suit for damages for breach of contract may be allowed. 8 L. 257=1927 L. 103. But see 134 I.C. 1110=1931 L. 260. Where such an amendment was not allowed on the ground that it was applied for at a late stage and that if allowed it would make a fresh trial necessary. *Application for probate* can be converted into one for letters of administration. 9 L.L.J. 152=102 I.C. 194. As to amendment of written statement in an *action for libel*, see 54 C. 73. Where the basis of plaintiff's right to sue has been jeopardised by a decision in another suit after the plaint in the suit was filed, an application for the amendment of the plaint put in promptly ought to be allowed. 23 L.W. 618=1926 M. 754. Suit by a person who had no right to sue—Amendment of plaint to enable proper

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party to sue should not be allowed 93 I.C. 305=1926 M 577. On this rule, *see also* the following cases—26 A. 215, 2 M 295; 5 Bom.L.R. 329; 13 B. 548, 14 B 395, 15 M 15, 15 M 255; 5 Bom L.R 643; 5 B 181, 7 M H.C.R. 364, 6 B. 495; 12 C. 414.

LATE STAGE.—Under the Rule, the Court can allow amendment at any stage. 156 I C. 531=37 Bom L R. 165=1935 B 213. Delay by itself is not an adequate reason for refusing permission to amend a pleading. The significance of delay lies not in the quantity of time that has elapsed but in what has transpired during that time. 157 I.C. 764=1935 P 463. An amendment at a very late stage should not be allowed. 45 C 305; 46 C. 168; 48 C 110 (P.C.); 48 C. 832 (P.C.), 3 L.L.J. 437, 47 I C 906; 3 L.L.J. 184; 67 I C. 132; 51 B 749=29 Bom L.R 1071=1927 B 521, 99 I C 979; 101 I C. 390=1927 M. 650, 46 I.C. 929=5 Pat.L.J 164, 134 I.C 1110=1931 L. 260 *See also* 60 C. 801=1933 C. 668, 40 C W N. 1233. But it can be allowed provided that no injustice is caused to the other side. 51 I.C. 328. *See also* 36 C.W.N 112, where amendment was allowed at a late stage and further trial directed. A belated amendment can be allowed only on condition of payment of costs by the petitioner to the opposite party and the latter being given an opportunity to adduce evidence on the new case adopted for the petitioner 56 A. 428=1934 A.L.J. 1129. Where in a suit for money due on account of business transactions, after the *ex parte* decree was set aside, the defendant pleaded in his written statements that certain items were barred by limitation and in answer thereto, the plaintiff applied to amend his plaint by inserting therein an acknowledgment made by the defendant to save limitation and the lower Court refused the application on the ground that it was "unduly delayed," *held*, that the delay may influence the Court in deciding whether the acknowledgment was genuine but as the amendment did not in any way alter the nature of the suit, the application should not have been dismissed 55 A. 256=1933 A.L.J. 268=1933 A. 374. A contract between the parties was that commission was to be paid on "steam coal, rubble coal, hard coke and soft coke" that was manufactured out of a mine. The contract also provided that "no commission or royalty shall be paid on dust coal". In a suit brought by the plaintiff to recover the commission, 13 months after the filing of the plaint, the plaintiff applied for amendment of the plaint to admit of his claiming commission on the coke manufactured from all coal whether rubble, slack or dust *Held*, that the amendment could not be allowed, as it was made at so late a stage and as it substantially changed the character of the suit 145 I.C 428=1933 P. 443.

SUIT PREMATURE.—When suit is premature amendment cannot cure the defect. 49 A. 599=25 A.L.J 385=1927 A 451.

NEW CASE.—The plaintiff brought a suit on the basis of a *bahi* entry against the

defendant alleging that money had been advanced by him. On the date fixed for evidence the scribe of the entry was examined on behalf of the plaintiff. He stated that the loan was advanced by the father of the plaintiff. The plaintiff closed his evidence on that date and the counsel for the defendant stated that he had no evidence to produce. On the same date the plaintiff made an application asking the Court to grant him permission to amend the plaint by adding that the loan was advanced by the father of the plaintiff and the father having died, the plaintiff succeeded him as his son and heir and was, therefore, entitled to sue on the basis of the *bahi* entry in favour of his father. *Held*, that an order allowing the amendment was fully justified and that there was no new case set up in the amended plaint and all that was done was a change in the history of the transaction. 36 P.L.R. 264=1934 L. 974.

ALTERNATIVE CLAIMS.—Suit against members of a joint family can be amended by including an alternative claim against them as members of a partnership. 33 Bom L.R. 1385=1931 B. 590. But *see* 34 Bom L R 35=1932 B 117, holding that such an amendment should not be allowed if the suit on that basis is barred on the date of the application.

AMENDMENT OF PRAYER FOR RELIEF.—"Amendment" is a very wide term and includes addition of claims, and claims which are not time barred can always be added if otherwise permissible. In a suit on a first mortgage executed by a Hindu father, if the plaintiff applies for an amendment of the plaint for addition of a claim under a second mortgage executed to him by the father and his son, on the allegation that the mortgagor in both cases is the joint Hindu family of the father and son, the amendment is one which ought to be allowed 156 I C 479=1935 P 365. A prayer for plaintiff's share of an amount due on a bond may be altered into a prayer for the whole amount due on the bond including the share of his co-obligee added as defendant. 166 I.C 992=1937 O.W.N. 163. A suit was brought for recovery of a sum being the amount of unpaid purchase-money still due by the vendee on account of a certain piece of land purchased by him. In his written statement the vendee pointed out that the suit was barred by limitation under Art. 111. The plaintiff then filed an amended plaint setting forth the same facts but asking for a different relief, thus bringing her claim within Art. 132. This application was still within time under that Art 132. *Held*, that it is permissible to allow a plaintiff without amending his cause of action to amend his prayer for relief when it is a relief which he is entitled to claim and that, as the vendee would not be deprived of any defence which he might have put forward before, the amendment should be allowed 152 I C 125=1934 R. 266; 98 I.C. 458=1927 M. 212 *See also* 54 I.A. 55 (P.C.). An amendment for an additional relief on the facts alleged in the

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plaint ought to be allowed 28 I.C. 828=29 M.L.J. 464. See also 101 I.C. 260=9 M.L.J. 429; 155 I.C. 1010=41 L.W. 429=1935 M.W. 56=1935 M. 266. But see 11 L.L.T. 300=1929 L. 449.

INCONSISTENT PLEA—An amendment inconsistent with the plaint should not be allowed 34 I.C. 541; 101 I.C. 280. See also 148 I.C. 104=11 O.W.N. 453=1934 O. 118. By means of an amendment, the subject-matter of the suit cannot be changed, or one distinct and inconsistent cause of action cannot be substituted for another 42 M.L.J. 43=68 I.C. 703=1922 M. 49. If an amendment changes the cause of action, and the suit if brought on that date would be barred, the amendment should be refused 28 I.C. 828=29 M.L.J. 464, 31 M.L.J. 638=38 I.C. 720; 46 I.C. 29=13 Bur. I.T. 201, 4 Bur. L.J. 110=90 I.C. 639=1925 R. 264, 57 I.C. 218; 13 I.C. 370=38 C. 797, 26 I.C. 42=12 A.L.J. 833; 41 M.L.J. 525. Amendment of plaint must be allowed when it merely amplifies and does not vary the original cause of action 1925 M. 188; 41 L.W. 37, 23 L.W. 771=1926 M. 827. When a claim is made on a document the fact that at one stage when a plaint was presented it was read in a particular way and at another time, when it is sought to be amended, it is sought to be read in another way, will certainly not justify the view that a new and inconsistent claim is sought to be introduced. These are really alternative ways of reading the document and it will be for the Court ultimately to decide what its correct construction is, and in such a case amendment of the plaint should be allowed 160 I.C. 989=8 R.M. 739 (1)=1936 M. 151.

LIMITATION—Amendment should not be allowed so as to defeat plea of limitation 39 M.L.J. 195=47 I.A. 255=48 C. 110 (P.C.), 10 R. 74=1932 R. 26; 132 I.C. 311=1931 M. 1=60 M.L.J. 713, 36 A. 370, 37 B. 340; 50 C. 878, 34 Bom. L.R. 35=1932 B. 117; 30 I.C. 379; 21 I.C. 306; 22 C.W.N. 104; 11 M.I.A. 468, 28 C.W.N. 1009=1925 C. 67. See also 46 C.L.J. 51=104 I.C. 151=1927 C. 733, 25 L.W. 506=101 I.C. 390=1927 M. 650; 23 L.W. 771=1926 M. 827=51 M.L.J. 414=96 I.C. 700; 131 I.C. 417=1931 N. 74; 154 I.C. 103=1935 P. 85. Where on the date of the application for leave to amend the plaint, the claim in the suit was barred by limitation, the Court has power to make amendments in the plaint if there are special circumstances. 165 I.C. 503=44 L.W. 267=1936 M. 632=71 M.L.J. 166. In a suit on a promissory note, claiming exemption from limitation on the ground of a part-payment, the Court has power under O. 6, R. 17, C.P. Code, to allow an amendment of the plaint, which seeks to add an acknowledgment of liability as a further ground of exemption. Under the rule, the Court is not only given the power, but is under a duty, to allow all such amendments as will enable the real questions in issue to be raised, provided such amendment does not take away an existing right of the defendant. 67 M.L.J. 921. See also 156 I.C. 531=37 Bom.

L.R. 165=1935 B. 213. Leave to amend the plaint should be refused when a person who was a necessary party to a suit was not impleaded and a step is taken to implead him after the suit is barred against him 1935 P. 86=154 I.C. 103. See also 104 I.C. 700 (where it is laid down that there may be special considerations that may necessitate an amendment even in such cases). An agreement to appropriate a part of claim was not proved and the plaintiff amended the suit, so as to cover the full claim after the period of limitation. *Held*, that the suit was not barred by limitation, as no new claim was made 150 I.C. 739=1934 L. 412.

RECTIFICATION OF MISTAKES—Inclusion of wrong property owing to mistaken identity—Amendment can be allowed 51 I.C. 757=56 P.W.R. 1919. Amendment may be allowed when a claim has been left out by mistake or inadvertence and not deliberately. 17 I.C. 646=17 C.W.N. 311, 97 I.C. 896 (2)=1926 L. 460. See also 63 M.L.J. 725=140 I.C. 500. Where it is proved that notice required under S. 80 has been served on the Secretary of State, the omission of amendment in the plaint of service of such notice as required by that section can be allowed to be rectified by amendment. 154 I.C. 103=1935 P. 86. A plaint cannot be amended when it would expose the defendant to an injury which could not be compensated in costs 40 B. 158. See also 139 I.C. 441=33 P.L.R. 694. Amendments should be allowed to rectify technical defects 34 A. 348; 47 B. 785=25 Bom. L.R. 513; 40 C. 541, 30 I.C. 323, 82 I.C. 177, 1926 A. 672. Want of verification of pleadings can be set right by amendment 133 I.C. 626 (L.). The proper signing of a plaint is a matter of practice only and if defective, it may be amended at any time. 138 I.C. 797=34 Bom. L.R. 628=1932 B. 367. The amendment of the plaint will relate back to the date of the institution of the suit for purposes of limitation. (*Ibid.*) See also 143 I.C. 504=1933 M. 153, 14 L.R. 60 (Rev.) Major suing as minor—Plaint can be amended if the party was under a *bona fide* mistake. 136 I.C. 710=1932 L. 322. Events that happen even after the filing of the suit may be taken notice of and an amendment of the plaint for including a prayer for relief on the foot of such events ought to be allowed to avoid multiplicity of proceedings 90 I.C. 881=49 M.L.J. 479; 22 L.W. 120=1925 M. 1021=91 I.C. 503, 155 I.C. 1016=41 L.W. 429=1935 M. 286.

COSTS—If under the terms of an order a party receives the costs subject to which the other party has been allowed a relief the former will not be permitted to challenge the order, unless he accepts the costs expressly reserving his right to challenge the order. 30 N.L.R. 347=150 I.C. 845=1934 N. 163. But where before the date fixed for payment of costs, the other party appeals, the appeal is valid though he accepts costs when tendered on the due date 1936 N. 20.

REVISION—An order refusing leave to amend the plaint can be set aside in revision.

18. [Cf. Ss. 53 and 54] If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

ORDER VII.

PLAINT.

Particulars to be contained in plaintiff.

1. [S. 50.] The plaintiff shall contain the following particulars:—

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40 I.C. 65=26 P.R. 1917, 78 I.C. 510, 1925 N. 195; 21 L.W. 639=87 I.C. 90=48 M.L.J. 349, 35 I.C. 344; 22 L.W. 26=1925 M. 950, 1930 M. 278. See also 1927 M.W.N. 175=1927 M. 504-41 M.L.J. 525; 4 L.W. 654, 60 C.L.J. 91=38 C.W.N. 1146. Amendment ordered on payment of costs—Costs drawn out under protest—Such order cannot be impeached in revision. 105 I.C. 620=1927 M. 1009. The plaintiff sued for recovery of a certain sum on the basis of a note of hand, the consideration for which being the balance which was found to be due from the defendant upon an accounting between the parties. Execution of the note of hand was apparently denied and the plaintiff applied for amendment of his plaint in such a manner as to base his claim alternatively on the *bahi khata* account. The application was rejected by the Court below on the ground that the amendment sought for would change the basis of the suit *Held*, in revision, that the object of O. 6, R. 17, C.P. Code, is to prevent multiplicity of proceedings and that a Court is bound therefore to allow such amendment to be made as may be necessary for the purposes of determining the real question in controversy between the parties, that the real question in controversy in the case was whether the balance of account as shown in the promissory note was or was not due from the defendant and the foundation of the claim was the account-books and that the lower Court ought to have allowed the desired amendment and by refusing to do so it disregarded an express provision of law and failed to exercise a jurisdiction which was vested in it 1934 A.L.J. 989=153 I.C. 65=1935 A. 353.

EFFECT OF AMENDMENT—Amendment takes effect from date of presentation of plaint or application. 98 I.C. 658=1927 N. 95; 93 I.C. 625=50 M.L.J. 442 See also 143 I.C. 504=1933 M. 153.

COURT COMPELLING PLAINTIFF TO AMEND PLAINT—WHO CAN COMPLAIN—Where the Court compels the plaintiff to amend the plaint, only the plaintiff can complain; and it is not open to the defendant to complain that the Court has no jurisdiction to compel the plaintiff to do so. 1934 M. 220=66 M.L.J. 315.

O. 6, R. 18.—Under O. 6 failure to amend merely involves loss of right to amend and therefore not the determination of the suit

as expressed in the original plaint. 164 I.C. 181=1936 Pesh. 155. The Court cannot reject a plaint or dismiss the suit under O. 6, R. 18 but must proceed to try the suit on the original plaint 169 P.L.R. 1913=19 I.C. 472. Where a plaint was rejected on the ground that it was not amended within the time fixed by the Court a fresh suit on the same cause of action is maintainable. 99 I.C. 538=1927 L. 83.

O. 7.—See 35 C.W.N. 930.

O. 7, R. 1 SCOPE OF.—See 1925 N. 113. The plaint should contain the facts constituting the cause of action and the time when it arose. 42 C. 85, 39 I.C. 21=13 N.L.R. 16. Pleadings in the *mofussil* Courts are drawn up by lawyers who are not generally familiar with the precision of English pleadings and in such cases the Courts should look to the substance of the plaint rather than to the wording. 131 I.C. 529=1931 P. 179. One plaint is only one suit. Jurisdiction depends on amount or value of the aggregate subject-matters at the date of institution. 40 M. 1=32 M.L.J. 221 Description of suit in heading does not determine nature of suit. See 1927 S. 78. Defect in signature is not fatal to a suit and the merits are not affected 1927 A. 514. Adverse possession should be expressly pleaded at least as alternative ground. 88 I.C. 249=1925 M. 1005. Plaintiff cannot be tied down to the date of the accrual of the cause of action. The Court is entitled to determine the date from the facts alleged and proved. 9 L. 428=1928 L. 516 In a redemption suit pleadings and proof must relate to the mortgage and plaintiff's right to redeem. 132 I.C. 793=1931 O. 378. Specific date of the cause of action should be given in the plaint 131 I.C. 529=1931 P. 179; 58 C. 418=1931 C. 458, as also the place where it arose 58 C. 418.

NAME.—A suit cannot be instituted against a dead man. 17 M.L.J. 551. If so instituted and a decree is obtained it is invalid. 9 Bom. L.R. 274 See 16 M. 319.

DESCRIPTION.—This term includes age, father's name, caste, etc. 7 M.L.J. 81. Where the Government has recognized a person as having a right to bear particular titles, a plaint in a suit against such person may contain them. 12 Beng.L.R. 443 (P.C.). A plaintiff cannot be compelled to insert every name and title to which the defendant may conceive himself entitled. 3 M.H.C.R. 31

- (a) the name of the Court in which the suit is brought;
- (b) the name, description and place of residence of the plaintiff;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
- (e) the facts constituting the cause of action and when it arose;
- (f) the facts showing that the Court has jurisdiction;
- (g) the relief which the plaintiff claims;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished, and
- (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees, so far as the case admits.

In money suits
amount claimed.

2. [S. 50] Where the plaintiff seeks the recovery of money, the plaintiff shall state the precise

Notes.

PLACE OF RESIDENCE—To describe the plaintiff as residing in Chitpore Road in Calcutta is not a sufficient description of his residence. 4 C.L.R. 366, 14 W.R. 474. See also 58 C. 418=1931 C. 458. Facts constituting cause of action must be stated. See 58 C. 418=1931 C. 458, 18 A. 403, 15 M.L.J. 122, 13 W.R. 248; 10 Bom.H.C.R. 182; 11 A. 438; 15 C. 533 (P.C.), 10 Bom.H.C.R. 414, 7 M.H.C.R. 364, 7 C. 169; 9 A. 486; 13 W.R. 48; 13 C. 9.

SUIT BY CORPORATION—O. 29, R. 1 only requires a pleading filed by a corporation to be verified by a principal officer of the company. But there is nothing to suggest that the heading of the plaint should contain any further particulars showing the name and description or place of residence of the person who represents such corporation. 26 S.L.R. 431.

INCONSISTENT CLAIMS.—A claim to set aside a deed as a forgery cannot be combined with a claim to set it aside on the ground of absence of consideration, fraud, misrepresentation, etc. 15 I.A. 86. A claim to set aside an adoption on the ground that it never took place cannot be joined with a claim that even if it took place it was conditional one. 14 M. 172. A stranger to a deed can aver that it is a forgery, and that if not a forgery, it is not supported by consideration. 16 M.L.J. 13 (Recent Cases).

RELIEF CLAIMED.—The Court should not give the plaintiff more relief than he prays for. 6 Bom.H.C.R. 9. An injunction could be granted on a general prayer. 6 C. 485. In a suit for partition no decree for redemption can be given. 10 M.L.J. 242, 5 A. 345; 27 B. at 603; 28 B. at 160. See R. 7. Plaint defective—Relief not claimed in proper form—Duty of Court. 93 I.C. 928=1926 L. 417.

VERIFICATION OF PLAINT.—Practice criticised. See 58 C. 418=1931 C. 458. O. 29, R. 1 only requires a pleading filed by a corporation to be verified by a principal officer of the company. But there is nothing to suggest that the heading of the plaint should contain any further particulars showing the name and description or place of residence

of the person who represents such corporation. 26 S.L.R. 431=142 I.C. 361=1933 S. 102.

CLAUSE (E).—In a suit on a promissory note payable at a specified place, the plaintiff ought to contain a statement that the note had been presented for payment as that forms part of the cause of action. If there is no allegation of presentment in the plaint, the plaintiff cannot be given an opportunity of proving presentment. 158 I.C. 89=1935 Pesh. 132.

CLAUSE (F).—The value of a suit for purposes of Court-fees is not applicable for determining jurisdiction. Acts of a fiscal nature are not to be resorted to for a determining questions of jurisdiction. 6 M.H.C.R. 151. Plaintiff in certain cases is free to fix his own valuation for purposes of jurisdiction. 18 C. 378. The general rule is that in all suits for account the valuation for purposes of Court-fees determines the question of jurisdiction. 22 C. 690; 92 I.C. 730=1926 M. 591. If in the course of preliminary enquiry in a suit for the value of the relief claimed by the plaintiff whether that enquiry be instituted at the request of the defendant or of the plaintiff whatever be the reason assigned for the overvaluation of the reliefs it becomes clear to the Court that there has been gross under-valuation, it is the duty of the Court on the motion of either party or *ex proprio motu* to order that the plaint be returned for presentation in the proper Court if the value be held to be not higher than the figure up to which that Court has jurisdiction. 3 A.W.R. 405.

PROCEDURE.—See 35 C.W.N. 267.

O. 7, R. 2.—A claim for contribution should distinctly set forth the amounts due by each party. 14 W.R. 374. Plaintiff is only entitled to the sum specified in the plaint, even though on the evidence he is found to be entitled to more. 2 M.I.A. 113. See also 30 C. 406. Rr. 1 and 4 of O. 7 are mandatory. 82 I.C. 201. None of the rules under O. 7 require or allow documents which are part of the evidence in the suit to be annexed to the plaint. On the other hand, such a course is forbidden by O. 9, R. 2. Particulars

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

Loc. Am.—[Punjab.] In the second paragraph of R. 2 of O. 7, after the word "defendant" insert "or for movables in the possession of the defendant, or for debts the value of which he cannot, after the exercise of reasonable diligence, estimate"; and after the word "amount" where it last occurs insert "or value"

3. Where the subject-matter of the suit is immovable property, the plaintiff shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaintiff shall specify such boundaries or numbers.

Loc. Am.—[Calcutta.] After R. 3, O. 7, add the words—
"and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures"

4. [S 50, para. 4.] Where the plaintiff sues in a representative character the plaintiff shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

When plaintiff sues as representative.

5. [S. 50, para. 5.] The plaintiff shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

Defendant's interest and liability to be shown.

6. [S 50, para. 6.] Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.

Ground of exemption from limitation law.

Notes.

which are too voluminous to be included in the plaint may be annexed thereto and may be delivered separately, and these facts should be stated in the plaint. 58 C 418=1931 C 458

O. 7, R. 4.—Plaint is to state the representative nature of the suit 1925 N 183=82 I C 201 A plaintiff suing in a representative character must set it forth, and show that he is qualified to fill it 7 B at 470 In Bombay Presidency Mahomedan executors can sue without first taking our probate 8 B 241. In the case of Hindus, see 14 C. 37 When the original plaintiff dies, the suit may be continued by his legal representative, although the latter has not taken out letters of administration. 16 B. 519 Production of a succession certificate is not a condition precedent to institution of the suit 16 M. 454=19 C 482. See also 17 M 14.

O. 7, R. 5.—Plaint must show how the various defendants are interested in the subject-matter of the suit and the cause of action against each 1924 N 191=79 I C. 614

O 7, R. 6—R 6 should be construed liberally and reasonably. 60 I C. 772=3 L. L J 22=2 L. 13; 46 I C 495=102 P.R. 1918 Where a plaint is presented on the re-opening date after Court holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under

S. 4, Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays 168 I C 383=1937 Pesh 41. R. 6 has no application when the plaint is not on its face time barred. 70 P.R. 1914=25 I.C. 463; but is applicable to cases in which the suit as laid in the plaint is *prima facie* barred by limitation. 51 I C. 956=1 L. 21. R 6 is a rule of pleading It makes no exception to the general rule that a plaintiff must plead the facts on which he relies for his case If a party is advised that his pleadings are defective, the remedy is amendment by leave of the Court. There is no reason why a different consideration should apply to a plaintiff who wishes to throw over the ground of exemption from limitation pleaded and to put forward some other ground of exemption which he has not pleaded If there is no application to amend the plaint, the suit ought to be dismissed as barred by limitation 37 L W. 370=1933 M. 395=64 M. L J 317. See also 20 N L J. 42 Where a suit is *prima facie* time barred the grounds on which exemption is claimed must be alleged in the plaint. 145 I C 343=1933 L. 491. Ground of exemption from limitation not set up in plaint cannot afterwards be set up and proved. 75 I C. 1048=1924 L 702 A ground to save limitation which has not been taken in the plaint cannot be taken unless the

7. Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

8. Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

9. [S. 58.] The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the

Notes.

plaint is amended 1933 M.W.N. 931=1933 M. 874. Failure to set up acknowledgment as saving limitation is a bar 3 L. 233=1922 L. 39, 52 I.C. 243=9 L.W. 82. Grounds on which plaintiff relies for extending the period of limitation must be specifically alleged in the plaint. 27 I.C. 344=8 S.L.R. 69. It is obligatory as a matter of pleading to show the grounds upon which exemption from limitation is claimed. Consequently unless the plaint is amended, it will not be open to a party to rely on an exemption not pleaded in the plaint. 165 I.C. 737=1936 M.W.N. 411=1936 M. 545. When a plaintiff deliberately takes up a definite position as to when the cause of action arose, he cannot be allowed to shift his ground later on, when he finds that position untenable. Thus the plaintiff cannot be allowed to take up a new plea of limitation resting on certain acknowledgments at the stage of arguments, when he finds his original position untenable. To adopt such a course is unfair, as the defendant has no notice either of the plea or of the statements in certain documents on which reliance is sought to be placed and he cannot therefore be reasonably expected to meet the plea. 1934 L. 753. Plea of exemption for limitation—Inconsistent averments when may be allowed. 65 I.C. 279=17 N.L.R. 209. Where in the plaint returned for presentation to proper Court the ground of exemption is not stated the endorsement of the Court as to the date of receipt and return is substantial compliance with the provisions of R. 6. 91.C. 157=9 M.L.T. 374, 1923 L. 591. The plaintiff ought not to be allowed to put forward a new case inconsistent with the plaint to enable him to avoid limitation. 30 C. at 709.

O. 7, R. 7.—The intent and purpose of R. 7, is to take the place of the practice previously followed by Courts. A Court should not refuse to grant a relief not specifically claimed in the plaint, if such relief is obviously required by the nature of the case and is not inconsistent with the relief specifically claimed and raised by the pleadings, although the plaintiff does not ask for any general or other relief. Thus in a suit for rent under a lease, the Court may, even if

the lease is not properly proved, pass a decree for use and occupation. The minor relief being inherent in the claim for the greater, it is incumbent on the Court to grant it when the facts require it. 13 L.L.T. 34. In a suit on a negotiable instrument, relief on the strength of the original consideration could be granted if prayed for in the alternative 46 C. 663=29 C.L.J. 340=36 M.L.J. 429 (P.C.), 14 I.C. 399=8 N.L.R. 7. See also 27 N.L.R. 327. [17 N.L.R. 22, Ref; 27 A. 325 (P.C.); 2 M.I.A. 353; 24 A. 456; 43 C. 743; 29 M. 491; 30 M.L.J. 302; 2 L. 256, 3 C. 314, 18 C.W.N. 617 (P.C.); 7 P. 845; 24 B. 360, Rel on.] Where specific allegation is not proved, it is not open to the Court to arrive at a finding in his favour contrary to the allegation set up 54 I.C. 797. A plaintiff is entitled to put his case in the alternative and his suit should not be dismissed as being for inconsistent relief 36 A. 476; 7 A. 184; 12 A.L.J. 798. The decree in a suit should conform with the rights of the parties as they stand at the date of its institution. 44 C. 47=20 C.W.N. 1099. A prayer "for any other relief" may cover any other relief arising out of the same cause of action but not one arising under a different cause of action. 13 I.C. 650=92 P.L.R. 1912. "General or other relief" which can be granted must be one consistent with the main reliefs claimed. Ownership and easement are not rights consistent with each other. 1933 L. 267. An exaggerated claim is no ground for refusing a person the rights which he is found entitled to 46 I.C. 679=13 P.R. 1919; 33 M.L.J. 63. In a suit for ejectment, a decree for joint possession may be passed. 38 M. 1036=26 M.L.J. 532; 24 M.L.J. 271=21 I.C. 724. But a relief which goes beyond the scope of the suit or the facts proved cannot be granted 10 L.L.J. 513=112 I.C. 485=1929 L. 126. Under R. 7, a prayer for general relief is unnecessary, and a Court may always give general or other relief, as it may think just to the same extent, as if it had been asked for. 76 I.C. 940=5 Pat.L.T. 330. On this section, see also 29 Bom.L.R. 147, 10 Pat.L.T. 630. Suit for possession—Power of Court to grant declaration. 118 I.C. 381=1929 A. 555. A claim as owner is quite distinct from a claim as manager though the

plaint as there are defendants unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.

Loc Ams—[Allahabad] In R 9 (a) for the semicolon after "it" in cl. (1) substitute a full stop and delete the rest of this clause as well as cls. (2) and (3); and (b) Re-number cl. (4) as cl. (2), deleting the words "or statements" therein.

[Calcutta] O 7, R 9—For R 9 (1) substitute.—

"9 (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1-A) The plaintiff shall present with his plaint:—

(i) as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements;

(ii) draft forms of summons and fees for service thereof

[Madras.] In R 9 of O 7 after the word "and" occurring in the third line delete the comma and the five words following, viz., "if the plaint is admitted" and insert the expression "along with the plaint" after the words "shall present"

[Nagpur] Substitute the following for R 9:—

"9. (1) The plaintiff shall endorse on the plaint or annex thereto, a list of the documents (if any) which he has produced along with it

(2) The chief ministerial officer of the Court shall sign such lists and the copies of the plaint presented under R 1 of O. 4, if, on examination; he finds them to be correct."

[Oudh] In R 9 (1) for the words "and if the plaint is admitted, shall present", substitute the words "and shall, at the same time, present" Also delete the words "unless the Court . . . present such statements" as well as sub-rules (2) and (3) and re-number sub-rule (4) as sub-rule (2) deleting the words "or statements"

[Rangoon] In O 7, R 9 (1), add the words "on the day on which the plaint is admitted, after the word "present"

10. [S. 57.] (1) The plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

Return of plaint

Notes.

plaintiff seeks possession on both grounds and the case falls under R 8 1929 N 347=120 I.C. 404

O. 7, R 9.—A suit is instituted on the date when the plaint is filed and not on the date when it is ordered to be registered. 66 I.C. 923=34 C.I. J 465.

ANNEXING DOCUMENTS TO PLAINT.—None of the rules under O. 7, require or allow documents which are part of the evidence in the suit to be annexed to the plaint. On the other hand, such a course is forbidden by Rr 2 and 9. Particulars which are too voluminous to be included in the plaint may be annexed thereto and may be delivered separately and these facts should be stated in the plaint 58 C.418=1931 C. 458.

O. 7, R. 10.—R. 10 applies only when it is found that the suit as originally framed was wrongly instituted; it does not apply when it is found at the trial on the evidence that the Court has no jurisdiction to grant the relief

prayed for 1932 S. 67 In many cases, the plaintiff has the choice of forum, but once a plaintiff has selected to choose his forum, he cannot change it at his own pleasure. Having selected the Court in which he proposes to file his case, if that Court has jurisdiction to deal with it, the case must remain there in the ordinary way. If there the plaint shows that a particular Court has jurisdiction to deal with the case, the plaintiff cannot be allowed to withdraw the plaint to be filed elsewhere. If a Court has jurisdiction, it is impossible for it to act under O. 7, R. 10, for the Court itself, if it has jurisdiction is the Court in which the suit should be instituted. 158 I.C. 63=1935 R 310. A Court cannot return or reject a plaint under O. 7, R. 10, merely because the suit is triable by some other Court. It can do so only if the suit is not triable by itself. 1936 A.M.L.J. 67. When the Court finds that on the correct valuation the plaint is not cognizable by it the proper thing to be done

(2) On returning a plaint the Judge shall endorse thereon the date of it

Notes.

is to return the plaint so that it may be presented to the Court having jurisdiction. It is not the function of the Court to direct the plaintiff to amend the valuation or pay additional Court-fee. They are matters for the Court before whom the plaint should be properly presented. 1931 M 67=61 M L.J. 43. (51 B. 236; 8 M. 62; 8 B. 313; 7 M. 171, Rel on, 8 B. 313 Not Foll.) See also 158 I.C. 613=1935 R. 310; 153 I.C. 53=37 P. L. R. 125. Where a plaint has been returned for presentation to the proper Court and the plaintiff appeals against the order, he is still at liberty to present the plaint to the proper Court subject to the bar of limitation 27 Bom. L. R. 652=89 I.C. 68. The direction in R. 10 is mandatory 53 I.C. 308=10 L. W. 525; 8 C. 834 Suit filed in Civil Court instead of before Collector—Proper procedure. 6 P. 358 See also 133 I.C. 411=1931 A. 664

APPLICABILITY—R. 10 only applies when it is found that the suit as originally framed was wrongly instituted in Court, but it does not apply when it is found at the trial, whether as the result of admission made by the parties or evidence led by them, that the relief which the plaintiff is really entitled to is different from that claimed in suit and that relief is not cognizable by that Court. In the latter case, the Court cannot decline jurisdiction and order the plaint to be returned but should proceed with the trial to its finish after amendment of pleadings or otherwise, and pass such decree as the circumstances permit. It may in certain cases grant permission for withdrawal of the suit with liberty to file a fresh suit (Case-law discussed) 1933 S. 296 See also 165 I.C. 908=1936 O. W. N. 1228=1937 O. 183 1933 N. 82; 1930 S. 252. R. 10 applies only where the suit is instituted in a wrong Court and not where the necessary relief under S. 20, C. P. Code, was not obtained 23 Bom. L. R. 1086=46 B. 229. See also 1934 C. 565=59 C. L. J. 47=1934 C. 524. O. 7, R. 10 applies to a Small Cause Court. 1926 M. 679=51 M. L. J. 158. Rule applies when the suit as originally framed was wrongly instituted. 54 I.C. 655 It is the duty of a Court to return the plaint for presentation to a proper Court, and not decide the suit on merits if it finds it has no jurisdiction to entertain the suit. 88 I.C. 991=1925 O. 735; 44 A. 686=70 I.C. 98; 10 M. 211; 41 M. 701=35 M. L. J. 27, 41 I.C. 203=27 C. L. J. 510; 10 L. W. 525=1920 M. W. N. 163; 153 I.C. 53. Where a petition for adjudication of a debtor has been presented in a Court having no jurisdiction, the Court should not dismiss it but should return it for presentation to the proper Court. 145 I.C. 755=1933 L. 851 (1) For passing an order returning plaint to be presented to proper Court, it is not necessary that the Court so returning and the Court to which plaint is ordered to be presented should be exercising the same kind of jurisdiction. If for instance

the plaint is preferred in the revenue Court which has no jurisdiction, the proper course for the Revenue Court to follow, is to return the plaint for presentation in the proper Court which may be the Civil Court 141 I.C. 109=1934 P. 234. There is nothing in the wording of the rule which forbids the return of the plaint after a late stage of the case. 8 B. 313 (F B) The plaint cannot be returned after a decree has been passed. 8 B. 380 Plaint properly filed—Court sending it to Sub-Judge's Court in course of distribution—Valuation wrongly raised there and returned—Plaint re-filed without delay in proper Court 1929 L. 409 Plaint in account suit returned after passing. Preliminary decree returned is improper without a finding by the Court that the amount found due exceeds its jurisdiction—No question also arises of the withdrawal of the suit and institution of fresh suit. 117 I.C. 369=1429 L. 248. See also 1933 N. 82=29 N. L. R. 115 Suit for partition—Preliminary decree passed—At final decree suit discovered to be under valued—Return of plaintiff for presentation to proper Court—Power of Court. 1930 C. 147 (1) When the appellate Court decides that the lower Court has no jurisdiction to entertain the suit, it should return the plaint to the plaintiff. 1 B. 534, 9 B. 266. But see 11 M. 482, 89 I.C. 511=1925 O. 499 Return of plaint cannot be made on the ground that it would be more advantageous to one of the parties to do so. 1927 C. 87, 97 I.C. 979 There is no provision of law which necessitates or even empowers the Court to return a plaint on the ground that the plaintiff has not mentioned therein the list of the documents on which he relies. The Court cannot take action under S. 151 of C. P. Code for such purposes 122 I.C. 488 (1)=1933 L. 480 As to whether suit is to be deemed to be pending in the Court of filing even after return of plaint See 5 R. 101 Where a plaint filed in one Court is returned to be presented to another Court, whether the latter Court has jurisdiction to return the same to be presented to the former Court See 42 I.C. 483=6 L. W. 239; 145 I.C. 261=1933 N. 221 But see 22 L. W. 582=1925 M. W. N. 804, 64 I.C. 496=2 Pat. L. T. 839. See also 51 B. 236=29 Bom. L. R. 280=1927 B. 257. Return of plaint—Amendment of plaint by plaintiff himself and representation to same Court—Propriety 32 L. W. 694=59 M. L. J. 953 An application for leave to sue as a pauper is not a plaint and it only reaches the stage of a plaint when it is granted. 52 I.C. 688. Where the plaintiff applied to the munsif and got leave to sue as pauper but subsequently during the course of the trial it was found that the suit was under-valued and the plaintiff was directed to re-present the plaint to the proper Court. *Held*, that the proceedings before the munsif, being without jurisdiction, were mere nullities and that the leave granted by the munsif was of no avail to the plaintiff

Procedure on returning
plaint.

presentation and return, the name of the party
presenting it, and a brief statement of the reasons for
returning it.

Rejection of plaint.

11. [Ss. 53 and 54.] The plaint shall be reject-
ed in the following cases:—

Notes.

and that he should once more apply to the sub-Court for leave to sue *in forma pauperis*. 1933 M.W.N. 197. If the cause of action arises within the jurisdiction of the Court the plaint cannot be returned simply because the defendant resides outside the jurisdiction of the Court. 32 C. 146. Court not to decide material issue of question of damages to decide question of jurisdiction. 91 I.C. 737=1926 M. 339. Plaint containing different causes of action—Jurisdiction of Court to try one cause of action only—Procedure to be followed. 94 I.C. 783=1926 B. 283=28 Bom. L.R. 521. Plaint returned under S. 23, Provincial Small Cause Courts Act—Order of return by Civil Court—Appeal if lies 1926 C. 83. See also 145 I.C. 261=1933 N. 221. An application to a Court trying the suit to stay a suit is an application in the suit and R. 10 does not apply. 150 I.C. 839=1934 S. 95

INHERENT POWERS.—Although R. 10 does not apply to a chartered High Court, it can, by virtue of its inherent powers, direct the return of a plaint for presentation to proper Court on dismissing a suit for want of jurisdiction. 12 R. 432=1934 R. 342

LIMITATION—A Court returning a plaint for presentation to the proper Court cannot fix a time for such presentation, so as to extend the period of limitation for the suit. Such an order allowing a period for presentation is clearly illegal, and if the presentation is made beyond the period of limitation for the suit, the suit will be barred, although it is presented within the time fixed 1936 A.M.L.J. 67

PLEADINGS—Plaintiff cannot rely upon the pleas in the written statements for making out a cause of action. 46 I.C. 60, 6 Bur.L.T. 85=.0 I.C. 278

PRACTICE.—The question of valuation and jurisdiction is one that should be determined at the earliest possible opportunity and, if the Court finds that it has no jurisdiction it should at once return the plaint to the Court having jurisdiction and should not take any steps either to enforce payment of Court-fees or in any other matter. In such a case the order requiring the plaintiffs to pay additional Court-fees and on their failure to do so rejecting the plaint, is *ultra vires* and cannot be upheld (46 M.L.J. 345 Not Foll 51 B. 236, Foll) 29 N.L.R. 367=1933 N. 312. It is a settled rule of law that the jurisdiction of a Court is initially determined by the allegations to be found in the plaint. If the plaint as it stood contained allegations making the suit clearly cognizable by the Court and he found against the claim of the plaintiff for rendition of accounts the plain duty of the Court is to

dismiss the suit and not to return the plaint for representation to some other Court which, on the plea of the defendants, would have had jurisdiction. 1933 A.L.J. 667=1933 A. 745.

PLAINT RETURNED BY TWO COURTS—REMEDY OF APPLICANT.—A plaint was filed in the Court of the Second Class Subordinate Judge. That Court considered that the case was cognizable by the Court of Small Causes and returned the plaint for presentation to the appropriate Court. The latter Court however held that the suit was not triable by it and returned the plaint to the applicant. The applicant applied in revision asking the High Court to determine which Court had jurisdiction to entertain the suit. Held, that the correct procedure would have been to make an application to the District Judge under the provisions of O. 46, R. 7. 145 I.C. 261=1933 N. 221 (1).

APPEAL.—An appeal lies against an order passed under this rule. See O. 43, R. 1: also 14 M. 462, 27 Bom L.R. 636=88 I.C. 753; 134 I.C. 203=1931 L. 294, but a second appeal does not lie in such cases. See 1931 L. 294. Also no appeal lies after the plaint has been taken back and re-filed in the Court as directed. 5 C.L.J. 580. But see 121 I.C. 668.

SECOND APPEAL—See 1935 M. 574.

REVISION.—Order returning a memorandum of appeal to be presented to the proper Court is revisable. 7 L.L.J. 285=1925 L. 479. See also 131 I.C. 303=32 P.L.R. 737.

O. 7, R. 11.—All statements in plaint are to be taken as true for argument on preliminary issue as to whether plaintiff discloses a cause of action 40 C. 598=25 M.L.J. 104 (P.C.). In deciding an application under R. 11 the Court is not entitled to go outside the pleadings I.L.R. (1937) 1 C. 541=41 C.W.N. 193. "Cause of action", meaning of See 54 A. 525=138 I.C. 396=1932 A.L.J. 489=1932 A. 543 O. 7, R. 11 is merely a rule of procedure. It is not meant to enlarge any taxing section but only to ensure a proper application of the Court-Fees and other Acts. 34 C.W.N. 870. The provisions of R. 11 are mandatory and where a plaint is written on paper insufficiently stamped, the Court is bound to give the plaintiff time to make good the deficiency. 38 B. 41; 2 Pat L.J. 74; 49 C. 880=27 C.W.N. 566; 44 C. 352=21 C.W.N. 834. See also 1932 M.W.N. 104 (38 B. 41, Ref. 27 M.L.J. 677 doubted); 133 I.C. 411=1931 A. 664. See also 39 P.L.R. 199. The mandatory provision contained in R. 11 is intended for cases where no other complications intervene and the Court has sufficient inherent power to depart from the normal procedure to suit the exigencies of the situation 40 C.W.N. 747=1936 C. 221. The Court's power to correct

- (a) Where it does not disclose a cause of action;
 (b) Where the relief claimed is undervalued, and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

Notes.

the valuation is not limited under R. 11 to any particular stage of the suit. It may be exercised by the trial Court at a hearing after remand by the appellate Court. 58 M. 1051=41 L.W. 562=1935 M. 569=68 M.L.J. 755. A plaint can be rejected at any stage of the suit even after its registration (12 A. 553; 27 C. 376 and 1922 C. 506, Foll.) The fact that the suit was registered, heard by the trial Court, and by the appellate Court and remanded would be of no moment for a plaint not correctly valued and stamped can be rejected under O. 7, R. 11, at any stage of the suit, the said provisions being mandatory. 1935 C. 764. See also 40 C.W.N. 1390. Where the Court finds that the plaint does not bear sufficient Court-fees, to dismiss it on merits is not proper—Correct procedure pointed out. 152 I.C. 799, 1935 L. 75. R. 11 (c) is not confined to a case where the plaintiff himself has properly valued the relief claimed, but has failed to pay the proper Court-fees. It applies as well to a case where the Court finds that the plaint has been undervalued and ascertains the real value and the deficient Court-fee has not been paid by plaintiff. 139 I.C. 520=36 C.W.N. 567=1932 C. 685. R. 11 (d) does not apply when there is no statement in the plaint suggesting the suit to be barred. 27 I.C. 232=18 C.W.N. 1340. Plaint insufficiently stamped—Court bound to grant time for affixing proper Court-fee. 27 P.L.R. 1917=39 I.C. 766, 3 P.L.T. 142; 55 I.C. 316=4 P.L.J. 703; 6 O.W.N. 1105. Application for leave to sue *in forma pauperis* is not governed by R. 11, because until the application is granted the suit cannot be regarded as instituted. R. 11 applies only to regularly instituted suits and not to other cases. Therefore, a Court is not compelled on its dismissing an application to sue *in forma pauperis* to grant a time within which a properly stamped plaint could be filed. 158 I.C. 790=1935 M.W.N. 863=42 L.W. 655=1935 M. 878. Where a suit has been registered as an ordinary suit and the plaintiff does not pay deficit court fee but, subsequently applies for permission to continue the suit as a pauper, the application should not be rejected merely on the ground that the suit has already been registered as an ordinary suit. It should be considered on merits. (Case-law discussed.) 40 C.W.N. 747=1936 C. 221. Pauper suit—Dismissal—Appeal by plaintiff paying full Court-fee—Order by appellate Court for payment of Court fee on plaint—Competency—Non-compliance—“Rejection” of appeal—If warranted. 1937 A.W.R. 113=1937 A. 280. Return of plaint for payment of deficient Court-fee—Payments beyond the time fixed by the Court—No application to extend the time—But Court has power to excuse delay. 95 I.C. 439=51 M.L.J. 90=1926 M. 676. In suits to obtain a declaratory

decree or order where consequential relief is prayed for, and in suits to obtain an injunction, where the Court finds the relief claimed as under-valued, it is under R. 11(b), entitled to require the plaintiff to correct the valuation stated by him in accordance with the provisions of S. 7, Court-Fees Act. But so long as there are no rules framed under S. 9, Suits Valuation Act, the Court would have no standard before it on which it may regard the plaintiff's valuation as an under-valuation, and its powers of correction would have to be exercised on that footing. (Case-law discussed.) 61 C. 796=38 C.W.N. 589=1934 C. 448 (F.B.). Where a Court finds that a suit is under-valued and directs it to be re-valued, and the re-valuation of the suit is beyond the pecuniary jurisdiction of the Court, the proper procedure to be followed by the Court is to return it for presentation to the proper Court; the Court has no power to call on the plaintiff to pay the deficient Court-fee and to reject the plaint on non-payment of the same. 58 M.L.J. 651. Where plaint is defective, plaintiff is to be given an opportunity to cure the defect. 1 Pat.L.T. 188=55 I.C. 445. See also 105 I.C. 881=1927 M. 1002=54 M.L.J. 67, 51 B. 236=29 Bom. L.R. 280=1927 B. 257. A Court has jurisdiction to entertain a plaint though it is unstamped. 20 I.C. 767=24 M.L.J. 658. But see 1930 N. 224. Court-fee stamps not available in treasury on the day of presentation of plaint and hence Court-fee paid late—Plaint must be deemed to have been presented on the proper date. 115 I.C. 757. It is competent to a Court to reject a plaint after it has been admitted and duly registered. 34 C. 20 (F.B.). A plaint may be rejected at any stage of the suit. 18 M. 338; 12 A. 553. But see 28 I.C. 504=1915 M.W.N. 228 (*contra*). The mere unlikelihood of plaintiff's success is no sufficient ground for rejecting a plaint. 1 M.H.C.R. 240. A suit should not be dismissed on the ground that it cannot be maintained as a mere acknowledgment of debt. 97 I.C. 800=1926 L. 472 (1). If plaint cannot be rejected in part, see 29 A. 325; 59 M.L.J. 923 (926). Rule does not apply to the High Court in the exercise of its appellate jurisdiction. 12 A. at 151 (F.B.). If a wrong date is given for the cause of action and the action is not barred, the plaint cannot be rejected. 7 N.W.P. 354. An appellate Court has the same powers of rejecting plaint under R. 11, as the Court of first instance. 69 I.C. 554 (1)=1924 N. 80. But see 1930 N. 224. Where a person claims damages for “deterioration” of the goods from a railway company, but fails to furnish along with the plaint the details of his claim for damages, this omission by itself is not sufficient to dismiss his claim. 27 A.L.J. 859=51 A. 895=1929 A. 597 (2). Plaintiffs not appearing on fixed date and not paying

(c) Where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court fails to do so;

(d) Where the suit appears from the statement in the plaint to be barred by any law.

Loc. Am.—[Calcutta.] Order 7. R. 11.—Add the following as cl. (e) :—

“(e) Where any of the provisions of R. 9 (1-A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so.”

Procedure on rejecting plaint.

12. [S. 55.] Where a plaint is rejected the Judge shall record an order to that effect with the reason for such order.

Where rejection of plaint does not preclude presentation of fresh plaint.

13. [S. 56.] The rejection of the plaint on any of the grounds hereinbefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action.

Documents relied on in plaint.

14. [S. 59.] (1) Where a plaintiff sues upon a document in his possession or power, he shall produce it in Court when the plaint is presented, and shall at the same time deliver the document or a copy thereof to be filed with the plaint.

Production of document on which plaintiff sues.

Notes.

additional Court-fee—Court dismissing suit, noting while dismissing “Plaintiffs have not paid additional Court fees. Plaintiffs are absent”—Dismissal was under this rule and not under O. 9, R. 8 117 I C. 789 (2) =1929 M. 344. O. 7 R. 11 (b), if controls S. 7 (iv) of the Court-Fees Act, see 1936 S. 25.

DISMISSAL OF SUIT AND REJECTION OF PLAINT are not identical terms. In one case a decree is passed and in the other case, it is merely an appealable order. 54 A. 525=1932 A L J 489 =1932 A. 543 Where the Court directed the plaintiff to pay additional Court-fee before a certain date and the plaintiff applied on that date for permission to continue the suit as a pauper. *Held*, the application having been made before the expiry of the period fixed for payment, the plaint could not be considered as having been rejected under R. 11. 37 L W 725=1933 M. 498=64 M L J. 728 As to rejection of plaint before registration as suit, see 62 C. 61

REDUCING VALUATION OF PLAINT.—Return of plaint—Re-presentation of plaint with same Court fee but with reduced valuation valid and allowable—No permission of Court necessary for reducing valuation. 134 I C. 816=1931 M 716

EXTENSION OF TIME to pay Court-fees.—Power of Court to grant, after expiry of time fixed. 40 C W N 747=1936 C. 321.

AS TO ALTERING NATURE OF SUIT on return of plaint, see 133 I C. 654=1931 L. 622.

APPEAL AND REVISION.—An order holding that a certain Court-fee is payable is revisable 1925 M. 722=48 M L J. 514. See also 1936 L 1021. An order of rejection under R. 11 (b) of a plaint is appealable and a revision is therefore incompetent 80 P.R. 1914=25 I C. 565. Where a plaint has been rejected by a Court for non-payment of

Court-fees, the proper remedy of plaintiff is by way of an application for review under O 47, R 11. 2 P 504=4 Pat. L.T. 261. Order rejecting plaint—Decree—Appeal and second appeal—Appellate Court refusing to entertain appeal—Same whether good ground for preferring revision to High Court against original order. 49 C L J. 81 Order demanding additional Court-fee—Cannot be revised by High Court. 1930 P 227. When a suit is dismissed for non-payment of proper Court fee within the time allowed, it amounts to a rejection under R. 11, Cls (b) and (c), and from that order there is an *appeal and second appeal*. When the appeal from the dismissal of the suit is also dismissed on first appeal, the remedy is a second appeal and not a revision application under S 115, C. P. Code. 60 C L J. 197=38 C W N. 1063 As to Court-fee on appeal, see 1935 N. 83.

RES JUDICATA.—An order rejecting a memorandum of appeal for deficient Court-fee is not a decree or final order and does not preclude the appellant from presenting a fresh memorandum on proper Court-fee 59 C. 388=138 I C 643=1932 C. 482. See also 40 C.W.N. 1390.

PRACTICE AND PROCEDURE.—The question whether a plaint ought to be rejected under R. 11 cannot depend on anything which the defendant may say in his written statement. The defect ought to be apparent on the face of the plaint. It is the duty of the Court under O. 7 to examine a plaint before issuing summons. The discovery of a patent defect should not, as a rule, be deferred until the summons has gone out, and the written statement has come in. 933 S. 1=142 I C 501

O. 7, R. 13—A fresh suit can be instituted provided it is not barred. 14 W R 289.

O. 7, R. 14—It is competent for a witness

- (2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint.

List of other documents.

Loc. Am.—[Oudh] O. 7, R. 14 In Oudh for sub-S. (2) of R. 14, *substitute the following* :—

(2) Where he relies on any other documents as evidence in support of his claim, he shall enter all of them in a list to be added or annexed to the plaint and shall produce in Court, when the plaint is presented, such of them as are in his possession or power. In regard to the documents not in his possession or power, he shall, if possible, state in whose possession or power they are, and shall cause them to be summoned for production before the Court on a date to be fixed by the Court for the purpose.

Explanation.—A certified copy of a public document is a document “in the power” of a party, but where a document is in the possession of a person other than the plaintiff, it will not be deemed to be “in the power” of the plaintiff.

Statement in case of documents not in his possession or power.

15. [S. 60.] Where any such document is not in the possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is.

Loc. Am.—[Oudh] [Deleted by Oudh Chief Court.]

16. [S. 61.] Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

Suits on lost negotiable instruments.

17. [S. 62.] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

Production of shop-book.

Notes.

for the purpose of refreshing his memory to refer to horoscope made at the time although the document has not been included in the list of documents under R. 14 41 A. 68=23 C.W.N. 577=45 I.A. 284 (P.C.) A document given to a witness to refresh his memory does not come within the meaning of this rule. 1 M.H.C.R. 168. Reception of a document in evidence, which has not been produced at the proper time, is no ground for appeal. 8 M. 373 (374). See also 13 M. I.A. 77; 44 C.L.J. 385=99 I.C. 258=1927 C. 168. Refusal to receive it is a good ground. 4 M. 417, 8 B. 377. Sanction of the Court receiving the documents clears the defect of their not having been tendered with plaint 13 M.I.A. 77. Documents produced by plaintiff in answer to case set up by defendants—No necessity for filing before first hearing. 4 Pat. L.T. 32. Rejection of documents not produced along with plaint if proper. 44 I.C. 21; 46 I.C. 246=27 C.L.J. 119. Good cause to be shown for non production with plaint or at first hearing. 101 I.C. 911=1927 O. 612. Document sued on, to be produced with plaint; and if it is produced subsequently it

can only be treated as evidence 1 L. 6; 21 C.W.N. 553 (P.C.); 32 M.L.J. 137=39 I.C. 243 (P.C.). It should not be sprung upon the opposite party a considerable time after. 44 B. 625. A Court may refuse to admit later on unlisted documents. 1926 L. 527. In a suit on a promissory note for cash consideration, the defendant denied the receipt of consideration and therefore the plaintiff, in answer, produced before recording of evidence bonds not included in the list of documents filed with the plaint. Held, that in these circumstances no inference could be drawn against the plaintiff from the non-production of the bonds with the plaint or the omission from the list of the documents on which the plaintiff intended to rely, which list had also been filed with the plaint. 1936 L. 1016

RIGHT OF INSPECTION under O. 11, R. 5 extends also to documents entered in a list annexed to the plaint. 1931 M. 825=61 M. L.J. 704/24 C. 302, Diss.)

O. 7, R. 16.—A plaintiff founding his suit on a lost hundi must furnish security against possible claims. 16 I.C. 769; 59 I.C. 363. Document not filed in Court when may be allowed to be used. 60 I.C. 372

(2) The Court, or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

Loc Am.—[Allahabad.] Add the following proviso to O. 7, R. 17 of the Code of Civil Procedure—

"Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use, the procedure laid down in O. 13, R. 12, as to verification, shall be followed, and in that case the Court or its officer need not examine or compare the copy with the original."

18. [S. 63.] (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

Loc Am.—[Allahabad.] Add the following rules to O. 7—

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address within in English block-letter at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect and the Court may make such order as it thinks just

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed, such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served

Notes.

O. 7, R. 18.—Failure to produce a document—Effect of. See 1924 L. 608. See also 44 C.L.J. 385=99 I.C. 258=1927 C. 168; 44 B. 625. Certified copies of public documents may be received though not produced with plaint. 67 I.C. 686=1922 P. 322. When there could be no possible doubt about the existence of a document at the date of suit, it is not proper to refuse to admit it in evidence on the ground that it had not been produced with the plaint. 8 B. 377. The only penalty which the plaintiff incurs is that laid down in this rule. 22 B. 971. The penalty to the non production of a document under O. 7, R. 14 is contained in R. 18 (1), and sub-rule (2) is an exception to sub rule. (1). 1936 A.L.J. 1195=1936 A.W.R. 983. Where the defendant's case is not cleared till the evidence stage, the Court may permit the plaintiff to file a document at that stage if it is otherwise material. 148 I.C. 1040=35 P.L.R. 28=1934

L. 126. See also 1936 L. 1016. The only ground contemplated by R. 18 for allowing a document which has not been produced in accordance with R. 14 to be produced at a later stage is that it may be used as evidence. The rule does not allow a plaintiff to put forward as creating rights a document which he has not in terms used. 168 I.C. 98=44 L.W. 840=1937 M. 122. No document can be taken after arguments have been heard, unless it be shown that the party, with the exercise of due diligence could not have obtained a copy of this document at the proper stage, nor is any other reason given for its non-production before he closed his case. 1935 L. 648.

O. 7, R. 18 (2)—"Defendant's witnesses" in R. 18, Cl. (2) includes witnesses who have turned hostile to the plaintiff and may be treated as the adversary's witnesses 54 I.C. 311. Sub-rule (2) is an exception to sub-rule (1). 1936 A.L.J. 1195=1936 A.W.R. 983.

23. Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if for any reasons, it thinks fit to do so."

[Added by Oudh Chief Court]—19. Every plaint or original petition shall be accompanied by an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. This address shall be called the 'registered address' and service thereat shall be deemed to be sufficient service.

20. Any party subsequently added as plaintiff or petitioner shall, in like manner, file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

21. A registered address shall be within the local limits of the District Court within which the suit or petition is filed, if the plaintiff or petitioner resides or carries on business within those limits.

22. If plaintiff or petitioner fails to file a registered address as required above, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

23. Where the registered address of the plaintiff or petitioner is within the limits of a headquarters town or of a municipality of India (including Burma) or Ceylon, a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

24. In all cases to which R. 22 does not apply, where a plaintiff or petitioner is not found at his registered address and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed, such plaintiff or petitioner is not present, another date shall be fixed and a copy of the notice, summons or other process shall be sent to his registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

25. Whenever a plaintiff or petitioner has engaged a pleader to act for him, a notice or process for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at his registered address.

Provided that where a notice is served on a pleader under the above rule, he shall be given sufficient time to communicate with his client and to receive instructions.

Explanation—Where 10 days' time has been allowed under this rule, this shall be deemed sufficient time within the meaning of this proviso in the absence of an application made within such 10 days by the pleader concerned for further time.

26. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition, and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform, and may be either served upon the pleader for such parties or be sent them by registered post, as the Court thinks fit.

27. Nothing in Rr. 19 to 26 shall prevent the Court from directing the service of a notice or process in any other manner, if for any reason, it thinks fit.

[Lahore.] Add the following rules:—

19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiff or petitioner subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice, summons or other process shall be fixed to the

outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as is the notice, summons or other process had been personally served.

23. Where a party engages a pleader, notices, summonses or other processes for service on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice, summons or other process in any other manner, if for any reasons, it thinks fit to do so.

(Rules 19 to 25 inserted by High Court Notification No 567—G dated 24th November, 1927.)

[Patna.] Add the following rules.—

19. Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner, and every plaintiff or petitioner subsequently added shall, immediately on being so added, file a similar statement.

20. An address for service filed under the preceding rule shall state the following particulars—

- (1) the name of the street and number of the house (if in a town);
- (2) the name of the town or village;
- (3) the post office;
- (4) the district; and
- (5) the munsif (if in Bihar and Orissa) or the district Court (if outside Bihar and Orissa).

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. A party who desires to change the address for service given by him as aforesaid shall file verified petition and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post as the Court thinks fit.

[Bombay.] The following shall be added as Rr. 19 to 26 in O. 7—

“19. Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post pre-paid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Where a party engages a pleader, notice or processes on him shall be served in the manner prescribed by O. 3, R. 5, unless the Court directs service at the address for service given by the party.

- 24 A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly.

Change of address.

Notice of such memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

Rules not binding on Court

25 Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if, for any reasons, it thinks fit to do so.

Applicability to notice under O. 21, R. 22.

26. Nothing in these rules shall apply to the notice prescribed by O. 21, R. 22.

[Nagpur.] Add the following as Rr. 19 to 23—

"19 Every plaint or original petition shall be accompanied by an address at which service of process may be made on the plaintiff or the petitioner. The address shall be within the local limits of the Civil district in which the suit or petition is filed, or of the Civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

20. Any party subsequently added as plaintiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

21. (1) If the plaintiff or the petitioner fails to file a registered address as required by R. 19 or 20, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where a suit is dismissed or a petition rejected under sub-rule (1) the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time, the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or petition.

22 Where the plaintiff or the petitioner is not found at his registered address, and no agent or adult male member of his family on whom a process can be served is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served.

23. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform."

ORDER VIII.

WRITTEN STATEMENT AND SET-OFF.

1. [S. 110. Cf. S. 112.] The defendant may, and if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written

Written statement.

statement of his defence.

Loc. Am.—[Oudh.] O. 8, R. 1.—Add the following as R. 1 (2), and read the existing R. 1 as R. 1 (1) —

(2) The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case, shall produce with the written statement such of the documents as are in his possession or power, and shall cause the others to be summoned on a date to be fixed by the Court for the purpose.

Explanation—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the defendant, it will not be deemed to be "in the power" of the defendant.

Notes.

O. 8, R. 1.—A written statement cannot be filed by one who is not a party to the suit. 25 W.R. 17. Where a written statement on behalf of defendant is not filed by him personally or on his behalf by a duly constituted agent, but by a third person, the procedure

is not regular. 53 A. 466=131 I.C. 543=1931 A.L.J. 181=1931 A. 333 (2). A written statement tendered before, or at the first hearing, need not bear any Court-fee. 5 B. 400. The practice of filing written statements on behalf of persons accused of criminal offences is improper. 32 I.C. 137=20 C.W.N. 128.

[Lahore.] The following was added:—

Written statement. and with such written statement shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set-off.

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his defence or claim for set-off he shall enter such documents in a list to be added or annexed to the written statement

2. The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or facts showing illegality.

3. It shall not be sufficient for a defendant in his written statement to deny Denial to be specific. generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

4. Where a defendant denies an allegation of fact in the plaint, he must not Evasive denial. do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

5. Every allegation of fact in the plaint, if not denied specifically or by Specific denial. necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability:

Notes.

O. 8, R. 2.—Defence to be specific and clear. 76 I.C. 603=1923 C. 578. Limitation should be specifically pleaded. 66 I.C. 287=34 C.L.J. 205; 69 I.C. 194. Limitation under special law cannot be allowed to be raised in appeal. 69 I.C. 194; 60 I.C. 280=32 C.L.J. 236; 46 I.C. 787=28 C.L.J. 216. Plea of want of necessity cannot be raised for the first time in appeal 1 P. 612=3 Pat. L.T. 367. A defendant in a suit in ejectment, denying plaintiff's title and tenancy, cannot plead want of notice to quit 17 M.L.J. 287. Raising of new defence for the first time in appeal not allowed. 95 I.C. 573=28 Bom. L. R. 513. In many cases persons in verifying the pleadings, defendants their written statements or plaintiffs their plants are often found to say something which is not strictly true, e.g., a defendant may deny the making of a contract in order to force the plaintiff to give evidence and be subjected to cross-examination or to put the matter raised in issue. But by such action he does not render himself liable for prosecution for perjury for making false statement. 1930 C. 639=129 I.C. 111.

O. 8, R. 3.—As to what amounts to an admission of the case in plaint, see 1927 A. 225=95 I.C. 1.

O. 8, R. 4.—It is a principle underlying R. 4, that the pleadings should be specific. 27 A.L.J. 1153=1929 A. 721 (2).

O. 8, Rr. 4 and 5.—It is enough to say in I—84

the written statement that a fact is not admitted in order to put the plaintiff to proof of it. 40 L.W. 366=1934 M. 579=67 M.L.J. 327. See also 55 A. 700=1933 A. 521.

O. 8, R. 5. APPLICATION OF—R. 5 is limited in its application to cases where there is in fact a pleading before the Court. 20 C. W.N. 1192=43 C. 1001; 115 I.C. 425; 1930 P. 293. For scope of R. 5, see 47 I.C. 589=35 M.L.J. 372. A defendant who does not put in any defence is bound by all the allegations in the plaint, under R. 5, every allegation of fact in a plaint must be taken as admitted unless denied or stated to be not admitted in the pleading of the defendant. The rule is not confined to a case where a pleading has been put in by the defendant; it equally applies to a case in which the defendant puts in no pleading. 60 B. 788=164 I.C. 189=38 Bom. L.R. 577=1936 B. 285. But it has been well settled that a mere omission to file a written statement does not amount to an admission of the facts stated in the plaint. 14 P. 70=157 I.C. 433=1935 P. 306. Where in a suit for dissolution of partnership and accounts the plaintiff stated the proportion of shares, defendants, while alleging that the shares were different, did not specify what the shares were, held, that the Court could treat the evasive denial as an admission of the correctness of the statement in the plaint. 113 I.C. 370=1929 S. 7. A denial of knowledge of a fact is not a denial of the fact, nor is it even putting the fact in issue. It

Provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission.

6. [S. 111.] (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill

particulars of set-off to be given in written statement.

Notes.

merely means that the defendant denies that he has any knowledge of it, but any man can, of course, admit a fact of which he has no personal knowledge. Where a defendant in a mortgage suit instead of denying specifically or refusing to admit specifically, the mortgage is not admitted, and consequently under R. 5, it must be held against such defendant that he has by implication admitted the mortgage in favour of the mortgagee. 152 I.C. 395=1934 R. 278. A recital in the written statement that a certain allegation in the plaint is not admitted cannot be deemed to be an admission, but amounts to denial by necessary implication. 55 A. 700=1933 A.L.J. 998=1933 A. 521. See also 168 I.C. 330=1937 S. 11; 1934 M. 579=67 M.L.J. 327

CONSTRUCTION—Strict construction ought not to be placed on the written statements as is placed on pleadings in England. 39 I.C. 460; 45 I.C. 878. In the absence of specific denial, a document relied on by a party must be accepted as admitted between the parties and therefore need not be proved. 41 B. 89=18 Bom.L.R. 946. Allegations in plaint not denied in written statement, effect of. 49 I.C. 733. Such portions of plaintiff's claim as are admitted by defendant need not be proved by plaintiff. 131 I.C. 206=1931 L. 203 A pleading "not known" cannot be held to be the same thing as "not admitted" 133 I.C. 414=1931 A. 423. The words "stated to be not admitted" in R. 5 means specifically stated to be not admitted. 22 L.W. 26=1925 M. 950. Omnibus clause that defendant denies all allegations not expressly admitted is not sufficient. (*Ibid.*)

O. 8, R. 6; SCOPE OF—The provisions of R. 6 and O. 20, R. 19 (1) read together, show that the Court must treat the claim of the defendant exactly as if the defendant had filed a plaint and the Court must pass a decree in favour of the defendant, if his claim is established, even though the claim of the plaintiff against the defendant is dismissed. Nature of set-off discussed. 150 I.C. 433=1934 A.L.J. 393=1934 A. 543. The rule only provides for set-off in suits for recovery of money but makes no provision for counter-claim 1922 C.1 (1). This rule is not exhaustive but Courts can allow an equitable set-off if the amount claimed arises out of the same transaction though not an ascertained amount 92 I.C. 787=1926 O. 301. Where defendant makes a counter-claim to the plaintiff's suit and the Court

decides to hear two together but the plaintiff withdraws his suit with liberty to bring a fresh one, the counter-claim can be continued as a plaint and proceeded on its merits. (2 R. 486, Ref.) 152 I.C. 552=1934 R. 160 In a suit for accounts defendant counter claimed—Court dismissed plaintiff's suit and passed decree in favour of defendant—Held equitable set-off was rightly allowed and R. 6 is no bar. 35 C.W.N. 17=132 I.C. 195=1931 C. 358. See also 128 I.C. 763=1930 A. 875, 27 A. 145. See also 59 C. 833 (counter-claim by defendant allowed by way of equitable set-off). "Debt" in this rule means a present obligation to pay a liquidated sum of money. 42 M. 873=37 M.L.J. 193. "Ascertained sum" means a conclusive and indisputable amount. 37 I.C. 367. See also 130 I.C. 87=1931 N. 12 It does not include unliquidated damages and mesne profits. 130 I.C. 87 Specified sums are not necessarily ascertained sums of money "legally recoverable" within the meaning of the rule 16 C. 71; 95 I.C. 358=1926 S. 225 A sum to be ascertained on a settlement of account is not an ascertained sum. 49 I.C. 193; 57 C. 855. A counter-claim for a definite amount by way of set-off though not admitted is a claim for an ascertained sum 1933 R. 13.

DISTINCTION BETWEEN SET OFF AND 'COUNTER-CLAIM'—24 Bom.L.R. 998=1923 B. 113; 47 B. 182=24 Bom.L.R. 328. A set-off is either legal or equitable. R. 6 is restricted to legal set-off. Equitable set-off is allowed if the demands arise out of the same transaction or are so connected that they can be looked upon as part of the same transaction and when the amount is unascertained. O. 20, R. 19 (3) recognises equitable set-off. A set-off may be purely defensive, that is, it may amount to an adjustment or satisfaction of the plaintiff's claim or it may be a counter-claim under which the defendant claims a decree for the surplus amount due to him. In a defensive set off, the set-off claimed must be recoverable at the date of the plaintiff's suit. In a counter-claim the sum claimed by the defendant should be legally recoverable at the date when he makes the claim, i.e., at the date when he files the written statement. The words "legally recoverable" in R. 6, mean legally recoverable at the date of the institution of the suit in one case and mean legally recoverable at the date when the counter-claim is made in the other case. Although in R. 6 and O. 20, R. 19, there is no clear distinction between a mere set off, i.e., a defensive set off and a counter-claim, a distinction has been made in Indian Courts in accordance with the law of England, as it is based on a sound principle.

the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless premitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Notes.

1936 C. 277. See also 34 Bom L.R. 1401=1932 B. 617. There is a different *terminus ad quem* for the case of a mere set-off and the case of a counter demand. In the former case the amount claimed must be legally recoverable by him on the date of the suit, while in the latter it must be legally recoverable by him on the date of his written statement. The result is that he can get a set off up to the amount of the plaintiff's claim provided his claim was not time-barred at the time of the suit. But if he wants to have a decree for the excess amount, he must show that it was not time-barred at the time when he filed the written statement. A claim for set-off cannot be allowed in respect of an unascertained amount. 150 I.C. 105=1934 A. L.J. 286=1934 A. 427; 1936 N. 290. Before a set-off can be allowed the parties must fill the same character as they fill in the plaintiff's suit. 8 L. 105=101 I.C. 762=1927 L. 228. It is not open to a defendant to claim a set-off in respect of unliquidated damages for alleged breaches of contracts. 24 Bom. L.R. 998=1923 B. 113; 130 I.C. 87=1931 N. 12, 1933 R. 13. Plea of set off as distinct from equitable set off. 9 N.L.J. 227. Set-off not pleaded in written statement, effect of. See 102 I.C. 688=1927 L. 431. The right of set-off exists not only in cases of mutual debts and credits but also of cross demands arising out of the same transaction. 21 I.C. 716=19 C.W.N. 1183, 17 C.W.N. 1060=19 C.L.J. 152; 126 I.C. 444=1930 L. 808.

LEGAL AND EQUITABLE SET-OFF.—A legal set off requires a Court-fee because it is a claim that might be established by a separate suit in which a Court-fee would have to be paid. But there is no such fee required in the case of an equitable set-off which is for an amount that may equitably be deducted from the claim of the plaintiff where a Court-fee has been paid on the gross amount. An equitable set-off may however only be claimed by the defendant for a claim arising out of the same transaction as the plaintiff's claim. 1934 A.L.J. 421=1934 A. 115. See also 1936 A.M.L.J. 60 (court-fees necessary). When there are different demands arising out of the same transaction or so connected in their nature and circumstances that they can be looked upon as part of one transaction, there arises an equitable set-off on which no Court-fees are payable. 1936 A.M.L.J. 10=39 P.L.R. 345=1937 L. 73. It is not the law that a claim to set-off a

definite sum of money can only be put forward under R. 6. Nor is it the case that an equitable set-off can only be urged when the claim is to an unascertained amount. The claim by way of equitable set-off can be urged when the claim of the defendant is to an ascertained amount also. But a claim for equitable set-off will not, however, arise simply because there are cross-demands; there must be some connection between them which will make it inequitable to drive the defendant to a separate suit. The two claims must arise out of the same transaction, and there must be knowledge on both sides of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it. 40 C.W.N. 751. R. 6 applies only to a legal set-off and not to any other set-off that a party may equitably claim. 39 I.C. 508=62 P.R. 1917. R. 6 not a bar to equitable set-off. 35 C.W.N. 17; 1930 A. 875. An equitable set-off which is barred by limitation cannot be allowed. 42 M. 873=37 M.L.J. 193; 22 M. 139, 28 M.L.J. 294, 39 M. 939=30 M.L.J. 59=32 I.C. 80. See also 44 I.C. 428=34 M.L.J. 32; 62 C.L.J. 430=40 C.W.N. 75; 1936 N. 290; 160 I.C. 908=1936 Pesh. 57; 8 L. 105=101 I.C. 762=1927 L. 228, 122 I.C. 490. But see 21 I.C. 716=19 C.W.N. 1183. Where in a suit on a promissory note the defendant puts in a counter claim that he had pledged gold with plaintiff as security for the promissory note and prays for a decree for the excess of gold value over plant amount, but does not stamp his counter claim, on his admission of the execution of the suit note, the suit must be decreed as the two transactions are separate. But if the defendant stamps his counter claim properly, the two cases can be tried together in one suit. But the filing of the stamp paper in the appellate Court will not validate the counter claim in the trial Court and the defendant's remedy is only to file a separate regular suit on his counter claim. 156 I.C. 425=1935 R. 116. A claim to set-off must be adjudicated according to common sense and equity. 82 P.R. 1914=25 I.C. 560. Time-barred claim by a coparcener against joint family cannot be set-off. 41 M.L.J. 370=62 I.C. 852. In case of legal set off, defendant is not bound to put forward his counter-claim and a separate suit by him will lie. 60 I.C. 226=12 L.W. 173. The Court is bound to try a claim to set-off which falls under O. 8, R. 6. 57 I.C. 656=12 L.W. 85; 40 M. 688=30

Loc. Am.—[Patna.] Rule 6 (1)—*add the words—*

"and the provisions of O. 7, Rr. 14 to 18 shall, *mutatis mutandis*, apply to a defendant claiming set-off as if he were a plaintiff."

Illustrations.

(a) *A* bequeaths Rs. 2,000 to *B* and appoints *C* his executor and residuary legatee. *A* dies and *D* takes out administration to *B*'s effects. *C* pays Rs. 1,000 as surety for *D*, then *D* sues for legacy. *C* cannot set-off the debt of Rs. 1,000 against legacy, for neither *C* nor *D* fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000.

(b) *A* dies intestate and in debt to *B*. *C* takes out administration to *A*'s effect and *B* buys part of the effects from *C*. In a suit for the purchase-money by *C* against *B* the latter cannot set-off the debt against the price, for *C* fills two different characters, one as the vendor to *B* in which he sues *B*, and the other as representative to *A*.

(c) *A* sues *B* on a bill of exchange. *B* alleges that *A* has wrongfully neglected to insure *B*'s goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

(d) *A* sues *B* on a bill of exchange for Rs. 500. *B* holds a judgment against *A* for Rs. 1,000. The two claims being both definite pecuniary demands may be set-off.

(e) *A* sues *B* for compensation on account of trespass. *B* holds promissory note for Rs. 1,000 from *A* and claims to set-off that amount against any sum that *A* may recover in the suit. *B* may do so, for, as soon as *A* recovers, both sums are definite pecuniary demands.

(f) *A* and *B* sue *C* for Rs. 1,000. *C* cannot set-off a debt due to him by *A* alone.

(g) *A* sues *B* and *C* for Rs. 1,000. *B* cannot set-off a debt due to him alone by *A*.

(h) *A* owes the partnership firm of *B* and *C* Rs. 1,000. *B* dies, leaving *C* surviving. *A* sues *C* for a debt of Rs. 1,500 due in his separate character. *C* may set-off the debt of Rs. 1,000.

7. Where the defendant relies upon several distinct grounds of defence or

Defence or set-off founded on separate grounds. set-off founded upon separate and distinct facts they shall be stated, as far as may be, separately and distinctly.

8. Any ground of defence which has arisen after the institution of the

New ground of defence. suit on the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement.

9. [S. 112.] No pleading subsequent to the written statement of a defend-

Notes.

M.L.J. 655. A plea of set-off cannot be raised without filing a written statement. 25 I.C. 361=16 M.L.T. 122; 28 P.L.R. 297=1927 L. 431. Conditions as to right to set-off. 2 Pat. L.J. 451=40 I.C. 350. Failure to plead equitable set-off is not bar to suit. It is not obligatory to plead an equitable set-off. 49 M.L.J. 14=1925 M. 830. Defendant making a statement that he would make a separate counter-claim is not estopped from claiming a set-off in the same suit. 20 L.W. 531=1925 M. 228. Rr. 6 does not apply to unascertained sum, but if cross demands are very closely connected, set-off can be pleaded. 49 M.L.J. 14=1925 M. 830. The whole of the sum claimed as set-off should be within jurisdiction. 2 R. 349=84 I.C. 956. *Court-fees* on claim of set-off. See 1927 N. 74=97 I.C. 916. Even in suit on negotiable instrument, defendant can claim set-off. 130 I.C. 87=1931 N. 12. *Attorney's lien*—The question whether an attorney's lien should or should not be allowed to intercept a set-off between the parties to a suit, is, in India, a matter for the Court's discretion. The lien has no overriding priority. 34 Bom.L.R. 1429=1932 B. 619. See also 40 C.W.N. 458. The Civil Procedure Code does not contain exhaustive

general principles of law applicable to a question of *attorney's lien for his costs*. That question is governed by the relevant principles of law, inasmuch as the C. P. Code does not in terms say that the pre-existing law (English law) is to be abrogated. 38 C.W.N. 1031; 40 C.W.N. 458. *Claim arising out of territorial jurisdiction* can be the subject-matter of set-off. In this respect it differs from a counter-claim. 34 Bom.L.R. 1401=1932 B. 617. "*Suit for recovery of money*".—A suit on a promissory note accompanied by deposit of title-deeds is a claim for recovery of money within the meaning of R. 6, as the words "*suits for recovery of money*" do not necessarily mean a suit for recovery of money pure and simple. Moreover a suit in which it is asked that the defendant may be called upon to pay a certain amount of money, and in default a certain property should be sold, is a suit for money. 1933 R. 13=147 I.C. 134. (8 C.W.N. 174, Dist.; 10 A. 587, Foll.)

O. 8, R. 9.—Court's permission is necessary for filing pleading in reply to defendant's written statement. 27 Bom. L. R. 890=1925 B. 390. There is no special provision in the Code which entitles a *minor defendant* to file an additional written statement on attain-

Subsequent pleadings. ant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

10. [S. 113] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

Loc. Ams.—[Allahabad.] Add the following rules to O. 8—

11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall, on or before the date fixed in the summons or notice served on him as the date of hearing, file in a Court a proceeding stating his address for service, written in English in block letters and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24, 25 and 26 of O. 7 shall apply, so far as may be, to addresses for service filed under the preceding Rule.

[Note.—R. 26 has been deleted by Allahabad High Court.]

[Lahore.] Add the following rules—

11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons, notice or other process served on him as the date of hearing, file in a Court a proceeding stating his address for service, and, if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24 and 25 of O. 7 shall apply, so far as may be, to addresses for service filed under the preceding rule.

[Nagpur.] Add the following as Rr 11 to 13—

11. Every defendant in a suit or opposite party in any proceedings, shall, on the first day of his appearance in Court, file an address for service on him of any subsequent process. The address shall be within the local limits of the Civil district in which the suit or petition is filed or of the Civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

12. (1) If the defendant or the opposite party fails to file a registered address as required by R 11, he shall be liable, at the discretion of the Court, to have his defence struck out and to be placed in the same position as if he had made no defence.

Notes.

ing majority. The matter can only fall under R. 9, and under that rule, an additional written statement otherwise than by way of a defence to a set-off shall only be presented by leave of the Court and on such terms as the Court thinks fit. The Court has, therefore, discretion either to grant or re use permission and if it refuses leave except in the case specifically named, it is final and cannot be interfered with in revision 153 I.C. 453=1935 M. 117=41 L.W. 640=68 M.L.J. 155 Where no harm has resulted from not filing proceedings for registered address and the case is going on normally, and the address is thereupon put in, which appears to have been accepted by all the parties and by the Court as a sufficient address, the Judge is wrong in ordering the defence to be struck out and he cannot proceed against the defendant *ex parte* and decree the suit. 1935 L. 791

O. 8, R. 10.—R. 10, relates back to R. 1 as well as to R. 9, and the rest are of the nature

of an explanation to R. 1. 40 I.C. 223=1917 M.W.N. 241. But see 1 B. 217; 43 C. 1001.

APPLICABILITY.—Rule applies only to specific requirement by the Court to the filing of a written statement and not to a general direction in the summons that such a written statement may be filed. 12 O.L.J. 532=88 I.C. 540=1925 O. 567. Vakil refusing to file is sufficient cause to excuse delay in filing written statement. 41 M.L.J. 213=44 M. 978. As O. 8 in terms applies only to a written statement and a set-off, the plaintiff could not be called upon to put in the counter-written statement. Where a Court thinks it necessary to clear up the ground further, the proper procedure to be followed is that laid down in O. 10, R. 1 of the Code. 31 Bom. L. R. 1118=1929 B. 413

APPEAL.—Where the Court refuses to strike out the plaint on the ground that the plaintiff has sufficiently set out the particulars of fraud alleged the order is not subject to appeal 131 I.C. 129=1931 L. 77

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where the Court has struck out the defence under sub-rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing, appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceeding as if the defence had not been struck out.

(3) Where the Court has struck out the defence under sub-rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order; and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding.

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant or opposite party only it may be set aside as against all or any of the other defendants or opposite parties.

13. Rules 20, 22 and 23 of O. 7 shall apply, so far as may be, to addresses for service filed under R. 11. (*Notifications Nos. 7390 and 7391, dated the 19th September, 1929.*)

[Oudh.] 11. Every defendant in a suit or opposite party in any proceeding shall, on the first day of his appearance in Court, file an address (to be called the 'registered address') for service on him of any subsequent notice, summons or other process; and, if he fails to do so, shall be liable, at the discretion of the Court, to have his defence or reply, if any, struck out, and to be placed in the same position as if he had made no defence or reply.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

12. Rules 21, 23 and 25 to 27 of O. 7 shall apply, so far as may be, to addresses for service filed under the preceding rule, and R. 24 shall in the same manner, apply, but as if the words at the beginning "In all cases to which R. 23 does not apply" were omitted.

13. Nothing in Rr. 11 and 12 shall apply to the notice prescribed by O. 21, R. 22.

[Patna] Add the following rules:—

11. Every party, whether original, added or substituted, who appears in any suit or other proceedings shall, at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20 and 22 of O. 7 shall apply, so far as may be, to addresses for service filed under the preceding rule.

ORDER IX.

APPEARANCE OF PARTIES AND CONSEQUENCE OF NON-APPEARANCE.

1. [S. 96.] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Notes.

O. 9, R. 1.—O. 9 does not apply to execution proceedings. 35 I.C. 337. See also 13 L. 761; 1931 M. 656=61 M.L.J. 348 (F.B.); 1931 A.L.J. 622=1931 A. 594; 133 I.C. 65=1931 S. 97 (F.B.); 17 A. 106, 41 I.C. 586=21 C.W.N. 769, 47 C.L.J. 87; 51 M.L.J. 219=1926 M. 980, 1926 M. 412=50 M.L.J. 290; 50 M. 67=51 M.L.J. 219; 100 I.C. 518=1927 C. 420; 53 C. 679, 1929 L. 744. The provisions of O. 9 do not in terms apply to execution proceedings but execution applications can be restored under the inherent powers of Court. 13 L. 761=142 I.C. 686=1933 L. 99.

See also 145 I.C. 995=1933 A.L.J. 1032=1933 A. 783 (F.B.). Desirability of framing a new rule making O. 9 applicable to execution proceedings pointed out 1931 M. 656=61 M.L.J. 348 (F.B.). O. 9 does not apply to the special set of circumstances contemplated by O. 10, R. 4. 1921 M.W.N. 390=63 I.C. 961=14 L.W. 15. The Court has power to order a case to be set down for hearing if the defendant enters appearance before the time for appearance fixed in the summons. 4 Beng.L.R. App. 75. For the meaning of the words "day fixed", see 2 A. 67. A defendant has a right to appear at the hearing of the

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs. 2. [S. 97.] Where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed:

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

Loc. Am.—[Allahabad.] After the words in the fourth line "for such service" insert the words "or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant".

Where neither party appears, suit to be dismissed. 3. [S. 98.] Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

Notes.

case although he has not been served. 15 B. 160. The provisions of O. 9, C. P. Code, by themselves, do not apply to a case in which the plaintiff or the defendant has already appeared but has failed to appear at an adjourned hearing of the case. For such a case the procedure is laid down in O 17, which deals with adjournments. 1935 A L J. 209=1935 A.W.R. 90=156 I.C. 754=1935 A. 210

INSOLVENCY COURT—The Insolvency Court in the mofussil has by virtue of S 5 of the Provincial Insolvency Act, the same powers of setting aside orders passed *ex parte* as it has under O 9, C. P. Code. 61 M.L.J. 719.

REVENUE COURT—A Civil Court to which an issue has been sent by the Revenue Court for decision under S. 271, Agra Tenancy Act, 1926, and which has decided that issue *ex parte* has jurisdiction under S 141 and O 9, C. P. Code, to entertain an application for the setting aside of the *ex parte* decision and to decide the issue on the merits. 147 I.C. 721=1934 A.L.J. 831=1934 A. 86.

MORTGAGE SUIT—NECESSARY PARTY IMPLEADED AFTER LIMITATION—DISMISSAL—R 9 of O. 1 of the Code is subordinate to O 34, R. 1. A mortgage is indivisible and if all the parties entitled to share in the money due on the mortgage are not on the record the suit must be dismissed in its entirety. When a necessary party has not been impleaded at the time of the institution of the suit but has been brought on the record after the period of limitation has expired, the whole suit must be dismissed. (1 Pat.L.J. 468, Foll.) 37 C.W.N. 478=1933 C. 621

O. 9, R. 2.—Court ordering summons in the ordinary way and by registered post—Plaintiff paying process-fee and not postal charges—Dismissal of suit—Illegal. 9 L. J. 96=90 I.C. 909=1927 L. 157; 99 I.C. 909. The Court is bound to fix a time within which the process-fee is to be paid into Court as provided for in O. 48, R. 2, C. P. Code, and the failure to so fix a time amounts to a material irregularity; when no such time has been fixed, the dismissal of the suit under O. 9, R. 2, for failure to pay process-fee is illegal and unjustified. 158 I.C. 250. This rule does

not authorise the Court to dismiss a suit merely for the reason that the process-fee which is required for fresh summons is not filed promptly along with the application for the issue of such summons. 1933 P 582. The rule has no application to a case where the plaintiff did not furnish the correct address of the defendants or did not go with the process server to serve the summons. 99 I.C. 898=9 L.L.J. 135=1927 L. 170 See also 132 I.C. 524=1931 L. 655. (To such a case O 9, R. 5 applies and the plaintiff has three months' time to supply the correct address for fresh summons.) The Court cannot dismiss the suit before the date fixed for hearing. 2 A. 318. The rule will apply where there are more defendants than one, and the plaintiff fails to pay process-fees for one or some of the defendants only. 5 Bom H C (A.C.) 119. But see R. 11. Reasonable time for compliance with Court's order to be given. 55 I. C. 650 Failure to file affidavits of service of summons on guardian of minor defendants—Dismissal for default is not proper. 55 I.C. 826=1 Pat L.T. 125. A fresh application can be made where an application for a final decree in a mortgage suit is dismissed for default of appearance of both parties. 43 I. C. 518=16 A.L.J. 1431. The mere fact that a case had been previously dismissed for default is no reason for refusing to restore it after a second dismissal. 43 I.C. 180. On this rule, see also 9 C. 163, 20 B. 541. No appeal lies from an order dismissing a suit under O. 9, Rr 2 and 4 for default, as it is not a decree, plaintiff could seek relief under R. 4. 38 A. 357; 9 C. 627. Dismissal of an application for insolvency is not a bar for the making of a fresh application 1928 P. 116 (49 I.C. 229, Foll.).

REVISION—See 8 O.W.N. 1179.

O. 9, R. 3.—Rule applies only to a case where a date is fixed for the appearance of the defendant 49 A. 592=25 A.L.J. 437. See also 130 I.C. 771=1931 L. 69; 1925 L. 96=78 I.C. 15; 94 I.C. 237=1926 L. 320. The provisions of O 9, R. 3, are not obligatory, but merely give the Court a discretion to make an order in suitable circumstances that the suit be dismissed. 162 I.C. 557=1936 P 437. Unless a date has been fixed for the

4. [S. 99.] Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal

Plaintiff may bring fresh suit or Court may restore suit to file.

Notes.

appearance of the defendant and neither party appears when the suit is called on for hearing on that date, O. 9, R. 3 would not apply. 159 I.C. 226=1935 L. 656. Where an application to restore a suit dismissed for default under O. 9, R. 3 is also dismissed in default, a second application to restore it is competent. 148 I.C. 917=1934 Pesh 13. Day fixed for hearing preliminary issue—Parties absent—Dismissal of suit, if proper. 1929 L. 830=31 P.L.R. 441. As to whether a suit dismissed under this rule can be restored, see 103 I.C. 620. The mere physical presence of a pleader not instructed to proceed with the case is not an appearance. 9 I.C. 842. Notice of application for restoration of a suit dismissed under this rule in the absence of both the parties need not be sent to the other side. (10 A.L.J. 399, Foll.) 24 O.C. 347=1923 O. 55. When the parties state that the case be struck off as settled it amounts to withdrawal and no suit can lie again. 32 I.C. 624=(1916) 1 M.W.N. 171. Application for amendment of issues—Parties absent—Suit cannot be dismissed 6 Pat.L.J. 331=63 I.C. 746. See also 102 I.C. 416=1927 S. 228. Where an application is made for the amendment of issues and the Court fixes a day for the consideration of the application for amendment but the parties do not appear on the fixed date the Court has no right to dismiss the suit for default. It can only dismiss the application for amendment. 35 P.L.R. 342=1934 L. 237. On an application of plaintiff to amend the plaint the amendment was allowed and fresh summons was ordered to be issued to the defendants along with copies with amended plaint which plaintiff was asked to file in a certain time. Plaintiff failed to file the copies of the amended plaint and on the date fixed, both parties were absent, whereupon the suit was dismissed. *Held*, that the case fell under R. 3 and not under R. 5 and that the order of dismissal was proper. 146 I.C. 1031=1934 P. 18. Failure to appear must be on the day fixed for hearing, or on the date to which the hearing is adjourned. 2 A. 67 (P.C.); 4 M.H.C. 56. See also 1933 N. 234. But the suit is not to be dismissed for failure to appear on the day fixed for judgment. 100 I.C. 472=9 L.L.J. 178. Where in a mortgage suit a preliminary decree was passed and the judgment debtors failed to pay up the amount and thereupon the plaintiff applied for a final decree but the parties were absent on that date and the Court dismissed the suit under O. 9, R. 3 and the plaintiffs subsequently applied under S. 151 praying for the setting aside of the order, *held*, that the Court had no power to dismiss the suit but should have proceeded to pass the final decree. *Held also*

that the order of dismissal was an abuse of the process of the Court and could be rectified in an application under S. 115. 10 O.W.N. 293=1933 O. 229=8 L. 496. A Judge is not bound to wait until the Court is about to close for the day. 7 M. 356. When neither party appears, the Court should dismiss the suit, and not strike the case off the file. 10 M. 270. The trial Court refused to restore to file a suit which was dismissed under R. 3 without giving due weight to the facts that plaintiff had been taken ill, that his Counsel was only a few minutes late, and that a fresh suit would be barred. *Held*, that the suit should be restored to file and proceeded with according to law. 148 I.C. 175=35 P.L.R. 345=1934 L. 34 (1). The rule applies to execution applications. 20 B. 541. See also 9 C. 163. No appeal lies from an order under this rule 10 M. 270.

O. 9, Rr. 3 and 4.—Where in the course of adjustment of business a case was transferred to the file of another Court but no notice of the transfer was given to the plaintiff, and when the case came up for hearing none of the parties was present and the suit was dismissed under R. 3, the Court should, on the application of the plaintiff, restore the case. 165 I.C. 563=38 P.L.R. 1118.

O. 9, R. 4: APPLICATION.—R. 4 does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed with his original suit. The alternative provisions of the rule are not mutually exclusive, and a plaintiff whose application for restoration of the dismissed suit has been rejected is not thereby precluded from bringing a fresh suit, subject to the law of limitation. 15 P. 716=17 Pat.L.T. 644. R. 4 expressly applies to suits, and cases under O. 21, Rr. 100 and 101 are not suits within this rule. 52 I.C. 416. But see 2 P. 372, *infra*. Where a previous application for amendment of decree was dismissed for default on account of the plaintiff failing to file the process papers, a second application for amendment was held to be maintainable. 12 P. 179, 144 I.C. 59=1933 P. 208 (39 C. 265, Foll.) An application under O. 21, R. 100 is not an application in execution, the proceedings being in the nature of a summary suit. R. 4 can well apply to proceedings under O. 21 R. 100, 4 Pat.L.T. 93=2 P. 372. O. 9, R. 4 does not apply to the dismissal of an application under O. 21, R. 90. 53 C. 679=1926 C. 773. Application under, to restore suit—Applicability of S. 5, Limitation Act—Power of Court to extend time. 51 A. 487=27 A.L.J. 323.

"SUFFICIENT CAUSE", WHAT IS.—A *bona fide* mistake which is not unreasonable amounts to sufficient cause. 96 I.C. 881.

charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

Loc. Am.—[Bombay.] This rule shall be numbered as R. 4 (1) and the following sub-R. (2) shall be added to it—

(2) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule

5 [Cf. S. 99-A.] 1[(1) Where, after a summons has been issued to the

Leg. Ref.

¹Para. (1) was substituted by Act XXIV of 1920.

Notes.

(1)=1926 L 634, 3 Bom H.C. 60, 135 I C 199=1932 L 176 (*Bona fide* mistake as to date of hearing is good cause to set aside order) See also 130 IC 542=1931 P. 87. (Where plaintiff was not able to attend on account of *picketting* by volunteers it would be a sufficient cause to set aside order of dismissal of suit 130 IC 542) If there are minor plaintiffs or defendants, represented by a next friend or guardian *ad litem*, and the next friend or guardian is absent, through whatever cause, at the trial and the Court makes an order of dismissal of suit or an *ex parte* decree, the absence of the next friend or guardian, as the case may be, is alone a sufficient reason for setting aside the order of dismissal in the case of minor plaintiffs or the *ex parte* decree against the minor defendants 152 IC. 163=1934 M 616=67 M.L.J. 387. Whether absence of counsel amounts to sufficient cause, see 26 M 599, 1929 L 882 (1). Where the non-service is due to the process being mislaid in Court, the suit should be restored 9 L.L.J. 19=100 IC. 595 (1). Grounds for restoration of suit dismissed under R. 3 See 103 IC. 620 As to carelessness of petitioner, see 27 Punj L.R. 264. An application under this rule need not always be accompanied by an affidavit 3 Bom L.R. 130. Default to pay process-fees for the attendance of one of several defendants—Suit cannot be dismissed against all 60 IC 377=2 Pat LT 256. The mere fact that the District Judge put down in his order of remand that the parties were to appear before the Subordinate Judge on a certain date does not prove that this direction is actually conveyed to the counsel of the parties or to the parties by the counsel concerned and there is "sufficient cause" within the meaning of O 9, R. 4 for the absence of the plaintiffs on such date. 1935 L 163. Duly authorised agent present—Suit cannot be dismissed for default 3 Pat L.T. 447=68 IC 659 A. Judge when restoring a suit to file under this rule cannot pass an order as to the general costs of the suit 26 B 201. An order of dismissal for default can under R 4 be set aside only by the Court which passed the order 2 L L J 48=55 J. C. 884 The two remedies provided by O 9, R. 4, are not mutually exclusive. 96 IC 187=1926 A. 678 See also 26 A.L.J. 776=1929 A. 131. One out of several plaintiffs

may appear on behalf of all and the non-appearance of the other plaintiffs may be excused The restoration of a suit is entirely a matter of discretion for the Court and the mode of its exercise cannot be interfered with by a Court of appeal where the lower Court has restored the suit for certain reasons. 27 A.L.J. 1103. Court is bound to consider application to set aside order under this section even though there has been a compromise in the case 28 N.L.R. 295.

Notice.—On an application under R. 4 notice to a defendant is unnecessary. (10 A. L.J. 399, Foll.) 24 O C 347=64 IC. 767=1923 O 55. Where a suit is restored after its dismissal on the ground that neither the plaintiff nor the defendant had appeared on the date fixed originally for the hearing of the case, the defendant is entitled both in equity and as of right to notice of the date fixed for hearing the case after its restoration by the plaintiff (17 IC. 292, Dist.) 55 A 684=1933 A L.J. 962=1933 A 522.

APPEAL.—No appeal lies from an order under R. 4 refusing to set aside the dismissal of a suit under R. 3. 43 IC. 180; 42 IC 613=2 Pat L.W. 172 Fresh application can be made although the application to sue in *forma pauperis* is once dismissed 2 Bur.L.J. 217=1924 R 161, 53 C 679=96 IC 705.

O 9, R. 5.—R 5 does not give the appellant the right to apply for fresh summons at any time within a year (now three months) from the date of return to the Court. 17 IC 294 It gives the Court power to dismiss the suit if after a summons has been issued to the defendant and returned unserved, the plaintiff fails for a period of three months to apply for the issue of a fresh summons, unless within that time the plaintiff shows cause for extending the time An order dismissing the suit before the expiry of three months to which plaintiff is entitled for tracing out defendant, is premature and irregular 1933 P. 557=147 IC. 179 Dismissal for default—Absence of petitioner—Non-service—Effect of. 1926 C 112=90 IC 675. An order staying proceedings under O. 9, R. 5, C P. Code, is illegal, where the report on the summons which was attempted to be served is that the defendant is absconding. 38 P.L.R. 197. Where the defendant's address is not furnished by the plaintiff for service of summons the Court cannot dismiss the suit under O 9, R. 2. Under R. 5 he has three months to supply the correct address for fresh summons 132 IC. 524=1931 L 655 The provisions of O 9, R. 5 giving one year's time (now three months' time) for the issue of first summons would not apply to appeals. 50 B 815=100 IC. 147=1927 B 68. dissenting from

Dismissal of suit where plaintiff, after summons returned unserved, fails for three months to apply for fresh summons.

defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of three months from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an

order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

(a) he has failed after using his best endeavours to discover the residence of the defendant who has not been served, or

(b) such defendant is avoiding service of process, or

(c) there is any other sufficient cause for extending the time, in which case the Court may extend the time for making such application for such period as it thinks fit.]

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

Procedure when only plaintiff appears.

6. [S. 100.] (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

When summons duly served

(a) if it is proved that the summons was duly served, the Court may proceed *ex parte*;

Notes.

25 M.L.J. 451. See also 21 I.C. 420. A summons ought not to be ordered after the lapse of one year (now three months) unless the plaintiff shows that there has been no laches on his part. 15 Beng L.R. (App.) 12 See also 5 C. 126; 3 Bom.L.R. 402. This rule applies also to application for final decree in mortgage suit. 1931 M. 795=135 I.C. 377.

O. 9, Rr 5 and 6: NON-SERVICE OF SUMMONS—DISMISSAL OF SUIT FOR LACHES—APPLICATION FOR RESTORATION.—The question of exercising inherent powers comes when the powers expressly conferred by the Code are exhausted. A summons was returned unserved with the note that it had reached only after the expiry of the date fixed. Thereupon plaintiff applied for issue of fresh summons, but the Court rejected his application and dismissed the suit for laches of the plaintiff. This order was sought to be supported as being passed under inherent power, as no provision of the Code was mentioned. Held, that the Court was empowered to act under either R 5 or 6 and that the order of dismissal passed under inherent power should be set aside. 147 I.C. 200=1933 P. 582.

O. 9, R. 6: SCOPE OF RULE—PROCEDURE—See 1 P. 188=69 I.C. 837 R. 6 lays down when the Court may proceed *ex parte* but there appears to be no explanation in the Code what *ex parte* procedure is. 69 I.C. 619=1923 N. 83. A decree passed on merits in the absence of the plaintiff and his pleader reporting no instructions is an *ex parte* decree. 1927 M.W.N. 897=1928 M. 234 A decree passed in the presence of the pleader for defendants is not an *ex parte* decree. 6 P. 383=103 I.C. 711=1927 P. 291. Where the witnesses came to Court late on account of heavy rain and the defendant not being present when the case was called the Court

treated the case as closed. Held, that the case fell under this rule and an application under O. 9, R. 12 was sustainable. The fact that the defendant's pleader was physically present when the case was taken up will not make any difference. 149 I.C. 512=30 N.L.R. 94. The application of the rule is not limited to defendants residing within British India. 23 A. 99. O. 9, R. 6 is not meant to be penal, but only intended to prevent undue delay. 134 I.C. 268=1931 N. 122. The words "proceed *ex parte*" in R. 6 mean proceed to take and determine evidence. 42 C. 1001=20 C.W.N. 1192 The appearance referred to in this rule is an appearance in an answer to a summons to appear and answer the claim on a day specified therein. 7 A. 538. "When a suit is called on for hearing" in connection with O. 9 refers to the first day's hearing and in connection with O. 17, R. 2 means "when the suit is first called on for hearing" 26 L.W. 76=104 I.C. 371=1927 M. 799. *Ex parte* proceedings cannot be taken on the basis of a service effected through registered post. 1926 L. 579=95 I.C. 874. Plaintiff ready—Defendant applying for adjournment—Court granting same—Plaintiff's evidence taken all the same and *ex parte* decree passed—Legality. 50 C.L.J. 549=1930 C. 251 (1) The mere fact of a case, being *ex parte* does not render bad evidence otherwise reliable. 37 I.C. 27=3 O.L.J. 468 A decree cannot be passed *ex parte* merely because the defendant does not appear. The plaintiff must prove *prima facie* that his claim is true. 91 I.C. 119=1926 O. 192; 118 I.C. 527 (1).

O. 9, R. 6 and O. 17, R. 2.—Applicability—Date fixed for hearing of suit after framing of issues—Defendant absent—Application by pleader for adjournment—Refusal of—Pleader withdrawing—Decree is *ex parte*—"Appearance." 1937 A.L.J. 239=1937 A. 347.

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;

(c) if it is proved that the summons was served on the defendant, but not in sufficient time to enable him to appear and answer on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

7. [S. 101.] Where the court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

8. [S. 102.] Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission

Notes.

O. 9, R. 7—Rule should be construed liberally 131 I.C. 447=1931 O. 159 "Good cause" in R. 7 of O. 9, includes non service of summons 1936 A.M.L.J. 18. If a defendant does not show good cause to set aside *ex parte* order he cannot claim a re-hearing; and what has already taken place must stand. This does not mean that he should not participate in future proceedings. He can appear in subsequent proceedings and contest the suit. 134 I.C. 268=1931 N. 122. An application to the Court under R. 7 can be made through a vakil notwithstanding that the Court had decided to proceed *ex parte* owing to the non-appearance of the defendant in person pursuant to an order of the Court. 55 I.C. 945=11 L.W. 289 In the absence of good and sufficient cause for previous non-appearance the defendant cannot be allowed to appear and defend the suit; and the case should proceed *ex parte* against him. 1 B. 217, 9 B. L.R. App. 15. But see also 26 M. 599. Defendant declared *ex parte*—Appearance on adjourned day—Application to appear is not necessary 92 I.C. 493=1926 S. 181; 91 I.C. 545=1925 M. 1275, 106 I.C. 664=1928 M.W.N. 103 1). But see 115 I.C. 310=1929 S. 46. A guardian's laches is a sufficient cause for setting aside an *ex parte* decree or order in the case of minors. (27 M.L.J. 166, Foll.) 11 L.W. 289. Good cause not shown—Application need not be allowed 26 O.C. 10=73 I.C. 591. An appeal lies from an order dismissing a suit for default where part of the claim is rejected. 45 M.L.J. 497=4 L. 284=50 I.A. 162 (P.C.). Where an application to set aside an order declaring a defendant *ex parte* is dismissed under R. 7 and an *ex parte* decree is passed against a defendant, it is open to the defendant to apply under O. 9,

R. 13, to set aside that order or to prefer an appeal from the *ex parte* decree 113 I.C. 409 In setting aside *ex parte* proceedings the Court has no jurisdiction to order payment of costs when the defendant does not want re-hearing of the proceedings previous to his appearance 134 I.C. 1107=1931 L. 616.

O. 9, R. 8 SCOPE OF—53 C. 844 The Court is not competent to bring its inherent powers into play in order to restore an order made under R. 8 in a case where no sufficient cause for non-appearance has been established 143 I.C. 158=1933 Pesh. 59 Failure to appear—Procedure 24 Bom. L.R. 775=46 B. 1026. Absence of plaintiff—Court cannot hear cases on merits. 20 A.L.J. 123=1923 A. 68; 55 I.C. 966; 37 A. 460=29 I.C. 553 Where the plaintiff is absent but he has been adjudged insolvent, whether formal notice to Official Assignee necessary even though he has actual knowledge of the suit. 1927 C. 76=31 C. W. N. 22=53 C. 844. Where there are several defendants jointly interested in a particular matter, an admission by some of them is relevant against all the defendants. (4 C. 133^s 45 C. 159, Ref.) 69 I.C. 35=1923 L. 123. Order fixing date for appearance invalid—Non-appearance on such date does not entitle the Court to throw out the suit 33 P.L.R. 804 Person not being legal guardian instituting suit—Dismissal of suit under O. 9, R. 8—Suit by minor on attaining majority not barred. 15 R.D. 394 Dismissal for default—Propriety—Suit transferred to another Court—Notice of hearing served on pleader. 164 I.C. 142=1936 L. 560 Dismissal of suit for default on date fixed for submission of Commissioner's report—Legality—Hearing of the suit—Meaning of 161 I.C. 790=1936 L. 280

MEANING OF TERMS—The word 'claim' in R. 8 being synonymous with the amount

and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Notes.

sued for, refers to the right claimed irrespective of the amount stated in the relief column. 35 I.C. 65. The words 'admits the claim or part thereof' applicable to the cases where the Court can consider on the examination of the plaint and defendant's written statement that the defendant is ready to pay the admitted claim there and then or submit to the relief claimed in the plaint. 35 I.C. 65.

"APPEAR," MEANING OF.—The word 'appear' in the rule means "appearing in the suit". A party may be present in the precincts of the Court or he may be round present in the Court room but if he does not take part in the suit it cannot be said that he has 'appeared'. If the plaintiff comes to Court and files an application i.e. adjournment and when it is refused he retires from the suit, he is not considered any longer to be present in the suit, though he may not have physically retired from the Court and even if he had been questioned by the Court regarding the *bona fides* of his application. 59 C. 756=138 I.C. 87=36 C.W.N. 158=1932 C. 418. (34 C. 403 and 51 M.L.J. 290, Foll. 23 B. 414 and 33 B. 475, Not foll.) See also 36 C.W.N. 160.

COURT'S POWER TO PASS ORDERS.—The provisions of O. 9, Rr 8 and 13 are exhaustive in respect of cases where the plaintiff makes default in appearance in a suit. 103 I.C. 425=1927 L. 622. In dismissing a suit for default, a Court has no jurisdiction to provide that the order shall not prejudice a minor plaintiff. 63 I.C. 736=6 Pat.L.J. 317. A Court has jurisdiction to direct a plaintiff to appear in person and to dismiss his suit if he fails to appear. But it cannot dismiss the suit against the other plaintiffs. 50 I.C. 323=4 Pat.L.J. 152. A person added as additional plaintiff on the objection of the defendant was ordered to appear personally.—Order dismissing suit for default of appearance is erroneous. 95 I.C. 865 (1)=1926 L. 577. Where a plaintiff and his witnesses were absent and his pleader had instructions only for an adjournment the Court can dismiss the suit only under O. 9, R. 8 and not under O. 17, R. 3. 23 I.C. 614=1914 M.W.N. 344, 1926 C. 246=90 I.C. 768. When the pleaders appear and intimate to the Court that they have no instructions from their client, it is tantamount to default of appearance by the party. [22 A. 66 (F.B.), Foll.] 1936 L. 1000. Where a sole plaintiff dies before trial, the dismissal of the suit for non-appearance is improper. 35 A. 331=40 I.A. 1150=25 M.L.J. 148 (P.C.). See also 162 I.C. 842=1930 R. 204 (Non-appearance on account of missing of train—Restoration proper). When all the evidence has been adduced but plaintiff and his pleader do not appear at a subsequent hearing, the suit cannot be dismissed. 7 Bom. L. R. 201. Dismissal for default.—If plaintiff dead on the date of hearing order is a nullity. 73 I.C. 230=1924 O. 114. The date fixed for the settlement of issues is a date fixed for the

hearing of the suit within R. 8. 48 I.C. 192=1919 P. 32. In a pre-emption suit, evidence of the parties was recorded after the issues had been framed and then a Commissioner was appointed to report as to the value of land. On the date fixed for the return of the report the plaintiff was absent from the Court and the report also was not submitted by the Commissioner and the suit was dismissed under R. 8 *Held*, that the case really fell under O. 17, R. 2 which gives a discretion to the trial Court either to proceed under R. 8, or to make such order as it thinks fit, that the suit should not have been dismissed but adjourned. 1934 L. 56=148 I.C. 521.

PRELIMINARY DECREE PASSED—SUBSEQUENT DISMISSAL OF SUIT.—After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed in appeal. The parties on the making of a decree acquire rights or incur liabilities which are fixed unless and until the decree is varied or set aside. After a decree any party can apply to have it enforced. It is not competent to the trial Court to dismiss the suit on the ground of non-appearance of one of the plaintiffs after a preliminary decree has already been drawn up. 144 I.C. 383 (2)=1933 S. 200.

APPEAL—Dismissal under R. 8—Appeal does not lie. 1922 M.W.N. 483=1922 M. 416. As to powers of appellate Court, see 1926 A. 284=92 I.C. 496.

O. 9, Rr 8 and 9.—Date fixed for payment of costs of adjournment by defendant to plaintiff—Suit dismissed for non-appearance of plaintiff—Application for restoration by his Counsel on same day—Plaintiff, entitled to restoration. 38 P.L.R. 484. Case transferred to another Court and adjourned *sine die*—Plaintiff not notified of date of hearing—Dismissal for default—Restoration proper. 1935 Pesh. 186.

O. 9, Rr 8 and 9 and O. 17, R. 2.—Where in the absence of the plaintiff, his counsel puts in an application for adjournment and that application is refused, the Court should, in view of the Explanation to O. 17, R. 2, proceed as though the plaintiff is present, and decide the suit on the merits. Where, however, this is not done and the Court dismisses the suit for default, it must be deemed to decide the matter upon its merits and not act merely under O. 9, R. 8. The proper remedy of the plaintiff, in such circumstances, is to file an appeal, and not to make an application under O. 9, R. 9. 164 I.C. 1059=1936 A.L.J. 635=1936 A. 659. See also 157 I.C. 1021=1935 A.W.R. 318=1935 A.L.J. 724=1935 All. 398.

O. 9, Rr. 8 and 9 and O. 22, R. 3.—Where a suit is dismissed for default of appearance of a plaintiff who is already dead, the dismissal can be set aside without a formal application to that effect being made by the legal representative of the deceased plaintiff under O. 9, R. 9. An application by the legal

9. [S. 103.] (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance

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representative to bring him on record falls under O. 22, R. 3. [6 O.C. 34 and 117 P.R. 1891, Dist., 35 A. 331 (P.C.), Appl.] 31 N.L.R. 374=158 I.C. 602=1935 N. 189.

O. 9, R. 9. SCOPE OF.—See 41 I.C. 905, 29 I.C. 902; 55 I.C. 481=23 O.C. 18. See also 1 Pat. L. J. 547=38 I.C. 53; 8 L.R. (Rev.) 281. Under O. 9, R. 9 when sufficient cause is shown re-opening is mandatory, but when sufficient cause is not shown it is discretionary with Judge. 164 I.C. 236=1936 R. 335. In deciding whether a suit dismissed for default should be restored under O. 9, R. 9, what has really to be considered is whether the party was really trying to appear on the date fixed for the case and if he honestly intended to be represented though in his own stupid way, not being guilty of anything in the way of misconduct or gross negligence, then he should not be deprived of his chance of being heard. (1923 Mad. 63, Foll.) 164 I.C. 236 (2)=1936 R. 335. Where counsel appears on behalf of a party and presents an application for adjournment which being refused he retires from the case, the party should be taken as not having appeared in the suit and an application under O. 9 R. 9 is competent. 59 C. 756=36 C.W.N. 158=1932 C. 418. Where the plaintiff's pleader applies for adjournment which is disallowed and the suit is dismissed, the order amounts to a decree dismissing the suit for want of evidence on the merits and not one dismissing it for default of appearance. The remedy is review or appeal and not an application under O. 9, R. 8. 1933 A.L.J. 4=1933 A. 41. See also 27 A.L.J. 391, 1933 A. 118. A suit for profits against the lambardar was adjourned on several occasions. On one of such adjourned hearings the Assistant Collector dismissed the suit for "want of prosecution". Held, the decision was not on the merits. 1933 A. 118=143 I.C. 307.

APPLICABILITY.—R. 9 is applicable to an application for final decree for foreclosure dismissed for default. 26 O.C. 194=1924 O. 30. R. 9 is applicable to the dismissal of an application for probate which had under S. 83 of the Probate and Administration Act been treated as a suit. 52 I.C. 639; 38 P.L.R. 973=1936 L. 863; 164 I.C. 334=38 P.L.R. 263=1936 L. 712. But see 53 I.C. 578. Also to dismissal of application to sue in *forma pauperis*. 140 I.C. 226=36 L.W. 586. Dismissal of suit for non-payment of deficit Court-fee—Fresh suit—If barred. 1935 C. 764, 40 C.W.N. 1390, 158 I.C. 942=1935 S. 198 (Non-payment of process fee). Where a suit under S. 37 of the Agra Tenancy Act is dismissed for default, the remedy of the plaintiff is under R. 9, and not to file a fresh suit. 15 L.R. 59

(Rev.)=18 R.D. 24. In order to make R. 9 applicable, it is necessary to show (1) that the subsequent suit is instituted by the same plaintiff or by person claiming under him, and (2) that the cause of action is the same. 14 L. 485=144 I.C. 651=34 P.L.R. 73=1933 L. 365, sub-rule (3) to O. 9 made by the Bombay High Court applying S. 5, Limitation Act, to proceedings under R. 9, is not *ultra vires*. The rule being one affecting practice and procedure only it will apply retrospectively. 53 B. 453=31 Bom. L.R. 484=1929 B. 262.

APPLICABILITY OF RULE TO PROCEEDINGS IN EXECUTION.—Rule has no application to proceedings in execution. 17 A. 106; 13 C.L.J. 532, 41 C. 1, 38 M. 199; 35 I.C. 337 (2), 21 C.W.N. 769, 4 Pat. L. J. 135=49 I.C. 617 (F. B.); 47 I.C. 154=4 Pat. L. J. 230; 100 I.C. 343=45 C.L.J. 60, 50 B. 457=1926 B. 377=28 Bom. L.R. 686=96 I.C. 411, 1929 B. 217=31 Bom. L.R. 400. A fresh application for execution is competent when a previous application is dismissed for default as R. 9 does not apply. 21 C.W.N. 769, 99 I.C. 954=1927 M. 355=52 M.L.J. 123, 1928 O. 478. R. 9 does not apply to an application under O. 21, R. 2 (2). 63 I.C. 855. An application for setting aside a sale under S. 47 and O. 21, R. 90 is not an application for execution. 29 I.C. 395=19 C.W.N. 758; 59 I.C. 575=23 O.C. 349. Where an application for setting aside an execution sale under O. 21, R. 90 is dismissed for default another application lies under R. 9. 19 C.W.N. 758.

BAR OF SUIT.—A second petition to have a person declared an insolvent is not barred under this rule. 101 I.C. 349 (1)=1927 M. 579. R. 9 bars a suit where the cause of action is the same. 39 M.L.J. 412=60 I.C. 201, 1929 P. 685. Where the cause of action is different a second suit is maintainable. 5 R. 471=104 I.C. 313=1927 R. 281; 5 R. 785; 6 Luck. 106=130 I.C. 65=1930 O. 510. But when a suit in ejectment is dismissed under R. 8 a fresh suit cannot be instituted in a subsequent year. 4 O.W.N. 1202. See also 17 R.D. 199=14 L.R. 197 (Rev.). Where a previous suit for ejectment has been dismissed, a second suit is barred whether the previous suit has been withdrawn without permission to bring a fresh suit or for plaintiff's default if the defendant has put up a defence in the previous suit claiming rights of a permanent character no matter whether he is a tenant or *sir* or *shikms* tenant. 18 R.D. 1=15 L.R. 1 (Rev.). If a suit for ejectment, in which the defendant claims "special rights of a permanent character" is dismissed for default, no fresh suit will lie. But this applies only as against that defendant or those privy in estate to him. Where the defendant in the second suit claims under an invalid will and he was not a relative who

when the suit was called on for hearing, the Court shall make an order setting

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would have inherited the land, there is no privity of estate between him and the defendant in the first suit and the second suit for ejectment is not therefore barred. 14 L.R. 246 (Rev.)=17 R.1) 313. When the mortgagees fraudulently allow their suit for possession to be dismissed for default the attaching creditors are not bound by the dismissal. A fresh suit for possession by the attaching creditors who have purchased the mortgagees' rights in the meanwhile against the former defendants is not barred under R. 9. 1929 A. 861. Application under R. 9 must be disposed of on evidence and not on the ground that it is *bona fide* or otherwise. 42 I.C. 649=22 C.W.N. 671 Fresh suit, when barred. 45 A. 81=1923 A. 408 The rules or orders dealing with the case of the new appearance of a suitor do not apply to the situation arising from the death of suitor: 35 A. 331=40 L.A. 150 (P.C.), 6 O.W.N. 1002. The dismissal for default of a suit for partition does not bar a second suit for partition. 5 R. 785=49 M. 939=51 M.L.J. 254 See also 156 I.C. 169 An order dismissing an appeal for default is not a decree and therefore the decree of the Court of first instance is not superseded by it nor does it merge into it. [39 A. 13; 36 A. 350 (P.C.), Foll.] 39 A. 393. An order under R. 9 setting aside an order of dismissal for default made on the application of some of the plaintiffs may operate in favour of all of them, as the Court setting aside the order may direct. 55 I.C. 481=23 O.C. 18. Subsequent application for assessment of rent where the application failed for default, is not barred under S 158 of the Bengal Tenancy Act. 2 P. 192=4 Pat. L. T. 705 See also 8 Pat. L. T. 789=103 I.C. 615=1927 P. 375.

LIMITATION.—Application to restore suit dismissed for default must be made within 30 days of the order and the limitation does not cease to run by making an application for review (2 C.W.N. 318, Rel.) 1 Pat. L.J. 547=38 I.C. 53.

RESTORATION.—The law contemplates that when a suit is dismissed in default, it should be restored only when sufficient cause for the default is made but not otherwise. (43 M. 94, 1927 L. 622; 1930 N. 48 and 48 M.L.J. 152, Foll.) 141 I.C. 188=1933 L. 169 Where an application to set aside an *ex parte* decree is dismissed for default, the Court has inherent power to deal with an application to set aside the above order of dismissal and for restoration of the previous application 1933 R. 406 But the Court has no inherent power to restore an application to restore a suit after that application was itself time barred. The Court has no right to interfere to override a lawful bar of limitation. 143 I.C. 24=1933 M. 258=65 M.L.J. 193. See also 37 L.W. 48. The law contemplates that when a suit is dismissed in default, it should be restored only when sufficient cause for the default is made out but not otherwise. 141 I.C. 188=1933 L. 169. A Court can under its

inherent powers restore a suit dismissed for default of appearance on a ground other than sufficient cause for non-appearance. 34 A. 426, 44 B. 82=53 I.C. 252; 20 S.L.R. 266; 99 I.C. 151=1927 R. 58. See *contra* 103 I.C. 425=1927 L. 623; 1930 N. 48; 1930 R. 65. Dismissal of suit for non payment of deficient Court-fee is one under O. 7, R. 11 and not under O. 9, R. 8; and so second suit is not barred under this rule 133 I.C. 449 Appearing in Court on the same day after the case has been disposed of *ex parte* cannot entitle a party to restoration 103 I.C. 129=1927 S. 223. See also 100 I.C. 313, 40 C.W.N. 1390, 1935 C. 764. There is no rule that enables the Court to restore an application made under R. 9 which has been dismissed for want of prosecution. Even S. 151 does not apply in such a case 1923 B. 386 Where the Court found as a fact that the plaintiff had undergone a serious operation and was unfit to attend the Court when the suit was posted but dismissed his application for restoration on the ground that there was no hurry for the operation and that he could have waited some time longer, *held*, the Court had approached the case from a mistaken point of view; the only question which should have been decided was whether plaintiff's inability to attend was 'sufficient cause' and that the suit should have been restored. 148 I.C. 329 (2). Where the plaintiff exonerates certain defendants from liability and the suit is subsequently dismissed for default, it cannot be restored as against the exonerated defendants. 25 O.C. 67=1922 O. 160 Subsequent suit on a different cause of action is not barred. 6 Luck. 106=130 I.C. 65. A difference in the mode of relief claimed does not affect the identity of the cause of action 15 C. 422 (P.C.); 96 I.C. 287=1926 L. 562 The dismissal of a suit for redemption does not bar subsequent suit for possession 10 B. 28.

SUFFICIENT CAUSE.—No rigid rule can be laid down that in all cases where a party arrives late in Court and finds his suit dismissed, he is entitled to have as of course his suit restored on payment of such costs as may be incurred by reason of his default. Each case must be dealt with on its merits bearing in mind that O. 9, R. 9 requires that "sufficient cause" be shown and that the dismissal of a suit for non-appearance of the plaintiff is a heavy penalty. What is "sufficient cause" in each case must quite obviously depend upon the particular facts 158 I.C. 942=1935 S. 198. A *bona fide* mistake which is not unreasonable amounts to sufficient cause 3 Bom. H.C.R. 60. Dismissal of suit under R. 8 precludes those claiming through the plaintiff from bringing a fresh suit 9 P. 447=1929 P. 685 Whether absence of counsel amounts to sufficient cause, see 7 A. 542; 100 I.C. 313, 100 I.C. 793, 6 R. 471=1927 R. 281; 9 L.L.J. 80=101 I.C. 444; 101 I.C. 880=1927 O. 211 Minority is not in itself "sufficient cause" for restoration under R. 9 (1), unless the guardian has been guilty of laches or gross neglect. The Court

aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

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is bound to enquire into the question (26 M. 599; 30 M. 274, Foll.; 24 M.L.J. 235 (Dist.) 25 I.C. 450=27 M.L.J. 167 Gross negligence on the part of a next friend in the conduct of a suit prevents the effect of the bar contained in the rule 23 C 8 See also 24 B 547 at 552, 19 B. 571 Where a suit by a minor represented by a guardian is dismissed for default and a petition is put in to restore the suit to file, the suit has to be restored to file whether or not the guardian had sufficient reasons for his non-appearance. 155 I.C. 575=41 L.W. 117=1935 Mad. 196 Where a minor's suit is dismissed for default owing to the neglect of his next friend who represents him, such dismissal can be set aside under O. 9, R. 9, C. P. Code, if the absence of the guardian is *bona fide*. There must be some limitation to this rule, where it is shown that the guardian absents himself deliberately in pursuance of a plan in order to obstruct a litigation or where the absence of the guardian is not *bona fide* 58 M. 929=41 L.W. 649=1935 M. 565=68 M.L.J. 515 Illness of a brother was held not sufficient cause to set aside a dismissal for default. 2 P 784. Non-appearance on account of missing of train 162 I.C. 842=1936 R. 204. Where a party's agent attended Court and after disposing of some work went away under a *bona fide* belief that he had no more cases in the Court and where his suit was dismissed for non-appearance, such *bona fide* mistake would amount to "sufficient cause" 1929 R. 224 "Sufficient cause"—Pleader sitting in the next room not hearing call. 102 I.C. 416=1927 S. 228 See also 117 I.C. 382, 10 L. 570=114 I.C. 76 Appearance of counsel two minutes late 103 I.C. 313 Late arrival of train 98 I.C. 868=1927 L. 40 Counsel engaged but remaining absent—Case should be restored. 95 I.C. 260=1926 N. 409 Each case has to be decided on its own facts but the exercise of discretion should not be divorced from equitable considerations arising from those facts The pleaders are sometimes busy elsewhere and if the suit is dismissed in the meantime the rule as to restoration should not be so rigorously enforced as to sacrifice the ends of justice 1932 A.L.J. 480=1932 A. 450 Where the plaintiff was doing his best and acting very strenuously in collecting his witnesses and producing them in Court on the morning of the date of hearing but nevertheless was an hour too late, *held*, that the Court was not debarred from giving him his remedy when in a wrong-headed and muddle-headed way he was doing his best to have his witnesses before the Court. 56 C.L.J. 12 Illness of plaintiff is a sufficient cause. 95 I.C. 240 (1)=1926 L. 541. Date of hearing declared holiday by Government notification. 14 N.L.J. 147 An appli-

cation under R. 9 should not be dismissed *in limine* 106 I.C. 821 Few minutes' delay due to plaintiff's going to call his pleader is sufficient cause 96 I.C. 821=1926 L. 650 (2). See also 91 I.C. 211 (1)=23 L.W. 430, 96 I.C. 402=8 L.L.J. 422. Plaintiff's delay on the way to Court, due to a puncture of the tyre of his motor-car, is sufficient cause under O. 9, R. 9, C. P. Code. 150 I.C. 735=1934 L. 416. Where the case had been eight times postponed to suit the convenience of the Court and on the final date fixed for hearing, the plaintiff was unavoidably absent, but there was nothing to suggest he had any intention of dropping his suit, *held*, that there was sufficient cause for restoring the suit 14 L. R. 214 (Rev.)=17 R.D. 346. On the day fixed for hearing of a suit, plaintiff who was a *pardanashin* lady was not present when the case was called. Her "pairokar" who was present in Court went to fetch the plaintiff's counsel as soon as it was called and the latter arrived in about five minutes and found that the suit had been dismissed for default. The dismissal was at an early hour (at 11 A.M.). *Held*, there was sufficient cause for setting aside the dismissal for default, equity was on the side of *pardanashin* lady who was dependent on the efficient discharge of their duties by her "pairokar" and counsel 152 I.C. 110=1934 O. 491.

PRACTICE AND PROCEDURE.—When a suit is dismissed in default it cannot be restored until and unless a valid cause is established or non-service of the notice is proved. 158 I.C. 922=1935 Pesh. 145 Before dismissing an application for restoration of suit, Court should give plaintiff an opportunity to prove the allegations contained in the petition. 33 P.L.R. 804. An application under R. 9 for the restoration of a case dismissed for default, made on the same date as the dismissal and within a very short time of the dismissal ought not to be summarily rejected by the Court on the ground that it is not accompanied by an affidavit. Neither R. 9 nor any rule having the force of law prescribes or requires an affidavit Applications under the rule are not to be disposed of summarily and it is the duty of the Court to give the applicant an opportunity to remove any doubts in the mind of the Court The hasty rejection of applications for restoration merely increases the work of the Court in the long run instead of clearing the file of the Court 1937 R.D. 7. Where notice of hearing issued to the plaintiffs was not served and the notice issued to their counsel was tendered to him but he declined to accept it on the ground that he was no longer representing them and no further steps were taken to have the party served and the Court held on the date fixed for hearing that counsel was entitled to withdraw and dismissed the

Loc Ams—[Bombay] R. 9 The following shall be added as sub-rule (3).—

"(3) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule."

[Calcutta] O. 9, R. 9 Re-number sub-rule (2), R. 9; O. 9 as sub-rule (3) and insert therein after the words "notice of the application" the words "with a copy thereof (or concise statement as the case may be)"

Insert the following as sub-rule (2), R. 9, *ibid*:—

The plaintiff shall, for service on the opposite parties present along with his application under this rule either—

(1) as many copies thereof on plain paper as there are opposite parties, or,

(2) if the Court by reason of the length of the application or the number of opposite parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements.

[Lahore] To O. 9, R. 9 (1), the following proviso shall be added:—

"Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage although a former suit may have been dismissed for default."

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Suit, *held*, that the dismissal was erroneous and that the party should not be penalized for the default of the counsel. 146 I.C. 944=1934 L. 91. On a day to which the case was adjourned for plaintiff's reply, the plaintiff's pleader filed a written reply and an application for amendment. The Court accepted the same, but wanted the pleader to make some further statements. The pleader being not properly instructed was unable to make any statement. The Court, thereupon holding the plaintiff absent, dismissed the plaintiff's suit. The case was however restored on application under R. 9. The defendant came up in revision. *Held*, that the inability of the pleader to answer further questions arising out of the reply did not constitute either his withdrawal from the suit or non-appearance on behalf of the plaintiff. The Court ought to have proceeded under O. 10, R. 4 by adjourning the case to a suitable date and calling upon the plaintiff to appear in person on such date for answering material questions with reference to his written reply and the application for amendment of the plaint. [1925 M. 21 and 34 C. 403 (F. B.), Dist.] 149 I.C. 881=1934 N. 101.

REVIEW—Plaintiff is entitled to apply for review of judgment when his suit is dismissed for default and he has not applied under R. 9 to set aside the order. (26 C. 598; 16 C.W.N. 643, Foll.) 37 M.L.J. 59=50 I.C. 327; 20 S.L.R. 266.

REVISION—A revision lies against an order re-admitting a suit dismissed for default. 29 I.C. 1004. See also 132 I.C. 431=1931 A.L.J. 962=1931 A. 452. R. 9 explicitly permits the plaintiff to apply for restoration of a dismissed petition. That being so, he has necessarily the right to question the correctness of the order on it in appeal and on revision. It may be that there are no adequate grounds for interference in revision. But the fact that an appeal lies against the decree in the suit is no bar to the maintainability of the revision petition. 40 L.W. 774=1934 M. 669=67 M.L.J. 485. An application in revision against an order setting aside an *ex parte* decree and

for restoration of the suit under R. 9 cannot be entertained for the simple reason that the validity of such an order can be attacked under S. 105 in an appeal from the final decree passed in the suit. 143 I.C. 222=1933 O. 331. See also 146 I.C. 750=1933 A. 539. Where pending a revision petition against an interlocutory matter, the suit was dismissed for default and then restored, the interlocutory order is also restored, and the revision petition is competent. It is different in a case where the suit is dismissed by the first Court and is decreed on appeal. The appellate decree does not revive the interlocutory orders which ceased to be effective on the dismissal of the suit by the first Court. (53 M. 334, Dist.) 38 L.W. 887=65 M.L.J. 844. Decision on merits instead of dismissal under the rule—Revision. See 4 O.W.N. 644. But an appellate or revisional authority should not lightly interfere with an order of restoration. 17 M.L.J. 225. See also 46 C.L.J. 182. Application under R. 9—Extension of time not known to law.—Illegality—Interference in revision. 52 C.L.J. 23.

APPEAL—No appeal lies from an order rejecting an application to set aside the dismissal of an application for restoration of a suit dismissed for default. 139 I.C. 296=1932 N. 101. The provisions of R. 9 apply to probate proceedings, and an appeal lies from an order refusing to set aside a dismissal in default of an application for grant of probate. 164 I.C. 334=38 P.L.R. 263=1936 L. 712. See also 38 P.L.R. 973=1936 L. 863. 161 I.C. 840=1936 A.L.J. 305=1936 A. 737. A suit for profits against the lambardar was adjourned on several occasions. On one of such adjourned hearings the Assistant Collector dismissed the suit for "want of prosecution." The Assistant Collector did not make any reference in that order to the evidence that had already been produced in the case nor did he deal with the validity or otherwise of the defence raised by the contesting defendants. *Held*, that such a decision could not be characterised as a decision on the merits. The order dismissing the suit therefore did not come within the purview of

10. [S. 105] Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

Procedure in case of non-attendance of one or more of several plaintiffs

Where there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

12. [S. 107] Where

Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person

a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

Notes.

O. 17, R. 3 but was one under O. 9, R. 8 of the Code, and could be set aside by the Assistant Collector under O. 9, R. 9 or under the inherent jurisdiction vested in Courts by S. 151. In either case the order was not appealable. 143 I.C. 307=1932 A.L.J. 1100=1933 A. 118. Although a person against whom an *ex parte* decree has been made is entitled to appeal against it instead of resorting to the procedure prescribed by O. 9, R. 13, yet his contentions on appeal must be limited either to questions of law or to such arguments as arise upon the record as it stood when the *ex parte* decree was passed. He is not entitled to ask the appellate Court to accept the appeal on ground which could be urged in an application under O. 9, R. 13 and to remand the suit for re-hearing. (12 O.C. 25, Foll.) 11 O.W.N. 256=1934 O. 131 (1). Order refusing to set aside the dismissal for default 100 I.C. 343=45 C.L.J. 60. See also 143 I.C. 307=1933 A.L.J. 1100=1933 A. 118, 51 B. 67=99 I.C. 38=1927 B. 1. Conditional order—Order to restore on payment of costs—Appeal lies 26 I.C. 895=12 A.L.J. 1270; 49 C. 616. See also 151 I.C. 402=1934 R. 192; 1932 A. 595.

O. 9, R. 9 and S. 141.—An application lies under O. 9, R. 9, read with S. 141, for the restoration of a previous application under that order and rule which has been dismissed for default (1923 O. 146, Foll.) 168 I.C. 47=1937 O.W.N. 372.

O. 9, R. 9 and S. 148.—Where a Court passes an order for restoration of a suit dismissed for default on condition of payment of costs to the opposite party within a time fixed by the order and directs that in case of default the application for restoration is to stand as dismissed, the order is legal and valid. The effect of the order on the expiry of the time fixed for the payment of the costs is that the application stands as dismissed, and the Court no longer remains seized of the application but becomes *functus officio*, and has, therefore, no power to extend the time for payment of costs 163 I.C. 554=1936 A.L.J. 566=1936 A. 477.

O. 9, R. 9 and O. 43, R. 1 (c).—Where on dismissal of a suit for default of appearance, the plaintiff applied for restoration of the suit, and his application for restoration was dismissed for non-prosecution, the order of dismissal of the application is one under O. 9, R. 9, and an appeal therefore lies against that order to the District Judge under O. 43, R. 1 (c). There is no warrant for confining the operation of R. 9 of O. 9 to an application dismissed on the merits 161 I.C. 840=1936 A.L.J. 305=1936 A. 737.

O. 9, R. 12.—The dismissal of a suit under this rule is a highly penal matter, and ought not to be done unless after a distinct order to attend, he has deliberately disobeyed the order 17 W.R. 141. See also 4 P.L.J. 152, 6 L.W. 337. A defendant, a minor represented by a guardian, is a party to the suit whose production in Court can be compelled by a direction to his guardian. (23 M.L.J. 676, Dist.) 55 I.C. 945=11 L.W. 289. The presence of a pleader or vakil when a plaintiff has been directed to appear in person does not amount to an appearance of the party 137 I.C. 792=1932 M. 414. The Court is not bound to have recourse to all the processes prescribed by law for compelling the attendance of the defendant as a witness. 5 C. 353. See also 8 A. 20. The non-filing of a written statement does not justify the Court in proceeding *ex parte*. 2 M.H.C.R. 311. If a defendant appears and files a written statement he ought not to be placed *ex parte*. 3 M. 264. On an application by the plaintiff under O. 3, R. 1 to have the first defendant examined as *his witness*, the Court directed the first defendant to appear. The first defendant failed to appear on the day fixed and thereupon the Court, purporting to proceed under O. 9, R. 12, struck out the defence and gave a decree to the plaintiff *Held*, that (i) striking off of the defence was a highly penal procedure and the order, disobedience to which is made the ground for doing so, should be free from any possible ambiguity, (ii) the application, though under O. 3, R. 1, was made to have the defendant examined as *witness* for plaintiff, and disobedience to the

Setting aside Decrees ex parte.

13. [S. 108] In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly

Setting aside decree *ex parte* against defendant.

served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting

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order thereon was only disobedience to a witness summons which did not justify the striking out of the defence, (iii) the disobedience to the order of Court could not be made to prejudice of the other minor defendants (23 M.L.J. 676, Ref.) 146 I.C. 536=1933 M. 821=65 M.L.J. 734

O. 9, R. 13 SCOP.—Applicability to an order under S. 53, Provincial Insolvency Act. 103 I.C. 381=1927 M. 879. See also 1936 M. 161=70 M.L.J. 90. O. 9, R. 13 deals only with default in appearance and not in the doing of any act ordered by the Court. 105 I.C. 842=1928 N. 75. Rule applies to every case in which a decree is passed *ex parte* against defendant either by reason of his non-appearance at the first hearing, or by reason of his non-appearance at an adjourned hearing 23 C. 738 (F.B.), 20 B. 380. The provisions of O. 9, C.P. Code, by themselves do not apply to case in which the plaintiff or the defendant has already appeared but has failed to appear at an adjourned hearing of the case. For a such case the procedure is laid down in O. 17, which deals with adjournments 1935 A.L.J. 209=1935 A.W.R. 90. See also 37 C.W.N. 1045. As to the meaning of the term "*ex parte* decree" see 41 L.W. 196=68 M.L.J. 123. The rule contemplates the case of a Court setting aside its own decree, and not that of another and higher tribunal. 4 C.W.N. 456. R. 13 is an enabling one which prescribes what is to be done in the ordinary course to get an *ex parte* decree set aside. 42 M.L.J. 344=1922 M. 10. The word "appearance" implies that the party is present at the trial either in person or through pleader for the purpose of conducting the case. 1922 P. 485=1 P. 188. See also 59 C. 456 under R. 9. The mere sitting in Court of the pleader for the party having no instructions but to ask for time is not an appearance. 3 P.L.J. 481=46 I.C. 488. Where the pleader for the defendants applied for examination of witnesses on commission, and on its rejection withdrew and the case proceeded on merits, decreeing the claim against the defendants, held that the suit could not be said to be decided *ex parte*. 133 I.C. 129=1931 A.L.J. 377=1931 A. 294=53 A. 612 (F.B.) Where the plaintiff who takes time to produce evidence fails to appear on the date fixed for hearing, the proper course is to pass an order of dismissal for default of appearance. In such a case even if the Court purports to deliver judgment on the merits, the order should be treated as an *ex parte* decree for setting aside which the procedure mentioned in the rule will apply 138 I.C. 200=1932 L. 477. The

words "was prevented by any sufficient cause from appearing" must be liberally construed to enable the Court to exercise powers *ex debito justitiæ*. 101 I.C. 632 (2)=1927 O. 173. See also 32 C.W.N. 10. The "sufficient cause" referred to in R. 13 may be the suppression of the summons by means or fraud so as to prevent the defendant from having any knowledge of the suit against him and thus to enable the plaintiff to obtain an *ex parte* decree 10 P. 516=132 I.C. 355 (F.B.). Where the defendant's absence was not intentional, but was due to absence of knowledge of the date fixed and the counsel *bona fide* believed that the defendant would be personally served and would give him fresh instructions there was sufficient cause for defendant's non-appearance 1933 L. 114=144 I.C. 1021. *Ex parte* decree—Defendants appearing late on the date of hearing and applying for restoration—Court whether bound to restore—Exercise of discretion—Interference by High Court in revision. 31 Bom. L.R. 468=119 I.C. 187=1929 B. 250. Counsel engaged before another Court—Party being Pardanashin lady—Application made without delay—Restoration of suit proper. 31 P.L.R. 550 (2). A service of summons on the *karta* is not a service on other members of the family who are impleaded in the suit as they may have their own defence to make 166 I.C. 635=18 Pat. L. T. 72=1937 P. 17. The service of summons against a major defendant upon a person who is described to be his guardian cannot be said to be a proper service on the defendant though the supposed guardian may be his brother 166 I.C. 635=18 Pat. L. T. 72=1937 P. 17. "Duly served"—Summons by registered post returned as "refused"—Effect of—Application to set aside *ex parte* decree on the ground of non service—Onus of proof. 39 C.W.N. 934. See also 34 C.W.N. 1119. The word "duly" does not mean personally. 102 I.C. 243=1927 M. 507=52 M.L.J. 477. The mere fact that the defendant knew that a suit had been instituted would not dispense with the necessity of proper service of summons 135 I.C. 110=1932 P. 150. See also 43 C. 447=23 C.L.J. 183. Appearance before registration of suit in a proceeding for appointing a guardian *ad litem* does not dispense with service of summons. 35 A. 163=18 I.C. 711. Where on the death of a defendant in a pending suit, summonses were issued against his three sons, the first described as the guardian of the other two and the first son returned the summons with the endorsement that he could not accept service as there was no separate summons in his own name and he

aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

Notes.

was not the guardian of his brothers but the Court nevertheless passed an *ex parte* decree, held, that the summons was not 'duly served' and that the *ex parte* decree should therefore be set aside 12 Pat L T 911=1932 P 150=135 I C 110 The defendant can show that he has not been duly served in the sense that knowledge of his opponent's claim has been brought home to him, even though the formalities of substituted service have been carried through 134 I C 1202=1931 M 813=6 M L J 920. Where the first summons was duly served and it appeared that the defendant intentionally neglected to ascertain the dates of hearing after the suit was transferred, the *ex parte* order could not be set aside for want of due service. 139 I C 354=1932 L 539. But where a suit is transferred without notice to defendant, the *ex parte* decree must be set aside. 1923 L 444 Mere misdescription of plaintiff in an application under this rule is not reason for refusal to hear the application on merits 23 N L R 71=102 I C 24=1927 N 251 Substituted service.—Several modes prescribed by Court.—Plaintiff's failure to comply with all the modes is sufficient cause for setting aside *ex parte* decree. 1930 L 560=128 I C 55. O. 9, R. 13 applies to proceedings under O 34, R 6 124 I C 729=1930 A. 841=52 A 839. Before the falsity of the claim on which an *ex parte* decree is based can be gone into in a fresh suit filed for the purpose of getting it vacated, it must be shown that the decree was obtained from the Court either by collusion of both parties, or by fraud committed by the plaintiff which prevented the defendant from appearing in the first suit. But where the defendant has been duly served with the summons and has failed to appear for no fault of the plaintiff, it is not open to him to file a fresh suit and challenge the decree on the ground of the falsity of the claim on which it is based His remedy if any in such a case is to apply in the same proceedings to have the decree set aside within the time allowed by law. If he satisfies the Court that he had sufficient reason for not attending the Court when the decree was passed he may obtain relief but not otherwise 30 S. L. R. 405=166 I C 906=1937 S. 18 See also 39 C.W.N. 894.

APPLICABILITY TO ORDERS IN EXECUTION AND OTHER PROCEEDINGS.—O 9 applies only to suits and not to execution proceedings An *ex parte* order under S 47 may be a decree by virtue of S 2 (2) but it is not a decree in a suit. 1931 M. 656=61 M.L.J. 348 (F B) (Overruling 37 M 462 and approving 1926 M.W.N. 245) An application to have an *ex parte* order in execution proceedings set

aside is not maintainable under O. 9, R. 13 and S 141 does not operate to make O 9, R. 13 applicable to execution proceedings An application, however, to have the *ex parte* order passed in execution proceedings set aside must at least be held to be entertainable in the discretion of the Court under its inherent powers. 1929 A 485=121 I C. 552 See also 13 L 761 Order 9, R 13 does not apply to delivery proceedings under O 21, Rr. 97 to 101 as they are execution proceedings 92 I C. 533=50 M.L.J 200=1924 M 412, 1929 A 485. As to the application to decrees passed under Sch II para. 21 (2) see 12 I C 927

INHERENT POWERS.—Inherent powers of Court under S 151 cannot be invoked to set aside an *ex parte* decree long after the limitation prescribed by Art 164 has passed 1 P. 277=65 I C 341; 53 I C. 147, 78 I.C. 660=1923 L. 147 (1). [But see also next case.] There is no inherent power in a Court apart from O 9, R 13 to set aside an *ex parte* decree on an application made for that purpose The scope of the inherent power of a Court pointed out. See 43 M 94=37 M L J. 599 (F B) (26 M. 599, Overr., 24 M L J 235, Affirm.) See also 40 L. W. 665=1934 M W N. 1312=1934 M. 699 An order refusing exercise of such powers by Court is not appealable 1 P 277=65 I C 341

COURT TO WHICH APPLICATION IS TO BE MADE.—Where there is transfer of territorial jurisdiction after decree, the new Court can entertain application to set aside *ex parte* decree 42 M.L.J 344 Though an appeal is pending against an *ex parte* decree, an application to set it aside should be made to the Court which passed the decree and not to the Court hearing the appeal 44 M. 731=41 M L J. 90 (30 M. 535 Dist., 27 M 602; 39 A. 13 and 38 C 394, Foll) A Court passing an *ex parte* decree is competent to deal with an application to set aside such a decree even if an appeal had been subsequently preferred. (12 C.W.N. 885; 30 M 535; 13 C.W.N. 846; 38 C. 394, Foll) 26 I C 412, or even after an appeal therefrom has been dismissed. 103 I.C. 146=1927 M 722 (2)=53 M L J 110.

DECREE WHEN EX PARTE.—The question whether a particular decree is or is not *ex parte* is a mixed question of law and fact The Court must examine the records of the case and examine the circumstances under which the decree was passed, and if it is found that a particular defendant was not present at the time of hearing of suit, the decree must be taken to be *ex parte* against him, in spite of the fact that decree as drawn up mentions his presence The recital in the

Loc Am.—[Allahabad] *Ida* the following further proviso—

Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim

[Bombay.] Rule 13. This shall be numbered as R. (1) and the following sub-rule shall be added to it, namely—“The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications made under this rule”

[Calcutta.] O. 9, R. 13. Re-number R. 13, O. 9, as R. 13 (1) and add the following as R. 13 (2).—

(2) The defendant shall, for service on the Opposite Party present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are Opposite Parties, or

(ii) if the Court by reason of the length of the application or the number of Opposite Parties or for any other sufficient reason grants permission in this behalf, a like number of concise statements

Notes.

records is not conclusive. 166 I.C. 635=18 Pat. L. T. 72=1937 P. 17. “*Ex parte*” decree—Meaning of—Appearance by pleader—Pleader reporting no instructions after commencement of hearing—Decree—Remedy is not application but appeal 58 M. 817=156 I.C. 403=41 L.W. 196=1935 M. 210=68 M.L.J. 123 A decree passed owing to defendant's default of appearance in spite of the Court's direction to him to appear on that day, amounts to an *ex parte* decree. 27 I.C. 882=2 L.W. 105. There can be no *ex parte* proceedings against a defendant who has entered appearance and filed his defence. 45 A. 618=21 A.L.J. 495 An application to set aside a final decree in a mortgage suit passed *ex parte* is maintainable under O. 9, R. 13 48 I.C. 71=35 M.L.J. 375. See also 51 A. 634=1929 A. 279. A decree based on a compromise cannot be treated as an *ex parte* decree and consequently O. 9, R. 13 does not apply 27 I.C. 227=19 C.W.N. 118 *Ex parte* decree cannot be re-opened except upon ground of fraud which must be alleged in particular form 58 I.C. 317

EX PARTE DECREE IN SMALL CAUSE SUIT—SETTING ASIDE—PROCEDURE.—The Code governs the procedure of Small Cause Courts to some extent, and O. 9, R. 13 applies to such Courts. When a Small Cause Court sets aside an *ex parte* decree, it is really under O. 9, R. 13. S. 17 of the Provincial Small Cause Courts Act itself makes the procedure under the Code applicable. The Provincial Small Cause Courts Act is supplemental to the Code. The proviso to S. 17 of the former Act does not add to the section but only cuts down the very wide discretion which Courts have under O. 9, R. 13, in imposing terms on the petitioner 58 M. 687=41 L.W. 482=1935 M. 380=68 M.L.J. 466 (F.B.).

CONDITIONS FOR SETTING ASIDE—Conditional order, when proper. Where there has been no default on the part of the party asking for re-hearing, e.g., where he has not been duly served, it is inequitable for the Court to impose conditions 57 I.C. 300=5 Pat. L.J. 420. A Court should not as a condition precedent to setting aside an *ex parte* decree require the deposit of a large sum of money 74 I.C. 86=1924 O. 229. An

order setting aside an *ex parte* decree under O. 9, R. 13 is not *ultra vires* if it does not impose any conditions as to costs 32 I.C. 984. Where an *ex parte* decree is set aside on condition of defendant's furnishing security the Court must adjourn the case in order to take security and must pass final orders only after the party has tendered or failed to furnish security 43 I.C. 1=6 L.W. 767. Where an *ex parte* decree is set aside, the defendant is entitled to be restored to his original position under S. 144 72 I.C. 912=2 P. 277

WHO CAN APPLY—The words “*against a defendant*” do not necessarily imply that the only defendant against whom relief has been in terms granted by the decree can apply for an order to set it aside. They are comprehensive enough to include a case in which the decree adversely affects the rights of a contesting defendant. Where therefore in a suit the real question is whether the plaintiff or the contesting defendants are really entitled to the claim in suit, and an *ex parte* decree is passed the contesting defendants are competent to apply under O. 9, R. 13. 147 I.C. 1186=1934 A. 163=56 A. 578. Heirs of a defendant against whom an *ex parte* decree is passed before his death have a right to apply to set aside the *ex parte* decree. (27 A. 274, Doubtful.) 1933 A. 80 It is competent to executor of a defendant since deceased, to apply to set aside an *ex parte* decree against him. 38 M. 442. A Court has no jurisdiction to set aside an order setting aside an *ex parte* decree at the instance of a person not a party to the suit 61 I.C. 534. A Court has no jurisdiction to set aside an *ex parte* decree at the instance of a person not affected by the decision, who has been expressly exempted from the decree 61 I.C. 484. Application by Official Receiver—Dismissal—Separate suit by creditors to declare decree is not binding—Maintainability. See 1936 M.W.N. 79=1936 M. 161=70 M.L.J. 90

PROCEDURE.—Under O. 9, R. 13, it is necessary that the Court should find that the defendants were prevented by any sufficient cause from appearing when the suit was called on for hearing 155 I.C. 249 (1)=1935 A.L.J. 377=1935 A. 565. Where a party seeks to set aside an order under O. 17,

[Lahore] To sub-rule (1) the following further proviso shall be added:—

Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced

Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim

Explanation.—Where a summons has been served under O. 5, R. 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.

[Madras.] Make the following amendments to O. 9, R. 13.—

Notes.

R. 2, the proper course is to apply under O. 9, R. 13 and not under O. 47, R. 1 37 C.W.N. 1045. See also 1935 A.L.J. 209=1935 A. 90, 18 R.D. 421=15 L.R. 519 (Rev.), 40 L.W. 665=1934 M. 699 (Application under C.P. Code, O. 21, R. 58 dismissed for default.) Under O. 9, R. 13, it is clearly illegal for the Court to proceed with the suit on the same day on which it restored the suit to file 41 L.W. 117=1935 M. 196 Where a Court decides to set aside an *ex parte* decree under O. 9, R. 13, although it is not obligatory on the Court to state reasons, it is most desirable that it should state why it thinks the *ex parte* decree should be set aside 163 I.C. 732=1936 M. 524.

OMISSION TO NAME SOME DECREE-HOLDERS AS PARTIES—IF FATAL.—The Code contains no provision for naming the persons in whose favour an *ex parte* decree has been passed as parties in the application to set aside the *ex parte* decree. All that is necessary is an indication should be given in the application of the particulars of the suit in which the *ex parte* decree has been passed. The fact that the application omits to mention the names of some of the decree-holders or that notice of the application is served on them beyond the period of limitation prescribed for the application will not make the application defective or invalid 62 C. 1057=39 C.W.N. 863=1935 C. 506 See also 1937 P. 49

BURDEN OF PROOF.—Where a person applies to have an *ex parte* decree set aside, the onus is on such person to show affirmatively that the summons was not duly served or that he was prevented by sufficient cause from appearing when the suit was called on for hearing. 145 I.C. 370=1933 R. 156 Under O. 9, R. 13 it is for petitioners applying to have an *ex parte* decree set aside to satisfy the Court that the service was not duly effected. 1933 L. 288.

JURISDICTION.—Where the appellate Court has adjudicated regarding the rights and liabilities of the person against whom an *ex parte* decree has been passed, the *ex parte* decree against such person cannot be set aside by the trial Court, but where there has been no adjudication regarding the rights and liabilities of such person in the appellate Court, the trial Court is entitled to entertain an application for the setting aside of the *ex parte* decree against him. The fact that a person has been impleaded as a *pro forma* respondent in the appeal does not in any way affect the jurisdiction of the trial Court so far as the setting aside of the *ex*

parte decree against such person is concerned 35 P.L.R. 675=1934 L. 1016

REVIEW.—Application to set aside an *ex parte* decree cannot be altered to one for review by merely changing the description to avoid limitation. 57 I.C. 15.

LIMITATION.—Under O. 9, R. 13 as amended by the Madras High Court, though time can be extended still it should be extended on justifiable grounds. 42 M.L.J. 12=1922 M. 33. Except where there are special rules made by the High Court extending the provisions of S. 5 of the Limitation Act to applications for setting aside *ex parte* decree the Courts do not have the power to have recourse to the provisions of S. 5, or enlarge the period prescribed by Art. 164 by resorting to S. 151 of the Code. The Nagpur Judicial Commissioner's Court has not framed any rules under S. 122 extending the application of S. 5 of the Limitation Act to applications for setting aside *ex parte* decrees and so that Court has no such power. 144 I.C. 394=1934 N. 43. Justice, equity and good conscience cannot be invoked to overrule the law of limitation. Where on an application for setting aside an *ex parte* decree under O. 9, R. 13 on the ground that the applicant had not been properly served with summons, the opposite party contends that the application is barred by limitation, and the Court without touching on the question of limitation, passes an order setting aside the *ex parte* decree on the ground that it considers it justifiable in the interest of justice, equity and good conscience that the applicant should be given a chance to contest the suit, the order cannot be sustained. 1935 R. 466, Rel. on 164 I.C. 286=1936 R. 305.

GROUND FOR SETTING ASIDE—ILLUSTRATIVE CASES.—Where a summons is personally delivered to the defendant but the defendant refuses to sign the acknowledgment and no substituted service is effected, though there is irregularity in the service of the summons the *ex parte* decree passed cannot be set aside on that ground. 1933 A.L.J. 165=1933 A. 165 There is no *due service of summons* under O. 9, R. 13, where substituted service has been ordered by the Court and effected on a misrepresentation of facts. 152 I.C. 830=60 C.L.J. 106=38 C.W.N. 1066=1934 C. 745. Defendant's want of knowledge of the date of hearing, no specific date having been fixed is sufficient cause to set aside *ex parte* decree 144 I.C. 154=1933 A. 276. See also 147 I.C. 759. Notice of date of hearing directed to be but not served on defendant personally.

Re-number R. 13 as R. 13 (1)

Insert the following as proviso to sub-rule (1) of R. 13 of O. 9—

"Provided further that no Court shall set aside a decree passed *ex parte* merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

Add the following as sub-rule (2) to R. 13—

"(2) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

[Nagpur] Rule 13 Add the following as an additional proviso to R. 13—

"Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

Explanation.—Where a summons has been served under O. 5, R. 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule."

(Notifications Nos. 7390 and 7391, dated the 19th September, 1929)

Notes.

See 144 I.C. 1021=34 P.L.R. 911=1933 L. 114 Suit transferred to another Court after service of summons on defendant—*Ex parte* decree—Absence of notice of hearing in transferee Court—If ground for setting aside *ex parte* decree 1936 P. 490. Death of defendant's mother preventing appearance is sufficient cause. See 1933 A.L.J. 1289=1933 A. 601. See also defendant's illness 147 I.C. 1186=1934 A. 163. Due to hot weather, the Court sat from 6 A.M. to noon. But on the day in question, the parties waited till noon, the Judge did not turn up and the parties left. The Judge turned up at 2 P.M. Party and pleader were absent but the Court passed an *ex parte* decree. *Held*, that there was sufficient cause for setting aside the *ex parte* decree. 1933 A.L.J. 1298=1933 A. 652. As to non-service of summons on defendant owing to plaintiff giving a wrong address, see 60 C. 98=143 I.C. 710=1933 C. 274. See also 153 I.C. 80=37 P.L.R. 121=1935 L. 129. (Substituted service, order for, obtained by fraud practised on Court) The defendant was present in person in Court premises on the day of hearing. The suit was twice called and on both occasions, defendant asked for an adjournment as his Counsel was not available. On the second occasion the Counsel sent his clerk to ask the Court for consideration. *Held*, that the fault, if any, lay with the Counsel and not the defendant, and that there was sufficient ground for showing latitude to the respondent and for setting aside the *ex parte* decree. 11 R.D. 583=15 L.R. 687 (Rev.) If the minor defendants were not represented there is sufficient cause for their non appearance and the Court could set aside the *ex parte* decree. 21 A.L.J. 185=1923 A. 213. See *contra*, 66 I.C. 460 (N.); 49 A. 123 (F.B.) See also 4 O.W. N. 356=1927 O. 173. The mere absence of a guardian *ad litem* of a minor defendant is not by itself a sufficient cause for allowing an application under R. 13, when there is nothing to show that the guardian has betrayed the interests of the minor 44 L.W. 702=1936 M. 961=(1930) 1 M.L.J. 36. See also 166 I.C. 635=1937 P. 17. The default of a guardian *ad litem* who wrongfully allows a claim

against a minor defendant to be decreed *ex parte* constitutes sufficient cause for non-appearance within the meaning of R. 13. But where the minor defendant has no case to put forward and the guardian, realising that and exercising his judgment honestly and deliberately and in the interests of the minor, decides that no good purpose can be served by putting an appearance, there is no sufficient cause under the rule, so as to entitle the minor to apply to have the decree set aside. 58 M. 1045=41 L.W. 654=1935 M. 435=68 M.L.J. 693. *Ex parte* decree against minor defendants—Sufficient cause for setting aside—Not only gross negligence of guardian *ad litem*, but also prejudice to minor's interest. 32 L.W. 662=59 M.L.J. 918 Court is bound to decide whether summons was not duly served 1926 M. 558=94 I.C. 420 (1)=23 L.W. 319; 57 M. 1069=37 L.W. 653=1934 M. 428=66 M.L.J. 683. Where a suit by a minor represented by a guardian is dismissed for default and a petition is put in to restore the suit to file the suit has to be restored to file whether or not the guardian had sufficient reasons for his non-appearance. 44 L.W. 117=1935 M. 196. The trial Court cannot set aside an *ex parte* decree on grounds other than those mentioned in O. 9, R. 13. 24 L.W. 439=97 I.C. 936 (1). See also 1931 A.L.J. 377=1931 A. 294 (I.B.) *Ex parte* order cannot be set aside when no reason is given for non-appearance. 34 C.W.N. 419=1930 C. 488; 1930 R. 152 (2). A Court can restore a suit only when it is satisfied that defendant was prevented by sufficient cause from appearing 64 I.C. 965=1 Pat.L.T. 69 On an application to set aside an *ex parte* decree, the Court should give its finding on the question whether the defendant was prevented by any sufficient cause from appearance. In the absence of such a finding, the Court has no jurisdiction to set aside the *ex parte* decree. 1931 M.W. N. 239. Service on the son of pardanashin lady living in the same house is proper 94 I.C. 228=1926 C. 845. Application for time to compromise by both parties—Rejection and *ex parte* decree—Application to set aside—Defendants not ready owing to illness of one of them in charge of case—Dismissal

Rule 13 In R 13 of O. 9, for the words "he was prevented by any sufficient cause from appearing" the words "there was sufficient cause for his failure to appear" shall be substituted.

Rule 13 In R 13 of O. 9—

(a) Existing R 13 shall be re-numbered as sub-rule (1), and

(b) after sub-rule (1) so re-numbered the following shall be inserted as sub-rule (2), namely—

"(2) The provisions of S 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-rule (1)."

Notes.

not proper—*Ex parte* decree—to be set aside. 167 I C. 496=17 Pat L.T. 793=1937 P. 85

APPEAL.—Erroneous order accepting application to set aside *ex parte* decree—Appealability. 29 Bom L.R. 925. See also 149 I C. 777=1934 R 202. An order setting aside an *ex parte* decree is not appealable. 1931 A.L.J. 377=1931 A. 294 (F.B.). Where an application is made for re-opening a case decided *ex parte*, that application must either be allowed or disallowed. If it is allowed no appeal will lie. If it is disallowed an appeal will lie. When a conditional order, that the application to set aside an *ex parte* decree will be allowed if the defendant deposits the full decretal amount within 15 days, but if he fails it would be dismissed, is made and the condition is complied with, then the application is allowed and no appeal will lie. If the condition is not complied with, then it is open to the party concerned to ask for a final order dismissing the application, and then an appeal will lie. 1933 R. 63=144 I C 186. An appeal lies against an order dismissing for default an application to set aside *ex parte* decree. 36 I C 798. There is no warrant for limiting the right of appeal to the case where an application under O 9, R 13 is dismissed on the merits. 8 P. 533=117 I.C. 317=1929 P. 529 (2). Where an application to set aside an *ex parte* decree is dismissed for failure to pay process fee this is in substance a dismissal for default and an appeal lies from the order. 69 I.C. 713. See also 51 B. 67=28 Bom L.R. 1245; 1926 A. 142 (2)=48 A. 199; 1926 O. 118=90 I.C. 745. No appeal lies against an order refusing to set aside an *ex parte* decree made in a reference under the Land Acquisition Act. 94 I.C. 330=1926 C 816. See also 36 C.W.N. 352. (39 C 393 and 54 C. 312, Foll.) *Ex parte* order set aside on condition of deposit of costs—No cost deposited—Suit decided—Order under O 17, R 3 and not under O. 9, R. 6—No appeal lay 1930 O. 351. An order under the rule setting aside an *ex parte* decree against some of the defendants can be attacked in appeal. 9 P. 102=1930 P. 266

CONDITIONAL ORDER SETTING ASIDE EX PARTE DECREE—NO APPEAL—LETTERS PATENT.—An order was passed directing that the *ex parte* decree should be set aside on certain terms, *vis.*, that the defendant would pay into Court within ten days a certain sum plus certain costs. Before the ten days had completely elapsed, an appeal was filed against the order. *Held*, that the order was not a judgment within cl. (13), Letters Patent, and that no

appeal lay from it. (2 R 469, Rel. on; 6 R 703 and 35 M. 1, Rel.) 151 I.C. 402=1934 R. 192. See also 26 I C. 895=12 A.L.J. 1270; 1932 A. 595.

REVISION.—The High Court is entitled to interfere in revision where the order setting aside an *ex parte* decree has been passed in defiance of the provisions of this rule. 1931 A.L.J. 377=1931 A. 294 (F.B.). See also 1934 A L.J. 552=148 I.C. 893=1934 A. 134.

POWERS OF APPELLATE COURT.—An appellate Court can set aside an *ex parte* order passed by the original Court against some of the defendants when an appeal by the other defendants is pending before it. (30 M. 535; 32 M. 416, Foll.) 29 I.C. 458=2 L.W. 529. See also 42 M.L.J. 12=1922 M. 33. After an appeal has been filed against a decree of the lower Court, the power to set aside the original decree becomes vested in the appellate Court. 30 M. 535. When a decree of the lower Court is superseded by a decree of a superior Court, the former cannot alter or amend it, on the application of defendants against whom the *ex parte* decree was passed. 37 A. 208=13 A.L.J. 283, but see 53 M.L.J. 110, 1932 A.L.J. 257=1932 A. 340. Where a defendant against whom an *ex parte* decree is passed is not joined as a party to the appeal preferred by other parties to the suit and the Appellate Court does not adjudicate upon his case the *ex parte* decree against him does not merge in the decree of the Court of Appeal so as to preclude him from applying under O 9, R. 13 to the Court which passed the *ex parte* decree to set aside the decree. 36 C.W.N. 747=1932 C. 773. Appellate Court cannot go beyond R. 13. 48 A. 165=1925 A. 610. Powers of appellate Court. See 1925 P. 534=7 P.L.T. 381. Power of appellate Court to go into sufficiency of order for substituted service. 52 M.L.J. 477. In an appeal from an *ex parte* decree the only question with which an appellate Court is concerned is ordinarily whether the evidence in the record is sufficient to support the decree. In such an appeal it is however open to the Court to go into the question of an improper refusal by the Court of an application for time. 10 P.L.T. 589=1929 P. 609. Application to set aside *ex parte* decree—Dismissal of—Non-preferring of appeal—Final appeal against decree—Raising the same points—Validity. See 100 I.C. 553 (1).

EVIDENCE.—Where a summons has not been personally served, but served on the gumasta, the plaintiff has to prove that such service was valid since it was not so *prima facie*. 1913 M.W.N. 1028=21 I.C. 922. Burden of proof of sufficiency of service—Defective

[Oudh.] In R. 13 between the words "was not duly served or that" and the words "he was not prevented by any sufficient cause", insert the words "notwithstanding due service of the summons", and at the end of the rule add the following proviso—

"Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim

Notes.

report of the process-server. 23 N.L.R. 166. It is for the petitioners applying to have an *ex parte* decree set aside to satisfy the Court that the service was not duly effected. 1933 L. 288. In the case of a substituted service of summons the Court is not bound by the return of the process-server alone, but can declare the service good from other circumstances of the case. 23 I.C. 14=26 M.L.J. 368. Under this rule the question to be considered is whether the defendant honestly intended to be present at the hearing of the suit and did his best to do so. 43 M.L.J. 632=46 M. 60. See also 5 R. 80=102 I.C. 379=1927 R. 150.

OTHER REMEDIES.—Difference in procedure in an application under the section and appeal pointed out 32 C.W.N. 101. The person against whom an *ex parte* decree is passed can apply to have it set aside under O. 9, R. 13, or he can appeal from the decree; but he cannot start a fresh proceeding to set aside the decree. 57 I.C. 551=22 Bom.L.R. 798; 56 C. 21=1929 C. 322. To impeach an *ex parte* decree on grounds other than fraud, the proper remedy is by an application under O. 9, R. 13 or an application for review or an appeal to a superior Court. A separate suit to set aside the decree will not lie 1 L. 344=2 L.L.J. 622. A plaintiff whose application to set aside an *ex parte* decree has proved infructuous, can maintain a suit to set aside the decree on the ground of fraud or any other valid reason (28 C. 475; 29 C. 395, Rel.on) 15 C.L.J. 446=17 C.W.N. 219; 55 I.C. 412; 10 P. 516=1931 P. 204 (F.B.); 35 C.W.N. 303=1931 C. 619. See also 60 C. 98=1933 C. 274. A subsequent suit to set aside the decree apart from fraud is not maintainable 3 L.W. 522=36 I.C. 128. A separate suit to set aside an *ex parte* decree on ground of fraud will lie, even when an application for setting an *ex parte* decree has been dismissed 144 I.C. 1013=1933 R. 123. Suit to set aside *ex parte* decree on the ground of false claim and perjured evidence is not maintainable 97 I.C. 879=31 C.W.N. 258=1927 C. 84.

PROVISO.—An application under O. 9, R. 13 if granted will reopen the suit only as against the successful applicant and not against other defendants 9 I.C. 835=8 A.L.J. 364. *Ex parte* decree against one defendant—Suit dismissed by consent against another—Court cannot restore suit against that other while setting aside the *ex parte* decree. 104 I.C. 216=1927 S. 245. Where there is an *ex parte* decree against one of several defendants mortgagors, and an application is made to set it aside, the better course would be to set it aside against all defendants and direct the suit to be tried

33 A. 264=38 I.A. 37=21 M.L.J. 1140 (P.C.). See also 35 C.W.N. 679. Where a suit against one of the defendants is dismissed after contest but an *ex parte* decree is given against the others, one of whom applies to have the *ex parte* decree set aside, the Court has power under proviso to R. 13 of O. 9 to set aside the whole decree, if the decree is one and indivisible. 151 I.C. 963=1934 A. 1051. A Judge cannot set aside an *ex parte* decree against the judgment-debtor without also setting it aside as against the surety 40 I.C. 400. An indivisible order is to be set aside *in toto*. 32 L.W. 662=59 M.L.J. 918. A mortgage debt being indivisible, a mortgage decree passed *ex parte* cannot be set aside in part, because complications will arise at the time of execution and anomalous results may follow. 166 I.C. 635=18 Pat.L.T. 72=1937 P. 17. The fact that the decree is the result of a compromise is no bar to the application of the proviso 101 I.C. 98=1927 M. 550. Where the decree is indivisible in its nature, for example, for the possession of a house, the whole decree must be set aside, subject to the payment of the money due by the person bound by the decree (*Ibid*). Reasons for acting under the proviso to be given. 1927 M. 507=52 M.L.J. 477. *Ex parte* decree against several defendants whether can be set aside at the instance of some of them alone. See 92 I.C. 776=1926 M. 256. An *ex parte* decree having been passed against a Hindu and his son on the basis of a trust deed executed by them, both of them applied to have the decree set aside under O. 9, R. 13. The Court in appeal set the decree aside as against the son, but not against the father. Held, in revision, that the decree was indivisible, and that the order refusing to set aside the decree as against the father being erroneous and in contravention of the proviso to R. 14, C.P. Code, must be interfered with in revision 155 I.C. 837.

O. 9, R. 13 proviso (Peshawar).—There is no legal justification for proceeding *ex parte* against the defendant on the ground that the summons was sent to him by post irrespective of the fact whether he received it or not. And O. 9, R. 13 as amended by the Judicial Commissioner's Court, Peshawar does not apply to an *ex parte* decree so passed. For, that rule applies only when there is irregularity in the service of summons. In this case there is no service of summons. 165 I.C. 947=1936 Pesh. 199.

MISCELLANEOUS.—A pleader duly appearing in a suit is not obliged to file a fresh vakalat for the purpose of an application to set aside the *ex parte* decree in the suit. 47 B. 11=24 Bom.L.R. 744. An application under O. 9, R. 13 to set aside an order passed on a previous application of the same nature

Explanation—Where a summons has been served under O. 5, R. 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule."

[Rangoon] In O. 9, R. 13, substitute 'decree or order' for the words 'decree' wherever it occurs in that Rule.

Add the following as second proviso —

"Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons, if the Court is satisfied that the defendant was aware of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

[N.-W.F.P.] *Id.* —

Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim.

[Sindh] Add the following further proviso —

"Provided also that a decree passed *ex parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

14. [S. 109.] No decree shall be set aside on any such application as aforesaid unless notice there-
without notice to opposite party of has been served on the opposite party.

Loc. Ams.—[Bombay.] Rule 15. Add the following rule—

In the application of this order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

[Calcutta] Order 9, R. 14. Cancel the word "thereof" in R. 14, O. 9, and substitute therefor the following words —

"together with the copy thereof (or concise statement as the case may be) "

[Madras] Add the following as R. 15 of O. 9 of the Code of Civil Procedure —

"15 (1) Rr. 6, 13 and 14 shall apply *mutatis mutandis* to those proceedings in execution falling within S. 47 of the Code in which notice to the opposite party is required under the provisions of the Code

(2) Subject to the provisions of sub-rule (2) of R. 13, an application under this rule shall be made within thirty days of the date of the order, or, where the notice was not duly served, of the date when the applicant has knowledge of the order" (*Port St George Gazette*, Pt II, p. 313, dated 14-3-1933)

Notes.

lies Thus the proceedings may go on *ad infinitum* 76 I.C. 583=1923 C. 552. Where an appeal against an order under O. 9, R. 13 is dismissed for non-prosecution second application under the same rule may be allowed subject to terms (*Ibid.*) Where an application to set aside an *ex parte* decree is consigned to the record room on account of non-payment of process-fee, it is tantamount to dismissal for default 102 I.C. 754=1927 L. 883 (2).

O. 9, R. 13 and O. 17, R. 2.—Where the defendants entered an appearance in the suit and filed a written statement and on the date fixed for final hearing failed to appear but their pleader asked for an adjournment which was refused and the pleader then stated that he had no instructions, and the Court passed a decree *ex parte* the defendants must be held to have actually appeared on the date in question, and the Court has no jurisdiction to set aside the *ex parte* decree and the remedy open to the defendants is only an appeal against the decree as it stood. 155 I.C. 249 (1)=1935 A.L.J. 377=1935 A. 565

O. 9, R. 14.—R. 14 is imperative and an *ex parte* decree against the defendant can be

set aside only after notice has been served on the plaintiff. 24 M.L.J. 482=19 I.C. 241. See also Notes under R. 13 "Opposite party", meaning of See 31 C.W.N. 906=103 I.C. 860=1927 C. 692. The principle of representation cannot be urged as against the definite provisions of R. 14 149 I.C. 153=1934 P. 396. "Opposite party"—Mortgage suit—*Ex parte* decree for sale—Application to set aside—Subsequent purchaser of part of mortgaged property—Not entitled to notice. 163 I.C. 226=1936 A.L.J. 544=1936 A. 410.

O. 9, R. 15.—New R. 15 of is not retrospective and cannot be made applicable to *ex parte* orders passed prior to its coming into force because, the effect of such application would be to deprive persons of the rights already vested in them by the orders not having been appealed from and thus having become final. 157 I.C. 985=42 L.W. 497=1935 M. 585 The executing Court has no power to set aside an *ex parte* order in execution passed by it prior to the coming into force of O. 9, R. 15 (M). Its power is limited by the law as it stood before the new rule was enacted 156 I.C. 141=42 L.W. 50=1935 M. 714.

ORDER X.

EXAMINATION OF PARTIES BY THE COURT.

1. [S. 117.] At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

2. [S. 118.] At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

3. [S. 119.] The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

4. [S. 120.] (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule (2) refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he

Notes.

O. 10, R. 1.—Admission on a question of fact made by pleader binds his client. 9 W. R. 485. See also 2 M.I.A. 253. Erroneous consent of *vakil* upon a mistaken view of the law cannot bind the client. 16 W. R. 246. Pleader cannot relinquish any portion of his client's case without express authority. 12 W. R. 279. Admissions made by a party under R. 1 are conclusive against him. 49 A. 219=97 I C 176=1926 A. 710. Under R. 1 it is obligatory on the Court to examine them only when there is no clear express or implied denial of any statement of fact in their pleadings. 92 I C. 1006=8 L. J. 67.

JOINT STATEMENT—LEGALITY.—There is nothing in law to support the view that when all the defendants confess judgment a joint statement of all of them cannot be recorded in a civil case. 152 I C. 622=1934 L. 540

O. 10, R. 2.—Object of examination is not to take evidence, but to see what are matters in dispute. 15 I A. 119. See 5 Bom. L.R. 687 and 1905 A.W.N. 170; 1926 A. 411=29 I C. 1003. The power under this rule is intended to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit and ought not to be employed so as to supersede the ordinary procedure at trial as prescribed in O. 18. 35 C.W.N. 925=1931 P.C. 175 (P.C.). A statement made under R. 2 by a person who appears with a pleader merely to prosecute a case or to look after it would not necessarily bind the party on whose behalf he appears. 1926 A. 411=94 I C. 1003. Statement under R. 2 is not evidence against the party who has had no opportunity to cross-examine the party mak-

ing it 1930 L. 947=129 I C. 301

O. 10, R. 4.—The powers granted by this rule are discretionary, and its intention is to enable the Court not only to get obscure points cleared up by getting information, but also to get admission to narrow down the issues. 5 Bom. L.R. 687. Power of the Court under R. 4 is not an unlimited one. It is only where the party's pleader or recognized agent refuses or is unable to answer to material questions that Court can direct the personal attendance of the party himself. In absence of such refusal or inability if the Court assumes that it has power to direct, without assigning any reason, the personal attendance of the parties, the order is irregular and can be rectified under S. 151 and O. 47, R. 1. 1933 A.L.J. 1318=1933 A. 517. Under the provisions of R. 4 Court cannot insist on personal attendance of a party who is a *pardanashin* lady. 55 A. 666=1933 A.L.J. 1384=1933 A. 551. R. 4 is a self-contained rule for cases where a party is ordered to attend because the Court desires to have his evidence. 63 I C. 961=14 L.W. 15. See also 140 I C. 716. The rule does not provide for cases where party appears and refuses to answer. For such cases, see O. 16, R. 20. Parties to suits should not be required to attend Court under R. 4 unless questions material to the case which are to be answered have first been put to their pleaders and they have been unable or have refused to answer them. 48 I C. 269=21 O.C. 252. There are only two cases in which personal appearance of plaintiff can be required and these fall under O. 5, R. 3 and O. 10, R. 4 140 I C. 716=1932 N. 135. Court ordering plaintiff to appear on the challenge of the defendant—

represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

ORDER XI.

DISCOVERY AND INSPECTION

1. [S. 121.] In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that

Notes.

Validity of the order. 24 L.W. 757. The question required to be answered must be material 2 Bom H.C.R. 340; 21 W.R. 44. Pleader merely applying for adjournment is not putting an appearance. 99 I.C. 717=1927 R. 46, 4 R. 408.

O 1, R. 4(2).—What is lawful excuse will depend upon the circumstances of each case. 18 W.R. 63. Before pronouncing judgment, Judge should hear what the defaulter has to say, and adjudicate on the sufficiency of the excuse. 24 W.R. 314. Several adjournments were given for appearance of a party, on the motion of pleader and agent of the party, and each time they were warned that in case the party failed to appear, action will be taken under R. 4. In spite of all this, neither the party appeared nor did the pleader or agent undertake to answer all the questions. Thereupon the Court disposed of the suit under R. 4(2) without putting any question to the pleader or the agent. *Held*, that even though it was incumbent on the Judge to put such questions before taking action under R. 4(2), still under the circumstances the Judge's action was quite proper. 1933 L. 922. Order dismissing suit for default of appearance under R. 4(2) can be restored under O 9, R. 9, for good cause 138 I.C. 613=1932 A.L.J. 726=1932 A. 595. An order under R. 4(2) against one of the parties is not appealable under O. 43, R. 1, unless that order amounts to a judgment. 39 A. 450=39 I.C. 151.

O 11 APPLICATION OF THE ORDER.—Order 11 applies to proceedings in probate. 49 C. 300=23 C. L. J. 480. Under the Code interrogatories can be administered in the same manner as is done in England for discovering the facts in issue. 24 I.C. 765=41 C. 6 (7 C. 840, Dist.)

O. 11, R. 1. WHAT INTERROGATORIES MAY BE DELIVERED.—Question to extract information as to material facts in issue or for the purpose of obtaining admissions about them may be asked. The mere fact that the questions would be admissible in cross-examination does not make them good as interrogatories. 17 I.C. 155=17 C.L.J. 66. In-

terrogatories must not be exhibited unreasonably or vexatiously or be prolix, unnecessary or scandalous, nor be obviously meant for the purpose of fishing information. (*Ibid.*) Thus defendant setting up the plea of wagering should not be allowed to interrogate his opponent generally as to his business transactions (*ibid.*) A party is not entitled to administer interrogatories for obtaining discovery of facts which constitute exclusively the evidence of his adversary's case. 56 C.L.J. 440=1933 C. 151. *See also* 10 P. 630=1931 P. 426; 17 C. 849. Interrogatories as to amount of damages are relevant, though they may not be allowed until the question in action has been tried. *See* 14 C. at 706. Interrogatories should be disallowed if aimed at discovering the nature of opponent's evidence. 69 I.C. 417=1923 L. 282 (2). Nor as to matters of opinion 23 C. 117. A party may deliver interrogatories in order to ascertain the nature of the opponent's case or to support his own case in order to narrow the points in issue or to avoid proving facts which are admitted. Interrogatories as to contents of a document cannot be issued. 151 I.C. 104=1934 N. 181. Defendants on whom the onus lies cannot escape that onus by laying no evidentiary basis for their defence but seeking to get admissions from plaintiff by interrogatories. To allow the interrogatories at their instance would be to allow them to avoid opening their case and to cast the onus on the other party. 142 I.C. 17(1)=1933 M. 298.

"OPPOSITE PARTY".—The party on the other side of the record to the applicant is an opposite party, and he may be ordered to give discovery if he is a necessary party to an action, although there may be no issue or matter in question at all between him and the applicant. *Spokes v Grosvenor and Co.*, (1897) 2 Q.B. 124. But *see contra* 58 C. 1091=134 I.C. 935. *See also* 17 B. 384. *Ex parte* defendant does not come within the words "opposite party". 63 I.C. 258. Plaintiff is not entitled to administer interrogatories to him; nor is he entitled to do so with defendants who have the same interests as he (the plaintiff) has in the suit. 63 I.C.

purpose. Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

2. On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the Court. In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

3. [S. 123.] In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

4 Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require.

5. [S. 124.] Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly.

6. [S. 125.] Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or any other ground, may be taken in the affidavit in answer.

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

8 [S. 126] Interrogatories shall be answered by affidavit to be filed within ten days or within such other time as the Court may allow.

9. An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

10. No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

Notes.

258. Objection to the relevancy of interrogatories must be adjudicated upon by the Court. 46 I C 660=16 A L J 762 *Ex parte* order giving leave to interrogate can be set aside on application of the opposite party 5 C. 707.

ORDER DECLINING TO RE-ISSUE INTERROGATORIES—REVISION—Under S. 44, Punjab Court's Act, High Court has no jurisdiction to entertain an application for revision from an interlocutory order declining to re-issue interrogatories but as the High Court's

powers under S. 107, Government of India Act, are not merely administrative but also judicial, it can interfere to prevent injustice where the lower court in an interlocutory order wrongly declines to re-issue interrogatories 39 P L R. 250=1937 L 28

O 11, R 6. Not "BONA FIDE".—Fishing questions in order to try whether any flaw can be discovered in defendant's case cannot be allowed. 17 C. at 849 See also 10 P. 630=1931 P 426. If defendant is out of the jurisdiction, a reasonable time will be given 24 W.R. 587

11. [S. 127.] Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

12. [S. 127.] Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs

13. [S. 129, para 2] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

14. [S. 130.] It shall be lawful for the Court at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents

Notes.

O 1, R 11.—When Court grants leave to interrogate, it does not make an order under this rule 18 C. 420 (F B). Order directing party to file proper affidavit within 10 days—Direction that suit should stand dismissed in default—Party failing to comply with Court's order—Suit whether automatically dismissed—Legality of such order—Right of aggrieved party. 50 C.L.J. 397=78 I.C. 859=1925 C. 166.

O 11, R 12.—The words 'opposite party' and 'any other party' in R 12 contemplate opposite parties within the meaning of O 11, R. 1, i.e., they must be persons between whom issues are raised at the stage at which the order for discovery is demanded. 58 C 1091=134 I.C. 935. Guardian *ad litem* if a party to the suit. See 22 C 981. But see R. 23 and 19 B 350. Where there are several plaintiffs all must join in making an affidavit. 15 B. 7 A defendant, if may obtain discovery against a co-defendant. 17 B 384. But see also 134 I.C. 935=58 C 1091. If one co-defendant is not entitled to an order for discovery against his co-defendant, he cannot obtain it indirectly by insisting on the performance of such an order already obtained by the plaintiff but not complied with. 58 C 1091=134 I.C. 935=1932 C. 72. Affidavit, effect of. 5 Pat L.J. 550=58 I.C. 281 A document directed to be produced under Rr. 12 and 14 does not *ipso facto* become evidence in the case. It must be proved by witnesses and then marked as an exhibit. 4 Lah.L.J. 385=1921 C. 328 On this section, see also 29 Bom L.R. 414=1927 B. 367.

PRACTICE AND PROCEDURE—Discovery of a

party's title-deeds is not ordered upon what may be a mere fishing application without the materials necessary to support the claim or precision in description of documents. 10 P. 630=1931 P. 426 See also 17 C. at 849; 56 C.L.J. 440

O 11, Rr 12 and 13 AFFIDAVIT OF DOCUMENTS BY PARTY'S AGENT.—[DISCRETION OF COURT.—Although ordinarily affidavit of documents must be made by the party himself, yet Court may allow it to be made by an agent of the party in a particular case. Under R. 12, the matter has been left to the discretion of Court and that discretion is obviously to be exercised with special reference to the facts of each case 1934 P. 693.

O 11, R. 13—Affidavit of document filed under R. 13 does not protect the party from obligation to give inspection of other documents that may be proved to be in his possession 38 C 428=16 C.W.N. 81.

STATE DOCUMENTS—PRIVILEGE.—Court is entitled to prescribe in any particular case the manner in which the claim for privilege for State documents shall be made if the claim is to be allowed It may be content with unsworn statement of a responsible Minister or it may accept a formal affidavit from him, or, if necessary call for an affidavit sufficiently full and indicative of the fact that his mind has been brought to bear on the question of the expediency in the public interest of giving or refusing the information asked for 35 C.W.N. 1121=1931 P C 254=61 M.L.J. 943 (P.C.).

O 11, R. 14 ORDER WHEN TO BE PASSED.—Court has no power to order production of documents which do not relate to any matter

in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

15. [S. 131.] Every part to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

17. [S. 132.] The party to whom such notice is given shall, within ten

Notes.

in question. 23 C. 125 An order for production of documents under R. 14 must follow an order as to affidavit of documents under R. 12 1923 P. 337=76 I.C. 991. No order will be made under R. 14 against a party unless he has directly or indirectly admitted the document to be in his possession or power. 5 Pat.L.J. 650=58 I.C. 281. Under R. 14, Court may order production of any documents in the possession of any party relating to any matter in question in such suit, but until it is known what the plea is and what the points at issue are it is impossible for the Court to say that plaintiff's accounts are relevant. In a suit on a promissory note to which the defendant has as yet not raised any defence there is no justification for the Court to make order directing plaintiff to produce his accounts. 1937 N 136 The Court can only order the production of documents under R. 14 and not the inspection. An order for inspection has to be made under R. 18, 14 I.C. 51. Suit by husband for restitution of conjugal rights relying upon correspondence between parties—Production of correspondence—Duty of plaintiff. See 1937 Sind 97 As to what documents are privileged and what statements, see 29 Bom.L.R. 414=102 I.C. 425=1927 B 367.

EFFECT OF NON-COMPLIANCE.—The non-compliance with order under R. 14 for production of account-books does not warrant the striking off the defence of the party who is guilty of non-compliance with the order 44 A. 565=20 A.L.J. 422. See also 38 L.W. 933=1933 M. 870; 46 M.L.J. 350. Grounds on which discretion is given to a Court for striking off the defence are given in O. 11, R. 21. (*Ibid.*)

REVISION.—Order under this rule cannot be revised, under S. 115, 9 M. 256.

O. 11, R. 15.—There is a distinction between documents sued upon and documents relied upon by plaintiffs and a defendant

under R. 15 is not entitled as of right to have inspection of documents relied upon by plaintiff before he files written statement 56 I.C. 457=24 C.W.N. 302 But see 34 L.W. 654=1931 M. 825=61 M.L.J. 704 (*contra*) See also 53 A. 442=1931 A.L.J. 94=1931 A. 221 See also notes under O. 11, R. 18 Rule 15 refers not merely to documents which the plaintiff sues upon but also those which he relies upon as evidence in support of his claim. The expression 'referred to' is equivalent to 'entered in the list' and the list must be deemed to be part of the plaint. So right of inspection extends to documents entered in a list attached to plaint. 1931 M. 825=61 M.L.J. 704 (24 C.W.N. 302 Diss.). It is a good cause for non-production of a document within rule 15 that the document is not in the possession or power of the person called upon to produce it. 5 Pat.L.J. 550=58 I.C. 281. It is not good case for non-production that the account books called for inspection are necessary for every day transactions. 156 I.C. 246=1935 M. 234

O. 11, Rr 15 and 18. RULE 18 IS NOT PREREQUISITE TO R. 15.—It cannot be said that unless the party who has given notice of inspection which is not replied to, takes further action which is open to him under R. 18, the party who has omitted to reply or give inspection is absolved from the penalties of R. 15 There is absolutely nothing in R. 18 to suggest that it is a prerequisite to R. 15 It lays down an alternative procedure by which, if the notice is not replied to, the party who has asked for inspection can force the other party to give it. 1935 M. 234; 156 I.C. 246. See also 10 C 59

O. 11, R. 17.—Where a contract is entered into at one place and has to be performed at another place, and the documents are at the place where contract has to be performed, the place of performance is proper place for inspecting the documents 5 B. 467. See also 11 C 655; 12 C. 265, 15 B 7

Time for inspection when notice given.

days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

18. [S. 133.] (1) Where the party served with notice under rule 15

Order for inspection.

omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

[S. 134.] (2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

19. (1) Where inspection of any business books is applied for, the Court

Verified copies

may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been

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O. 11, R. 18.—[N. B. See also under O 11, R. 15.] Strict compliance with provisions of the rule is necessary before order for inspection of documents is passed 67 I.C. 73=44 A 565 See also 20 S.L.R. 309. No order can be made under this rule until the questions raised under R 17 have been determined 14 C 776 Before Court can make an order under this rule, if the preliminary steps mentioned in R 15 must be taken, see 1935 M. 234 cited under R 15, *supra*; 10 C. 59. Applicant must show that document is relevant to the matter in question 23 C 125 Party cannot be compelled to show the whole account-book to the opposite party, if his trade secrets are likely to be unnecessarily exposed to him 14 I.C. 371 See also 1931 M. 825=61 M.L.J. 704. Under this rule, Court is not the proper place to offer inspection of documents. 1935 M. 234=156 I.C. 246.

O. 11, R. 18 (2).—Under R. 18 (2) order of inspection can be made not only in respect

of document mentioned in the plaint and written statement and affidavit of discovery but also in respect of other documents. Where Judge is satisfied as to relevancy of the document it is not necessary that there should be an affidavit. At any rate, the want of affidavit cannot invalidate the order under R. 18 (2), requiring the defendant to produce a document and if defendant does not comply with the order, Court is justified in ordering that his written statement be struck off 53 A 442=1931 A. L.J. 94=1931 A. 221 (26 A.L.J. 1376, 1922 A 235, Dist.).

O 11, R 19.—In a proper case, Court has power, notwithstanding a certificate from the Minister of State claiming protection, to inspect state documents and official communications, in respect of which privilege was set up, in order to see whether the claim was justified, see 35 C.W.N. 1121=1931 P.C. 254=61 M.L.J. 943 (P.C.).

in his possession or power, relating to any matter in question in such suit, as the Court shall think right, and the Court may deal with such documents, when produced, in such manner as shall appear just.

15. [S. 131.] Every part to a suit shall be entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

17. [S. 132.] The party to whom such notice is given shall, within ten

Notes.

in question. 23 C. 125. An order for production of documents under R. 14 must follow an order as to affidavit of documents under R. 12 1923 P. 337=76 I.C. 991. No order will be made under R. 14 against a party unless he has directly or indirectly admitted the document to be in his possession or power. 5 Pat.L.J. 650=58 I.C. 281. Under R. 14, Court may order production of any documents in the possession of any party relating to any matter in question in such suit, but until it is known what the plea is and what the points at issue are it is impossible for the Court to say that plaintiff's accounts are relevant. In a suit on a promissory note to which the defendant has as yet not raised any defence there is no justification for the Court to make order directing plaintiff to produce his accounts. 1937 N. 136. The Court can only order the production of documents under R. 14 and not the inspection. An order for inspection has to be made under R. 18. 14 I.C. 51. Suit by husband for restitution of conjugal rights relying upon correspondence between parties—Production of correspondence—Duty of plaintiff. See 1937 Sind 97. As to what documents are privileged and what statements, see 29 Bom L.R. 414=102 I.C. 425=1927 B 367.

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REVISION.—Order under this rule cannot be revised, under S. 115. 9 M. 256.

O. 11, R. 15.—There is a distinction between documents sued upon and documents relied upon by plaintiffs and a defendant

under R. 15 is not entitled as of right to have inspection of documents relied upon by plaintiff before he files written statement. 56 I.C. 457=24 C.W.N. 302. But see 34 L.W. 654=1931 M. 825=61 M.L.J. 704 (*contra*). See also 53 A. 442=1931 A.L.J. 94=1931 A. 221. See also notes under O. 11, R. 18. Rule 15 refers not merely to documents which the plaintiff sues upon but also those which he relies upon as evidence in support of his claim. The expression 'referred to' is equivalent to 'entered in the list' and the list must be deemed to be part of the plaintiff. So right of inspection extends to documents entered in a list attached to plaintiff. 1931 M. 825=61 M.L.J. 704 (24 C.W.N. 302 Diss.). It is a good cause for non-production of a document within rule 15 that the document is not in the possession or power of the person called upon to produce it. 5 Pat.L.J. 550=58 I.C. 281. It is not good cause for non-production that the account books called for inspection are necessary for every day transactions. 156 I.C. 246=1935 M. 234.

O. 11, Rr 15 and 18. RULE 18 IS NOT PREREQUISITE TO R. 15.—It cannot be said that unless the party who has given notice of inspection which is not replied to, takes further action which is open to him under R. 18, the party who has omitted to reply or give inspection is absolved from the penalties of R. 15. There is absolutely nothing in R. 18 to suggest that it is a prerequisite to R. 15. It lays down an alternative procedure by which, if the notice is not replied to, the party who has asked for inspection can force the other party to give it. 1935 M. 234; 156 I.C. 246. See also 10 C. 59.

O. 11, R. 17.—Where a contract is entered into at one place and has to be performed at another place, and the documents are at the place where contract has to be performed, the place of performance is proper place for inspecting the documents. 5 B. 467. See also 11 C. 655; 12 C. 265; 15 B. 7.

Time for inspection when notice given. days from the receipt of such notice, deliver to the party giving the same a notice stating a time within three days from delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

18. [S. 133.] (1) Where the party served with notice under rule 15 omits to give such notice of a time for inspection, or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

[S. 134.] (2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

19. (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries, and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that, notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may, on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been

Notes.

O. 11, R. 18.—[N B See also under O. 11, R. 15] Strict compliance with provisions of the rule is necessary before order for inspection of documents is passed. 67 I.C. 73=44 A 565 See also 20 S.L.R. 309. No order can be made under this rule until the questions raised under R. 17 have been determined 14 C 776 Before Court can make an order under this rule, if the preliminary steps mentioned in R. 15 must be taken, see 1935 M. 234 cited under R. 15, *supra*, 10 C. 59. Applicant must show that document is relevant to the matter in question 23 C 125 Party cannot be compelled to show the whole account-book to the opposite party, if his trade secrets are likely to be unnecessarily exposed to him 14 I.C. 371. See also 1931 M. 825=61 M.L.J. 704. Under this rule, Court is not the proper place to offer inspection of documents. 1935 M. 234=156 I.C. 246.

O. 11, R. 18 (2).—Under R. 18 (2) order of inspection can be made not only in respect

of document mentioned in the plaint and written statement and affidavit of discovery but also in respect of other documents. Where Judge is satisfied as to relevancy of the document it is not necessary that there should be an affidavit At any rate, the want of affidavit cannot invalidate the order under R. 18 (2), requiring the defendant to produce a document and if defendant does not comply with the order, Court is justified in ordering that his written statement be struck off. 53 A 442=1931 A. L.J. 94=1931 A. 221 (26 A.L.J. 1376, 1922 A 235, Dist.).

O 11, R 19.—In a proper case, Court has power, notwithstanding a certificate from the Minister of State claiming protection, to inspect state documents and official communications, in respect of which privilege was set up, in order to see whether the claim was justified, see 35 C.W.N. 1121=1931 P.C. 254=61 M.L.J. 943 (P.C.).

ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession, when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

20. [S. 135.] Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection

21. [S. 136.] Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

Notes.

O. 11, R. 20—Rule applies to mixed questions of law and fact 27 W.R. 678. It is not intended to come into operation until after an application has been made under R. 18 14 C. 776. *See also* 6 B 578 Discovery may precede particulars if two conditions are satisfied: (1) where information sought is necessarily within opponent's knowledge, (2) where Court is satisfied that no unfair attempt to fish out a case is being made. In these two cases, discovery may precede particulars even where the object of the action is to re-open settled accounts. R. 20 does not operate as a bar to discovery, when for determining the very issue of a settled account, the discovery or production of documents is essential. 41 L.W. 275=68 M. L.J. 241=157 I.C. 599=1935 M. 288.

O. 11, R. 21: APPLICABILITY OF RULE—*See* 1933 L. 248=143 I.C. 355

WHEN AN ORDER UNDER THE RULE MAY BE PASSED—Order can be passed only after Court has directed discovery under R. 12 or inspection of documents under R. 18 44 A. 565=20 A.L.J. 422=67 I.C. 73; 96 I.C. 1003=1926 S. 272. Thus a mere suspicion against plaintiff of suppressing documents relating to matters in issue, without order for discovery or inspection, is not a ground for dismissing the suit 38 A. 5=13 A.L.J. 831 The principle governing the Court's exercise of its discretion under R. 21 is that it is only when the default is wilful and as a last resort that Court should dismiss the suit or strike out the defence 158 I.C. 613=1935 R. 310. Suit can be dismissed for failure to comply with an order for discovery or in-

spection of documents only when the documents are referred to in the pleading or affidavits 28 I.C. 905 Order under R. 21, can be passed only when there is a previous order under R. 11 requiring a party to answer interrogatories. 96 I.C. 16=24 A.L.J. 589=1926 A. 553. Court has no power to dismiss suit for disobedience of an order under O. 11, R. 14 for production of certain documents. (46 M.L.J. 350, Foll.) 38 L.W. 933=1933 M. 870. *See also* 1936 N. 130 (Insolvency petition by creditor—Non-production of account books—Power to dismiss petition) Mere non-compliance with orders for discovery or inspection does not justify trial Court to strike off the defence of the party so ordered. 20 A.L.J. 422=44 A. 565 Penalty provided in R. 21 should only be imposed in extreme cases and as a last resort (58 P.R. 1898, 59 P.R. 1892; 9 C. 923; 38 A. 5; 58 I.C. 281=5 Pat.L.J. 550; 14 C. 768, Ref.); 65 I.C. 661; 121 I.C. 421=1929 L. 750. Defendant should be called upon to show cause before an order striking off defence is passed. It must also be shown that the non-compliance was due to wilful default 27 B.L.R. 694=89 I.C. 215 *See also* 1925 C. 166=50 C.L.J. 397. 20 S.L.R. 309. 'Wilfully' means that the act is done deliberately and intentionally, not by accident or inadvertence but so that the mind of the person who does the act goes with it 1929 L. 750=121 I.C. 421. Where a party fails to comply with order for discovery, the proper remedy is for the party seeking the discovery to apply to have the proceedings stayed or the suit dismissed. 48 I.C. 711=4 Pat.L.J. 394. Where suit is dismissed for want of prosecution under the rule, the

22. Any party may, at the trial of a suit, use in evidence any one or more of the answers or any part of an answer of the opposite party to interrogatories without putting in the others or the whole of such answer: Provided always that in such case the Court may look at the whole of the answers, and if it shall be of opinion that any others of them are so connected with those put in that the last-mentioned answers ought not to be used without them, it may direct them to be put in.

23. This order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of persons under disability.

Order to apply to minors

ORDER XII.

ADMISSIONS.

1. Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

2. [S. 128] Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

3. A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

4. Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs: Provided that any admission made in pursuance of such notice is to be deemed to be made only for the

Notes.

remedy of the aggrieved party is by appeal. Court cannot set it aside under O. 9, R. 9 3 R. 63=1925 R. 218. See also 137 I.C. 842=1932 M. 316. Where plaintiff's suit has been dismissed under O. 11, R. 21, the Court has no power to review its order under S. 151, the order being appealable. 98 I.C. 70=1927 C. 158. Non-compliance with order under R. 14—Dismissal under R. 21 if justified—Appeal from—If lies. 115 I.C. 464=1929 A. 83. If defendant fails to comply with an order for discovery of documents, he is liable to have his defence struck out and to be placed in the same position as if he had not defended the suit. It does not justify Court in shutting out all his evidence, although he was allowed to defend the suit 121 I.C. 337=1931 P. 114.

APPEAL—PRACTICE AND PROCEDURE—Where order is made under the provisions of R. 21, dismissing suit and simultaneously with that order judgment and decree are passed, notwithstanding that an appeal lies against the decree itself, an appeal is competent against

the order that the suit should be dismissed. 137 I.C. 842=1932 M. 316 [See also 143 I.C. 355=1933 L. 248]. Where the provisions of law quoted in dismissing suit is R. 21 but everything points to the order itself in substance and intention having been under O. 6, R. 5, in judging of the appealability of order, Court has to look to the substance of it rather than the provisions of law under which it purports to have been made (*Ibid*).

O. 11, Rr. 21 and 23.—R. 21 is part of the rules of the High Court, unless High Court has made a rule of itself expressly or by implication abrogating it, and when High Court Original Side Rules do not contain any such Rule, the provisions of R. 21, ought to be enforced even against a minor defendant, in view of R. 23, of O. 11; the enforcement cannot be refused on the ground that it is not the practice of the Court to do so. A practice of the Court cannot be allowed to abrogate the rules applicable to the Court. 39 C.W.N. 1029.

O. 12, R. 1.—Admissions must be taken as a whole 41 M.L.J. 525=71 I.C. 270.

purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice: Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

5. A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C with such variations as circumstances may require.

6. Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

Loc. Ams.—[Madras.] 1. Re-number the existing R. 6 of O. 12 as sub-R. n (1) and insert the following as sub-Rr (2) and (3).—

"(2) The Court may also of its own motion make such order or give such judgment as it may consider just, having due regard to the admissions made by the parties.

(3) Whenever an order or judgment is pronounced under the provisions of this rule, a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced."

[Patna.] Substitute the following for R. 6 in O. 12

"6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of a suit, on the application of any party, or, of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment, as it may think just.

[Rangoon.] In O. 12, R. 6, substitute 'judgment, decree or order' for the words 'judgment or order' where they first occur and for the last part of the rule substitute the following.—"and the Court may, either upon such application or upon its own motion, give such judgment or make such decree or order as the Court may think just"

Add the following as sub-R. (2).—

"(2) A decree or order passed under this rule may be executed at any time, notwithstanding that other questions between the parties still remain to be decided in the case."

7. An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be sufficient evidence of such admissions if evidence thereof is required.

8. Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

9. If a notice to admit or produce specified documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

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O. 12, R. 6.—When judgment on admissions to be passed. 27 C.W.N. 783=1924 C. 190; 1929 L. 750=121 I.C. 421. See also 132 I.C. 796=1931 O. 321. Before Court can act under R. 6, admission must be clear and unambiguous and the amount due and recoverable, must be due and recoverable in action in which admission is made (45 C. 138, Rel. on) 145 I.C. 705=1933 L. 403; 1927 S. 25=97 I.C. 623. Judgment on confessions, object and enforcement of See 92 I.C. 562=1926 S. 119=20 S.L.R.

216. Admission of portion of claim—Judgment—Procedure 45 C. 138=22 C.W.N. 204. Applicability to admission of law—Use of word 'may', significance of—Admission of plea as to *res judicata*—Court whether bound to pass decree on basis of admission. 116 I.C. 330=1929 L. 569. Court is not always bound to pass a decree on basis of an admission. It has a discretion to pass or refuse to pass a decree on mere admission, which discretion, if properly exercised, will not be interfered with in appeal or revision. 132 I.C. 796=1931 O. 321.

ORDER XIII.

PRODUCTION, IMPOUNDING AND RETURN OF DOCUMENTS.

1. [S. 138.] (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) [S. 140.] The Court shall receive the documents so produced: provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

Loc Am —[Oudh.] O. 13, R. 1, substituted by *Oudh Chief Court* —(1) The parties or their pleaders shall produce or cause to be produced on the date fixed by the Court, under O. 7, R. 14 and O. 8, R. 1 (2), or on any subsequent date which may be fixed by the Court for the purpose, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has permitted or ordered to be produced.

(2) The parties or their pleaders may also file, with the permission of the Court, either on the date of hearing or any subsequent date to be fixed by the Court for the purpose, a supplementary list of further documents on which they intend to rely, and such documents shall be produced by them within the time fixed by the Court.

(3) The Court shall receive the documents so produced provided that (whenever the documents are produced at any stage of the case) they are accompanied by an accurate list thereof prepared in such form as the Chief Court may direct.

Explanation.—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the plaintiff or defendant it will not be deemed to be "in the power" of the plaintiff or defendant.

[Patna] Order 13 In R. 1 after the words "at the first hearing of the suit" should be added "or, where issues are framed, on the day when issues are framed, or within further time as the Court may permit."

[Rangoon] To O. 13, R. 1, the following shall be added as sub-rule (3).—

"(3) The High Court of Judicature at Rangoon directs that such lists shall be prepared in Form

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 which will be given free of charge to parties wishing to tender documents in evidence."

2. [S. 139.] No documentary evidence in the possession or power of any

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O. 13, R. 1.—The words "when called for by the Court" have been omitted to meet the ruling in 8 M. 373, 375.

SCOPE.—R. 1 is peremptory that documents on which a party intends to rely must be produced at the first hearing, and R. 62 of the Madras Civil Rules of Practice does not relieve the party of that obligation. 34 L.W. 528=133 I.C. 371=1931 M. 512.

"FIRST HEARING OF THE SUIT".—The words "first hearing" do not mean first hearing on the issue 21 W.R. 42 First hearing means day of framing of issues and documents can only be produced after that date on good cause being shown under O. 13, R. 2 23 L.W. 69=1926 M. 347=93 I.C. 16. First hearing of suit means not the day to which the case is adjourned but the day when the case is actually gone into. It is enough if documents are filed before the latter date 50 I.C. 296. Documentary evidence which has not been produced at the first hearing of a suit under R. 1 may be admitted at a later stage at the discretion of Court. 45 C. 878=45 I.A. 73=35 M.L.J. 422 (P.C.). See also 42 C.L.J. 280=1926 C. 1; 106 I.C. 272=1928 P. 209=9 P.L.T. 317, 23 L.W. 69. Summary rejection of application to produce documents after settlement of issues but at an early stage, not

proper 87 I.C. 351 (2)=1925 M. 744 Where certain registered documents were filed and admitted in evidence at a very late stage of the trial and the opposite side did not object to the same, held, that trial Judge had complete discretion to admit the documents and that no objection having been raised to their mode of proof, the question cannot be raised in appeal 8 Pat L.T. 255=98 I.C. 968=1927 P. 117. Mere receipt of a document by a Court does not imply that it is evidence, but merely declares that it may be used as evidence in the suit. 21 W.R. 76 The mere endorsement "Exhibit" does not amount to formal admission in evidence 16 I.C. 834=169 P.L.R. 1912. See also 13 L. 126=1931 L. 546 Absence of endorsement makes the document inadmissible. 96 I.C. 998=8 L.L.J. 492 (38 A. 627, P.C.) Duty of counsel to tender documentary evidence and have the endorsement of the Judge. 9 L. 4=1928 L. 142

REVISION.—See 133 I.C. 371=1931 M. 512.

O. 13, R. 2.—Rule was enacted to prevent fraud by the late production of suspicious documents, and not to shut out formal evidence beyond suspicion, such as certified copies of public document, like records of Government. 22 B. 173, 6 C.L.J. 521; 56 C. 1003 (P.C.), 1930 P. 603 But Courts should

Effect of non production of documents.

party which should have been, but has not been, produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

Rejection of irrelevant or inadmissible documents.

3 [S. 140.] The Court may, at any stage of the suit, reject any document, which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

4. [S. 141.] (1) Subject to the provisions of the next following sub-rule

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be careful in allowing parties to make out at a late stage a new case different from that which was set up in their pleadings before the trial, and should not be too ready to receive documents produced very late with the allegation of their having been mislaid 140 I.C. 104=1932 P. 332. Rule does not apply to documents handed to a witness to refresh his memory 1 M.H.C.R. 168, or to documents filed for comparison of handwriting. 8 M. 373, to documents produced for the cross-examination of witness. (*Ibid*) Where, according to the evidence, at the date of the first hearing certain documents were not in the possession or power of the plaintiffs and the plaintiff and his advisers did not know of their existence so as to enable them to inspect them and form an opinion as to whether they would rely on them or not, *held*, that it cannot be said that they should have been produced at the first hearing and, therefore, the rule does not authorize the exclusion. 56 C. 1003=33 C.W.N. 463=56 M.L.J. 562 (P.C.). Discretion of Court—Time of exercise—Order directing documents to be kept on record—Effect. 8 P. 766=10 Pat.L.T. 183=1929 P. 254

O. 13, R. 2—Rule (2) contemplates late production of documents in the possession of the party and has no reference to documents in possession of a witness 1930 M.W.N. 511.

O. 13, Rr 2 and 3.—A document which was neither a public document nor even a registered one was produced at a late stage in the suit and was refused to be admitted in evidence by trial Court. Lower appellate Court also refused to interfere with the discretion exercised by trial Court. *Held*, that the lower Court did not err in law in refusing to admit it 146 I.C. 445=1933 R. 174 Acceptance or rejection of a document tendered by a party at a late stage of the case is a matter entirely within the discretion of the Court which cannot be interfered with in second appeal unless that discretion has been exercised capriciously, in an arbitrary manner and contrary to well-recognised judicial principles 146 I.C. 683=34 P.L.R. 736=1933 L. 892. The debtors in an insolvency petition against them are no doubt under an obligation to produce their books of account at the earliest opportunity. The Judge also should see that the books are produced at the first possible moment. But

when the Judge waives such production, the Judge cannot refuse permission to produce the books at a later stage. Judge is not justified in stating that the books are fabricated merely relying on the unsupported allegation of a creditor. Whether the books are fabricated or not is a question to be determined by the Judge after the books are produced. 152 I.C. 655=15 P.L.T. 461=1934 P. 526

O. 13, R. 3—Appellate Court is bound to consider documents admitted by Lower Court 8 M. 373; 6 C.L.J. 621. *See also* 12 M.L.J. 351. An insufficiently stamped document was filed and some evidence was taken on it and it was marked as an exhibit for reference, but the endorsement required by O. 13, R. 4 was not made. Next day the opposite party objected to the admissibility of the document and the objection was upheld. *Held*, that there was no judicial determination of the question of the admissibility of the document till the objection was raised, and the words "admitted in evidence" in S. 36, Stamp Act, must be taken to mean letting in as a part of the evidence as a result of judicial determination of the question whether it can be admitted in evidence or not for want of stamp. Hence the Court could reject the document under this rule. 142 I.C. 535=34 P.L.R. 417=1933 L. 271 (1929 M. 522, Rel on.).

O. 13, R. 4—Provisions of rule are imperative. Judge should endorse with his own hand a statement, that a document is proved or admitted by the person, against whom it is used 38 A. 627=31 M.L.J. 607=43 I.A. 212 (P.C.). *See also* 1933 L. 261, cited under O. 13, R. 3, *supra*. Strict compliance with section necessary 8 L. 1=1927 L. 115 Documents produced behind back of a party and endorsed by Court—Party can call for the proof thereof 9 L.L.J. 347=104 I.C. 146=1927 L. 679 As to *mofussil* practice in Madras Presidency regarding admission of documents, *see* 37 M. 455=22 M.L.J. 217. (*See also* 1931 L. 546 as to procedure in exhibiting documents as evidence) Documents tendered and marked as exhibit by Commissioner—Formal endorsement not made by trial Judge—Document not rendered inadmissible. 7 R. 164=118 I.C. 122=1929 R. 211 When once a document is admitted under R. 4, its admission cannot be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. And the trial Court has no

Endorsements on documents admitted in evidence there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:—

- (a) the number and title of the suit,
- (b) the name of the person producing the document,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted,

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

Loc Ams —[Oudh] In R 4 (1) (d) add "in the judge's own handwriting after the word "statement"

[Rangoon] To O 13, R 4, the following shall be added as sub-titles (3), (4) and (5) —

"(3) The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted thus A B C, etc., and the documents admitted on behalf of the defendant with figures thus 1, 2, 3, etc.

"(4) When a number of documents of the same nature are admitted, as for example, a series of receipts for rent, the whole series shall bear one number or capital letter, a small number or small letter being added to distinguish each paper of the series

"(5) Every document on admission shall be entered in a list in Form Judicial
General 25 prepared by the Bench Clerk and signed by the Judge"

5. [S. 141-A.] (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891, where a document admitted in evidence in the suit is an entry in a letter-book or a shop-book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

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more authority to review its own order admitting the document in evidence than an appellate Court would have to reverse that order on appeal 1933 A 821 Document mechanically admitted in trial Court, but not considered—Appellate Court basing its decision on the document—Not valid Proper course is to send back the whole case for re-trial *de novo* 99 I.C. 920=1927 L 45, 56 M.L.J. 633=1929 M. 522. Where certain documents are produced by a party, and are referred to in the argument and made use of in judgment also, the mere fact that they have not been marked as exhibits is a mere irregularity which is not incurable 1933 S. 379 Documents sent for from another Court—No endorsement—Documents whether evidence. 31 P.L.R. 250

EXHIBITING DOCUMENTS—PRACTICE.—The practice of putting seal on the documents immediately on their production and thereby exhibiting the document is not proper. There are two stages relating to the documents. One is the stage when all the documents on which the parties rely are filed by them in Court. The next stage is when the documents are proved and formally tendered

in evidence. It is at this later stage that the Court has to decide whether they should be admitted or rejected. If they are admitted and proved, then the seal of the Court is put on them giving certain details laid down by law as to how they are to be exhibited, otherwise the documents are returned to the party who produced them with an endorsement thereon to that effect 1931 L. 546=132 I.C. 481. Where a document is produced in Court and is initialled by the Judge, he should make it quite clear whether he is admitting it in evidence or only marking it for identification. 1936 A.M.L.J. 22

NON COMPLIANCE WITH RULE—EFFECT OF—The fact that the provisions of R 4 have not been strictly complied with in regard to endorsement on an exhibit does not make it inadmissible in evidence 161 I.C. 164

O 13, R 5—An extract from an entry in an account book does not require any stamp 26 B. 522 Proceedings for return of documents are purely ministerial. No question can arise therein, which would make the taking of evidence on oath compulsory. 71 I.C. 666=26 C.W.N. 660 On this rule, see 8 L.L.J. 537=1927 L 45 cited under R 1

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 of Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

[Rangoon.] To O 13, R 5, sub-rule (3), the following shall be added —

"(3) A note of the return should be made in the list in Form Judicial
General 25 "

6. [S. 142.] Where a document relied on as evidence by either party is considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

Endorsements on documents rejected as inadmissible in evidence.

Recording of admitted and return of rejected documents

7. [S 142-A.] (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

Loc Ams —[Madras.] Add the following proviso to O 13, R 7 (2) —

"Provided that no document shall be returned which by force of the decree has become wholly void or useless."

[Rangoon.] Add the following to sub-rule (2) to O. 13, R 7.—"who shall give receipt for them in col 6 of the list in Form Judicial
General 23 "

8. [S 143] Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may,

Court may order any document to be impounded.

if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

9. [S. 144] (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,—

Return of admitted documents.

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of, and

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O 13, R. 6.—See 12 M L J 351

O. 13 R. 7.—A document which is not admitted in evidence cannot be treated as forming part of the record, although it is found amongst the papers on record. 14 A 356

O 13, R 7 and Oudh Civil Rules, Rr 38 and 39—RECORDING OF ADMITTED AND RETURN OF REJECTED DOCUMENTS — PROCEDURE — The language of R. 7 and of Rr. 38 and 39 of the Oudh Civil Rules, shows that the document must be either placed on the record or returned to the person producing it. There is no alternative. It is highly desirable and even necessary for the ends of justice, that a

disputed document should be placed on the record and should not be returned to the person producing it. Therefore, as soon as formal or *prima facie* evidence of its genuineness has been given, it should be endorsed as "admitted in evidence" and placed on the record. Subsequently the Judge might find, upon a consideration of the whole evidence, that the document was a forgery, or that its genuineness was not proved to his satisfaction. In that event the Judge should, in order to avoid any possible misunderstanding add a further endorsement "genuineness not established" or words to that effect, but he should not endorse it as "rejected" which implies that the document should not form part of the record and should be returned to

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of:

provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so:

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless

Loc Am.—[Bombay] Between the first and second proviso to sub-rule (1) of R 9 of O. 13, the following proviso shall be inserted namely—

Provided also that a copy of the decree and of the judgment filed with the memorandum of appeal under O 41, R. 1, may be returned after the appeal has been disposed of by the Court.

[Lahore] Rule 9 (1) —Add the following proviso as the third proviso—

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[Madras] O XIII, r. 9—Substitute the following for the existing sub-r. (3) and re-number the existing sub-r. (4) as sub-r. (5)—

(3) Every application for return of a document under the first proviso to sub-r. (1) shall be made by a verified petition and shall set forth facts justifying the immediate return of the original.

(4) The Court may make such order as it thinks fit for the costs of any or all the parties to any application under sub-r (1) The Court may further direct that any costs incurred in complying with or paid on application under sub-r (1) or incurred in complying with the provisions of r. 5 of this order, shall be included as costs in the cause.

(G. O. Ms. No. 2823, Home, dated 22nd October, 1936)

the Court shall, except for reasons to be recorded by it in writing, require the party on whose behalf the document was produced, to substitute with the least possible delay a certified copy for the original, and shall thereupon cause the original document to be returned to the applicant and may further make such order as to costs and charges in this behalf as it thinks fit. If the copy is not so provided within the time fixed by the Court, the original document shall be returned to the applicant without further delay."

[Nagpur] Rule 9—Insert the following sub-rule (2) of R 9 and re-number the present sub-rule (2) as sub-rule (3)—

(2) Where the document has been produced by a person who is not a party to the suit, the Court may and, at the request of the person applying for the return of the document, shall order the party at whose instance the document was produced to pay the cost of preparing the certified copy

[Patna.] Add the following as sub-R. 1-A in R. 9, O 13.—

(1) (a) Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document is produced to substitute a certified copy for the original as hereinbefore provided.

10. [S. 137] (1) The Court may of its own motion, and may in its

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the person producing it. 162 I C 527=1936 O.W.N. 619=1936 O. 298.

O 13, R 10—Judge is not bound to send for the records of another suit. 7 W R 109; 18 W R 13 But should not refuse an application under this rule merely because in his opinion the document cannot be produced before trial 7 C. 560. Party applying may be required to file copies of the documents on record. 2 Bom H C. 341. Mere summoning by Court of a record containing a document relied on by a party will not absolve the party from the duty of placing the document by formal admission or proof upon the record of the trial for which it is required as evidence; the correct procedure for the

party relying on a document not in his possession but of which a copy can be got by him is to produce the copy. If the copy is admitted by the opposite party original need not be produced. If it is not admitted or if it is still necessary to produce the original for technical proof, then the party must make an application in strict accordance with R 10 specifying the documents required. Application for summoning records of a case on the file of suit should be rejected unless the affidavit satisfied the Court that copies of the specified documents cannot be produced without unreasonable delay or expense or that the production of the original is necessary. 131 I.C. 374=1931 L. 119

Court may send for papers from its own records or from other Courts

discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit

Loc Ams—[Rangoon] In O 13, R. 10, sub-rule (3) shall be re-numbered as (5) and the following shall be inserted as sub-rules (3) and (4) —

"(3) If the Court think fit to send for the record, it shall do so by sending a formal proceeding to the Court whose record is required. No summons to produce any record shall be issued to any Record-keeper, Chief Clerk, or Official of any Court

"(4) Whenever a Judge sends for the record of another suit or case or other official papers and uses any part of such record or papers as evidence in trial before him, he shall direct that an authenticated copy of the part so used shall be put up with the trial record, and shall further direct at the expense of which party such copy shall be made "

In O 13, the following shall be inserted as Rr 10-A and 10-B —

"10-A Exhibits, with their accompanying lists, shall not be filed with the record until after the termination of the trial

"10-B If any exhibit included in the index of contents of the trial record is withdrawn after judgment, the fact should be noted in the column of remarks of the index, and it should be stated whether a copy has been substituted or not "

Provisions as to documents applied to material objects

11. [S. 145] The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.

Loc Am—[Allahabad] Insert the following as Rr 12 and 13 to O 13 —

"12 Every document not written in the Court vernacular or in English, which is produced (a) with a plaint or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character. The person making the translation or transliteration shall give his name and address and verify that the translation or transliteration is correct. In case of a document written in a script or language not known to the translator or to the person making the transliteration, the person who reads out the original document for the benefit of the translator or the person making the transliteration shall also verify the translation and transliteration by giving his name and address and stating that he has correctly read out the original document "

"13. When a document included in the list, prescribed by R 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in R 4 (1), mark such document with serial figures in the case of documents admitted as evidence for a plaintiff and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants the documents of the first party defendant may be marked A-1, B-1, C-1, etc., AA-1, BB-1, etc., and those of the second A-2, B-2, C-2, etc., AA-2; BB-2, etc. When a number of documents of the same nature is admitted, as for example, a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series "

ORDER XIV.

SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES OF LAW OR ON ISSUES AGREED UPON.

Framing of issues.

1. [S. 146.] (1) Issues arise when a material proposition of fact or law is affirmed by one party

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O. 14, R. 1. OBJECT OF FRAMING OF ISSUES

—"We make it the occasion for insisting on the importance of defining with precision at

and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds, (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

2 [S. 146, para. 6.] Where issues both of law and of fact arise in the

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the outset the points on which a decision must turn. This no doubt requires thought and care, but the time is well spent; vague and general issues for the most part mean that the case is approached without a clear idea of its essentials." 28 B. 424. *See also* 22 C. 324 (P.C.); 11 C. 111 (118) (P.C.). The duty of framing issues rests under the Code on the Court, and it would be unsafe to presume from the failure of the Court to raise the necessary issues, an intention of the defendant to admit the facts which the plaintiff was bound to prove. 26 B. 363. *See also* 47 I.C. 589=35 M.L.J. 372, 51 I.C. 1007. It is the duty of Court primarily to frame issues but the parties are entitled to be heard. 78 I.C. 1=1925 M. 169, 60 I.C. 751. Court cannot raise points not raised by parties. 1923 A. 167, 21 M.L.J. 1008=12 I.C. 137. The issues should raise matters fairly in controversy between the parties, even though the pleadings may be defectively drawn. 8 M.H.C. 114. No issues arise where there is no averment or denial. 68 I.C. 106=2 Lah.L.J. 188. Every Court trying civil cases has inherent power to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties, 35 M. 607=39 I.A. 218=23 M.L.J. 321 (P.C.). This rule implies that issues may be settled whether there is a written statement or not, though it is not obligatory on Court to frame issues when the defendant makes no defence. 11 C.W.N. 870. *See also* 29 B. 234. Court is not bound to frame issues when defendant does not appear. 15 W.R. 145. Under R. 1 issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other. Such affirmation or denial must be contained in the pleadings as defined in O. 6, R. 1. Where there is no written statement the only issues would be those arising out of the plaint which allegations are put in issue when not admitted. 165 I.C. 29=1936 N. 177. Court is not justified in framing an issue on a question about which there is no dispute in the pleadings. 51 I.C. 981=1919 P.H.C.C. 393. But *see* 87 I.C. 575=1925 C. 1157 (an issue may be framed by reference to other matters besides plead-

ings); 5 R. 527=1927 R. 319 (Suit on promissory note—Defendant admitting signature but pleading fraud on the part of plaintiff—Burden of proof on plaintiff). As to the raising of issues between co-defendants, *see* 15 M. 264. For other illustrative cases, *see* 2 M.H.C. 470; 13 M.I.A. 573; 29 M. 72. *See also* 29 A. 184 (P.C.), 16 W.R. 235, 17 W.R. 359; 6 C. 815, 8 C. 975. Inconsistent issues should not be raised. 15 C. 684 (P.C.). *See also* 13 M. 549. Judge is not bound to raise an issue on a point of law which he considers to be perfectly clear. 2 Bom.H.C. 272. Court while striking issue regarding limitation should first ascertain what article the parties consider to be applicable to the suit as framed. If the application of a particular article raises a question of fact, an issue should be struck on those facts; and if the facts are not in dispute, it may be possible to decide the question on purely legal arguments in the initial stages of the case without putting the parties to the expense of a trial. 1935 L. 982. The Court should not decide a suit in a way which is not the case of either party and on matter on which no issue is raised. 15 I.C. 185=1912 M.W.N. 177. A specific finding must be given on every issue though two or more issues may be discussed jointly. 20 I.C. 792=25 M.L.J. 329. Evidence inadmissible on issues not raised. 53 I.C. 975.

O. 14, R. 1 (5). 'FIRST HEARING OF SUIT'—MEANING OF.—The words 'first hearing of the suit' in O. 13, R. 1 are obviously different from the words 'the first hearing of the suit' under O. 14, R. 1, Cl. (5), because parties have not to produce their documents till issues are framed. First hearing would clearly extend at least up to period of the 'first hearing of the suit, referred to in O. 13, R. 1. Hence it cannot be said that the powers conferred by O. 1 (5) only extend to the first discussion of issues and not to any subsequent ones which intervene between the 'first hearing of the suit' as meant by R. 1, Cl. (5) and the first hearing as meant by O. 13, R. 1. 1935 M. 261.

O. 14, R. 2. SECTION MANDATORY.—R. 2 is mandatory; the only thing left open to Court is to form and express an opinion of whether

Issues of law and of fact. same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

Materials from which issues may be framed. 3. [S. 147.] The Court may frame the issues from all or any of the following material:—

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by either party.

4. [S. 148.] Where the Court is of opinion that the issues cannot be

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the case can be disposed of on the issue of law, but the opinion even if expressed must be expressed upon some reasonable materials. 162 I.C. 486=17 Pat.L.T. 253=1936 P. 250

OBJECT OF RULE—DISCRETION OF COURT.—In deciding the question as to whether Court should grant or refuse a prayer to try a preliminary issue on a point of law, some harmony is to be observed between the general principle that it is undesirable to try cases piecemeal and the specific and wholesome provision of R. 2 which is for the purpose of preventing the injustice of a party being able to force his opponent go at great length into evidence when the simple decision on a point of law might render the investigation of the facts unnecessary. 162 I.C. 486=17 Pat.L.T. 253=1936 P. 250.

APPLICATION OF THE RULE—Provisions of this rule, as to trying issues of law before those of fact only come into operation at the first hearing of the suit. 4 B 578. This rule and O. 15, R. 3 have no application to a case where application is made after the date fixed for first hearing for the trial of some issues raised in a suit, as issues of law, without taking evidence. The question should be dealt with quite irrespective of the provisions of the Code. 145 I.C. 446=57 C.L.J. 127=1933 C. 559. R. 2 does not apply to cases in which issues of fact have not been settled but applies to cases, where Court has not postponed the settlement of issues of fact. 28 I.C. 818=19 C.W.N. 1193. It applies when on settlement of issues Court thinks there are issues of law upon which the case or some part thereof may be disposed of, then those issues of fact may be postponed. 15 L.W. 667=68 I.C. 167. See also 57 C.L.J. 127=1933 C. 559. As to limitation on the power, see 89 I.C. 814=1925 P. 674. Court acts illegally, if it treats issues raising mixed questions of law and fact, as involving only questions of law and decides without taking evidence. 26 I.C. 954=20 C.L.J. 426. On this section, see also 5 R. 527. Under R. 2 Court must decide whether the case can be disposed of on the issue or issues of law in the first place, and if it is of opinion that the case may be disposed of on those issues only, it has no option but must decide those issues first.

Where the defendant applied to have the issue relating to the jurisdiction of the Court tried first, but the Court rejected the application on the ground that it was not desirable to decide the case piecemeal. *held*, that as the Court had failed to consider at all the question whether the case may be disposed of on the legal issue alone, it had acted irregularly and that the order of dismissal may be interfered with in revision. 146 I.C. 792=1933 A.L.J. 707=1933 A. 753

PRELIMINARY ISSUE OF FACT.—Under R. 2 Court has no power to frame a preliminary issue of fact, though, no doubt, when Court has framed issues which properly arise, Court may come to the conclusion that one or more of these issues should be tried first and independently, because the evidence on such issue or issues can be conveniently separated from the rest of the evidence and the finding on that issue or issues may render the trial of other issues unnecessary. 56 B 224=137 I.C. 362=1932 B 128. See also 1932 M.W.N. 331. Where, in a suit, there are several issues of fact and law, if there is a preliminary issue of law, the decision of which may obviate the examination of a large number of witnesses, it is desirable and proper that such issue should be determined before the witnesses are called. In such a case it is not the proper procedure to take the evidence on all the issues and then decide the case finally. The mere fact that findings on preliminary issues give rise to revision applications and cause delay is no ground for postponing the determination of such issues. 18 N.L.J. 339. The burden of proof is fixed when the issues are framed, and after that it is merely a case of considering the evidence. Once the pleadings are complete the burden of proof is not transferred from side to side in the course of the proceedings. 146 I.C. 445=1933 R. 174.

REVISION.—It is for trial Court to decide in what order it will decide the issues and High Court will not interfere in revision in order to make a direction on this point. 1933 A. 749. But see 146 I.C. 792

O. 14, R. 3—See 3 B 210 (213); 11 C. 407 (410); 12 W.R. 512; 27 A. 266.

O. 14, R. 4.—Document produced at the instance of other party—Evidence. 1926 N. 60.

Court may examine witnesses or documents before framing issues

correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

5. [S. 149.] (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

Power to amend, and strike out, issues.

(2) The Court may, also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

6. [S. 150.] Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,

Questions of fact or law may by agreement be stated in form of issues.

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

7. [S. 151.] Where the Court is satisfied, after making such enquiry as it deems proper,

(a) that the agreement was duly executed by the parties.

(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided, it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.

Notes.

O 14, R 5 — It is duty of the Court to frame clear and distinct issues on points in dispute between the parties. 1931 A L.J. 349 = 1931 A 625 An issue cannot be amended or a fresh issue framed so as to convert a suit of one character into one of another and inconsistent character. 13 B. 664, 6 A 456. See also 38 I.C 191 = 2 Pat L.J. 69 A charge of unchastity disentitling a Hindu widow to maintenance, must be specifically raised in the pleadings or issues After plaintiff's case is closed, Court will not frame an issue to that effect. 27 B 485 (P C) Judge is not bound to make any amendment in the issues of a case, except for the purpose of more effectually putting in issue and

trying the real question or questions in controversy, or disclosed by the pleadings on either side. 5 C. 64. The application of this rule is not confined to the date of first hearing. 68 I C 167 = 1922 M 321. Amendment of plant—Late stage—Plea of fraud—Amendment ordered, on payment of costs. 57 C 398.

O. 14, R. 6—The principles laid down in this rule and in R. 7 apply when the question of fact is stated in the form of an issue and is referred to the finding, not of the Court but of a Commissioner. 29 C. 306.

O. 14, R. 7.—The word "shall" has been substituted for the word "may" to give effect to the ruling in 16 B 202 (216)

ORDER XV.

DISPOSAL OF THE SUIT AT THE FIRST HEARING.

1. [S. 152.] Where at the first hearing of a suit it appears that the parties are not issue on any question of law or of fact, the Court may at once pronounce judgment.
Parties not at issue.
2. [S. 153.] Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants
One of several defendants not at issue.

Loc Am—[Madras.] *Re-number* R 2 of O. 15 as sub-rule 2 (1) and *insert* the following as sub-rule (2).—

"(2) Whenever a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced."

3. [S. 154.] (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit:
Parties at issue

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

- (2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further arguments as the case requires.

4. [S. 155.] Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.
Failure to produce evidence.

ORDER XVI.

SUMMONING AND ATTENDANCE OF WITNESSES.

1. [S. 159.] At any time after the suit is instituted, the parties may obtain,

Notes.

O. 15, R. 2.—The working of this rule will lead to anomalies. See 25 A 42. In an action commenced against several joint debtors judgment recovered against one of them who admits the claim does not bar the further prosecution of the suit against the others. 25 B, 378.

O. 15, R. 3: APPLICATION OF THE RULE.—R. 3 (1) applies after issues have been framed and allows the Court to determine issues of law, if satisfied that no further argument or evidence than the parties can at once adduce, is required upon such of the issues as may be sufficient for the decision of the suit. 68 I.C. 167=1922 M. 321. See also 16 M 198. O. 14, R. 2 and O. 15, R. 3 have no application to a case where the application is made after the date fixed for first hearing for the trial of some issues raised in a suit, as issues of law, without taking evidence. The question should be dealt with quite irrespective

of the provisions of the Code 145 I.C. 446=57 C.L.J. 127=1933 C. 559. In appealable cases Court should as far as possible pronounce its opinion on the other issues as well. 34 C.W.N. 1129=1930 C. 787.

O. 15, R. 4.—Judge cannot dispose of the case at the first hearing when the summons is issued for settlement of issues only 25 I.C. 9=1914 M.W.N. 501.

O. 16, R. 1.—Under R. 1, Court has no discretion in the matter of an application for summonses on witnesses if such application be made before the day of hearing 68 I.C. 272. See also 132 I.C. 579=1931 L. 135; 27 Bom.L.R. 471=1925 B 368; 15 B 86; 16 A. 218; 57 C. 560 at 565=1929 C. 459=49 C.L.J. 546. The word 'may' in O. 1, means "it shall be lawful" unless an application, on the face of it, is frivolous and vexatious, the Court has no discretion except to summon the witnesses. If an application is made too late and the service on the witness cannot be effected

Summons to attend to give evidence or produce documents.

on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents.

Loc. Ams.—[Allahabad.] *The following proviso is added by the Allahabad High Court—*

Provided that no party who had begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witnesses against whom process has not previously issued, or to call any witness not named in a list, which must be filed in Court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor.

[Bombay.] The following shall be added as R. 1-A to O. 16—

1-A (1) The Court may, on the application of any party for a summons for the attendance of any person, permit that service of such summons shall be effected by such party

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service to be effected by an officer of the Court

[Lahore] Add the following proviso.—

"Provided that no party who has begun to call his witness shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence, without an order of the Court made in writing and stating the reasons therefor."

[Nagpur.] Rule 2 (1) —Add the following as an exception to R. 2 (1) —

"Exception —When applying for a summons for any of its own officers, Government will be exempt from the operation of sub-rule (1)."

[N - W F P] Substitute the following for R. 1 —

1 (1) On such date as the Court may appoint and not later than 30 days after the settlement of issues, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents.

(2) They shall not be permitted to call witnesses other than those contained in the said list, except with the permission of the Court and after showing good cause for the

Notes.

in time, it is no doubt within the discretion of the Court to adjourn the date of the hearing or not, but that is no reason whatever why a party should not be given an opportunity, if he is prepared to take the chance of having the presence of the witness secured by serving a notice upon him. 17 L. 775 Even where application is too late Court has no power to refuse to summon witnesses, it may refuse to adjourn the case 87 I.C. 355=1925 L. 67. See also 101 I.C. 541=1927 L. 281; see also 96 I.C. 448=1926 P. 545, 1926 C. 364, 1929 P. 622 Where one party desires the presence of the opposite party in Court for purpose of examining him as a witness the proper procedure to adopt is the one under O. 16 and not under the proviso to O. 3, R. 1. 146 I.C. 536=1933 M. 821=65 M.L.J. 734 The legitimate privilege of taking out summons to witnesses is subject to the control of the tribunal which is called upon to enforce their attendance though such control will be sparingly exercised, and only in exceptional cases. When a person's attendance is required from ulterior motives, a commission may be issued. 28 M. 28 Judge's discretion in not compelling the attendance of witnesses must be exercised on

reasonable grounds distinctly stated in the judgment. 7 W.R. 147 Detailed reasons, for refusal, need not be given. 6 W.R. 65. Direction to witnesses to appear—Adjournment of hearing by Court if can be made. 15 I.C. 367=22 M.L.J. 409. The fact that a party has undertaken to bring his witnesses is no ground for refusing to summon them. 6 B. 472 Where witnesses summoned are absent, further opportunity should be allowed. 4 Pat.L.T. 545=1924 P. 36. And the case cannot be decided on the ground that the witnesses, if produced, would not have supported the case of the party producing them. 86 I.C. 1012=1925 L. 572. The witness can produce documents not referred to in the summons. 88 I.C. 498=1925 C. 1149.

O. 16, R. 1: PROVISO (PUNJ.)—APPLICABILITY.—Court cannot refuse to examine the witnesses whose names were included in the original list and who were present on the date of hearing R. 1, Proviso (local amendment) does not apply 1934 L. 317 The proviso to R. 1 added by the Lahore High Court, does not say that all the witnesses have to be named in the list filed. The party can file his list up till the moment when he actually commences to lead evidence. 157 I.C. 431=1935 L. 488.

omission of the said witnesses from the list, the Court granting such permission shall record reasons for so doing.

(3) On application to the Court or such officer as it appoints in this behalf, the parties may obtain summonses for persons whose attendance is required in Court.

[Oudh.] *Substitute* for R. 1 the following—

1. (1) The Court may, in any suit or class of suits, require any party to file by a date to be fixed by the Court, a list of witnesses whom he proposes to produce, and may, if necessary, direct that such list be kept in a sealed envelope for such time as the Court considers desirable.

Where such a list has been called for from any party, the latter shall not, except for special reasons, be permitted to summon or produce as witness any person whose name has not been entered in the list.

(2) Subject to the provisions of sub-rule (1) the parties may, after the suit is instituted, obtain on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents

[Sindh.] *Add* the following as R. 1-A, after R. 1—

1-A. The Court may, on the application of any party for a summons for the attendance of any person as a witness, permit that service of such summons shall be effected by such party

2. (1) The party applying for a summons shall, before the summons is granted, and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf.

Loc. Ams.—[Allahabad.] To O. 16, R. 2, *add*—

(4) This rule shall not apply, in cases to which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs. 10 per mensem and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their headquarters.

[Bombay] *Insert* as proviso to sub-rule (1) of R. 2 of O. 16—

Provided that where Government or a public officer being a party to a suit or proceeding, as such public officer supported by Government in the litigation, applies for a summons to any public officer to whom the Civil Service Regulations apply, to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any documents from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness.

[Lower Burma] *For* the provisos to sub-rule (1) of R. 2, *substitute* the following—

"Provided that in cases to which Government or a Local Authority is a party—

(a) no payment into Court will be required for the travelling and other expenses of a servant of Government or of a Local Authority who may be required to be summoned at the instance of Government or the Local Authority respectively to give evidence in his official capacity;

Notes.

O. 16, R. 2.—After the list of witnesses has been filed and batta paid, Court's Officers and not the applicant are responsible for their service 15 W.R. 88. Dismissal of suit is proper where plaintiff fails to pay process

fees. 7 Lah.L.J. 232—89 I.C. 955. No action will lie for the expenses of a witness. 5 W.R.S.C. Ref. 6-A witness is entitled to be paid his expenses although he has not applied for them before giving his evidence. 4 B.

(b) the amount to be paid into Court for the travelling and other expenses of a servant of Government or of a Local Authority whose salary exceeds Rs. 10 and who may be required to be summoned at the instance of a party other than the Government Servant or the Local Authority respectively to give evidence in his official capacity in a Court situated at a distance of more than five miles from his headquarters shall be equivalent to the travelling and halting allowances admissible under the rules applicable to him in his official capacity."

In O 16, R. 2, the following shall be substituted for sub-rule (3) —

"(3) Subject to the provisions of sub-rule (2), travelling and other expenses of witnesses, in Courts subordinate to the Chief Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale —(1) Ordinary labouring class of Natives —The actual railway or steamboat fare to and from the Court by the lowest class, so far as these can be ascertained, or, where the journey cannot be performed by rail or steamboat, actual travelling expenses up to limit of Rs. 2 a day by boat and of 4 annas a mile by road and an allowance for each day's absence from home, including one day in attendance at the Court, or six annas to those who are residents of places other than the place where the Court is held, and of four annas to those who are residents of the place where the Court is held. (2) Petty village officers —Double the above rate of daily allowance, same rates as above for railway or steamboat fare or actual travelling expenses by boat or road up to the limit of Rs. 2 a day by boat and of four annas a mile by road, and an allowance for each day's absence from home of fourteen annas to those who are residents of places other than the place where the Court is held and of twelve annas to those who are residents of the place where the Court is held. (3) Persons of higher ranks of life, such as clerks, tradespeople, Ywathugyis and Cicle Thugyies —Second Class railway or steamboat fare to and from the Court or, where the journey cannot be performed by rail or steamboat, actual travelling expenses up to a limit of Rs. 4 a day by boat and of six annas a mile by road, and an allowance not to exceed except in special cases Rs. 3 for each day's absence from home to Europeans or Eurasians and Re. 1 to Natives. NOTE.—A non-official who does not pay income-tax, even though he may describe himself as a clerk or a tradesman, is not entitled to be treated as falling under class (4). (4) Persons of superior rank.—The actual sum likely to be spent in travelling to and from the Court, with an allowance, according to circumstances, not to exceed, except in very special cases, Rs. 5 for each day's absence from home to Europeans or Eurasians and Rs. 2 to Native gentleman. (5) Witnesses following any profession, such as medicine or law.—A special allowance according to circumstances. (6) Lodging allowance.—In addition to the above, a lodging allowance not exceeding except in special cases rupee one for persons in class (3) and rupees two for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness has to pay for his night's lodging. When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent.

Provided that—

(i) a servant of Government or of a Local Authority whose salary exceeds Rs. 10 per mensem giving evidence in his official capacity in a suit to which Government or the Local Authority respectively is a party—

(a) When giving evidence at a place more than five miles from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance,

(b) When giving evidence at a place not more than five miles from his headquarters, shall, in cases where the Court considers it necessary, receive under these rules, actual travelling expenses, but shall not receive subsistence, special or expert allowances.

(ii) A servant of Government or of a Local Authority whose salary does not exceed Rs. 10 per mensem, giving evidence in his official capacity, shall receive his expenses from the Court.

NOTE.—When the journey has to be performed partly by rail or steamboat and partly by road or boat the fare shall be paid in respect of the former and the mileage or boat allowance in respect of the latter part of the journey. Railway servants summoned by a Civil Court as witnesses, and travelling by rail to attend the Court, should be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fare."

[Calcutta] Rule 2 Cancel clauses (1) and (2) and substitute therefor the following —

(1) The Court shall fix in respect of each summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

[Lahore.] Add the following as an Exception to R 2 (1) —

"Exception—When applying for a summons for any of its own officers, Government will be exempt from the operation of clause (1).

[Nagpur.] Add the following as an exception to R 2 (1) —

Exception—When applying for a summons for any of its own officers, Government will be exempt from the operation of sub-rule (1)."

[Patna] Add the following proviso to O 16, R 2 (1) —

Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the person to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or as matters with which he has had to deal in his public capacity.

[Rangoon] Add the following to R. 2 (1).—

"Provided that in cases to which Government or a local authority is a party:—

(a) No payment into Court will be required for the travelling and other expenses of a servant of Government or of local authority who may be required to be summoned at the instance of Government or the local authority prospectively to give evidence in the official capacity;

(b) The amount to be paid into Court for the travelling and other expenses of a servant of a Government or of a local authority whose salary exceeds Rs. 10 and who may be required to be summoned at the instance of a party other than the Government or the local authority prospectively to give evidence in his official capacity in a Court situated at a distance of more than five miles from his headquarters shall be equivalent to the travelling and halting allowances admissible under the rules applicable to him in his official capacity."

The following shall be substituted for the sub-rule (3) —

"(3) Subject to the provisions of sub-rule (2), travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale:—

(1) *Ordinary labouring classes*.—The actual railway or steam-boat fare to and from the Court by the lowest class; or where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 2 a day by boat and of 4 annas a mile by road; and an allowance for each day's absence from home of ten annas to those who are residents of places other than the place where the Court is held and of eight annas to those who are residents of the place where the Court is held.

(2) *Petty village officers*.—The same rates as above for railway or steam-boat fare, or actual travelling expenses by boat or road up to the limit of Rs. 2 a day by boat and of four annas a mile by road; and an allowance for each day's absence from home of fourteen annas to those who are residents of places other than the place where the Court is held, and of twelve annas to those who are residents of the place where the Court is held.

(3) *Persons of higher ranks of life such as clerks, trades people, village headman and headman of circles*.—Second class railway or steam-boat fare to and from the Court; or where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 4 a day by boat and annas six a mile by road; and an allowance not to exceed except in special cases Rs. 1-8-0 per each day's absence from home.

(4) *Persons of superior rank*.—The actual sum spent in travelling to and from the Court with an allowance according to circumstances, not to exceed except in special cases Rs. 5 for each day's absence from home.

(5) *Witnesses following any profession, such as medicine or law*.—A special allowance according to circumstances.

(b) *Lodging allowance*.—In addition to the above, a lodging allowance not exceeding except in special cases rupee one for persons in class (3) and rupees two for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness has to pay for his night's lodging. When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent.

Provided that—

(1) A servant of Government or of a local authority whose salary exceeds Rs. 10 *per mensem* giving evidence in his official capacity in a suit in which Government or the local authority respectively is a party—

(a) When giving evidence at a place more than five miles from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance,

(b) When giving evidence at a place not more than five miles from his headquarters, shall in cases where the Court considers it necessary, receive under these rules actual travelling expenses, but shall not receive subsistence, special or expert allowances

(2) A servant of Government or of local authority whose salary does not exceed Rs. 10 *per mensem*, giving evidence in his official capacity, shall receive his expenses from the Court

Note—When the journey has to be performed partly by rail or steam-boat and partly by road or boat, the fare shall be paid in respect of the former and the mileage or boat allowance in respect of the latter part of the journey

Railway servants, summoned by a Civil Court as witnesses, and travelling by rail to attend the Court should be paid the railway fare to which they are entitled under the rules for the payment of witnesses without regard to the fact that they may have travelled under a pass and not on actual payment of the fares."

3. [S. 161.] The sum so paid into Court shall be tendered to the persons summoned, at the time of serving the summons, if it can be served personally.

Tender of expenses to witness.

Loc Ams.—[Bombay.] Insert as proviso to R. 3 of O. 16—

Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice, or of facts with which he has had to deal in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him.

[Calcutta] *Cancel* R. 3 and *substitute* therefor the following —

The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally

[Lahore.] For R. 3, *substitute* :—

3 (1) The sum so paid into Court shall, except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government.

Exception (1).—In cases in which Government servants have to give evidence at a Court situate not more than five miles from their headquarters, actual travelling expenses incurred by them may, when the Court considers it necessary, be paid to them

Exception (2).—A Government servant, whose salary does not exceed Rs. 10 *per mensem*, may receive his expenses from the Court.

[Nagpur.] Rule 3 —*For* R. 3, *substitute* the following.—

"3 (1) The sum so paid into Court shall, except in case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally

(2) When the person summoned is a Government servant the sum so paid into Court shall be credited to Government.

Exception (1) —In cases in which Government servants have to give evidence at a Court situate not more than 5 miles from their headquarters, the actual travelling expenses incurred by them, may, when the Court considers it necessary, be paid to them.

Exception (2).—A Government servant, whose salary does not exceed Rs. 10 *per mensem* may receive his expenses from the Court."

Notes.

O. 16, R. 3—A witness who attends on *subpoena* is entitled to demand his *batta* at any time, from the party summoning him although he gives evidence as witness for a

party other than the party summoning him. 28 B 647. If he does not attend, he can be sued for the recovery of the sum tendered. 17 M.L.J. 143.

[Patna.] *Add the following as proviso to R. 3 of O. 16:—*

Provided that when the person summoned is an officer of Government who has been summoned to give evidence in a case to which Government is a party, of facts which have come to his knowledge, or of matters which he has had to deal, in his official capacity; then,

(i) if the officer's salary does not exceed Rs. 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by R. 2 and recover the amount from the treasury;

(ii) if the officer's salary exceeds Rs. 10 a month and the Court is situated not more than five miles from his headquarters, the Court may, at its discretion, on his appearance, pay him the actual travelling expenses incurred;

(iii) if the officer's salary exceeds Rs. 10 a month and the Court is situated more than five miles from his headquarters, no payment shall be made to him by the Court. In such cases any expenses paid into Court under R. 2 shall be credited to Government

[Rangoon] To R. 3 of O. 16, *add the following —*

"This rule does not apply, where the person summoned is a servant of Government or of a Local Authority summoned to give evidence in his official capacity in a case to which the Government or the Local Authority respectively is a party."

4. [S. 162.] (1) Where it appears to the Court or to such officer as it

Procedure where insufficient sum paid in.

appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum

to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

(2) Where it is necessary to detain the person summoned for a longer

Expenses of witnesses detained more than one day.

period than one day, the Court may, from time to time, order the party at whose instance he was summoned, to pay into Court such sum as is sufficient to

defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the movable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

Loc. Ams.—[Calcutta.] *Cancel clause (i) and substitute therefor the following:—*

(1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons; or the Court may discharge the person summoned without requiring him to give evidence, or may both order such levy and discharge such person as aforesaid

[Lahore] Rule 4 After the word "summoned," where it first occurs in R. 4 (1) *insert:—*

"or, when such person is a Government servant, to be paid into Court"

[Madras] *Insert the following as R. 4-A in O. 16:—*

4-A (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council no payment in accordance with R. 2 or R. 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles from his headquarters, and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit.

Notes.

O. 16, R. 4.—Default of payment. Only

movable property can be attached. 70 I.C. 123=26 C.W.N. 877.

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed by the Government under whom the officer is serving and shall also pay any further sum that may be required, under R. 4 according to the same scale and the money so deposited or paid shall be credited to Government.

(3) In all cases where a Government servant appears in accordance with this rule, the Court shall grant him a certificate of attendance.

[Nagpur.] Rule 4—After the word “summoned” where it first occurs in R. 4 (1) insert—

“or, when such person is a Government servant, to be paid into Court.”

5. [S. 163.] Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

Time, place and purpose of attendance to be specified in summons.

6. [S. 164.] Any person may be summoned to produce a document, without being summoned to give evidence; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

Summons to produce document.

Power to require persons present in Court to give evidence or produce document

7. [S. 165] Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

Loc Am —[Calcutta.] 7-A Insert the following—

“7-A (i) Except where it appears to the Court that a summons under this Order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summons under this Order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

(ii) Rules 16 and 18 of O. 5 shall apply to summonses personally served under this rule, as though the person effecting service was a serving officer.

(iii) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant.”

8. [S. 166.] Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply in the case of all summonses served under this rule.

Summons how served.

Loc Ams —[Allahabad] For the words in line 1 “under this order shall be served” read “under this order may by leave of the Court be served by the party or his agent, applying for the same, by personal service and failing such service shall be served.”

[Calcutta] Rule 8. Cancel R. 8 and substitute therefor the following—

8 (1) Every summons under this Order not being a summons made over to a party for service under R. 7-A (1) of this Order, shall be served as nearly as may be in the

Notes.

O. 16, R. 5.—A summons should state the place of attendance. 7 M.H.C. Ap XIV & XLIII. A summons should clearly specify the title of the Court and the place, day and

time of the day when attendance is required. 5 A. 7.

O. 16, R. 8.—The rule is one in favour of the witness, and for enforcing diligence on the party. 9 B 308 (310).

same manner as a summons to a defendant, and the rules in O. 5 as to proof of service shall apply thereto.

(2) The party applying for a summons to be served under this rule shall, before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under R. 2 of this Order.

[Oudh] In Oudh add the following provisos.—

Provided that any party may, with the sanction of the Court, himself or by his agent effect service on his own witness, as if he were an officer of the Court; but in this case no diet money paid to a witness by a party or by his agent shall be included in the costs of the suit unless the witness verifies such payment before an officer of the Court.

Provided also that the special procedure for the service of summons upon defendant under O. 5, R. 20-A (1) shall not apply to service of summons under this order.

[Patna.] Add the following provisos to R. 8.—

Provided that such summons shall ordinarily be made over for service to the party calling the witnesses, and his affidavit shall be considered sufficient proof of service; provided further that he shall for sufficient reason, be entitled to apply to the Court to have the summons served through its agency.

Provided that a summons under this Order may by leave of the Court be served by the party or his agent, applying for the same, by personal service. If such service is not effected and the Court is satisfied that reasonable diligence has been used by the party or his agent to effect such service, then the summons shall be served by the Court in the usual manner.

[Rangoon] The following proviso shall be added.—

Provided that, at the request of a party or his pleader, a summons for service on a witness or witnesses, whose attendance is required by such party, may be delivered to such party or his pleader for service by a person employed by such party or his pleader, and the rules in O. 5 as to service and proof of service shall apply in such case as if the person employed by such party or his pleader to effect service were the officer of the Court whose duty it is to effect service of summons.

9. [S. 167.] Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

Time for serving of summons

Loc. Am.—[Rangoon] The following shall be added.—

"Where the person summoned is a public officer or servant of the Railway Company, sufficient time shall also be allowed in order to give the witness an opportunity of communicating with his departmental superior, so as to arrange for the discharge of his duties during his temporary absence from his post."

10. [S. 168.] (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving officer has not been verified by the affidavit, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching the service or non-service of the summons.

Procedure where witness fails to comply with summons

(2) Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be

Notes.

O. 16, R. 10.—Where an application is made at a very late stage of the case, to enforce the provisions of this rule, Court is justified in not adjourning the case. 15

WR. 176. Non-appearance of witness—Court should not insist on party taking out warrant if the party offers to produce the witness himself. 101 I.C. 257 (2)=1927 L. 424 (1).

named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immovable property.

If witness appears, attachment may be withdrawn. 11. [S. 169] Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

(a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment and shall make such order as to the costs of the attachment as it thinks fit.

12. [S. 170.] The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold, or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any:

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

13. The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this order as if the person whose property is so attached were a judgment-debtor.

14. [S. 171.] Subject to the provisions of this Code as to attendance

Notes.

O. 16, R. 10 (3).—*See* 7 P. 312; 1928 L. 979

O. 16, R. 12—No order under R. 12 can be made until the procedure laid down in R. 10 had been followed, where that rule applies. 33 I.C. 968=20 C.W.N. 511; 57 I.C. 302, 1929 A. 850. But *see* 48 M. 941=49 M. L.J. 438, where it has been held that there need not be any issue of proclamation or attachment of property before the fine is imposed. If an order for attachment of property is made, and the person concerned fails to attend in obedience to a warrant, Court may impose upon him a fine under R. 12. 55 I.C. 425=31 C.L.J. 363. When witness or party is present, and Court directs him by word of mouth to produce a document, and there cannot be the slightest mistake as to

the witness or the party having received information of such direction, it will be merely making a travesty of procedure to insist upon the Court issuing a summons to a witness who is present. On failure by a witness to produce the document he can be fined without going through the cumbrous procedure. 116 I.C. 483=1929 A. 99. Both arrest and attachment cannot be ordered. 51 I.C. 967=27 M.L.T. 95. Court is not bound to compel attendance of a witness in absence of an application by a party to that effect. 57 I.C. 311. Where witness appears, but is unable to produce the document, it is illegal to impose a fine upon him. 61 I.C. 967=29 M.L.T. 95.

O. 16, R. 14—EXAMINATION OF PLEADER AS COURT WITNESS.—Court may refuse to examine the lawyer of one party as

Court may of its own accord summon as witnesses strangers to suit.

Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document.

15. [S. 172.] Subject as last aforesaid, whoever is summoned to appear

Duty of persons summoned to give evidence or produce document.

and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

16. [S. 173.] (1) A person so summoned and attending shall, unless the

When they may depart.

Court otherwise directs, attend at each hearing until the suit has been disposed of.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.

17. [S. 174, para. 1 and S. 175.] The provisions of rules 10 to 13 shall,

Application of rules 10 to 13.

so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contra-

vention of rule 16.

18. [S. 174, last para.] Where any person arrested under a warrant is

Procedure where witness apprehended cannot give evidence or produce document.

brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given, may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

No witness to be ordered to attend in person unless resident within certain limits.

19. [S. 176.] No one shall be ordered to attend in person to give evidence unless he resides—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for

Notes.

a Court witness when in dealing with his client's case he is aware of every detail which was expected to be elicited from him. Thus it will not be fair to examine him after the details had been discussed in two Courts. 12 P. 359=14 Pat L T. (Sup) 1=1933 P. 306 A witness called by the Court is liable to be cross-examined by any of the parties 11 WR 468.

O. 16, R. 16.—The rule has been amended so as to meet the ruling in 5 M.H.C.R 132 These rules have no application to a case where a party to a suit desires to give evi-

dence of his own motion in his own favour. 35 C.L.J 7=68 LC 9.

O. 16, Rr 19 and 21—Scope of 35 C.L.J. 78=68 I.C 9. O. 16, R. 19 if controls O. 26, R. 1 See 63 C. 914 A plaintiff who does not reside within limits of the jurisdiction of trial Court nor within 200 miles of the place where the Court sits cannot be compelled to appear in person as a witness for the defendant, but the defendant has to get him examined on commission at the place where the plaintiff resides. 140 I.C. 716=1932 N. 135. See also 68 M.L.J 203.

five-sixths of the distance between the place where he resides and the place where the Court is situated) less than two hundred miles distance from the Court-house.

20. [S. 177.] Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any documents then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

Consequence of refusal of party to give evidence when called on by Court

Rules as to witnesses to apply to parties summoned.

21. [S. 178.] Where any party to a suit is required to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as they are applicable

See also *Fallahabad* 1 Add the following to O. 16 as R. 22 and 23:—

Page 719.

[Madras] O. XVI, r. 21. Substitute the following for r. 21:—

(1) When a party to a suit is required by any other party thereto to give evidence or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

Rules in the case of parties appearing as witnesses.

(2) When a party to a suit gives evidence on his own behalf, the Court may, in its discretion, permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing.

[G. O. Ms No 402, Law (General), dated 4th February, 1936.]

of that witness on a slip which the witness will present to the Court from which the summons was issued

(3) If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under cl. (4) of this rule as may seem to the Court to be reasonable and proper

Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed."

"23 In cases to which Government is a party, Government servants, whose salary exceeds Rs. 10 per mensem and all police constables whatever their salary may be who are summoned to give evidence in their official capacity at a Court situated more than five miles from their headquarters shall be given a certificate of attendance by the Court in lieu of travelling and other expenses"

[Calcutta] Rule 21 Cancel R. 21 and substitute therefor the following —

21 (1) When a party to a suit is required by any other party thereto to give evidence or to produce a document, the provision as to witnesses shall apply to him so far as applicable.

(2) When a party to a suit gives evidence on his own behalf, the Court may, in its discretion, permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing.

Notes.

O. 16, R. 20—What is or what is not a lawful excuse, must depend on the circumstances of each case. 18 W.R. 63 The stringent provisions of this rule ought to be applied only in case of contumacious litigants. 15 W.R. 253 The requirement of the law under R. 20 is fulfilled, if the document is produced, and where a document is produced but refused to be exhibited, the Court cannot dismiss the suit. 46 I.C. 879=28 C.L.J. 24. A decision against a party for

failure to give evidence does not operate as *res judicata* 2 C. 222 An appeal will lie from a decree passed under this rule. See also O. 43, R. 1

O. 16, R. 21—See 140 I.C. 716=1932 N. 135, cited under O. 16, R. 19. Court has no power under R. 21 or any other provision of the Code to order travelling expenses of a party to the suit who has given evidence in support of his own case, by way of costs to him. 41 L.W. 186=68 M.L.J. 203=159 I.C. 319=1935 M. 244

ORDER XVII.

ADJOURNMENTS

1. [S. 156.] (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

Court may grant time and adjourn hearing

(2) In every such case the Court shall fix a day for the future hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment:

Costs of adjournment

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

Loc. Ams.—[Allahabad] The following proviso is added by the Allahabad High Court—

Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to O. 16, R. 1

[Lahore.] To R. 1 add the following as sub-rule (3)—

(3) Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1) the Court shall proceed with the suit forthwith

2. [S. 157.] Where, on any day to which the hearing of the suit is adjourned the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or

Procedure if parties fail to appear on day fixed.

Notes.

O 17, R. 1: APPLICATION OF THE RULE.—The rule does not apply to an adjournment not made at the instance of the parties. 2 C.W.N. 490. Application for adjournments should not be belated. 83 I.C. 257=1925 N. 536 (2). Non-compliance with a provision of law does not give a party an absolute right to insist on an adjournment. 5 Pat.L.J. 390. Adjournment is in the discretion of Court. 24 I.C. 206; 37 I.C. 266=1 Pat.L.J. 173; 27 I.C. 942. See also 17 Pat.L.T. 329 (S.B.). Court can no doubt refuse to grant an adjournment for good reasons, but if an adjournment be given, the Court cannot refuse to summon witnesses for the adjourned hearing if the process-fees are paid, unless the Court is satisfied that the application for the summons is not made *bona fide* or, is an abuse of the power of the Court to summon witnesses. Where, on the other hand, the non-attendance of the witnesses was due to the mistake of the process writer, who had given a wrong date of hearing, Court should adjourn the case to enable the party to summon his witnesses afresh. 146 I.C. 334=16 Nag.L.J. 208=1933 N. 336 Where a person applied to the Court without delay for the issue of summons and paid in the necessary fees and on the date fixed for the recording of evidence, some of the witnesses although duly served refused to come to Court until they had been served through their superior officers and he asked for adjournment but the Court refused it on the ground that sufficient cause had not been made out, High Court can examine the correctness of the order and it was the duty

of the Court to see that service was effected. 117 I.C. 891=1929 L. 620. Case transferred without notice to defendant an adjournment should be given if he pleads unpreparedness to go on. 91 I.C. 167=7 P.L.T. 381=1925 P. 534. O 17 R. 1 draws a distinction between the hearing of a suit and the hearing of evidence. 46 I.C. 246=27 C.L.J. 119 When the defence set up is of such a nature as to take plaintiff by surprise, time should be granted. 7 W.R. 84. Trial Court alone has power to grant adjournment. 26 I.C. 261=16 M.L.T. 504. Signature of parties or their pleaders to be taken when adjournments are granted. 4 P. 440=1925 P. 807. Court can grant adjournment on the understanding that plaintiff should bear the whole costs of the hearing. 7 C. 177. If costs are not paid, the suit is liable to be dismissed. 90 P.W.R. 1916=35 I.C. 534. Where such a condition is imposed on the defendant and he fails so to pay, Court can strike off the defence and proceed *ex parte*. 47 A. 538=23 A.L.J. 312 But payment on the same day should not be insisted on. 1925 C. 570=78 I.C. 125. When a pleader is asked to admit the genuineness of certain documents there and then, he is entitled to consult his client; and the Court, simply because the pleader wants a short adjournment to receive proper instructions, should not burden him with costs. 38 P.L.R. 896=1936 Lah. 705.

O 17, R. 2: APPLICATION OF RULE.—This rule does not apply to a case where no day has been fixed for the hearing of the suit. 18 W.R. 325. It applies to the case where the hearing of a suit has been adjourned and on adjourned date, the parties or any of them

But where the plaintiff sues for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

Loc. Am.—[Punjab.] In the second paragraph of R. 2 of O. 7, after the word "defendant" insert "or for movables in the possession of the defendant, or for debts the value of which he cannot, after the exercise of reasonable diligence, estimate"; and after the word "amount" where it last occurs insert "or value"

3. Where the subject-matter of the suit is immovable property, the plaintiff shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaintiff shall specify such boundaries or numbers.

Where the subject-matter of the suit is immovable property

Loc. Am.—[Calcutta.] After R. 3, O. 7, add the words—
"and where the area is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without, at the option of the party, the same area in terms of the local measures"

4. [S 50, para. 4.] Where the plaintiff sues in a representative character the plaintiff shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

When plaintiff sues as representative.

Defendant's interest and liability to be shown.

5. [S. 50, para. 5.] The plaintiff shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

6. [S 50, para. 6.] Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.

Ground of exemption from limitation law.

Notes.

which are too voluminous to be included in the plaint may be annexed thereto and may be delivered separately, and these facts should be stated in the plaint. 58 C 418=1931 C 458

O. 7, R. 4.—Plaint is to state the representative nature of the suit 1925 N 183=82 I C 201 A plaintiff suing in a representative character must set it forth, and show that he is qualified to fill it 7 B at 470 In Bombay Presidency Mahomedan executors can sue without first taking over probate 8 B 241. In the case of Hindus, see 14 C. 37 When the original plaintiff dies, the suit may be continued by his legal representative, although the latter has not taken out letters of administration. 16 B. 519 Production of a succession certificate is not a condition precedent to institution of the suit 16 M. 454=19 C 482. See also 17 M 14.

O. 7, R. 5.—Plaint must show how the various defendants are interested in the subject-matter of the suit and the cause of action against each 1924 N 191=79 I C. 614

O. 7, R. 6—R. 6 should be construed liberally and reasonably. 60 I C. 772=3 L. L J 22=2 L. 13; 46 I C 495=102 P.R. 1918 Where a plaint is presented on the re-opening date after Court holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under

S. 4, Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays 168 I C 383=1937 Pesh 41. R. 6 has no application when the plaint is not on its face time barred. 70 P.R. 1914=25 I.C. 463; but is applicable to cases in which the suit as laid in the plaint is *prima facie* barred by limitation. 51 I C. 956=1 L 21. R 6 is a rule of pleading It makes no exception to the general rule that a plaintiff must plead the facts on which he relies for his case If a party is advised that his pleadings are defective, the remedy is amendment by leave of the Court. There is no reason why a different consideration should apply to a plaintiff who wishes to throw over the ground of exemption from limitation pleaded and to put forward some other ground of exemption which he has not pleaded If there is no application to amend the plaint, the suit ought to be dismissed as barred by limitation 37 L W. 370=1933 M. 395=64 M. L J 317. See also 20 N L J. 42 Where a suit is *prima facie* time barred the grounds on which exemption is claimed must be alleged in the plaint. 145 I C 343=1933 L. 491. Ground of exemption from limitation not set up in plaint cannot afterwards be set up and proved. 75 I C. 1048=1924 L 702 A ground to save limitation which has not been taken in the plaint cannot be taken unless the

[Oudh.] To R. 2 add the following as sub-rule (2) and read the existing R 2

sub-rule 2 (1) —

(2) Where, before any such day, the evidence of a substantial portion of the evidence any party has been recorded, and such party fails to appear on such day the Court may, in its discretion, proceed with the case as if such party were present and may dispose of it on the merits

Explanation.—No party shall be deemed to have failed to appear if he is either present in person, or is represented in Court by his agent or pleader, though engaged only for the purpose of making an application.

Notes.

UNDER O. 9, Rr. 8 to 13.]—Defendants failing to appear on date of final hearing—Pleader asking for adjournment and on refusal by Court reporting no instructions—Decree *ex parte*—Setting aside of—Jurisdiction. See 1935 A.L.J. 377=1935 A.W.R. 269 See also (1937) A.W.R. 151=1937 A. 347. Plaintiff's counsel applying for adjournment during plaintiff's absence—Court refusing adjournment and dismissing suit for default—Plaintiff's remedy. See 1936 A.L.J. 635=1936 A.W.R. 499 The mere filing of the list of witnesses before the case has been called on for hearing does not amount to an appearance within the meaning of the explanation to R. 2. The failure to appear takes place only when the suit is called on for hearing even though it be an adjourned hearing. If at the time the case is called on for hearing either party is present or is represented in Court by an agent or pleader then he has not failed to appear, but if at that time he is neither present nor represented by an agent or pleader, he has failed to appear. The mere fact that at an earlier stage, something almost mechanical as the filing of a list of witnesses, is done by a pleader on his behalf before the case is called on for hearing, cannot amount either to appearance or being represented in Court by an agent or pleader at the time when the case is called on for hearing. A decree passed against a defendant in a suit, under such circumstances in the absence of the defendant and his pleader, is therefore *ex parte* although passed under O. 17, R. 3 and he is entitled as of right to show cause for his non-appearance under O. 9, R. 13. The Court holding that it has no jurisdiction to consider the matter errs in the exercise of its jurisdiction. 1936 A.L.J. 1274=1936 A.W.R. 835=1936 A. 619.

O 17, Rr 2 and 3. SCOPE AND CONSTRUCTION—Rules 2 and 3 are mutually exclusive and where the vakil pleads no instructions and the party is not prepared to go on R 2 applies 148 I.C. 177 (1)=39 L.W. 353=1934 M. 199 (1). See also 1934 A. 107, 1934 A. 652; 30 N.L.R. 94=1933 N. 370=149 I.C. 512. See also 18 R.D. 421. R. 3 cannot apply where the adjournment is not at the instance of a party but under the ordinary procedure of the Court, as the witnesses present could not be examined on the date fixed for hearing. 1933 N. 234=29 N.L.R. 326 Even when an adjournment has been granted at the instance of one party, who fails to appear at the adjourned hearing, an order should be passed under R. 2 and not under R. 3. (*Ibid*). In order to attract the provisions of R. 3,

two conditions must co-exist: (i) the application for adjournment must be at the instance of the party to suit applying for the production of evidence; (ii) there must be some materials on which the Court can proceed to judgment, unless these two conditions are present, the Court should only pass an order under R. 2. If a Court erroneously passes an order which may be of the nature of a decree, an appeal would lie from that order; and the appellate Court which can exercise the same power as a Court of first instance is competent to restore the suit under O. 9, if it comes to the conclusion that there is sufficient cause for doing so 39 C.W.N. 859. See also 37 C.W.N. 666=1933 C. 412. The proper way of construing rule 3 would be that where no default occurring under rule 2, default occurs under rule 3, the Court should proceed under the latter rule and dispose of the case on the merits, but if the default consists in non-appearance, rule 2, which specifically deals with such a case, must in terms apply. Where a suit is adjourned to a date for production of evidence by the defendant, and the latter and his vakil are absent on that date, but another vakil applies for an adjournment on behalf of the vakil on record, and that being refused, reports that he has no further instructions, the decree passed by the Court must be deemed to be an *ex parte* decree and not a decree on the merits. When the vakil who appears states that he has no instructions beyond applying for an adjournment, it is a contradiction in terms to hold that he does in fact appear, though he says he does not appear. 43 L.W. 738=1936 M. 625=70 M.L.J. 688. In a case where there are no materials on the record the proper procedure to be followed would be that laid down in R. 2, but if there are materials on the record the Court ought to proceed under R. 3. 37 C.W.N. 666=1933 C. 412. See also 1933 A. 907. As to *inherent powers* of Court to correct errors, see 152 I.C. 211=1934 N. 234. Where plaintiff's pleader appears on the day of adjourned hearing and makes an application for an adjournment which is disallowed, the plaintiff cannot in view of the explanation to the Allahabad and Oudh Rules be deemed to have failed to appear on that occasion. There is accordingly no default of appearance on behalf of the plaintiff and there being no evidence before the Court, the suit is dismissed for want of prosecution. Such an order amounts to a decree dismissing the suit for want of evidence on the merits and not one dismissing it for default of appearance. The plaintiff's remedy is either by way of review or an appeal and not for restoration.

3. [S. 158.] Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may notwithstanding such default, proceed to decide the suit

Court may proceed notwithstanding either party fails to produce evidence, etc

forthwith.

Notes.

tion of suit after setting aside the decree. 1933 A.L.J. 4=1933 A. 41. (34 A 426, Expl.) See also 1933 A. 539=146 I.C. 750; 1933 L. 248=143 I.C. 355

O. 17, R. 3 APPLICATION OF THE RULE.— This rule applies to those cases where time has been given to adduce evidence, and the parties appear, but fail to produce the necessary evidence. 95 I.C. 798 (1). See also 10 M. 270. Where the parties do not appear, R. 2 applies. 10 M. 270, 20 B. 736, 6 M.H.C. R. 262 and 1 M. 287. But see 25 A. 194. R. 3 does not apply where the adjournment was not at the instance of a party but under the ordinary procedure of the Court and there are not materials on record for the Court to proceed to decide the suit. 29 N.L.R. 326. R. 3 gives an option to the Court to decide the suit on the merits. Where time is given to the plaintiff to produce his evidence on the adjourned date, the Court is entitled to decide the suit on the merits. If no evidence is produced by the plaintiff, the Court has no option but to dismiss the suit, if it wants to decide it on the merits. In R. 3 of O. 17, there is no provision that a suit can be decided on the merits only if the evidence or a substantial portion of the evidence of the party failing to appear has been recorded. 1935 A.L.J. 209=1935 A.W.R. 90=1935 A. 210. Plaintiff who was represented by a lawyer asked for adjournment of the case on the date when it was posted for peremptory hearing, on the ground that her lawyer was not present and further it was found that she was not ready with her witnesses. She refused to get into the witness-box whereupon the Court dismissed the suit under R. 3. *Held*, the order was quite proper. 1935 R. 123. See also 1936 A.L.J. 902=1936 A. 67. R. 3 is made specially applicable in a case where any party to whom time has been granted fails to perform any act necessary for the further progress of the suit. On the date fixed for final disposal, a party did not appear and the Court gave an *ex parte* decree against him. An application to set aside the *ex parte* decree was dismissed; and in revision it was contended that the Court ought to have proceeded under R. 3. *Held*, that R. 3 was not applicable to the case as time was not granted to the applicant, that even if there was an adjournment and O. 17 applicable to the case, the Court had under R. 2 jurisdiction to dispose of the suit in one of the modes directed in O. 9 and that the order passed by the Court was proper. (1933 A. 41, Ref.) 1933 A. 907. See also 1933 C. 412=37 C.W.N. 666. R. 3 only applies where the hearing of the suit had commenced

and an application for an adjournment is then made by one of the parties. 1928 P. 167=7 P. 236. Where there is no institution of the suit and the plaintiff has been returned for amendment, the rule does not apply. 86 I.C. 491=1925 M. 1645. Where there are materials on record on which the Court can decide the case it should proceed under R. 3 and not under R. 2. 3 Pat. L.T. 64=6 Pat. L.J. 313=61 I.C. 897. See also 1425 O. 278=78 I.C. 240. Rule 3 applies only where on the application of one of the parties the Judge directs a particular act to be done on the adjourned hearing and the party is unable to perform that act. 27 I.C. 82=2 L.W. 105. See also 1933 N. 234. Case adjourned by consent of parties—Party not ready on adjourned date—Dismissal of suit under R. 3 is not valid and an appeal lies. 5 R. 838=1927 R. 148=101 I.C. 618. Rule 3 applies only to cases where the parties are present and have not satisfied the Court as to the existence of any adequate reason for their not having done what they were directed to do. 41 M. 286=34 M.L.J. 24 (F.B.) The words “notwithstanding such default” in R. 3 clearly imply that Court is to proceed with the disposal of suit in spite of default upon such materials as are before it. 51 M.L.J. 684=1927 M. 109

SCOPE AND OPERATION OF THE RULE.— R. 3 merely authorises Court to proceed to decide the suit forthwith and it does not authorise its dismissal summarily. 71 I.C. 862=1924 L. 404. Rule 3 is an enabling and not a mandatory rule. 52 I.C. 292=150 P.R. 1919. Where plaintiff who takes time to produce evidence fails to appear on date fixed for hearing, proper course is to pass an order of dismissal for default of appearance. In such a case even if Court purports to deliver judgment on the merits the order should be treated as an *ex parte* decree for the setting aside of which the procedure mentioned in O. 9, R. 13, will apply. 138 I.C. 200=1932 L. 477. Where there is no default by party, Court cannot proceed under this rule. 69 I.C. 665=1924 L. 272. Party's failure to request the Court to pass orders under O. 16, R. 10 (2) and (3) for getting the attendance of material witnesses, does not enable the Court to proceed under R. 3. 33 A. 660=8 A.L.J. 839=10 I.C. 903. A dismissal of suit for failure to amend plaint and pay costs of adjournment cannot fall under R. 3. 312=1926 L. 571. Plaintiff present on date of hearing but not present on date fixed for return of summons—R. 3 is not applicable—Dismissal of suit is illegal. 102 I.C. 289=1927 L. 484. Absence of defendant on date of hearing—Court should pro-

Loc. Ams—[Allahabad.] The following is substituted for O. 17, R. 3 by the Allahabad High Court:—(3) "Where any party to a suit, to whom time has been granted, fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, whether such party is present or not, proceed to decide the suit on the merits."

[Oudh] Substituted by Oudh Chief Court:—(3) Where any party to a suit to whom time has been granted, fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default, and whether such party is present or not, proceed to decide the suit on the merits.

ORDER XVIII.

HEARING OF THE SUIT AND EXAMINATION OF WITNESSES.

1. [R. 179, Expln. 3.] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

Notes.

ceed under R. 3. 9 O.L.J. 543=72 I.C. 394. Default in appearance is not covered by this rule. 1 P. 18=69 I.C. 837. Date fixed for final disposal of suit and for appointment of guardian. No steps taken by plaintiff for latter—Suit cannot be dismissed 63 I.C. 570=6 P.L.J. 650. Party not aware that he was to pay adjournment costs—Further hearing not conditional upon payment of costs—Time should be allowed. 1926 C. 1221=97 I.C. 172 (2). Plaintiff ordered to appear as a witness—Failure to appear—Dismissal of suit is improper. 100 I.C. 788 (1)=1927 L. 388 (1). Production of stay order is not an act within the rule 105 I.C. 30. Order apparently passed under—Plaintiff persistently absent—No adjournment specifically granted—Suit decreed on the merits—Order really one under O. 9, R. 8—Appeal—Maintainability. 116 I.C. 752=27 A.L.J. 391. A suit for profits against the lambardar was adjourned on several occasions. On one of such adjourned hearings the Assistant Collector dismissed the suit for "want of prosecution". The Assistant Collector did not make any reference in that order to the evidence that had already been produced in the case, nor did he deal with the validity or otherwise of the defence raised by the contesting defendants. Held, that such a decision could not be characterised as a decision on the merits. The order dismissing the suit, therefore, did not come within the purview of R. 3, but was one under O. 9, R. 8 of the Code, and could be set aside by the Assistant Collector under O. 9, R. 9 or under the inherent jurisdiction vested in Courts by S. 151. In either case the order was not appealable. 143 I.C. 307=1932 A.L.J. 1100=1933 A. 118. Where a counsel appears on behalf of a person and makes an application or prayer for an adjournment, but the same is refused and the counsel then refuses to proceed on ground of no instructions and the case is decided and decree passed against them in their absence, it cannot be said that the case was decided

ex parte as to attract the consequences of O. 9, R. 13. The case is decided under O. 17, R. 3 [53 A. 612 (F.B.), 1933 A. 41, Rel. on.] 148 I.C. 456=11 O.W.N. 393=1934 O. 171.

APPEAL—Only an appeal and no revision lies against an order under O. 17, R. 3, 34 A. 123=8 A.L.J. 1265. But *see also* 1933 A. 118. This is so even if the Court wrongly acts under R. 3 instead of under R. 2. 84 I.C. 521 (1)=1925 A. 252. A mistake in judgment stating the disposal was under R. 2 does not affect the right of appeal. 86 I.C. 356=1925 O. 495, 1929 A. 432=1929 A.L.J. 507. A decision passed "forthwith" under R. 3 is one on the merits as gathered from available facts. 31 I.C. 307=2 L.W. 1067. Decree passed on merits—Party cannot appeal against order setting it aside but must appeal against the decree. 103 I.C. 192=1927 L. 562 (1). *See also* 143 I.C. 307=1933 A. 118.

REVISION—Where a suit is dismissed by the Small Cause Court on the merits on the plaintiff's failure to be present on an adjourned date, the only remedy available to the plaintiff is to apply in revision to the High Court and not to the trial Court for restoration. 1935 A. 210=1935 A.L.J. 209. *See also* 1936 A.L.J. 902=1936 A. 670.

RESTORATION—Suit adjourned for final hearing—Application by plaintiff's Counsel for further postponement rejected—Counsel reporting no instructions—Suit dismissed—Restoration—Jurisdiction. *See* 1935 A.W.R. 318=1935 A. 398. *See also* 1936 A.L.J. 902=1936 A. 670.

O. 18, R. 1.—Right to begin—Preference is generally given to plaintiff. 3 Beng.L.R. 70 (A.C.). Restitution of conjugal rights, suit for Marriage admitted but coercion and non-consent pleaded—Defendant should begin. 7 Bur.L.T. 129=23 I.C. 242. Applicant for mesne profits of property taken in execution of a decree reversed on appeal, must begin. 47 M. 800=48 M.L.J. 89. Where a defendant pleads minority he must prove his plea. 8 W.R. 371. Right of objector under Income-tax Act to begin. *See* 48 C. 161. Where a

2. [S. 179.] (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

Statement and production of evidence.

(2) [S. 180, paras. 1 and 2] The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

Loc Ams —[Allahabad.] For the present Rr 2 and 3 substitute the following —

"2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him, and the nature of the evidence which he proposes to adduce and shall then call his witnesses in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any).

3 (1) Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either state his case in the manner aforesaid and produce his evidence on those issues or reserve the statement of his case and the production of his evidence on those issues by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may state his case in the manner aforesaid and produce his evidence on those issues after the other party has produced all his evidence.

(2) The substance of the statement of the case provided for by Rr. 2 and 3 (1) above shall be taken down by or under the personal direction and superintendence of the Judge and shall form part of the proceedings.

(3) After both parties have produced their evidence, the party beginning may address the Court on the whole case; the other party may then address the Court on the whole case; and the party beginning may reply generally on the whole case, provided that in doing so he shall not without the leave of the Court, raise questions which should be raised in the opening address."

[Calcutta] Insert the following as R. 2-A.—

"2-A Notwithstanding anything contained in cls (1) and (2) of R. 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded, and may also allow either party to produce any witness at any stage of the suit."

[Madras] Add the following —

Explanation —Nothing in this rule shall affect the jurisdiction of the Court, for reasons to be recorded in writing, to direct any party to examine any witness at any stage

[Nagpur.] Rule 2.—Add the following as sub-rule (4) to R. 2.—

"(4) Notwithstanding anything contained in this rule the Court may order that the production of evidence or the address to the Court may be in any order which it may deem fit"

[Oudh.] For the present Rr 2 and 3 substitute the following:—

"2. (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case, indicating the relevancy of each of the documents produced by him and the nature of the evidence which each of his witnesses is expected to give and shall then produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case in the manner aforesaid and produce his evidence (if any)

Notes.

claim is preferred in execution the claimant must begin as the onus is on him. 11 WR 8 (F.B.) Where a preliminary objection is raised by the defendant that the suit is barred, he has the right to begin 12 B 454 If on the issue or issues of facts, the burden of proof is on the defendant, he has the right to begin. 40 C W N. 865

O. 18, R. 2.—"The day fixed for the hearing of the suit," see 82 I C. 73=1925 A. 98. New pleadings cannot be introduced without leave of the Court. 103 I C 501=1927 L. 615 (1). Every party is entitled to

have all the witnesses whom he desires to call, and is ready at the trial to produce, heard by the Court. 17 WR. 172, 6 C. 608; 9 B. 146; 2 M.L.A. 424. But see 6 Beng.L.R. App. 10. Omission of counsel to argue a question of law or his abandonment of it, is not sufficient to disentitle the Court to go into the question. The case is different, when a question of fact is concerned. 11 C. W.N. 340 (342). Plaintiff accepting onus—Court not bound to hear defendant's case if plaintiff fails. 25 M.L.J. 281=21 I.C. 96. Where there are several defendants and some support plaintiff's case, see 32 B. 599.

3. (1) Where there are several issues the burden of proving some of which lies on the other party, the party beginning may, at his option, either state his case in the manner aforesaid and produce his evidence on those issues or reserve the statement of his case and the production of his evidence on those issues by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may state his case in the manner aforesaid and produce evidence on those issues after the other party has produced all his evidence.

(2) The substance of the statement of the case provided for by Rr 2 and 3 (1) above shall be taken down by or under the personal direction and superintendence of the Judge and shall form part of the proceedings.

(3) After both the parties have produced their evidence, the party beginning may address the Court on the whole case, the other party may then address the Court on the whole case, and the party beginning may reply generally on the whole case, provided that in doing so he shall not, without the leave of the Court, raise questions which should have been raised in the opening address."

[Rangoon.] Add the following as a proviso to sub-rule (2) of Rule 2—

"Provided that the Court may, in its discretion, call upon the other party to proceed under this sub-rule before the evidence of the party having the right to begin is complete if it considers that the other party will not be prejudiced by so proceeding and that unnecessary inconvenience and delay will thereby be avoided.

3. [S. 180, last para] Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence, on those issues or reserve it by way of answer to the evidence, produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

4 [S. 181.] The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

5. [S. 182.] In cases in which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of

Notes.

O. 18, R. 3.—Suit for declaration and recovery of possession—Plea of *benami* in defence—Plaintiff has right to adduce evidence of rebuttal after the close of evidence of *benami* by the defendant. 93 IC 273=7 Pat.L.T. 445

O. 18, R. 4—Courts should in all cases exercise the powers entrusted by law in the examination of witnesses, if they see that they are not properly examined 10 W.R. 280. A *pardanashin* lady should be admitted into Court in her palanquin, and her evidence taken after her being properly identified. 1 Beng.L.R. 5. Omission to administer oath to a witness, or any irregularity in the form in which it is administered does not invalidate the proceedings. 24 W.R. 61. See S. 13 of the Oaths Act (X of 1873).

O 18, R. 5: SCOPE AND OBJECT OF.—Failure to comply with the provisions of this rule and R 6 is an informality which renders the deposition inadmissible in evidence on a charge of giving false evidence based on such deposition. 6 C 762 O. 18, Rr. 5 to 12, have no application to Small Cause Courts and the depositions need not be read over to the

witnesses and they would be admissible in evidence in a prosecution for perjury. 89 I. C 390 (2)=1925 N. 412. The object of R 5 is to ensure accuracy, non-compliance with it does not affect the admissibility but the weight to be attached to the evidence. (18 M. 308; 42 C. 240, Diss.) 27 C.L.J. 377=22 C.W.N. 646 See also 51 C. 236; 45 C. 825 Reading out the deposition to a witness in a room adjoining the Court-hall and at a distance of 30 feet from the Judge's seat is a sufficient compliance with R 5 1918 M.W.N. 239=7 L.W. 435. Reading over of the deposition by the witness himself is a sufficient compliance with the rule. 46 C. 895=23 C.W.N. 661. S. 91, Evidence Act, bars the admission of secondary evidence in proving a witness's statement, where it was not read over to him according to requirements of R 5. 1 L. 361=58 I. C. 830. Witnesses in civil cases are not legally bound to sign or thumb mark their depositions. Courts cannot order them to do so, nor could they be compelled to sign under S 151. 8 P.R. 1912 (Cr.)=16 I.C. 521 When parties agree that evidence is to be taken in a particular way, and that evidence in one suit shall be treated as evidence in

the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.

Loc Am —[Rangoon] The following shall be substituted for R. 5 of O. 18—

5. In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing in the language of the Court or in English by or in the presence and under the direction and supervision of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed shall be read over or translated to the witness by such person as the Judge may direct, provided that the Judge may, if he thinks fit, require the evidence to be read over in his own presence.

Such a person shall, after reading over the deposition to the witness, sign it and correct it at the foot of the deposition form as follows—

Read over

_____ by me in Burmese or _____ (as the case may be) and acknowledged correct

Interpreted

(Signature)

Interpreter or Clerk

The Judge shall, if necessary, correct the deposition and shall sign it

6. [S. 183.] Where the evidence is taken down in a language different from that in which it is given, and the witness does not

When deposition to be interpreted understand the language in which it is taken down the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

Loc Am.—[Rangoon] The following shall be inserted as R. 6-A —'6-A. Where there are no interpreters paid by Government and it is found necessary to employ an interpreter in a civil case, he shall be paid such fee, ordinarily not exceeding Rs. 2 per diem, as the Court may fix. The fee shall be advanced by the party at whose instance the interpreter is required and shall be treated as costs in the case. All payments of interpreter's fees shall be made through the Court and duly entered in Bailiff's Register II "

7. [S. 185-A, para. 3.] Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over

Evidence under section 138.

and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under

that rule.

8. [S. 184.] Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each

Memorandum when evidence not taken down by Judge.

witness proceeds, to make a memorandum of the substance of what each witness deposes, and such memorandum shall be written and signed by the Judge and

shall form part of the record.

Loc Am —[Rangoon] Rule 8 shall be deleted.

9. [S. 185.] Where English is not the language of the Court, but all the

Leg. Ref.

another suit, this is not a matter which affects the jurisdiction of the Court. 30 B. 109.

The *Special Referee* who has been appointed *Commissioner of Partition* in the Original Side and authorised by the order of his appointment to examine witnesses upon oath or solemn affirmation and to take their depositions in writing is, in respect of procedure for the taking of evidence, governed by Rr. 5 and 6 by virtue of the concluding provisions of O. 26, though, were the enquiry to be held by the Court itself, those provisions will not apply because of O. 49, R. 3. 61 C. 488=38 C. W.N. 624=1934 C. 737.

O. 18, Rr. 5, 8 and 14 —Where evidence is dictated to a typist by a Judge and no memorandum is kept by him, the provision of Rr. 5, 8 and 14 will not be complied with. 55 C. 1084.

O. 18, R. 6.—As to applicability of rule, see 132 I C. 270=1931 O. 385.

O. 18, R. 8.—Where there is a conflict between the Judge's memoranda and the recorded deposition, the Court must be guided by the latter. 9 Beng.L.R. 274. Objections to non-compliance by Judge with provisions of this rule cannot be allowed to be taken for the first time in the third appeal. 15 R. D. 600=12 L R 298 (Rev.).

When evidence may be taken in English. parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

Any particular question and answer may be taken down. 10. [S. 186.] The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

11. [S. 187.] Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

Remarks on demeanour of witnesses. 12. [S. 188.] The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

Memorandum of evidence in unappealable cases. 13. [S. 189.] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the judge and shall form part of the record.

Judge unable to make such memorandum to record reasons of his inability. 14. [S. 190.] (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

(2) Every memorandum so made shall form part of the record.

Loc. Am.—[Rangoon.] In the 2nd line of sub-rule (1) for the words "this" the word and figure "Rule 13" shall be substituted.

Power to deal with evidence taken before another Judge. 15. [S. 191.] (1) Where a Judge is prevented by death, transfer, or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

Power to examine witness immediately. 16. [S. 192.] Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

Notes.

O. 18, R. 11.—If no objection is taken in Court of first instance to the reception of a document in evidence, appellate Court cannot raise or recognise it in appeal 11 B. 320. The objection cannot be taken in special appeal. 24 W.R. 296.

O. 18, R. 13.—Abstract of evidence incomplete—Judgment based on it is illegal. 2 L.W. 803=30 I.C. 634.

O. 18, R. 15 applies only when the pre-

vious Judge has not concluded the trial of the case. 21 M.L.J. 808=9 I.C. 254. It is not necessary for the succeeding Judge to re-hear the case after arguments had been heard by the predecessor. 17 I.C. 278=1912 M.W.N. 999

O. 18, R. 16.—The evidence must be taken by the Court unless the parties consent to the evidence being taken on commission. 5 Beng. L.R. 252.

(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice, as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

17. [S. 193.] The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

Court may recall and examine witness.

18. The Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

Power of Court to inspect.

Loc. Am.—[Allahabad] Add the following as Rule 19—

19 (1) The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.

(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings

ORDER XIX.

AFFIDAVITS.

1. [S. 194] Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the Court thinks reasonable:

Power to order any point to be proved by affidavit.

Notes.

O. 18, R. 18—Local inspection—Result of investigation to be recorded. 65 I C 601 No decision should be based solely on local inspection of the Judge 73 I C. 616=1923 L 546; 39 M 501=28 M L J. 598, 131 I C 139=1931 M. 531 Judges, both of Courts of first instance and Courts of appeal, who have to appreciate evidence and understand its bearing properly are entitled, in proper cases, to make local inspection with a view not only to save time with reference to the arguments in the case but also to enable them to follow intelligently, and understand the evidence in the case But it is not open to either Court to base its findings of fact solely on the result of its local inspection, nor without giving opportunities to the parties to let in counter-evidence and explain what is recorded as the result of the inspection 131 I.C. 139=1931 M. 531; 1930 L. 152=129 I C. 346 Where parties agreed to shut out oral evidence and to substitute for it the inspection that the Judge might make of the locality, appeal from the decision of the Court is competent, because the Judge was not constituted an arbitrator. 113 I.C. 762=1929 A. 116. It should be used to test the accuracy of other evidence. It need not be recorded 1925 C. 170 R. 18 authorises every Court to inspect any property or thing without the sanction of its superior Court. 28 M.L.J. 9=23 I C. 297

O. 19, R. 1.—An affidavit is ordinarily not

evidence unless the person seeking to use it complies with the requirements of O 19. 63 I C 258. Court is authorised under O 19 to receive an affidavit from the identifier as evidence of the fact of the service of summons. 106 I C. 703=6 P 700 There is nothing illegal in a Court admitting proof of execution of a pro-note by the affidavit of plaintiff's next friend instead of calling him as a witness into the witness-box and taking his deposition in open Court, when there is no contention as to the facts 142 I C 386 (1) =1933 M. 164. R. 11, which is made applicable to proceedings for divorce by S. 45 of Indian Divorce Act, empowers Court to allow the petitioner and her witness in divorce proceedings to give evidence by affidavit, subject to what the law provides, namely, that the petitioner and her witness will have to be present for cross-examination, if so directed by the Court. 38 C.W.N 969 District Judge can act upon affidavits in support of an application to declare certain persons law-touts 13 M.L.J 272. It is altogether undesirable and indeed contrary to established practice to accept evidence on affidavit in matrimonial suits—especially evidence of the petitioner—except as regards evidence other than that of the petitioner in some very exceptional circumstances 62 C. 541=62 C.L.J. 264. There is nothing in R. 1 to exclude from its operation a foreign company incorporated in a foreign country. 8 P.R. 1912=10 I.C. 141.

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

Power to order attendance of deponent for cross-examination.

2. [S. 195.] (1) Upon any application evidence may be given by affidavit, but the Court may at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

3. [S. 196.] (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statement of his belief may be admitted: provided that the grounds thereof are stated.

Matters to which affidavits shall be confined.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.

Loc Ams.—[Allahabad.] Add the following Rules 4 to 15, O. 19.—

4. Affidavits shall be entitled in the Court of _____ at (naming such Court). If the affidavit be in support of, or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case it shall be entitled *In the matter of the petition of*.

5 Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

7 Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit; each shall depose separately to those facts which are within his knowledge and such facts shall be stated in separate paragraphs.

8 When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" or "I make oath and say".

9 Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed" and, if such be the case, "and verily believe it to be true," and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such documents.

Notes.

O. 19, R. 2.—Applicability—Appeal in proceeding in Revenue Court under S. 201, C.P. Land Revenue Act. 155 I.C. 557=1935 N. 125 (1).

O 19, R. 3.—Contents and essentials of a valid affidavit. See 36 A. 18=22 I.C. 740. Affidavits should clearly specify what statements are made on knowledge and what on belief. 1924 P. 312=73 I.C. 721. An affidavit stating certain facts upon information and belief without stating the source thereof is sufficient evidence upon which to grant an injunction. 46 I.C. 335=22 C.W.N. 700; 1 L.

W. 394=23 I.C. 377, 90 I.C. 703=1926 P. 54. An affidavit, in which it is stated that the allegations are based partly on information believed to be true and partly on belief, but which contains neither a specification as to which part is based on information and which on belief, nor the grounds of belief, is contrary to the provisions of and offends against R. 3. 61 C. 814=38 C.W.N. 771=1934 C. 694. An affidavit as to the points argued in a case and sworn to by a person, who cannot understand the language in which the argument was made has no value. 41 I.C. 1.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11. Every person making an affidavit for use in a Civil Court, shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address and description of him by whom the identification was made as well as the time and place of such identification.

11-A Such identification may be made by a person

(a) personally acquainted with the person to be identified, or

(b) satisfied from papers in that person's possession or otherwise, of his identity:

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified.

FORM.

I (name, address and description) declare that the person verifying this petition (or making this affidavit) and alleging himself to be A. B. has satisfied me (here state by what means, *e.g.*, from papers in his possession or otherwise) that he is A.B.

12. No verification of a petition and no affidavit purporting to have been made by a *pardanashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been identified in manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

13. The person before whom any affidavit is about to be made shall, before the same is made, ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made, and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

15. If it be found necessary to correct any clerical error in any affidavit such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made, and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made.

[Rangoon.] To Order 19, the following shall be added as Rules 4 to 12—

4. The officer administering the oath to the declarant of an affidavit should first make the declarant take the oath or affirmation. Then he should make the declarant repeat the whole of the statement written in the affidavit as coming from him. Then the declarant should sign the affidavit, and lastly the officer administering the oath should sign and date it.

5. Every affidavit to be used in a Court of Justice should be entitled "In the Court of at naming the Court. If there is a case in Court, the affidavit in support of or in opposition to an application respecting it, must also be entitled "In the case of."

If there is no case in Court, the affidavit should be entitled "In the matter of the petition of"

6. Every affidavit containing any statement of facts shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

7. Every person, other than a plaintiff or defendant in a suit in which the application is made, making an affidavit shall be described in such a manner as will serve to identify him clearly, that is to say, by the statement of his full name, the name of his father, his profession or trade, and the place of his residence.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" (*or* make oath) "and say".

9. When the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant must use the expression "I am informed" (and, if such be the case, should add) "and verily believe it to be true" or he may state the source from which he received such information. When the statement rests on facts disclosed in documents or copies of documents procured from any Court of Justice or other source, the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents.

10. Every person making an affidavit, if not personally known to the Commissioner, shall be identified to the Commissioner by some person known to him, and the Commissioner shall specify at the foot of the petition, or of the affidavit (as the case may be), the name and description of him, by whom the identification is made, as well as the time and place of the identification and of the making of the affidavit.

11. If any person making an affidavit is ignorant of the language in which it is written, or appears to the Commissioner to be illiterate or not fully to understand the contents of the affidavit, the Commissioner shall cause the affidavit to be read and explained to him in a language which he understands. If it is necessary to employ an interpreter for this purpose, the interpreter shall be sworn to interpret truly. When an affidavit is read and explained as herein provided, the Commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained and that the declarant seemed perfectly to understand the same at the time of making the affidavit. When an interpreter is employed the Commissioner shall state in his certificate the name of the interpreter, and the fact that he was sworn to interpret truly.

12. In administering oaths and affirmations to declarants the Commissioner shall be guided by the provisions of the Indian Oaths Act, 1873.

ORDER XX.

JUDGMENT AND DECREE.

1. [S. 198.] The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

Judgment when pronounced

Loc. Am.—[Madras.] Re-number Rule 1 as sub-rule (1) and add the following as sub-rule (2):—

"(2) The judgment may be pronounced by dictation to a shorthand-writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court."

Notes.

O. 20, R. 1—A judgment signed, dated and delivered in the absence of the parties or their pleaders and without previous notice to them is not validly pronounced. 47 A. 332=23 A.L.J. 145; 100 I.C. 909=28 Punj.L.R. 132. Pronouncing a judgment within the meaning of O. 20, does not require a reading out of the whole judgment by the Court. 94 I.C. 121 (1). But the decree which has followed such a judgment cannot be violated so long as it stands. (*Ibid.*) Judge may, at the close of the hearing, state at once orally the judgment which he intends to record and deliver. 5 M.H.C.R. at 8. Where Judge commences to write a judgment before the finishing of the entire evidence and hearing the arguments of the counsel, there is a gross irregularity in the trial of the case. 1933 A. 196. The omission in judgment to make special mention of oral evidence is not in itself sufficient to show that, as a matter of fact, Judge did not consider the evidence. 59 I.C. 963. It is not legal for Judge trying a civil suit to

ask two members of the bar to act as assessors presumably to appraise the value of the evidence and to base his judgment on that opinion. 21 I.C. 427. A mere order in the order-sheet recording "that the case and suit be dismissed in terms of compromise" is not the disposal of a suit under the Code, which can only terminate in accordance with the rules set forth in R. 1 1933 P. 135. Contravention of Rr 1 to 3—Judgment pronounced by another Judge—Effect. 46 C. 979=29 C.L.J. 438. Posting of result of appeal on notice-board is not a pronouncement in open Court. 41 M.L.J. 385=65 I.C. 42. Omission to give notice of the date on which judgment is to be pronounced is a serious irregularity if not an illegality. 12 M.L.T. 332=1912 M.W.N. 999, 38 I.C. 575; 7 A. 857. Where judgment was pronounced in open Court, but not in presence of the parties or after notice to them, *held*, that the judgment was not invalidated on that ground. 28 N.L.R. 308. Where judgment written and signed by the Judge at home was delivered to the clerk for com-

Power to pronounce judgment written by Judge's predecessor. 2. [S. 199] A Judge may pronounce a judgment written but not pronounced by his predecessor.

3. [S. 202] The judgment shall be dated and signed by the Judge in open court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by S. 152 or on review.

Loc. Am.—[Madras.] Order 20, R. 3 Substitute for the old rule —

The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by S. 152 or on review, provided also that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand-writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge.

Notes.

munication to the parties as Judge did not attend Court on account of illness, *held*, per *Ghose, J.*, that no competent officer had pronounced judgment and that the appeal should be remanded for fresh disposal on that ground. Per *Guha, J.*—The failure to comply with Rr 1, 2 and 3 of O. 20 constitutes an irregularity. Appeal remanded for fresh disposal on merits 130 I.C. 573=52 C.L.J. 566=1931 C. 164 When either party dies before judgment is pronounced, *see* O 22, R. 6. *See also* 12 M.L.J. 435

O. 20, Rr. 1, 2 and 3 FAILURE TO SIGN ORDER—IRREGULARITY.—Infringement of the procedure prescribed by Rr 1, 2 and 3 merely constitutes an irregularity curable by consent or waiver and it affords no ground for reversal of the decree based on the judgment irregularly pronounced. Where the irregularity is waived by the parties and does not affect the merits of the case where the omission to sign an order in execution was shown to be merely accidental *held* that the order was none the less binding 149 I.C. 430=1934 L. 763

O. 20, R. 2—Rule 2 does not apply to the original side of the High Court 51 B. 267=29 Bom. L. R. 126 Judgment—Pronouncement, can be made by successor. 42 A. 362=61 I.C. 932, 50 I.C. 641; 46 I.C. 618=29 C.L.J. 568. *See also* 49 I.C. 724; 14 I.C. 371, 5 Pat.L.J. 147=58 I.C. 437. Judge may write a judgment after he ceases to be a Judge in the district. It may be pronounced by his successor. 35 A. 368. *See also* 1930 A.L.J. 1566; 53 A. 133=130 I.C. 303=1931 A. 90 Under R. 2, it is not necessarily incumbent upon the successor of the Judge, who wrote the judgment after he had ceased to be a Judge of the Court in which the trial was held to pronounce the judgment that had been written by his predecessor. He has a discretion in the matter, and if he is in doubt as to the correctness of the judgment that has been written by his predecessor he ought either to act in accordance with the provisions of O. 18, R. 15, or to hear the case *de novo*. 14 Rang. 136=1936 Rang. 147 (F.B.). In the absence of an order of transfer of the

case by a competent authority a Judge who transferred has no power to deal with it. 80 P.R. 1919=49 I.C. 724, 80 P.R. 1916=35 I.C. 938. *See also* 5 Pat.L.J. 147=58 I.C. 437.

O. 20, R. 3.—R. 3 is a distinct prohibition against any alteration of a signed judgment except as provided by S. 152 or on review. 254 P.L.R. 1913=20 I.C. 3 *See also* 31 A. 153. It shows that after the judgment has been signed by the Judge he becomes *functus officio* and has no authority to alter it except as provided by S. 152 where the order provided for automatic dismissal of a suit on non-payment of Court fee within a certain date. *Held*, that Court had no power to extend the time after that period. 8 Luck. 502=10 O.W.N. 387=1933 O. 241. Judgment dictated to shorthand writer—Transcript cannot be amended. 18 L.W. 105=1923 M. 663 As to the power of Court to rectify an order which it finds is wrong or has been made in an improper form, *see* 16 B. 404. Section 151 was never meant to enable Court to contravene a distinct provision of law. When there is no clerical error or arithmetical error in the judgment or decree Court cannot amend the decree. 8 O.W.N. 1238=12 L.R. 383 (Rev.) Where Court gives a judgment but refuses to pass a decree till the successful party complies with a certain condition, the judgment is only a provisional judgment which does not become operative until the decree is passed. 34 I.C. 867=9 S.L.R. 193

INHERENT POWER TO CORRECT ERRORS—R. 3, is not exhaustive and it is the duty of Court to invoke its inherent powers to correct errors that have led to injustice through no default of a party and to do real and substantial justice for the administration of which alone it exists 152 I.C. 211=1934 N. 234. Where Court passed an order under a misapprehension of facts, it is open to it under its inherent power to set aside such order when true facts are brought to light R. 3 has no application to such cases 148 I.C. 614=1934 A.L.J. 862=1934 A. 287 A suit for rent had been brought against the proper person who was misdescribed owing to his own action in giving his son's name instead of his own when he rented the premises and who had since

4. [S. 203.] (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the decision thereon.

Notes.

been refusing to receive the summons on the ground that he was not the proper person. He was the proper person against whom the decree had been rightly made. On an application in execution proceedings to bring on record the real judgment-debtor's name, *held*, that the record could be corrected by virtue of the powers under S. 151 if not under O. 1, R. 10. 144 I.C. 901=35 Bom L.R. 365=1933 B. 200.

O. 20, R. 4.—Judges, whatever reasons they may give in judgments, must make specific and precise statements of their findings. 37 I.C. 304. But R 4 does not require the evidence to be discussed. It merely lays down that the judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. Hence merely because the judgment does not mention some particular item of evidence it does not follow that the Judges had not considered it. 146 I.C. 445=1933 R. 174. The fact that the Judge has set out a point for determination after the pleadings on the record is not sufficient. The points must be included in judgment. The use of a *rubber stamp* in a contested suit is most reprehensible. 146 I.C. 16=1933 N. 272 (1). Personal inspection by Judge alone is not sufficient material for judgment. 67 I.C. 302=1923 C. 311. Courts invested with Small Cause powers is governed by sub-r. (1) 31 B. 314=4 Bom. L. R. 327. Judgment of Small Cause Court not containing the points for determination and the decision thereon is liable to be set aside. 6 M.L.J. 50; 1925 O. 283. Court of Small Causes need not give reasons for its decision nor even a concise statement of the case. 88 I.C. 376=1925 O. 648. *See also* 146 I.C. 1056=1934 P. 243. Need not state more than the points for decision and the decision thereon *seriatim*. 67 I.C. 851 (C.); 42 M.L.J. 583=1922 M. 360; 4 Lab.L.J. 55=1922 L. 122 (1), 48 I.C. 752, 40 I.C. 890. *See also* 12 I.C. 740=7 N.L.R. 146, 59 I.C. 906=12 L.W. 285; but *see* 15 L.W. 642, 109 P.L.R. 1913=18 I.C. 216; 1 R. 274=2 Bur.L.J. 108; 97 I.C. 538; 95 I.C. 584. Small Cause Judge can reduce his remarks to intelligible minimum containing points of determination. 1921 P. 298=64 I.C. 226, 1933 S. 62, 7 Luck. 526=136 I.C. 701=1932 O. 143. Where judgment in a small cause suit shows that the Judge has applied his mind to the points for determination and he has also recorded his decisions thereon, there is sufficient compliance with the law. 43 L.W. 514=1936 M. 486=70 M.L.J. 433. O. 20, R. 4 (1) does not require that either the reasons for arriving at a conclusion or discussion of the evidence should be given by the Small Cause Court. The points for determination in order to arrive at the result and the resulting decision thereon alone need be stated. If all that is set out is the ultimate result without an indi-

cation of the points for determination, there is no compliance with the rule. A statement of issues only does not necessarily indicate the points to be determined although in some cases it may well do so. Each case must be judged by itself. 1936 Mad 913. No doubt a judgment of the Court of Small Causes need not contain more than the points for determination and the decision thereon. It is however highly desirable that the judgment should also contain some indication that the Judge has actually applied his mind to the evidence on the record in order to facilitate the High Court to find out whether the decision under revision was rightly arrived at after weighing the pros and cons or whether there was merely a mistake or an inadvertent omission in recording a particular finding. 142 I.C. 844=1933 S. 62. *See also* 145 I.C. 579=1933 A.L.J. 316=1933 A. 339. The test whether R 4 (1) of O. 20 has been used or abused by a Small Cause Court lies in the answer to the question whether the judgment has been made intelligible. When the Judge has to deal with a question of fact he need not give anything more than his actual decision on the question, namely his answer to it. But in cases involving difficult questions of law or mixed questions of fact and law the Judge should set out so much of his reasoning as will make clear the road by which he has reached his conclusion. 55 M. 671=1932 M. 336=62 M.L.J. 439. Judgment should contain reasons for decision. 1 R. 274=2 Bur.L.J. 108, 15 B. 11. The words "need not" in O. 20, R. 4 were not meant to be read as "shall not". (*Ibid*) A Small Cause Court is of course not bound to record the evidence *in extenso*, but it is incumbent upon that Court to record such statements of the witnesses, or to make a summary of those statements, in the deposition, as recorded, on which the Court relies in its judgment. Where the judgment in a small cause suit is not supported by the evidence as recorded, and the evidence has not been recorded in such a way as to enable the High Court to form any opinion as to the respective cases of the parties before the Court, and on what material circumstances the Court has relied upon in support of the judgment, the judgment is liable to be set aside in revision. It is not enough for the Judge trying a small cause suit to say that he finds for or against a party from the facts and circumstances; he must take care to note those facts and circumstances when recording the evidence of the witnesses who come and depose before him. 64 C.L.J. 456. There must be a distinct finding one way or the other, on all the material issues in the case. 8 W.R. 481. A judgment jumbling up all points together and containing a statement that all issues are found in plaintiff's favour does not comply with the rule. 1925 M. 1229=49 M.L.J. 354, 7 Luck. 526=136 I.C. 701=1930 O. 143.

(2) Judgments of other Courts shall contain a concise statement of the Judgment of other case, the points for determination, the decision thereon, and the reasons for such decision.

5. [S. 204.] In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues, is sufficient for the decision of the suit.

6. [S 206.] (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and the descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

Notes.

PRACTICE OF "STRIKING OFF" PETITIONS DEPRECATED.—When a matter is contested and when the Court has heard pleadings for both sides, simply to say the petition is "struck off", is entirely unwarranted and extremely undesirable. To say that the "petition is struck off" is surely not a proper and legal mode of disposal of an important contested application; there must be judicial determination on the merits of the controversy. [10 C 416 and 6 A. 269 (P.C.), Rel. on.] 144 I. C. 503=38 L.W. 218=1933 M. 510.

O. 20, R. 4 (2).—Conjecture is not a sound basis for judicial decision. 21 I.C. 413=18 C.L.J. 220. Judgment based on a question neither raised in written statement nor included in any issue is bad. 15 I.C. 159. Judgments.—Contents of.—Following prior judgment. 15 I.C. 434=1912 M.W.N. 900. Where the trial Judge did not give a reasoned finding on the main issue in the case but simply stated his conclusion, it was held to be a violation of the provisions of R. 4. 102 I.C. 280=1927 L. 418. Where a Judge mentions specifically certain points which were argued before him and the judgment is silent on other points taken in the memorandum of appeal, it may be presumed that such points have been abandoned, but where the Judge, after mentioning the points specifically argued before him, states that on merits too there is no force in the objections taken, it cannot be held that the other points have been abandoned (1933 L. 124 and 1924 L. 107. Dist.) 145 I.C. 113=1933 L. 570. It cannot be assumed from the mere fact that the Court below has not referred in detail to all the items of the documentary evidence produced by the parties, that the said evidence has been ignored or discarded. If a party did not, during the progress of the suit, bring certain documents to the notice of the Court, the blame rests with him. If any document is referred to the Court, it can be said that the Court must have considered the nature and scope of the document before forming a conclusion on the questions in issue. A Judge is not however bound to refer in his judgment to each and every item of evidence which is relied on by the parties. 130 I.C. 289=1931 A. 210. See also 1936 M. 913; 1936 M. 486=70 M.L.J. 433, 64 C.L.J. 456. The Judge is not obliged to refer to the evidence under O. 20, R. 4 but if he does so and his reference indicates that he did not

consider a material portion of the evidence, High Court is entitled to interfere in revision. 35 C.W.N. 1242. In trying a question of fact a Judge should not act on his knowledge or public rumour. 11 M.I.A. 213.

COMMISSIONER'S REPORT.—Commissioner's report and the opinion he expressed on the evidence is merely a piece of evidence to be considered by the Judge. It is the duty of the Judge to consider every objection of fact or of law made by the parties to the report, to show the nature of the objection in his judgment and his grounds for allowing or dismissing it. 27 S.L.R. 194=1933 S. 327.

O. 20, R. 5.—Although a suit is decided upon a preliminary point, Court can record findings on all the issues. 9 C.W.N. 60. But see 11 C. 544 and 17 M.L.J. 626 (P.C.). Courts deciding a suit have no right to impose a condition as to the mode of execution of the decree. 45 I.C. 250. High Court set aside the judgment of first Court for uncertainty in the judgment as it could not know what the judgment meant. 25 I.C. 576=19 C.L.J. 545. In appealable cases lower Court should as far as possible pronounce its opinion on all the issues raised. 24 I.C. 87=1 L.W. 416 [5 W.R. 53 (P.C.), Foll.] On this Section see also 1935 A.L.J. 309=1935 A.W.R. 244=1935 A. 519.

O. 20, R. 6.—Court will not be deterred from making a decree by the difficulties to be expected in carrying it out. 1 M.H.C.R. 415. Decree should not be vague, but explicit in its terms. 7 W.R. 232. When a decree or any part of a decree is passed by consent of parties, it should always so appear on the face of the decree when drawn up. 35 C.W.N. 612=131 I.C. 316=1931 P.C. 107=60 M.L.J. 648 (P.C.). A decree ought to be drawn by the Court deciding a case, showing all the costs incurred by both the parties. 10 I.C. 858=38 C. 125. When there are several parties in a suit, the judgment and decree should make it clear which parties are to receive costs and how many sets are allowed. 1936 A.M.L.J. 117. In the case of an original suit decree must be quite distinct from the judgment. 54 I.C. 913=1 L. 223. When a plaintiff sues by a recognised agent and obtains a decree, the decree should stand in the name of the agent as agent and on behalf of the plaintiff. 11 W.R. 503. Decree in a suit for contribution should specify the particular sum payable by each defendant. 24 W.R. 252. See also 3 M.H.C.R. 187. Decrees

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) [S 221.] The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

Loc. Am.—[Madras.] In O. 20, R. 6, after sub-rule (2) the following be inserted as sub-rule (2-A) —

"(2-A) In all cases in which an element of champerty or maintenance is proved, the Court may provide in the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant."

7. [S. 205.] The decree shall bear date the day on which the judgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Loc. Am.—[Allahabad.]

"7-A A Court, other than a Court subordinate to the District Court exercising insolvency jurisdiction, passing an order under S 47 or 144 of the Code of Civil Procedure or one against which an appeal is allowed by S 104 or R 1 of O. 43, or an order in any case, against which an appeal is allowed by law, shall draw up a formal order embodying its adjudication and the memorandum of costs incurred by the parties.

8. Where a Judge has vacated office after pronouncing judgment but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

Procedure where Judge has vacated office before signing decree.

Notes.

declaring a right to maintenance should contain an order directing future maintenance 9 B 108 See also 7 C 394. Findings upon issues other than those upon which the suit is determined should not be inserted in decree. 26 A 234. Where there is delay on the part of applicant for correction of decree, which is not capable of satisfactory explanation the Court may reject application 139 I.C. 528=36 C.W.N. 97=1932 C 563

POWER OF COURT SUBSEQUENT TO JUDGMENT.—After judgment has been pronounced, decree must automatically follow and Court has no power to direct that the preparation of decree be stopped until payment of deficit Court-fee 11 P 532=137 I.C. 855=1932 P. 228

O. 20, R 6 (2)—The sub rule does not authorize the Court to order payment of costs by a person who is not a party to the suit. Costs cannot be decreed against the guardian of a defendant except in the case referred to in O. 32, R. 2 3 M. 263 A set-off cannot be allowed for costs not actually awarded. 16 W R. 308 Costs awarded on the disposal of a preliminary point may be set off against cost awarded at the final disposal of the suit 9 C. 797. Although it is within Court's discretion to allow or not to allow costs, still Court is bound to pass order with regard to it. Even where suit is dismissed decree ought to be prepared showing the amount of costs and giving direction in respect thereto even where each party has to bear its own costs 1933 P 135

MISCELLANEOUS.—The word "decree" is often misunderstood. The order in the decree might give some relief to the plaintiff or might disallow the relief claimed altogether, but the Court has to prepare a

decree whether the claim is allowed or dismissed, except in cases excepted under General Rules and Circular Orders Civil Vol. V, Ch 5, R. 11. 1933 P. 135.

O. 20, R. 7.—Where a person has the judgment of Court that he shall have a decree, he then obtains his decree. The decree, when drawn up afterwards, relates back to that time. 65 I.C. 650=34 C.L.J. 494. (17 C. 347, Ref.). See also 13 C 104; 11 P. 532=137 I.C. 855=1932 P. 228 A decree must follow the judgment and failure to prepare a decree cannot deprive the parties of their right to appeal. 52 I.C. 479=66 P.R 1919 Date of decree is date of delivery of judgment. 1 P 771=75 I.C. 879; 66 I C 7=1922 N. 113, 21 I.C. 545=25 M L J 560; 25 I.C 67, 32 I C. 744; 42 B 309 Difference in date between judgment and decree—The decree should bear the date of judgment. 101 I C 319=6 Bur.L.J 23. In the case of a decree not drawn up on a non-judicial stamped paper, although it is invalid on that account, the subsequent affixing of the proper stamp, by the order of Court to the original decree, the stamp being defaced by the names of the parties and the cause title of the case being put upon it, makes the decree valid retrospectively from the date when it was drawn up. But if the Judge, when affixing the non-judicial stamp to the decree as originally drawn up, puts down his initials and the date of such affixing on the original decree, the decree has to be taken to be a decree passed on such date. 38 C.W. N. 1118.

O 20, R 8—The Judge deciding a case on the conclusion of all the evidence is not bound by the previous decision on certain issues of a Judge who has tried a part of the case. 47 I.C. 555=11 Bur L.T 97.

- 9 [S. 207.] Where the subject-matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.
- Decree for recovery of immovable property.
10. [S. 208.] Where the suit is for movable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.
- Decree for delivery of movable property.
11. [S. 210.] (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be
- Decree may direct payment by instalments

Notes.

O. 20, R. 9.—A decree which does not specify the lands decreed, but directs them to be determined in execution, is bad in law 4 C. 69. Such a decree cannot be executed. 25 W.R. 39. Evidence cannot be given in the execution department to amend any uncertainty in the decree 12 W.R. 99. But evidence could be taken to ascertain the boundaries, and the subject on which the decree operates. 16 W.R. 171, 22 W.R. 330. If the boundaries given are no longer in existence, evidence may be taken to ascertain the former position of the lands 16 W.R. 191.

O. 20, R. 10.—In the case of a decree which follows R. 10, execution cannot be taken out by the decree-holder so far as the money portion of it is concerned without adopting the procedure prescribed by O. 21, R. 31, C. P. Code 31 C.W.N. 850=1927 C. 652=55 C. 26 (13 M.L.J. 444, Foll.)

FORM OF DECREE.—R. 10, does not say that a person who is entitled to delivery of specific movables must in all cases sue for such delivery and not for their value or for damages, for in many cases the moveables themselves would be of no use to him after conversion or detention. Nor does the rule say that the Court must invariably decree the articles claimed and not their value only. Court is not bound to pass a decree for the articles in the first instance and in the alternative only for their value in a case where the defendant asserts that the articles are not in his possession, or not in existence, and it is not possible for the plaintiff to prove that the defendant's assertion is untrue 61 C. 711. In an action for specific restitution of chattels, it is for the defendant, and not the plaintiff, to determine the manner in which the alternative judgment of the articles or their value is to take effect, and it is in his election whether he would deliver the chattels or pay the assessed value on them. And the plaintiff has no right or power to obtain their specific restitution. But when a decree is in the form contemplated by R. 10, and there is no question of deterioration in value of the articles decreed to be recovered, the decree-holder is not entitled to execute the money part of the

decree before applying for delivery of the articles. 61 C. 711. As a mere piece of movable property, and irrespective of its character as representing an actionable claim the *value of a bond* is only nominal, but the measure of the damages for its non-delivery would be upon the basis of its character as representing an actionable claim. But if the bond is void at the time of conversion, and not by any act of the defendant, only nominal damages can be recovered. 61 C. 711. Where a decree is passed for *delivery of bonds*, an enquiry as to damages for their non-delivery may more profitably be started by the Court in execution 61 C. 711.

O. 20, R. 11 SCOPE AND APPLICATION OF RULE.—R. 11 is not in any way controlled by the provisions of the Imperial Bank of India Act, (1920), which limit the power of the Bank in the matter of advancing loans for a period exceeding six months. The Courts are not therefore precluded from granting instalments in proper cases simply because such a course would postpone realisation of the dues by the plaintiff (Imperial Bank) for over six months 146 I.C. 1046=16 N.L.J. 78=1933 N. 330. After a portion of the amount due under a money decree had been paid, execution had been started for the balance, the decree-holder and judgment-debtor entered into a compromise, whereby, some of the properties which had been attached were released and judgment-debtor was given time to pay the balance due in four instalments. This was presented to Court, and Court granted permission for the compromise, directing a decree to be passed in its terms. *Held*, the order of the Court must be taken to have been passed under R. 11 (2). 40 L.W. 883=67 M.L.J. 801. *See also* 144 I.C. 158=1933 L. 758. The word "postponed" has been added to meet the ruling in 2 A. 649. *See* 7 M. at 154 and 2 A. at 132. Applicability of rule to decree against tenants under Agra Tenancy Act. *See* 54 A. 521=138 I.C. 254=1932 A. 436. No doubt instalments and interest are discretionary matters, but that discretion must be exercised on judicial principles, and where there is no reason proved that the debtor should be granted an unusual concession, the normal course should be followed 148 I.C. 349=1934

made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

(2) After the passing of any such decree the Court may, on the applica-

Notes.

Pesh, 2. The discretion to order payment of a decretal amount by instalments must never be exercised so as to constitute a virtual denial of the decree-holder's rights (54 A 539 Rel. on) A L R. 1935 R. 495. In making orders for instalments under R. 11, not only the condition of the debtor and his ability to pay must be considered but also all other circumstances, namely, the date and the amount of the loan, the amount of instalments, etc. The Court should be careful to guard also the interest of the creditor. Too much pity for the debtor is not the consideration. Simply because instalments are prayed for and the claim is not contested, that does not entitle a debtor to get an instalment decree as a matter of course. In granting instalments even a Small Cause Court is required under R. 11, to state its reasons therefor. 157 I C. 1038=61 C.L.J. 93=A.L.R. 1935 C. 559. The mere fact that the debtor is hard pressed or is unable to pay in full at once is not sufficient reason for granting instalments. The debtor may be required to show his *bona fides* by arranging prompt payment of a fair proportion of the debt. But that is only one way of proving *bona fides* and the prompt payment of a fair proportion of the debt cannot be made in all cases a condition precedent for granting instalments. 146 I C. 1046=16 N.L.J. 78=1933 N. 330. It is not open to the executing Court to go behind an adjustment or agreement between the judgment-debtor and decree-holder for the payment of an amount smaller than the decretal amount payable by instalments, an agreement attested by the Court. Under R. 11, it is open to the Court, with the consent of the parties, to vary the terms of a decree. The order attesting the terms of the compromise having been passed by the Court in the presence of the parties and with their consent it is not open to either of them to contend that the Court was not competent to attest it. 144 I C. 158=1933 L. 758. See also 67 M.L.J. 801. A decree for the enforcement of a mortgage or charge is not a decree for the payment of money. 7 B 332. See also 1933 R. 323. An order under this rule can only be made by the Court which passed the decree. 12 A. 571; 54 A. 573=1932 A.L.J. 365=1932 A. 273 (F.B.). The Court referred in sub-section (1) of R. 11 is clearly a Court which passed the decree. The executing Court must take the decree sent to it for execution as it stands and is not entitled to vary the decree by making it payable by instalments. 149 I C. 763=1934 R. 197. S. 42 does not empower the Court to which a decree is sent for execution to pass an order which has the effect of amending, altering or varying the decree itself. An order for payment of a decree by instalments which is made after the decree has been passed, undoubtedly has the effect of altering or varying the terms of the original decree and consequently it is not within the

competence of the transferee Court to make such an order. 12 R. 320=151 I C. 937 (2)=1934 R. 165. See also 7 B. 332. In the case of instalment decrees, the amount of the instalments and the periods for their payment is a matter of discretion for the Court. But the discretion is one which is to be exercised within reasonable bounds. 54 A 539=1933 A. 90. The Court is not bound to direct that the instalments shall carry the stipulated rate of interest. 3 B 202. Supplemental decree for balance of mortgage amount—Power of Court to order instalment payment. 11 I.C. 736=15 C.W.N. 1083. The fact that the estate of the defendant has been brought under the management of the Court of Wards is not a reason for allowing instalments. 5 Lah.L.J. 571=1923 L. 266. Court which passed the decree is the Court which can postpone the execution of decree under R. 11. 32 M.L.J. 13=40 M. 233 (F.B.). An order postponing execution of a decree or ordering payment by instalments is virtually an order amending the decree. 34 I C 393. Rule refers to order passed by the Court which passed the decree and not executing Court. 2 Pat L.T. 80=58 I C. 893. The trial Court has the power under R. 11, to postpone payment of the amount decreed but it must be exercised judiciously. 7 L. 393=97 I C. 769=1926 L. 604. Burden of proving that the defendant is entitled to indulgence of a decree in instalments rests upon him. 71 I C. 303.

LIMITATION.—When order under this rule is made on an application held after the expiry of the period of limitation, it is invalid. 14 C. 348 (350). But see 54 A. 573 *contra*. Although Court should not entertain an application for payment of the decretal money by instalment under R. 11, if made after expiry of six months from date of decree, the order if actually passed on such a time-barred application is not a nullity. Limitation is a question of procedure and not one of jurisdiction. (26 A. 522, Rel. on, 1924 L. 342, Not foll.) 54 A. 573=1932 A.L.J. 356=1932 A. 273 (F.B.). The time for an application subsequent to decree for payment by instalments runs only from the date of the decree of the appellate Court even though the latter only confirmed the judgment of the lower Court and dismissed the appeal. 135 I C 858=1932 R. 54.

APPEAL.—An order postponing the time for the payment of the decretal amount passed under R. 11 is not by itself appealable, but when such an order is passed at the time of giving judgment and is incorporated in the decree, it is clearly a part of the decree and as such is appealable. 133 I C. 233=1931 R. 152. (7 L.B.R. 71, Dist., 1928 L. 931, 1926 L. 604, Ref.) See also 1933 Pesh 31. An order under this rule is not a nullity because it postpones the period of limitation. 7 M. 152 (154). See also 12 B. 65.

Order after decree for payment by instalments by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

Loc Ams —[Madras.] Order 20, R. 11 *Substitute* for Rule 11 —

11. (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and after notice to the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor or, or the taking of security from him, or otherwise, as it thinks fit

[Nagpur] Rule 11 —In sub-rule (2) of Rule 11 in O. 20 for the words "and with the consent of the decree-holder" the words "and after notice to the decree-holder" shall be *substituted*

[Rangoon] Order 20, R. 11, sub-rule (2) For the words "and with the consent of the decree-holder" *substitute* the words "and after notice to the decree-holder"

[Sind.] Order 20, R. 11 (2). In sub-rule (2) of Rule 11 of O. 20 in the First Schedule of the Code of Civil Procedure, 1908.—

for the words "and with the consent of the decree-holder" *substitute* the words "and after notice to the decree-holder"

12 [Ss. 211 & 212.] (1) Where a suit is for the

Decree for possession and mesne profits recovery of possession of immovable property and for rent or mesne profits, the Court may pass a decree—

Notes.

O 20, R 11 (2) —An order in the terms "Let the petition be filed" passed on a petition presented by a judgment-debtor after he is arrested, asking for 15 days' time, the decree-holder consenting, does not amount to an order directing payment to be postponed 16 C 16 See also 14 C. 348, 11 C. 143, 4 Bom H.C.A.C. 77 and 5 B 604 Order under R. 11 (2) directing judgment-debtor to execute mortgage—Subsequent insolvency does not affect decree-holder's rights. 2 R. 673—4 Bur L J 32 Compromise between parties that decretal amount should be paid by instalments—Court accepting compromise and dismissing execution case—Terms of compromise—Can be enforced in execution. 41 C.W.N 480=1937 C 236 Execution of decree—Postponement of, on furnish ing security—Validity of order. See 52 M. L.J 182=1927 M 416=100 I.C. 841 Order under R. 11 (2) is *appealable* being one under C.P. Code, S. 47 119 I.C. 751 (1)=1929 R. 191; 135 I.C. 858=1932 R. 54 Even though the petition on which an order for payment of the decretal amount by instalments is made, is not made within six months of the decree, the order is not a nullity. The proper remedy of the person who objects to the order is to take appropriate steps for getting that order set aside and so long as that order is not set aside, it is binding on him. 41 C.W.N 480=1937 C 236.

O 20, R 12.—Difference between the old section (S. 211) and this rule See 26 I.C.

622=2L.W.8. As to the effect of the rule, see 37 M. 186 It is the Court which passed the decree and not the executing Court which is to ascertain the mesne profits under the new Code 130 I.C. 785=1931 P 1. See also 1931 M. 650=61 M.L.J. 596 (F.B.) Mesne profits must be determinable in the suit itself and not by way of execution. 16 C.W.N 109 See also 37 I.C. 997; 32 I.C. 862, 2 Pat L J 394=41 I.C. 231 An application for assessment of mesne profits is an application in the suit. 25 A 385; 90 I.C. 811=1926 C. 175; so where such an application is dismissed for default a fresh application is not maintainable. 16 C.L.J. 3. See also 29 I.C. 997. The remedy of the aggrieved party is under O. 9, R. 4. 1921 P. 25=62 I.C. 747. Where in a suit for damages and arrears of rent, the plaintiff makes it clear that he would not press his claim for damages and confines his relief to the recovery of the fixed rents which had been agreed upon between the parties, the amount becomes definitely ascertained, and the Court is, therefore, not bound to pass a preliminary decree in the first instance 166 I.C. 897=1936 A. W.R. 1212=1937 A. 36.

SCOPE OF RULE.—The rule does not apply to a suit for partition, but to suits for possession of immovable property in which plaintiff has a specific share. 14 C 493 (P. C.) Mesne profits may be allowed, however, when one member has been entirely excluded from enjoyment 19 B. 532 See also 16 C. 397 (P.C.); 14 W.R. 397 Mere

- (a) for the possession of the property;
 (b) for the rent of mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
 (c) directing an inquiry as to rent or mesne profits from the institution of the suit until—

Notes.

excess of enjoyment is not ouster. 23 I.C. 122 A suit for mesne profits does not fall within this rule. 9 Bom.H.C.R. 7 See also 1 N.W.H.C. R. 22; 9 M.L.J. 163; 9 C.L.R. 1. 21 A. at 432 (F.B.); 5 C. 503, 24 B. 345; 19 A. 290; 30 C. at 664 (F.B.). Mesne profits may be awarded during the whole period a suit is pending, however long that period may be. 8 Bom.H.C.R. (A.C.) 205. In absence of mention of period in the decree, plaintiff is entitled to mesne profits up to the date of delivery of possession. 13 C.W.N. 430 See also 8 C. 178 (P.C.), 16 I.C. 866, 12 W.R. 75; 17 W.R. 209 Amount larger than what is claimed may be awarded as mesne profits 3 C. 295, 9 C. 474 But see 6 C. 474, 5 W.R. 127 (P.C.) *contra* The provision of R. 12 (c), suggest, that when a person obtains a decree for possession of immovable property, the defendant would be answerable to the plaintiff for mesne profits either until he delivers up possession or relinquishes possession with notice to the decree-holder through Court. It is immaterial that the decree itself contains no direction as to future mesne profits. 43 L.W. 221=1936 M. 137=70 M.L.J. 87 Where the appellate Court finds that a person is entitled to possession, the proper course is not to remand the whole suit, but to pass a preliminary decree so far as possession is concerned and direct an enquiry as to mesne profits 45 M. 449=42 M.L.J. 372. Where possession is decreed to a plaintiff, possession is decreed to a plaintiff, he is entitled to a further decree for mesne profits from the date of the suit up to the date of taking possession. 42 A. 497=18 A.L.J. 613

COURT FEE.—A person applying under R. 12 for ascertainment of mesne profits prior to suit need not pay any court-fee which should be paid only after the amount of mesne profits has been ascertained 1935 A.W.R. 31=1935 A.L.J. 254=1935 A. 206.

"DELIVERY OF POSSESSION."—Mere filing of a petition stating that the plaintiff might take possession, of which no notice went to the plaintiff would not amount to delivery of possession. 12 I.C. 272=(1911) 2 M.W.N. 258 'Relinquishment of possession'—Notice of relinquishment if given at a time when it is too late to cultivate, if of no avail. 2 L.W. 1129=31 I.C. 387

"THREE YEARS FROM DECREE."—Mesne profits for more than three years from the date of the decree should not be awarded, even though possession was not delivered during that period 24 B. 345, 24 B. 149; 35 C. 1017, 27 C. 951 (P.C.). Claim for mesne profits up to date of suit—Decree silent as to period for which mesne profit is to be given—Court whether can award such profits till date of delivery of possession. 53 C. 992=31 C.W.

N 112=99 I.C. 428=1927 C. 182 The period should be calculated from the date of the ultimate decree 34 C.L.J. 415 In cases of appeals, it is the appellate decree. 30 C. 660. See also 23 A. 152, 70 I.C. 6=34 C.L.J. 415, 31 A.L.J. 116=43 I.C. 855.

O. 20, R. 12 (c) (Mad)—Mesne profits—Application for ascertainment—Necessity—Limitation. 71 M.L.J. 388.

O. 20, R. 12 (1).—The word "may" in R. 12 (1) indicates that Court's power is discretionary though in R. 12 (1) (a) "may" means "shall" 41 M. 188=33 M.L.J. 699 (F.B.) Preliminary decree—What amounts to—Objection to jurisdiction—Where to be taken. 36 I.C. 431=9 Bur.L.T. 119

Mesne profits—Liability for period between date of judgment-debtor's relinquishment of possession with private notice to decree-holder and date of formal delivery through Court 66 I.C. 49=25 C.W.N. 369 Exclusive possession of one co-sharer as lessee of others—Jurisdiction of Court to award compensation to co-sharers out of possession subsequent to institution of suit 35 C.W.N. 949=1931 P.C. 209=61 M.L.J. 186 (P.C.)

MODE OF AWARING ASSESSMENT AND CALCULATION OF MESNE PROFITS—See notice under S. 2, cl. 12) See also 15 I.C. 1, 3 C.W.N. 748, 18 C. 99 (P.C.), 4 C. 882, 9 A.L.J. 774=16 I.C. 126, 2 A. 651 The only relevant consideration for Court is whether defendant's possession was wrongful or not. If it was wrongful, Court is not justified in going further and inquiring what the degree of the misconduct or culpability is 38 I.W. 714=1933 M. 825 When Court passes the preliminary decree under R. 12 and directs an enquiry as to mesne profits, it should, at the same time, decide the basis upon which the mesne profits are to be assessed There is no provision in the Code for deciding the basis upon which mesne profits are to be assessed, at a date subsequent to the passing of the preliminary decree 151 I.C. 922=38 C.W.N. 384=1934 C. 503 The character of the possession held by the decree-holder before ouster to be taken into consideration in cases where the intention as to the mode of occupation if there were no trespass has got to be gathered 29 C. 622= C.W.N. 409 See also 35 C. 1000=12 C.W.N. 650, 30 I.C. 536, 1931 P.C. 209=61 M.L.J. 186 (P.C.) In arriving at nett profits expenses of management and collection charges should be allowed. 1931 M.W.N. 813 Charity expenses such as temple kattalais and chatram expenses charged on the suit property cannot be treated as voluntary payments and should therefore be deducted in computing the mesne profits to be awarded to the plaintiff 1931 M.W.N. 813 Basis of assessment of mesne profits—Some lands held at produce

- (i) the delivery of possession to the decree-holder,
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs
- (2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or mesne profits shall be passed in accordance with the result of such inquiry

Notes.

rent—Presumption. 53 C. 992=31 C.W.N 112=1927 C 182 Thus a landlord who dispossesses a ryot is liable, not merely for the profits which he makes by letting the land but to make good the loss which the ryot sustains 15 W.R. 428, 11 W.R. 481, 12 W.R. 104. Cultivation expenses ought to be deducted 24 M.L.J. 30=18 I.C. 615, 1931 M.W.N. 813. As to the other deductions which the trespasser is entitled to, see 23 A. 252, 24 A. 376, 1 A. 518 (F.B.). (Collection expenses); 27 C. 951 (P.C.); 17 B. 35. See also 3 W.R. 30, 16 W.R. 171, (1911) 2 M.W.N. 308=12 I.C. 385. No deduction for expenses incurred in obtaining decrees for rent 20 A. 208.

CLAIM FOR MESNE PROFITS AGAINST TRESPASSERS—NATURE OF DECREE TO BE PASSED—In the case of a claim for mesne profits two courses are left open to Court. A decree for mesne profits may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiffs out of possession for any particular period, leaving them to have their respective rights adjusted in a separate suit for contribution, or, the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them and a decree on the basis of such several liabilities may be passed against the respective trespassers in plaintiff's favour 58 C.L.J. 8=1933 C. 554=147 I.C. 466

DECREE FOR MESNE PROFITS ONLY—VALIDITY—Though ordinarily a decree for mesne profits can only follow a decree for possession and when the plaintiff fails to obtain a decree for possession, a claim for mesne profits should not be allowed still when the plaintiff is precluded from obtaining *khass* possession. he cannot be deprived of his right to mesne profits till the date to which he is entitled to possession 58 C.L.J. 8=1933 C. 554=147 I.C. 466

SUIT FOR MESNE PROFITS—BURDEN OF PROOF—In a suit for mesne profits, if the defendant asserts that a particular amount and no more was received by him, the duty of establishing it affirmatively rests upon him, that fact being especially within his own knowledge. On his laying before the Court sufficient evidence to prove that fact, he shifts the burden to the opposite party of proving that more might have been received. 38 L.W. 714=1933 M. 825.

INTEREST ON MESNE PROFITS.—See note under S. 2, cl (12) See also 35 C. 329. (Mesne profits shall carry interest unless expressly refused.) See also 27 C. 951=4 C.W.N. 631 (P.C.), 6 A.L.J. 327=2 I.C. 464;

15 M. 203. But see 22 A. 262 and 8 C. 332 (P.C.) in which it was held that where interest is not given by a decree, it is not obtainable in execution. On this point, see also 10 C. 785 (P.C.), 4 P. 57=8 I.C. 272

FUTURE MESNE PROFITS.—Although Court may pass a decree directing an enquiry into future mesne profits under R. 12, this provision is only directory and not mandatory. It does not compel plaintiff to unite the claim for future mesne profits in a suit for recovery of possession of immoveable property 1931 A.L.J. 673=1931 A. 429=53 A. 951 (S.B.)

PROCEDURE—R. 12 does not require that after the preliminary decree has been passed the decree-holder should apply to the Court for starting the proceedings in connection with an enquiry as to mesne profits. On the other hand R. 12 (2) provides that where an enquiry is so directed a final decree in respect of the mesne profits shall be passed in accordance with result of such enquiry. The proceedings should be taken to continue till the result of the enquiry into mesne profits is known. And under the Code the Court has no power to direct the ascertainment of mesne profits in execution 151 I.C. 755=1934 A.L.J. 86=1934 A. 465. See also 1934 C. 472. The enquiry and ascertainment as to mesne profits is a part of the proceedings in the suit consequent on the preliminary decree and is terminated by a final decree after the mesne profits are ascertained. 41 I.C. 231=2 Pat. L. J. 394; 1931 A.L.J. 413=1931 A. 538. (It has nothing to do with the execution department.) Suit for possession by heir—Enquiry into mesne profits from date of suit should be directed. 66 I.C. 494=2 L. 383. Where Court by an order determines the principle for ascertaining mesne profits, such an order is one made in a pending suit and is therefore not appealable 13 I.C. 186. (19 C. 132, 5 I.C. 272, Rel. on.) Decree for mesne profits does not become operative till the amount has been ascertained by the Court and the Court-fee paid thereon under S. 11 of the Court Fees Act. 27 I.C. 300. See also 1931 A.L.J. 413=1931 A. 538. Decree directing enquiry into mesne profits in execution, though it was in contravention of the provisions of R. 12 is a case of an irregular exercise of jurisdiction and not a nullity. 30 L.W. 810=57 M.L.J. 728. Non-compliance with—Irregularity or illegality—Executing Court whether can refuse to execute on the ground that R. 12 was not complied with. 31 Bom.L.R. 400=118 I.C. 700=1929 B. 217. The cases mentioned in O. 20 of the C.P. Code are not exhaustive of the orders which

Loc. Am.—[Madras.] *Idu* the following to O. 20, R. 12.—

(3) Where an Appellate Court directs such an inquiry, it may direct the Court of first instance to make the inquiry, and in every case the Court of first instance shall, on the application of the decree-holder, inquire and pass the final decree.

13. [S 213.] (1) Where a suit is for an account of any property and for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.
- (2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full

Notes.

may form the basis of final decrees. 27 C.W. N. 989=38 C.L.J. 255. In the absence of a period for the calculation of mesne profits in a decree awarding mesne profits, the decree should be construed as awarding mesne profits for three years. 24 I.C. 484=1 L.W. 443. When decree is passed both for possession and mesne profits, decree for possession only must be executed first. 2 L.W. 688=30 I.C. 246. Application for ascertainment of mesne profits—Death of defendant—No abatement. 129 I.C. 84=11 Pat.L.T. 796=1931 P. 57. The dismissal of an application for ascertainment of mesne profits to be made in execution does not amount to the dismissal of the entire claim for mesne profits. 151 I.C. 913 (2)=38 C.W.N. 141=1934 C. 472. *See also* 1934 A. 465.

JURISDICTION.—Jurisdiction is not taken away by the mesne profits ascertained by the Court exceeding the pecuniary jurisdiction of the Court. 21 C. 550; 40 C. 56; 15 I.C. 252; 2 Pat.L.T. 143=6 Pat.L.J. 54. *See also* 2 Pat.L.T. 648=68 I.C. 903; 32 I.C. 788; 1934 P. 380. Suit for mesne profits is cognizable by Small Cause Courts. 23 C. 884 (F.B.); 22 M. 196; 24 M. 118. *But see* 25 B. 85; 14 C.W. N. 1001. After an order has been finally made determining the amount of mesne profits due, a formal decree should be drawn up to give effect to the order which terminates the suit. 32 C. 175. *See also* 15 B. 416. Suit against several trespassers—Decree for mesne profits—Form of. 59 C. 859=138 I.C. 882=1932 C. 600. *See also* 58 C.L.J. 8=1933 C. 554. Where a preliminary decree in a partition suit has omitted to direct an enquiry into mesne profits the final decree cannot award mesne profits or direct an enquiry as to mesne profits. 42 M. 296=1919 M.W.N. 284. Decree directing delivery of possession and awarding mesne profits without directing enquiry is final and not preliminary. 22 L.W. 347=90 I.C. 789. Mesne profits—Limitation. 16 C.L.J. 135=17 I.C. 121; 41 M. 188=33 M.L.J. 699 (F.B.); 77 I.C. 497=1923 B. 268. Decree—Application for ascertainment of mesne profits—Death of defendant—No abatement. 11 Pat.L.T. 796.

LIMITATION.—Limitation for execution runs from the date of the final decree, that is, from the ascertainment of mesne profits. 4 C. 629; 8 M. 137; 14 C. 50; 19 C. 132 (F.B.); 25 C. 203; 14 A. 531; 25 A. 385; 32 C. 175; 25 A. 623. Under Art. 109 of the Limitation Act, mesne profits can be recovered only for a

period preceding three years next before the institution of suit. 10 C. 785 (P.C.), 8 C.L.J. 181=35 C. 996=13 C.W.N. 15. *See also* 5 M. 236. *But see* 33 C. 23 (P.C.). The period of three years has no reference to the time when the rents fall due. 24 C. 413; 32 C. 118. An application for ascertainment of mesne profits being an application in the suit itself is not governed by any provisions in the Limitation Act. 8 P. 482=10 Pat.L.T. 762=1929 P. 368. Contract procured by undue influence—Possession under—Contract set aside—Account for mesne profits—Period of. *See* 59 I.A. 147=36 C.W.N. 461=1932 P.C. 89=62 M.L.J. 451 (P.C.). *See also* 41 M. 188=33 M.L.J. 699 (F.B.).

COURT-FEES.—As to the Court-fees leviable on mesne profits ascertained subsequent to the decree, *see* under S. 11 of the Court Fees Act. *See also* 55 I.C. 24=1 Pat.L.T. 235. Fees are payable on the difference between the amount paid on the mesne profits claimed in the plaint and the amount ascertained to be due subsequent to the filing of the suit. 10 L.B.R. 276=62 I.C. 175=13 Bur.L.T. 165. Application for ascertainment of further mesne profits—Court fee if and when payable. 59 I.C. 939=5 P. 361=1926 P. 218 (F.B.). A person applying under R. 12 for ascertainment of mesne profits prior to suit need not pay any Court-fee which should be paid only after the amount of mesne profits has been ascertained. 1935 A.L.J. 254=1935 A. 206. Application for mesne profits—Appeal claim for higher amount than that awarded—*Ad valorem* fee on the claimed amount not payable—No Court-fee apart from the fixed fee can be claimed from party till the amount of mesne profits actually due has been ascertained. 11 Pat.L.T. 703.

APPEAL ON REVISION.—An interlocutory order of the lower Court relating to the maintainability of an application for mesne profits before the passing of the final decree is not open to appeal or revision, it can only be challenged in an appeal from the final decree. 138 I.C. 30=1932 O. 271.

SECOND SUIT.—Decree for possession—Question of mesne profits left open—Second suit for future profits maintainable. 130 I.C. 785=12 Pat.L.J. 127=1931 P. 1.

O. 20, R. 13.—The Code of Civil Procedure nowhere lays down what are to be the contents of a final decree in an administration suit. The contents must depend upon the nature of dispute in each case. Where after passing of a preliminary decree in an

of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claims against the same as they may respectively be entitled to by virtue of this Code.

14. [S. 214.] (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

Decree in pre-emption
suit.

Notes.

administration suit the Court passed an order which determined all the matters in dispute between the parties but refused to frame a final decree sheet, such order must be construed as a final decree to that extent, and is appealable 1936 L. 879. The rules to be observed as to the respective rights of secured and unsecured creditors, etc., are to be found in the Provincial Insolvency Act See also 15 C. at 208. Priority of Crown debts, see 45 C. 653=22 C.W.N. 793. The right of an unsatisfied or unpaid creditor, who has not come in under an administration decree to obtain payment in respect of his debt, unless he is precluded from exercising it by reason of negligence, default or laches or any other circumstance which would make it inequitable for the Court to make a decree in his favour is not by way of action but by way of a petition under the administration action itself, such a petition can, however, succeed only if the fund is in Court or subject to the control of the Court, and further the claim can only be made against satisfied legatees and can never succeed against the creditors who have already been paid in respect of their debts. 38 Bom L.R. 864=1936 B. 423. Rule does not apply where Administrator-General has obtained letters of administration of estate of deceased insolvent. 38 M. 500. See also 5 Bur.L.T. 5=14 I.C. 508. A suit for mesne profits is not a suit for an account 22 M. 118. Administration suit in Rangoon High Court—Change in form of preliminary decree—Practice—Rangoon High Court 1925 P.C. 261=50 M.L.J. 644 (P.C.). In the case of an administration action, *unsecured creditors* are entitled to interest up to the date of the preliminary decree and not up to the date of payment or any other date, whereas secured creditors are entitled to interest, from the proceeds of the sale of the secured property, up to the date of payment 112 I.C. 621=1929 M. 242. When a preliminary decree is passed in an administration suit all the *attaching creditors* stand on the same footing, even though the attachment may have been effected before the decree, provided that the decree was passed before any payment is made. (15 C. 202, Foll.) 61 C. 240=152 I.C. 69=1934 C. 559. As to what is an administration decree See also 1935 Pesh. 63.

O. 20, R. 14. APPLICABILITY.—The rule does not apply where the vendee is not entitled to possession 45 A. 482=21 A.L.J. 417. Sub rule (2) is new and is based upon the rulings in 6 A. 455, 11 A. 164. The words "whose title thereto shall be deemed to have accrued from the date on such payment" give effect to the observations in 24 M. 449 at 463. The pre-emptor's rights to or in the property accrue only when he has complied with the conditions laid down in the decree and paid the purchase-money into Court and it is then and only then the property vests in him and is divested from the vendee. Such ownership does not vest from the date of sale notwithstanding success in the suit and the actual substitution of the owner of the pre-empted property dates with possession under the decree (25 P.R. 1908, overruled) 11 L. 128=1930 L. 273 (F.B.). Pre-emption decree—Form of—Date of payment to be fixed. 24 A.L.J. 63=1926 A. 158, 158 I.C. 78=1935 L. 523.

"SPECIFY A DAY"—When the day specified happens to be a Sunday, payment may be made on the following day 3 A. 850 See also 7 A. 107, 134 I.C. 201=1931 L. 388. The day on which judgment was passed, ought to be excluded in computing the period specified 3 A. 830 See also 14 A. 529. When appellate Court dismisses an appeal, it can extend the time fixed by the lower Court. 2 A. 744 See also 11 A. 346. But see 18 A. 223. Court cannot extend the time after the period mentioned in the decree has elapsed. 13 A. 400 See S. 148. But see 45 A. 456=74 I.C. 745.

COSTS.—Rule makes no provision for cases where costs are awarded in favour of pre-emptor. In such cases he can pay the sum after deducting costs 6 A. at 353.

CASES.—Where a pre-emptor joins with himself a stranger in suing to enforce his right he thereby forfeits it 5 A. 197. For further cases, see 15 C. 224, 15 C. 184; 4 A. 420, 16 A. 126, 44 C. 675=32 M.L.J. 459=44 I.A. 80 (P.C.). The transferee of a pre-emption decree cannot execute it but the pre-emptor can execute it for the benefit of the transferee. 7 A. 109, 7 A. 107. Pre-emption decree—Failure to deposit whole amount by mistake—Effect of. 1923 L. 250, 18 I.C. 600=141 P.L.R. 1913. Decree silent as to standing crops—Plaintiff entitled to them on

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that on payment into Court of such purchase-money, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct—

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property, including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

15. [S. 215.] Where a suit is for the dissolution of a partnership, or the taking of partnership accounts, the Court before passing a final decree, may pass a preliminary decree declaring the proportionate shares of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved and directing such accounts to be taken, and other acts to be done, as it thinks fit.

16. [S. 215-A.] In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or

Notes.

paying money into Court. 76 I.C. 193=1923 N 327. R. 14 (1) (b) provides that in pre-emption suits the title to property should be deemed to have accrued from the date of the payment of pre-emption money. The mere passing of a decree in such a case does not confer any title on the plaintiff. 27 A.L.J. 1049=1929 A 953. A registered document is not necessary for passing of title to the pre-emptor. 27 A.L.J. 423=115 I.C. 113=1929 A 237.

O. 20, R. 15.—It is desirable that the Court passing a preliminary decree for accounts should decide who is to be the accounting party. But the omission to do so is not fatal and does not render the judgment illegal. It is open to the Court to give instructions at any time to facilitate and regularise the taking of accounts. 157 I.C. 1113=37 P.L.R. 663. The preliminary decree ought to declare the several rights and liabilities which have been adjudicated upon and embody an order which is contemplated by this rule and R. 16. 18 M. at 87. A direction in a final decree leaving distribution of assets undisposed of is in essence a preliminary decree and the decree is final as regards matters finally decided and preliminary as regards matters still undisposed of. 53 M. 378=1930 M. 528. For the purpose of working out a partnership decree each party should produce all documents and

accounts in his possession. See 18 C.W.N. 1025=27 M.L.J. 192 (P.C.). On this rule see also 25 I.C. 146=17 O.C. 193, 45 I.C. 727; 41 P.L.R. 1918; 40 A. 446=16 A.L.J. 305. Proceedings between preliminary decree and final decree are continuation of suit for carrying out the directions in the preliminary decree. 53 M. 378=1930 M. 528. The proof of an agreement between the partners of firm, which forms an exception to the general rule of law that no interest is to be allowed on the capital account of each partner after dissolution, is not a matter concerning the mode of taking accounts. Even if such an agreement is pleaded in the plaint, it has to be proved before the Court and not before the Commissioner who takes accounts in accordance with the preliminary decree of the Court. A Commissioner taking accounts has no power to decide questions relating to the terms of the partnership, its duration or the shares of the partners. He is bound by the terms of the decretal order of reference. 38 Bom L.R. 1058.

O. 20, R. 16.—The order portion in a preliminary judgment need not specify all details and need not be exhaustive. 132 I.C. 195=35 C.W.N. 17=1931 C. 358 (2). Where a decree requires an agent to render accounts, he can only discharge himself by accounting for all the moneys that have come into his hands, and it is always open

from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

17. The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

Decree in suit for partition of property or separate possession of a share therein

18. Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,—

Notes.

to the decree-holder to show that this has not been done. 15 W.R. 260. The Court should order an account to be taken of the defendant's dealings with the plaintiff's money. 14 C. 147, 12 B. 675 See 24 W.R. 70 See also 7 C. 654; 62 I.C. 537, 49 I.C. 441, 28 I.C. 452; 36 I.C. 210 On the fact of agency being established, it is the duty of the Court to direct an account to be taken of the defendant's dealings as agent 27 A. 374 See also 123 I.C. 7. The question as to which of two defendants is the accounting party is essentially a matter for decision at the stage when the preliminary decree in a suit for rendition of accounts is to be passed. 146 I.C. 297=34 P.L.R. 676=1933 L. 891 In a suit for rendition of accounts brought by a principal against a commission agent, it is permissible to a Court to pass a decree in favour of the defendant, if it turns out that a balance is due to him 1937 A.L.J. 115=1937 A.W.R. 16=1937 A. 276 A preliminary decree in a suit for rendition of accounts does not conclude the proceedings and those intervening between the passing of the preliminary decree and the final decree are not fresh proceedings but continuation of the same suit 1931 L. 268 Suit for accounts—Preliminary decree not imperative—Facts if simple—Court can proceed direct to final decree. 53 M. 475=59 M.L.J. 316. Objection to particular item—When to be taken—Object and purpose of preliminary decree—95 I.C. 171=1926 N. 393 The order portion in a preliminary judgment need not specify all details and need not be exhaustive 35 C.W.N. 17=1931 C. 358 (2)=132 I.C. 195.

COSTS.—In a suit for accounts, which on second appeal, has been remanded to the District Judge, the actual decree for costs should not ordinarily be made until the stage of final decree is reached But if the preliminary decree has specified the costs in the decree and such decree is put in execution, High Court cannot interfere to amend the decree. 148 I.C. 572=1934 P. 146.

O. 20, R. 17.—A comparison of O. 34, R. 7 and O. 20, R. 17 makes it clear that directions by the Court with regard to the mode in which the account is to be taken

or vouched will not at least in *redemption suits* amount to preliminary decrees 14 Pat. L. T. 735=1934 P. 97 (2)=149 I.C. 311.

O. 20, R. 18—Difference between old and new Code, see 43 M.L.J. 406=46 M. 47. After a preliminary decree in a partition suit has been passed it is not competent to the Court to dismiss the suit. The preliminary decree can only be reversed on appeal, and whatever default may be in the subsequent stages of suit, the preliminary decree itself cannot be vacated. 139 I.C. 761=1932 M. 519 [51 I.A. 321 (P.C.), 51 M. 701 (F.B.)], 6 P.L.T. 152, Foll., 1928 M. 963, Ref.] Under certain circumstances, in partition suits final decree in the first instance would be proper 17 I.C. 390=246 P. L.R. 1912 See also 1931 M.W.N. 846; as in the case of a consent decree. See 144 I.C. 95=1933 M. 516. Preliminary decree in partition suit effects severance of status 23 I.C. 543=2 L.W. 325, 1931 M.W.N. 846, 1931 M.W.N. 586 Preliminary decree does not terminate the suit or action which must be considered as still pending 1933 Sind 371 Preliminary decree for partition of moveables (as) jewels, must determine whether they exist, their value, if they are partible property, and in whose possession they are, 50 I.C. 876 Where the decree gives no directions as required by R. 18, Cl. (1) and is defective, it is incumbent upon the plaintiffs to have it corrected within the time allowed by law, and if they fail to do so they cannot ask the Court to transfer the proceedings to the Collector in the absence of any such directions contained in the decree. 158 I.C. 373 (2)=1935 Sind 192. Preliminary decree omitting to direct enquiry into mesne profits—Final decree cannot award the same 42 M. 296, 1931 M.W.N. 846 Partition suit—Preliminary decree not granting interest—Whether Court can award interest in the final decree. 94 I.C. 686 (2)=1925 B. 406 See also 1931 M.W.N. 846. In an ordinary partition suit the Court may, in working out the preliminary decree, create a charge in favour of one co-parcener over another's share by way of adjustment of shares. 1930 M. 988=60 M.L.J. 79 Interlocutory order embodied in final decree

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54,

(2) if and in so far as such decree relates to any other immoveable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

19. [S. 216.] (1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

Decree when set-off is allowed.

Loc Am —[Allahabad] In R. 19, sub-rule (1) —

(a) Substitute a comma for the full stop at the end, and

(b) at the end add the following:—

"but no decree shall be passed against the plaintiff unless the claim to set off was within limitation on the date on which the written statement was produced".

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

Appeal from decree relating to set-off

(3) The provisions of this rule shall apply whether the set-off is admissible under Rule 6 of Order VIII or otherwise.

20. [S. 217.] Certified copies of the judgment and decree shall be furnished to the parties on application to the Court and at their expense

Certified copies of judgment and decree to be furnished.

Loc Ams —[Allahabad] Add the following to O. 20, as R. 21—

21 (1) Every decree and order as defined in section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of

Notes.

—Appeal against order not maintainable (*Ibid.*) The usual practice of the Lahore High Court is to stay the proceedings for the partition of the property by metes and bounds pending the decision of the appeal preferred from the preliminary decree 144 I.C. 596=1933 L. 790

O. 20, R. 19—As to applicability of the rules, see 25 W.R. 275 See also 39 I.C. 508=62 P.R. 1917. The question whether an attorney's lien should or should not be allowed to intercept a set-off between the parties is, in India, a matter for Court's discretion. The lien has no overriding priority. 34 Bom. L.R. 1429=1932 B. 619. In a suit for accounts where the defendant counter-claimed Court may, by way of equitable set-off, dismiss plaintiff's suit and pass a decree in favour of defendant 132 I.C. 195=35 C.W.N. 17=1931 C. 358

Where under a lease of a supply of water the lessor is bound to carry out the usual repairs of the embankments which resulted in such supply, the lessee, in a suit for arrears of rent against him, is entitled to claim a set off on account of the expenses connected with the repairs which he had to do. Such a claim is admissible within the

provisions of R. 19, and it is not necessary for a set-off that it should be limited to O. 8, R. 6 163 I.C. 872=1936 A.L.J. 625=1936 A.W.R. 533=A.I.R. 1936 A. 522.

O. 20, R. 19 (3) —Set-off—Legal set-off and equitable set-off—Set off and counter-claim—Distinction. See 1936 C. 277 [See also Notes under O. 8, R. 6 *supra*]

O. 21 —As to applicability to sales in insolvency See 48 A. 209=24 A.L.J. 26=1926 A. 124; 102 I.C. 543=1927 N. 262, 1929 L. 622 To execution of Revenue Court decree under Agra Tenancy Act. 1936 R.D. 197, 1937 R.D. 37, to execution of order for costs by Registrar under S. 75 (4) of Registration Act. (1937) 1 M.L.J. 635 The law as to solicitor's lien in India, which has been governed by the principles of English law, has not been altered or abrogated by the provisions of O. 21. 38 C.W.N. 1031=1935 C. 168.

PAYMENT TO UNRECOGNISED ASSIGNEE OF DECREE.—There is no provision for judgment debtor paying a third party merely because he happens to know of the assignment of the decree in the latter's favour by decree-holder; if he were to make such payment, he would run the risk of having to pay money over again to the decree-holder. 144

Small Causes, shall be drawn up in the Court vernacular. As soon as such decree or order has been drawn up, and before it is signed, the Munsarim shall cause a notice to be posted on the notice-board stating that the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, or if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of Rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

[Rangoon] To O. 20 the following shall be added as Rr 21, 22—

21 As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records Establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final, and the interest of any party to the suit in any land included in the survey has been effected thereby, the Court of first instance shall certify the nature and extent of such change of interest in each plot of land in suit to the Superintendent of Land Records of the district in which the land is situate. A copy of the certificate in every such case should also be sent to the Sub-Registrar within whose sub-district the land or any part thereof is situate.

22 The certificates shall be in the prescribed Form (Civil) 96, and shall be signed by presiding officer of the Court.

23 1[] * + *]

ORDER XXI.

EXECUTION OF DECREES AND ORDERS.

Payment under decree

Modes of paying money
under decree.

1. [S. 257.] (1) All money payable under a decree shall be paid as follows, namely:—

Leg. Ref

¹ Omitted by Chief Court Notification, dated 16th June, 1916

Notes.

I.C. 237=1933 M. 523=64 M.L.J. 732. Before execution sale can be set aside the matter has necessarily to be brought within O. 21; Court has obviously no jurisdiction to set aside a sale outside O. 21. 155 I.C. 228=1935 P. 242.

O. 21, R. 1. EXECUTION OF DECREES AND ORDERS—Procedure in execution is not a very unimportant branch of the work. It ought to be conducted with as much gravity, care, and decorum as procedure in suits if not with more care and attention. 12 A. 179 (183). Order 21 has no application to sales under administrative order. 69 I.C. 718=40 P.L.R. 1922; 1924 L. 70. Nor to sales by Receivers though with approval of Court 90 I.C. 116. "Decree-holder" in the singular

includes also the plural. 25 M. at 440 (F.B.). Judgment-debtor can make payment out of Court to the creditor of decree-holder who has stepped into shoes of the decree-holder and is carrying on execution of the decree 1930 A. 659. As to procedure to be adopted in execution, where a party to a suit was directed to pay costs of the day, see 12 M. 120. Payment out of Court only to one of several joint decree-holders cannot bind the others unless he was also constituted by them an agent for this purpose. See 26 A. 318. Or in the absence of evidence that he received it on behalf of all 1936 A.M.L.J. 32. As to whether deposit under O. 21, R. 80 to prevent confirmation of sale is payment under R. 1, see 1925 N. 17. As to whether a decree is satisfied where money is paid into Court by judgment debtor with a request to pay it to plaintiff on his giving security, see 29 M. at 210. See also 11 B. 724; 20 A.L.J. 353=1922 A. 190. As to the effect of pay-

- (a) into the Court whose duty it is to execute the decree; or
- (b) out of Court to the decree-holder; or
- (c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree-holder.

Loc. Am.—[Lahore] O. 21, R. 1. Add to sub-rule (1).

Explanation—The judgment-debtor may, if he so desires, pay the decretal amount, or any part thereof, into the Court under clause (a) by postal money order on a form specially approved by the High Court for the purpose.

[Nagpur.] Rule 1—In R. 1—

(a) In sub-rule (1) after the words "a decree" insert the words "or an order",

(b) for clause (a) of sub-rule (1) substitute the following clause—

"(a) by deposit in, or by postal money-order to, the Court whose duty it is to execute the decree or order, or",

(c) in clause (c) of sub-rule (1), after the word "decree" insert the words "or order", and

(d) in sub-rule (2), add the following proviso

"Provided that when the payment is made by money-order the notice may be given by registered post by the judgment-debtor direct to the decree-holder."

2. [S 258.] (1) Where any money payable under a decree of any kind

is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree and the Court shall record the same accordingly.

Notes.

ment by third parties, see 34 I.C. 350=(1916) 1 M.W.N. 195. Payment into Court must be notified to the decree-holder and served on him like summons. 81 I.C. 1001=1925 N 52; 20 A.L.J. 353=66 I.C. 744. Interest ceases when the decree-holder receives notice 42 M. 576=50 I.C. 410, 35 C.W.N. 544. Decree-holder will be entitled to interest and costs of execution *bona fide* incurred till he had notice of deposit 35 C.W.N. 544. Judgment-debtor must pay process-fee when Court orders notice. If not, Court must inform decree-holder of payment into Court when executing decree. 67 I.C. 242. Where decree for payment of annuities was passed creating a charge on certain properties and a Receiver was appointed to realize the amounts, and the Receiver absconded after receiving certain amounts from judgment-debtor for payment to decree-holder under the decree, *held*, that the charge affirmed by the decree was in no way affected or impaired by the embezzlement of the Receiver. The decree provided in express terms that all the annuitants were entitled to recover their annuities from the properties charged. The decree-holder having received no part of the annuity due to her, is entitled to recover it by sale of the properties as the payments to Receiver were made by the judgment-debtor at his own risk, in the absence of an order of Court authorising the judgment-debtor to pay the sums to the Receiver. 59 I.A. 311=36 C.W.N. 882=63

M.L.J. 658 (P.C.) [1929 O. 231=117 I.C. 748 (F.B.), Reversed.] Payment to attaching creditor is not payment to a decree-holder. 80 I.C. 947=1925 A. 123 (2). If the last date fixed for payment was a holiday the money can be deposited on the re-opening date 87 I.C. 620=1925 A. 687, 1925 M. 743=48 M.L.J. 596. But see 51 A. 527=1929 A. 207, even if the amount be due under a compromise decree which has fixed a certain date. 158 I.C. 352=1935 L. 369. In the absence of a special direction the judgment-debtor is entitled to choose between Cls. (a) and (b). It makes no difference that the decree is a compromise decree 158 I.C. 352=1935 L. 369. A decree for mesne profits is a decree for money. 4 P.L.J. 336=48 I.C. 183. Rule does not apply to mortgage decree not being money-decree 45 M.L.J. 687=18 L.W. 680. Deposit without notice of the assignment of the decree or of petition put in by assignee of execution—The deposit serves as discharge. 76 I.C. 55=2 P. 754.

O. 21, R. 2: SCOPE OF RULE—Rule 2 contemplates a stage in execution proceedings when the question lies only between judgment-debtor and decree-holder. After sale has been duly carried out in execution, the interests of the third party, namely the auction-purchaser cannot be ignored. So thereafter it is not competent for decree-holder and judgment-debtor to get rid of it by merely asserting that the decree has been satisfied out of Court. The only method by which sale can be set aside is indicated by

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

Loc Am —[Madras] After "judgment-debtor" insert "or his legal representative or his surety for the decree debt"

Substitute the following for Rule 2 (2) —

"Any party to the suit or his legal representative or any person who has become surety for the decree debt also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment

Notes.

R 89. 58 I.A. 50=35 C.W.N. 381=1931 P.C. 33=60 M.L.J. 423 (P.C.) See also 1932 L. 238=136 I.C. 735 Distinction between adjustment and agreement to adjust, pointed out 38 M. 897, 1927 M. 911=53 M.L.J. 533 See also 102 I.C. 753=1927 L. 544, 132 I.C. 670=1931 L. 608 As to effect of agreement prior to decree, see 1935 C. 177 The rule applies to awards under Indian Arbitration Act 97 I.C. 321 Court cannot recognize payment or adjustment which has not been certified, for any purpose whatsoever. An uncertified payment or adjustment cannot now operate to prolong the period of limitation for applying for execution. See 19 M. 162; 21 C. 542 (549), 21 B. 122, 17 A. 42; 26 A. 36. See also 35 I.C. 234=38 A. 289, 13 I.C. 424; 16 C.W.N. 396, 51 I.C. 567=13 S.L.R. 71; 29 M. 312, 13 I.C. 944=15 C.L.J. 88 Oral adjustment is covered by this rule 1926 C. 643. An oral agreement between parties to a decree varying the terms of the decree can be proved and not barred by S 92, Evidence Act. But an oral agreement that an instalment of the decree is to be paid into Court, which is later on actually so paid, amounts to an adjustment of decree within the meaning of R 2 and is capable of proof provided the adjustment has been certified within 90 days of its alleged completion. Else the executing Court could not recognize the alleged adjustment. (1931 S. 42, Foll.) 14 L. 668=34 P.L.R. 887=1933 L. 806. See also 25 S.L.R. 29=1931 S. 42 The rule is general and does not limit the payment to decree-holder only 45 A. 304=21 A.L.J. 97; 1914 M.W.N. 346=23 I.C. 530 When one party performs his part of a consent decree he has to apply for execution for performance by the other party. 53 I.C. 882=30 C.L.J. 118. When execution petition is dismissed by consent of the decree-holder, he cannot raise the question of mistake and his remedy is by way of review. The order of Court, if not appealed against, becomes final. 35 I.C. 369=10 Bur.L.T. 30 The rule provides for the adjustment of any decree and not merely money decrees. 46 B. 226=23

Bom.L.R. 981. Applies to decree for possession 165 I.C. 358 (1)=1936 L. 842. Applies also to complex decrees 40 I.C. 820=1917 M.W.N. 327 Also to mortgage decrees. 1925 M. 467=48 M.L.J. 121, 5 Pat L.J. 672=57 I.C. 473 See also 40 I.C. 845=21 C.W.N. 920; 1930 L. 814. Also to partition decrees which provide for payment of money as for other relief 43 M. 476=56 I.C. 289, 1928 C. 715=117 I.C. 833. Where preliminary mortgage decree directs payment into Court, Court is bound to pass a final decree for sale. It cannot recognise a payment out of Court. 1932 L. 231=136 I.C. 732, 155 I.C. 231=1935 O.W.N. 541=1935 O. 313 A final decree in a mortgage suit is capable of adjustment 34 I.C. 137=37 M.L.J. 356, 68 I.C. 443=1923 N. 20 A compromise which has been entered into after a decree does not come within the meaning of this rule 5 Bom.H.C. (A.C.J.) 78. Clause (3) of R. 2 can only relate to an adjustment of the decree under execution and not to an agreement in respect of a claim which remains to be investigated by the Court—as is the case of a claim for a personal decree under O. 34, R. 6. 42 L.W. 968=69 M.L.J. 765 (F.B.). But other considerations may arise in cases where the agreement relates not only to the personal liability but also to the liabilities of the properties directed to be sold or where a composite decree has once for all been passed awarding a personal decree for any deficiency that may arise on sale of the hypotheca. (*Ibid.*) In the case of a compromise which involves a future payment, the question whether the compromise amounts to an adjustment is not a question of the terms to be performed in the future or the present, but the question is whether parties intended to make the decree no longer executable in whole or in part. If they did so intend, there is an adjustment, if not there is not an adjustment. (But in this case, his Lordship was constrained to hold that a compromise involving a future payment is not an adjustment) (1931 L. 608, Ref.) 1933 L. 732 (1). See also 144 I.C. 721=1933 Pesh. 53 Where a decree-holder puts his money decree payable by instalments into

an adjustment should not be recorded as certified, the Court shall record the same accordingly."

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree.

Notes.

execution on default in payment of the instalment and the Court, after recording the statements of the parties, found that the matter had been adjusted between them by a compromise by which instalments were to be again allowed, it would be fully justified in allowing the adjustment 1935 A. 155 (2)=4 A.W.R. 846. See also 1929 L. 886=118 I.C. 908. Where part payment of the amount due under a decree is made by judgment-debtor and it is agreed between the parties that not only the balance of the decree but also another decree should be paid by instalments and that the decree-holder would accept the instalments without interest, the arrangement amounts to an agreement which is certifiable under R. 2, although only part of the decree is paid. Such an agreement affects the right of decree-holder to execute the decree and it amounts to an adjustment and cannot be recognised unless certified. 162 I.C. 482=1936 P. 253. Court can inquire whether a decree for possession of lands has been satisfied. 25 M.L.J. 586=21 I.C. 639. Rule recognises discharge by operation of law. 23 I.C. 848. But see 41 C.W.N. 406 noted *infra*. This rule does not debar a Criminal Court from recognizing an uncertified payment when the decree-holder is charged with fraudulently executing satisfied decree 9 M. 101, 4 M. 325. It has reference only to proceedings in execution as between parties to the decree. 10 M.L.J. 213. Nor does it limit the operation of S. 47. A separate suit does not lie to declare that a decree has been satisfied. 8 C.W.N. 395. This rule covers a much larger ground than what is covered by S. 47. It deals with all adjustments arrived at between decree-holder and judgment-debtor. 25 C. 718 (724). Executing Court can investigate the adjustment of a decree out of Court 50 I.C. 443=135 P.R. 1919 (36 M. 357; 24 C.L.J. 462, Rel.; 34 B. 575; 40 B. 333, Diss.). See also 37 Bom.L.R. 230=157 I.C. 646=1935 B. 303. A claim for restitution before it is allowed by the Court of first instance, cannot be regarded as a decree or order of Court and adjustment of a claim to restitution, which is uncertified, is not hit by R. 2. 44 L.W. 287=1936 M. 840=71 M.L.J. 344. Agreement to give time to judgment debtor is valid. 24 I.C. 391. As regards agreement prior to decree to execute the decree for a lesser sum, see 4 R. 118=96 I.C. 773=1926 R. 140; 49 M. 513=50 M.L.J. 364. Where an agreement is anomalous in character, i.e., while in point of time it is post-decree, in point of character and intention it is pre-decree, having been executed in ignorance of the fact that a decree had already been passed, it should be treated as a pre-decree agreement, not coming within the terms of R. 2, but falling under S. 47; and a suit brought on the basis of such an agree-

ment for recovery of money realised in execution of the decree is barred by S. 47. 130 I.C. 187=1931 M. 26 (2). By the terms of a decree passed in accordance with an award in a suit for partition, defendant was directed to pay a sum of money to plaintiff. The decree was attached by creditors of plaintiff but defendant pleaded in bar of execution that he had paid certain sums of money to plaintiff prior to the decree and that credit should be given for those sums. *Held*, (1) that R. 2 was not applicable to the case, of payments made prior to decree; (2) the payments could not be pleaded in bar of execution 54 M. 184=1931 M. 399=60 M.L.J. 721. Where only some of the conditions provided in a compromise are performed, decree-holder is entitled to proceed with execution of the rest. 16 I.C. 972=16 C.L.J. 101.

O. 21, R. 2, and O. 23, R. 3. **RELATIVE SCOPE.**—The terms of R. 2 must be understood in the light of the scheme of the Code and with due regard to the scope of O. 23, R. 3. One noteworthy difference between the terms of the two rules is that, whereas under the latter rule, Court may not only record an agreement, compromise or satisfaction, but also pass a decree in accordance therewith, under R. 2, the Court can only record the adjustment, but cannot pass a fresh executable decree on the agreement of the parties, and further proceedings, if any, when part satisfaction only has been recorded can only take place on foot of the original decree 42 L.W. 968=69 M.L.J. 765 (F.B.).

SCOPE AND OBJECT OF CL. (3).—93 I.C. 53=1926 O. 482, 105 I.C. 163=26 L.W. 349=1927 M. 876. The provisions of R. 2 (3) are highly technical and must, therefore, be construed. 1935 N. 230. They are also mandatory. 162 I.C. 482=1936 P. 253. The embargo under R. 2 (3) is limited to "Court executing the decree" only 79 I.C. 278=1923 R. 44 (1); 19 N.L.J. 175. Unsuccessful applicant (judgment-debtor) under R. 90 appealing to High Court—High Court ordering sale to be set aside provided judgment-debtor pays certain amount to decree-holder on or before certain date—Judgment-debtor's application to have his payment recorded as certified will not lie to execution Court but to High Court, R. 2 (2) having no application where execution has come to an end 1929 P. 400. Judgment-debtor cannot plead uncertified adjustment in opposition to application under O. 21, R. 16 55 M. 720=62 M.L.J. 562=1932 M. 372 (F.B.). Uncertified payments by judgment-debtor to insolvent after adjudication is not valid against Receiver. 137 I.C. 394=1932 M. 250. R. 2 (3) does not apply to proceedings under S. 52 (2), Oudh Rent Act. 15 R.D. 776. R. 2 requires that adjustment to be certified, quite regardless of whether there is or is not an appeal

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pending against that decree and if any adjustment is come to after the decree and before the decision of the appeal and is not certified or recorded as required under R 2, Court is debarred by sub-R 3 from recognizing such an adjustment 161 I.C. 751=43 L. W. 601=1936 M. 494. An adjustment of a decree must be presumed to have been duly certified. The burden of proving that an adjustment has not been duly certified is on the party who alleges it 19 N.L.J. 175.

MEANING OF TERMS—Receipts by mortgagee in possession, after decree, will not be "money payable under the decree" and need not be certified 28 M. 473 (478) (F.B.). See also 30 M. 255 at 265, 38 I.C. 675=39 M. 1026. As regards decree-holder, see 25 M. 431 (440) (F.B.). See also 28 A. 252, 26 A. 318, 29 M. 183, 26 A. 334 and 9 C. 831. "To show cause"—For the meaning of these words, see 11 C. 166. The words "of any kind" have been added, after the word "decree" in the first paragraph to give effect to the ruling in 6 C. 786. See also 49 M. 716=50 M.L.J. 547; 8 C.W.N. 1028 and 22 M. 182 are not now good law. The term "decree of any kind," means a decree of any kind capable of execution. 14 P. 488=155 I.C. 976=16 Pat.L.T. 311=1935 P. 385. The words "to the satisfaction of the decree-holder" shows that the section is not applicable to a case in which the adjustment was not accepted by the decree-holder 1935 A.L.J. 543=1935 A.W.R. 556=1935 A. 513.

"Court"—An application for recording adjustment may be made to the Collector to whom a decree has been transferred for execution 16 A. 228. Also to a Court to which a decree is sent for execution 5 C. 448. Certificate of payment or adjustment should be filed in the Court which passed the decree or in Court to which it was sent for execution. 25 M.L.J. 586, 5 C. 448. But see 34 Bom.L.R. 203=137 I.C. 517=1932 B. 202. Filing in wrong Court and obtaining an order "recorded" from that Court cannot be treated as valid. 25 M.L.J. 586=21 I.C. 639. Court proceeding against surety is not strictly Court executing decree 20 S.L.R. 362=96 I.C. 234=1926 S. 105.

WHAT ARE ADJUSTMENTS—The rule contemplates an adjustment which is binding between decree-holder and judgment-debtor as an agreement by reason of their consent to it. It does not contemplate an adjustment which, although not consented to, is made binding by operation of law 41 C.W.N. 406=1937 C. 211. So, a scheme which is sanctioned by the Court under S. 153 of the Companies Act and which supersedes a decree, is not an adjustment of the decree as contemplated by R 2, and is not, therefore, required to be certified or recorded by that rule. (*Ibid*) The adjustment referred to under R 2, is such an adjustment as completely or partly extinguishes the decree under execution and cannot mean an adjustment to give effect to the terms of which would be to create a new decree at variance with the

decree under execution and which will again have to be executed. 32 C.W.N. 434, 1931 M. 26 (2), 132 I.C. 670=1931 L. 608, 156 I.C. 807=1935 L. 347. See also 62 C. 28=158 I.C. 1074=1935 C. 596. The term "adjustment" must be taken *ejusdem generis* with payment and it means any method or mode whereby the decree is satisfied to the satisfaction of decree-holder 144 I.C. 721=1933 Pesh. 53. It includes any step which alters the liability under the decree, whether by reducing the amount recoverable, or by reducing the number of persons against whom the decree would otherwise be executed 146 I.C. 3=1933 P. 576. See also 1936 C. 518. In all cases it is a question of fact to determine whether the alleged adjustment was intended to extinguish the decree, and if it did, the adjustment will be completed, no matter whether the compromise that is made to wipe out the decree is to be performed at some future date. 158 I.C. 701 (1)=37 P.L.R. 288=1935 L. 589, see also 15 P. 390=165 I.C. 940=1936 P. 619. An agreement made before the date of the decree cannot be looked upon or treated as an adjustment of the decree under R 2, and an execution Court can therefore look at such an agreement and receive evidence of it in order to see whether it prevents execution according to the terms of the decree 58 B. 610=36 Bom.L.R. 798=1934 B. 370. See also 1935 C. 177. An agreement for payment of enhanced interest on the decree amount is not an 'adjustment.' 151 I.C. 541=11 O.W.N. 1103=1934 O. 465. An agreement to accept a portion of the decree amount to be paid in instalments in full satisfaction of decree is an adjustment and if certified as required by law it can be recorded and acted upon if proved. It is not necessary that such an agreement should be reduced to writing. It is open to the Court to accept oral evidence of the same. 37 Bom.L.R. 230=1935 B. 303. See also 1936 C. 518. An agreement by which decree-holder agrees not to take out execution against the person of judgment-debtor and not to attach moneys due to judgment-debtor from a third person is not an adjustment of the decree which should be certified but still the agreement is binding on the decree-holder, and the execution Court should refuse execution contrary to the provisions of the agreement. 154 I.C. 292=1935 A.L.J. 287=1935 A. 364. Adjustment what is—Pre-decree agreement operating as adjustment—Must also be certified. 1930 M. 673=1930 M.W.N. 240=125 I.C. 543. See also 32 L.W. 919. It is not necessary that there should be an actual payment in order to constitute a valid adjustment within the meaning of R 2. 60 B. 729=38 Bom.L.R. 505=1936 B. 277. Service rendered by the judgment-debtor to decree-holder amounts to an adjustment. 12 I.C. 169=11 M.L.T. 380. An agreement whereby the rights under it should supersede the decree is an adjustment of it 35 M. 75=21 M.L.J. 709. A decree can be adjusted or satisfied by the making of an agreement between decree-holder and judgment-debtor. An obvious

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instance is the taking of a negotiable instrument which is nothing but a particular form of promise. 1937 C. 222. Decree-holder may accept and parties may have recorded in lieu of the performance of the terms of the decree an agreement to perform something else. (*Ibid.*). But the new agreement is not *prima facie* capable of execution because, if it is made capable of execution, it would automatically vary the decree. The same principle applies even where the agreement itself contains a condition or term that the subsequent agreement shall be capable of execution (*Ibid.*). The agreement is capable of being recorded as an adjustment but incapable of being the subject matter of execution. It is an agreement merely (*Ibid.*) Rule 2 (1) covers an agreement extinguishing the right of execution 12 I.C. 364=7 N.L.R. 136. An award on arbitration is binding upon the parties as an adjustment. 1927 S. 60, 42 I.C. 46. Agreement not to execute one decree if another is satisfied is a sufficient adjustment and satisfaction can be recorded for the former 1925 R. 349=4 Bur L.J. 179. But see 32 C.W.N. 434. A compromise at the time of execution must be treated as if incorporated in the decree itself 57 I.C. 591. An incomplete, inchoate contract cannot bar execution. Judgment-debtor cannot claim completion of such contract 43 I.C. 537. "Adjustment" does not include an executory contract 123 I.C. 604=1930 M. 410, 113 I.C. 238 (1). But see 63 M.L.J. 598. An oral agreement not performed by either party cannot bar execution. 103 I.C. 85=1927 L. 537. Part-payments towards money decrees can be certified by decree-holder in execution application. 26 C.W.N. 534=35 C. L.J. 566. It is sufficient if the payment or adjustment is either certified or recorded 30 I.C. 45=21 C.L.J. 362. Proceedings to set aside a sale under O. 21, R. 90, are not proceedings in execution inasmuch as execution proceedings ordinarily end with sale and therefore a compromise made in such a proceeding should be recorded under O. 23, R. 3 and not O. 21, R. 2 118 I.C. 908 (1)=1929 L. 886 (2). A consent order passed in an execution appeal will not amount to an adjustment and binding on persons who were not parties in the appeal. 41 L.W. 594=1935 M. 429=68 M.L.J. 593.

ADJUSTMENT—EXECUTORY AGREEMENT TO ADJUST, NOT SUFFICIENT.—Before an executory agreement to adjust becomes an executed agreement and thereby an adjustment to the satisfaction of the decree-holder, the agreement itself cannot amount to an adjustment which may be taken into account in the execution of the decree. (44 A. 258, Foll.) 149 I.C. 95 (1)=1934 R. 190 (1). See also 123 I.C. 604=1930 M. 410; 113 I.C. 236; 1935 L. 973. An oral agreement to sell some lands to decree-holder in satisfaction of the decree, not being capable of being enforced or executed, would not constitute adjustment under O. 21, R. 2 30 S.L.R. 249=1936 S. 191. See also 16 I.C. 106=1936 R. 289, 1935 A. M.L.J. 97.

WHO CAN CERTIFY.—The holder of a decree that is attached may certify satisfaction of decree after the attachment. 2 M.L.J. 288; 1 Luck. 428=1927 O. 7. See also 16 B. 522. The law casts on the decree-holder the duty of certifying payment. 30 M. 545. See also 1 Bur L.J. 207=1923 R. 88. *Vakil's duty* to report to Court payment of decree amount to him as early as possible. 105 I.C. 86=1927 M. 947=53 M.L.J. 901. Court, as a general rule, will not, for the purpose of preserving the *solicitor's lien*, interfere in an adjustment or compromise which is *bona fide*. But if the compromise is not *bona fide* but collusive and is entered into between the parties specifically for depriving the solicitor of his lien, Court will interfere for protection of the solicitor who in such an event can claim payment of the costs by either of the parties. "*Collusion*" in relation to such a case will be held to exist if parties enter into it knowing and intending that the outcome will be that the solicitor is deprived of his lien. 38 C.W. N. 1031. A manager of a joint family can certify satisfaction of a decree so as to bind the other members 35 A. 380=19 I.C. 645. So also one partner on behalf of a firm. 1926 S. 167. Any one of joint decree-holders can not report satisfaction of the entire decree but only so far as his own share goes. 89 I.C. 195=1925 P. 822, 1928 C. 759, 119 I.C. 426=1929 L. 462, 1930 L. 814; 126 I.C. 124=1930 C. 78. See also 1935 N. 25. Unless he is authorised by his co-decree-holders to do so 62 C.L.J. 560. Adjustment should not be recognized by Court if not perfected by the guardian obtaining leave of Court in that respect. If guardian fails to apply for leave of Court and resiles from adjustment, the other party to adjustment cannot apply for leave in order to perfect the adjustment 146 I.C. 707=1933 R. 186. Decree holder and his judgment-debtor can adjust their rights and liabilities and some of the judgment-debtors may be released. See 40 I.C. 1. [25 M.L.J. 586 and 1915 M.W.N. 225, Dist.] Where there is an adjustment in respect of a money decree and the party agreeing to pay a certain amount under the adjustment fails to do so the other party can enforce the terms of the adjustment in execution. 142 I.C. 220 (1)=35 Bom.L.R. 91=1933 B. 100. If an adjustment is not certified, it is entirely the fault of judgment-debtor. 1923 R. 103. (See also same case as to fraud of decree-holder.) Judgment-debtor is not bound to wait and see whether decree-holder applies or not. He can apply as soon as payment or adjustment is made 12 M.L.J. 94. Judgment-debtor can prove that he is discharged, even where an adjustment of a decree is not certified. 18 L.W. 453=1924 M. 189. Assignee or transferee of the decree cannot continue any proceedings nor can he institute any fresh proceeding for the execution of the decree. He must make an application under O. 21, R. 16 to the Court which passed the decree and the Court must order that execution may proceed at his instance. It is then open to judgment-debtor to plead that the claim has already been satisfied. 47 B. 643=1923 B.

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404 An uncertified adjustment between the assignee and the judgment-debtor before the former applies under O 21, R. 16 can be validly pleaded as bar to execution 31 C. W.N. 921=104 I.C. 4=1927 C 694; 1935 N. 230. Where a decree-holder attaches another decree without notice to the judgment-debtor and the latter pays money to his decree-holder satisfaction should be entered in his decree notwithstanding the attachment 61 I.C. 815=1 L.W. 34. A surety can apply. 49 M. 325=50 M.L.J. 584; 1926 S 105. Adjustment by surety with decree-holder may be proved. 108 I.C. 376=1928 L. 61. If the judgment-debtor is unable by lapse of time or any other reason to obtain order under this rule, surety for the judgment-debtor is also prevented from obtaining same relief by applying under S. 47. 59 C. 135=36 C.W.N. 653=1932 C 729. Auction-purchaser of property in execution of money-decree has a right to apply for entering up satisfaction of a decree affecting that property 50 I.C. 931=9 L.W. 596. Adjustment between decree-holder and judgment-debtor cannot affect the rights of a third party auction-purchaser. 33 P.L.R. 146=1932 L. 238=136 I.C. 735. See also 58 I.A. 50=1931 P.C. 33=60 M.L.J. 423 (P.C.) An agent acting under the power-of-attorney obtained decrees on mortgages and pending proceedings for the sale of the mortgaged properties, the principal applied under R 2 for satisfaction of the decrees. But the agent assigned the decrees to a third party who applied under O 21, R 16 for recognition of the assignment and for execution. Held, that it was not open to the Court to go into the question whether the alleged satisfaction was *bona fide* or fraudulent, and that the decree being alleged to have been satisfied, the petition under O 21, R 16 should be dismissed 144 I.C. 237=1933 M. 523=64 M.L.J. 732.

DUTY OF COURT—If a Court is seized of an application to enter up satisfaction of a decree it must make an inquiry whether the decree has been satisfied. The application should not be allowed to be withdrawn 51 I.C. 411=35 M.L.J. 252. Where decree-holder has been induced by the fraud of judgment-debtor to file application for certification, he has a separate cause of action on the fraud, but the Court has no jurisdiction to refuse to record satisfaction where such an application is made, or re-open execution proceedings subsequently 1931 R. 332=134 I.C. 213. Opportunity must be given to prove adjustment 102 I.C. 753=1927 L 544. Even where alleged adjustment is disputed by the decree holder, Court can enquire into the matter and record the adjustment if it is proved. The expression "the decree-holder fails to show cause" does not merely mean fails to appear but would include "fails to satisfy the Court". 113 I.C. 760=1929 A 79. Court will not inquire into the truth of the decree holder's statement. Certificates of satisfaction are not conclusive in any way and the judgment-debtor can show that no

such payment was made and raise the plea of limitation. 47 I.C. 177=21 O.C. 161. See also 12 I.C. 580. Where decree-holder admits that payments have been made but states that they were not certified, held, that the Court executing the decree is not precluded from inquiring into the payments admitted although there was no direct certification. 30 L.W. 526=1929 M 783 (1) See also 165 I.C. 804=1936 N. 281. In recording an adjustment out of Court, Court must enquire into the factum of adjustment and if there is anything still due to the decree-holder. 41 A. 443=50 I.C. 65, 45 B. 91=59 I.C. 399. No appeal lies for dismissal of an application for default. 63 I.C. 855; 132 I.C. 206=1931 L. 505. No particular form is prescribed for certifying payment to Court. No particular words are essential. The rule should be construed so as not to defeat justice. 54 I.C. 257=55 P.L.R. 1919; 35 I.C. 70=31 M.L.J. 207; 30 C. 357=29 M.L.J. 219. Adjustment need not be in writing and judgment-debtor need not have carried out all the terms for satisfying the decree. 102 I.C. 753=1927 L. 544. Enquiries in a suit or in execution proceedings should be confined to matters which could be taken advantage of by parties to the proceedings in the suit or execution itself. 28 I.C. 376=1915 M.W.N. 225. Enquiry under sub-rule (2) can take place only between persons standing in the relation of judgment-debtor and judgment-creditor. 19 M. 230 (232). The representative of a deceased judgment debtor can apply. See S. 146. Court has no power to enquire into a compromise—Power of executing Court. See 17 I.C. 752=24 M.L.J. 88. Section 92 of the Evidence Act does not bar oral evidence to prove an agreement adjusting decree. 60 I.C. 316=16 N.L.R. 204; 156 I.C. 834=42 L.W. 384=1935 M 424. But see 50 M. 897=1927 M. 911=53 M.L.J. 533. Executing Court cannot enquire into a prior agreement between the parties that no decree should be obtained in the suit 8 L.W. 205=1918 M.W.N. 547. See also 29 I.C. 838=11 N.L.R. 110, 9 Lah. L.J. 7, 119 I.C. 705=1929 N. 339. But see 40 M. 233. As to the power of executing Court to enquire into adjustment of decree, see 5 R. 833; 39 C.W.N. 961; 157 I.C. 646=37 Bom. L.R. 230=1935 B. 303. Notice of deposit in Court must be served on decree-holder. 1925 N. 52. Once admission of payment is made, it cannot be allowed to be retracted, and no proof of such payment is necessary from judgment-debtor. 54 I.C. 257=55 P.L.R. 1919. When decree is admitted to be satisfied by decree-holder, it is not executable 18 N.L.R. 134=1922 N. 248. Admission of payment in an execution application can be treated as an application to certify such payment 83 I.C. 360 (2); 26 A.L.J. 966=112 I.C. 73=1928 A. 629 (F.B.); 1930 A. 123=124 I.C. 22, 8 R. 310; 1931 S. 28; 141 I.C. 745=1933 Pesh. 14. A payment is certified when decree-holder mentions such payment in his application. And it is sufficient to entitle the executing Court to consider such payments. 58 B. 610=152 I.C.

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575=36 Bom.L.R. 748=1934 B. 370. If payment is brought by the decree-holder to the notice of the executing Court, that is enough to constitute certification and would satisfy the requirements of R. 2. It does not matter under what circumstances it is brought to the notice of the Court. 45 L.W. 291= (1937) 1 M.L.J. 296. Where a deed of transfer of a decree recites an uncertified payment and states that the transferee has to recover the balance remaining due, judgment-debtor is entitled to the deduction of the uncertified payment. The transferee cannot acquire more than what that deed recites and it is not necessary for the judgment-debtor to go behind this transfer-deed or to give evidence of the uncertified payment. 161 I.C. 830=43 L.W. 585=1936 M. 472. When a decree-holder certifies part satisfaction and the materials put before the Court by the decree-holder are such as to put the Court on notice that there was a dispute between the parties as to whether the amount certified was less than the amount which had been actually paid, it is quite competent for the Court to give notice to the judgment-debtor and enter into an enquiry as to whether more has been paid than that which the decree-holder certifies. 164 I.C. 434 (1)=1936 M. 468. But see also 1922 C. 200, *infra*. Mere statements in the execution application that payments towards the decree have been made out of Court cannot be treated as an application for certification. 64 I.C. 32=1922 C. 200. But see 4 Pat.L.J. 159=50 I.C. 364. A Court can certify payments towards money decree in an application for execution. 26 C.W.N. 534=35 C.L.J. 566. Rule requires that a decree-holder should certify payment. The application need not be distinct from an application for execution of decree. 23 I.C. 753=12 A.L.J. 387, 35 C.L.J. 71=26 C.W.N. 529. See also 54 C. 143. When such application is acted upon no formal order of Court is necessary. 43 C. 207=20 C.W.N. 272, 54 I.C. 257=55 P.L.R. 1919. No record by Court is necessary before adjustment is recognised. 98 I.C. 698=1927 M. 155. Withdrawal of appeal by judgment debtor and stay of execution in the lower Court is sufficient compliance with the requirements of the rule. 16 C.W.N. 923=13 I.C. 63; 49 I.C. 141=1918 M.W.N. 507; 52 I.C. 764. A casual reference in a plaint or civil proceeding is not sufficient. 52 I.C. 901=13 S.L.R. 130. Confirmation should not be ordered when decree is admitted to be satisfied. 66 I.C. 331=1922 N. 248. Full satisfaction can be recorded if a smaller sum is paid under a composition scheme to which the decree-holder is also a party. 22 L.W. 853=49 M.L.J. 730. See also 91 I.C. 1051=1926 M. 184. Dismissal of an application for recording satisfaction does not operate as *res judicata*. 89 I.C. 195=1925 P. 822. See also 132 I.C. 206=1931 L. 105. Where a transferee of a decree is only a benamidar for one of the judgment-debtors, the others can plead that he has no title to execute the

decree. 40 M. 296=32 I.C. 952. Also see 35 M. 659=22 M.L.J. 170. Where a compromise is made and is inconsistent with the subsequent decree of the Court, the clauses of the compromise cannot operate. 1 L. 445=57 I.C. 153. Whether payment to one of many decree-holders can be recorded in full satisfaction, when paid to manager of joint Hindu family without leave of Court. See 1925 M. 230 (2)=47 M.L.J. 498. A decree can be executed when satisfaction has been wrongly entered up. 7 M. 167. A fresh decree is unnecessary when parties adjust claim. 20 N.L.R. 122=1925 N. 49. Where there is an adjustment in respect of a money decree and the party agreeing to pay a certain amount under the adjustment fails to do so the other party can enforce the terms of the adjustment in execution. 35 Bom.L.R. 95. Where in a decree no order regarding Court fees is passed and subsequently an order under O. 33, R. 12 is passed, the Government's existing interest to get Court-fee cannot be defeated by any adjustment, collusive or otherwise, the parties may enter into and the Court is entitled to refuse to record an adjustment which is calculated to achieve such a result. 159 I.C. 765=1935 S. 111.

INSTALMENT DECREE—CERTIFICATION.—If a statement purporting to certify a payment out of Court is made by decree-holder after the controversy has arisen, it cannot have the force of a certificate. The mere placing of certain cross-mark after the instalments alleged to have been paid does not amount to any intimation to Court that the decree-holder is certifying payment of those instalments. These payments are not certified within the meaning of R. 2 and therefore the execution Court cannot take cognizance of any such alleged payments. 149 I.C. 598=1934 A.L.J. 772=4 A.W.R. 498=1934 A. 534.

AS TO UNCERTIFIED PAYMENTS AND ADJUSTMENTS.—Where the payment is made out of Court and is not certified the Court cannot take any legal notice of it. 14 L.R. 859 (Rev.). The judgment-debtor has no right to plead an uncertified adjustment whether it is the original decree-holder or his assignee that applies for execution, and whether alleged adjustment consists of a direct payment by judgment-debtor himself or a payment by his vendee as satisfaction of the decree. [19 M. 230, Not foll; 35 M. 659, Ref.] 56 M. 316=37 L.W. 79=140 I.C. 872=1933 M. 157=64 M.L.J. 22; 163 I.C. 671=1936 R. 218. Court merely because a decree has been attached will not recognise a payment or adjustment of that decree which has not been duly certified or recorded under R. 2. 11 R. 420=145 I.C. 525=1933 R. 239. See also 1934 S. 205. Execution of decree is barred by sub-R (3) of R. 2 if satisfaction of decree is not certified under sub-R. (1) or (2) of R. 2. 1928 O. 195; 49 B. 548 (F.B.); 32 C.W.N. 434. A suit lies to enforce a mortgage executed in consideration of a sum paid in cash, and a debt due under a decree, although satisfaction of the decree has not been certified. 12 M. 61. As to

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recovery of amount paid and not certified, see 10 C. 354, 21 M. 409; 3 A. 538, 30 M. 545, 5 M. 397 (F.B.), 8 M. 277 (F.B.), 23 B. 394 (396), 95 I.C. 410=1923 B. 253 Judgment-debtor entitled to recover it 11 I.C. 1. A decree-holder can be *sued in damages* for not certifying an adjustment and for repayment of money again realised in execution 15 M. 302, 30 M. 545; 21 B. 463; 20 A. 254; 20 M. 369, 12 C.L.J. 312, 36 M.L.J. 376, 42 M. 338. See 7 R. 310=1929 R. 269 If a contracting party has suffered damages through breach of contract by the other contracting party, it is his duty to minimise that damage and if he fails to do so when it was in his power he cannot recover in respect of the damage which he could have avoided; and as under R. 2, it is within the power of the judgment-debtor to certify any payment made by him, if he fails to do so he puts himself out of Court as regards his claim for damages. 1933 A.L.J. 670=1933 A. 511. The filing of the execution petition itself gives cause of action and successive applications constitute fresh breaches. Rule governed by Art. 1'5, Limitation Act. 48 I.C. 810=36 M.L.J. 175. Separate suit does not lie on uncertified adjustment for setting aside sale under the satisfied decree 50 I.C. 956=15 N.L.R. 158. Where an adjustment is not certified when Court can take cognizance of it, see 77 I.C. 337=1924 O. 208. It is not competent to a Court executing decree to enquire into the fact of a payment or adjustment which has not been certified as required by R. 2 even if fraud be imputed to decree-holder 32 C.W.N. 434; 1929 A. 79. See also 97 I.C. 608 (1)=1926 M. 945 (1). Whether suit maintainable to restrain decree-holder from execution when payment not recorded. 1925 L. 54. A suit to set aside sale held under a decree adjusted, but not certified does not lie 50 I.C. 956=15 N.L.R. 158. See also 14 C. 376, 21 M. 356, 17 M.L.J. 527. A suit for declaration that a decree has been adjusted and is not capable of execution is maintainable. Art. 97, 115 or 120, Limitation Act, is applicable. 21 I.C. 557=330 P.L.R. 1913, 1925 L. 54. Interest ceases to run from the date when tender was made. 38 I.C. 295=5 L.W. 718. Failure of an adjustment on the basis of an oral agreement cannot be pleaded as a bar to execution of the decree by judgment-debtor. He has his remedy by a suit for specific performance of it. 44 A. 258=20 A.L.J. 65. If judgment-debtor admits making payments though uncertified it is not necessary to prove them. 52 I.C. 362. Uncertified payments cannot be recognised for any purpose. 30 A. 204; 11 R. 420=1933 R. 239; 56 M. 316=1933 M. 157=64 M.L.J. 22, 32 I.C. 590=14 A.L.J. 132; 13 I.C. 21. See also 25 Bom L.R. 247=1923 B. 253 (1). An adjustment of a decree out of Court by an agreement to accept a smaller sum in full satisfaction of the decree, cannot, unless certified, be pleaded as a bar to execution of decree for balance. 17 M.L.J. 527. A surety for the judgment is bound so long as

the judgment-debtor is bound. 60 I.C. 885=1923 C. 313 (1). Executing Court will not recognise adjustment of uncertified payment. 55 I.C. 669, 48 I.C. 765, 50 I.C. 331; 33 I.C. 71. Payment out of Court if not certified can be ignored only in execution of the decree but not otherwise 58 I.C. 123. Decree-holder can execute decree as if no payment has been made out of Court, if it is not brought to the notice of Court in time. 6 P.L.J. 337=63 I.C. 535. An attaching Court cannot recognise an uncertified adjustment and cannot refuse to proceed with execution. 65 I.C. 830=1922 M. 60. An uncertified adjustment of a preliminary decree in a mortgage suit cannot be pleaded in bar to execution of a final decree. 54 I.C. 137=37 M.L.J. 356; 68 I.C. 443=1923 N. 20; 30 L.W. 551=1929 M.W.N. 867. But it may be pleaded against an application for the passing of final decree itself as this is not a proceeding in execution. 14 P. 488=16 Pat L.T. 311=1935 P. 385. An agreement to give time for the satisfaction of a judgment-debtor is void if uncertified and has no proper consideration. No suit for damages for breach. 1918 M.W.N. 292=45 I.C. 16. Arrangement pending appeal that original decree should be inexecutable in part cannot be pleaded as a bar in execution of the appellate decree 44 M.L.J. 599=1923 M. 619. Case where Court can take cognizance of an alleged adjustment though it has not been certified. 77 I.C. 337=1924 O. 208; 32 C.W.N. 434. See also 40 B. 333=33 I.C. 232 (case where decree-holder fraudulently denies execution). 1925 M. 230 (2)=47 M.L.J. 498, 53 I.C. 443=135 P.R. 1919, 27 Bom L.R. 403=49 B. 548 (F.B.). Court has no discretion to refuse execution by transferee on the ground of uncertified adjustment. 54 I.C. 922=10 L.W. 179=119 I.C. 480. See also 64 M.L.J. 22. And the order declining to proceed with the execution is liable to be set aside in revision by High Court. 1935 R. 481. Adjustment of decree out of Court and uncertified cannot be recognised. 40 I.C. 889=5 L.W. 644. Rule prohibits proof of uncertified payment. 26 I.C. 944=2 L.W. 109, 18 L.W. 453=1924 M. 189. Where the decree-holder has exempted the judgment-debtor from liability though uncertified, his sons cannot execute the decree after his death 14 I.C. 574=16 C.W.N. 951. Executing Court has no power to recognise payment out of Court and uncertified. 22 I.C. 963=1 U.B.R. 191. A written statement of judgment-debtor alleging uncertified adjustment should be entered as an application by the Court and disposed of. 11 I.C. 780=4 Bur.L.T. 162; 113 I.C. 139=1929 A. 674, 9 P. 521. But see 18 I.C. 944=15 C.L.J. 88. After a decree has been satisfied and certified, subsequent sale is void and can be set aside. 9 I.C. 452=4 Bur.L.T. 12.

RIGHT OF SURETY.—Where a judgment-debtor has made payments but they are not certified by the opposite party he can file a suit for recovery of such amount, whether or not he raised the point in the execution proceedings. 1935 P. 65.

Notes.

LIMITATION.—A decree-holder may apply to have a payment certified, at any time 21 B. 122. See also 17 I.C. 617=12 M.L.T. 592; 47 A. 873=1925 A. 802; 4 Pat.L.J. 159=50 I.C. 364, 54 C. 143; 1 Luck. 428=98 I.C. 353=1927 O. 7, 1929 C. 687. See also 25 S.L.R. 360, 1931 A. 219. In computing the period of limitation, the date when payment was made and not the date when the payment was certified, is to be taken into consideration. Therefore, a certification under R. 2 (1) can take place when execution of the decree is barred but for the payment certified. [56 I. A. 30 (P.C.); 29 M.L.J. 669; 44 M. 902 (F. B.), *Foll*] 159 I.C. 38=1935 M. 922; 165 I. C. 804=1936 N. 281. Certification to Court under R. 2 (1) by a decree-holder of payments or adjustments is not governed by Art. 181, Limitation Act, nor expressly limited by any other article (*Ibid*). But a judgment-debtor must apply within 90 days. See 27 I. C. 11=20 C.L.J. 131; 24 M.L.J. 541=36 M. 357, 6 P.L.J. 337=63 I.C. 535; 86 I.C. 1051=1925 C. 1012, 26 C.W.N. 529=35 C.L.J. 71. A certification by the decree holder under R. 2, C. Code, has no period of limitation and can be made at any time and without notice to the judgment-debtor. But an application by the latter would fall under Art. 181, Limitation Act. (3 Luck 684, *foll*) 15 P.L. T. 457=1934 P. 380. Having regard to the provisions of R. 2, and Art. 174, it is not open to judgment-debtor to prove adjustment or satisfaction, if he did not take steps to have the same certified within a period of 90 days from the date on which the alleged payment or adjustment was made. This rule would apply whether the payment pleaded is sought to be proved against the decree-holder or his assignee 148 I.C. 1118=3 A.W.R. 477=1934 A.L.J. 198=1934 A. 209. But there need not be any formal application by judgment-debtor, nor is it necessary that judgment-debtor must certify the adjustment before execution proceedings begin. 157 I.C. 646=37 Bom L. R. 230=1935 B. 303. The information given to the executing Court in a written statement put in by judgment-debtor in answer to an application by decree-holder for execution of the decree is a sufficient compliance with the requirements of R. 2 (2). (*Ibid*) It cannot be laid down as a matter of law that the decree-holder's certification is in itself a step-in-aid of execution. In order to save limitation, the payment must fall within S. 20, Limitation Act, 54 C.L.J. 201=35 C.W.N. 1192=134 I.C. 922=1931 C. 719 (F.B.). Decree-holder cannot certify after three years 50 I.C. 242=23 C.W.N. 320. An uncertified adjustment will not save the period of limitation for execution 13 I.C. 424=16 C.W.N. 396, 29 I.C. 274=13 A.L.J. 666; 24 I.C. 215=12 A.L.J. 825; 35 A. 178=18 I.C. 731, 25 A.L.J. 933. Failure to certify satisfaction of a decree out of Court is fraud upon the Court. 45 I.C. 222=5 O.L.J. 92. In case of uncertified payment Court

will not go into the question of fraud on the part of the decree-holder 16 C.W.N. 923=16 C.L.J. 174; on the part of the judgment-debtor 63 I.C. 238=15 S.L.R. 77. Part-payments and the certification must take place before the application for execution is barred by limitation 26 C.W.N. 534=35 C.L.J. 566. Interest paid by judgment-debtor operates to save limitation 43 C. 207=20 C.W.N. 272. See also 21 I.C. 926=19 C.L.J. 126. No time or manner is prescribed for the decree-holder to certify payment. An application within three years can be accepted as a certificate. 51 A. 237=112 I.C. 73 (F.B.); 117 I.C. 790=1929 M. 811. An uncertified payment of a portion of the decree amount made before the expiry of the period saves the decree from bar of limitation. 33 M.L.J. 219=41 M. 251. Court is bound to recognise payments previously made and S. 20 of Limitation Act comes in to save limitation 29 M.L.J. 669=31 I.C. 318. See also 1935 M. 922=159 I.C. 38. Rule does not refer to payments in kind which need not therefore be certified to Court. 21 I.C. 177=25 M.L.J. 442. Court has no power to order repayment or over-payment but judgment-debtor has got his remedy in law to claim refund. 11 I.C. 200. As to limitation, see 1933 A.L.J. 670=1933 A. 511. A Court other than a Court executing a decree can recognise an uncertified payment or adjustment of decree and direct a refund of the amount in a suit brought for the purpose. 39 I.C. 15. Limitation Act, Art. 174—Application by judgment-debtor stating that a portion of the decree amount had been paid and tendering the balance—Nature of application—Limitation. 115 I.C. 139=1929 A. 674. Application by decree-holder under R. 2 (1) certifying payment is not a step-in-aid under Art. 181, Limitation Act 27 A.L.J. 33=56 M.L.J. 233=1929 P.C. 19 (P.C.), 1930 R. 4; 55 A. 393=146 I.C. 836=1933 A.L.J. 256=1933 A. 364 (56 I.A. 30, 1930 R. 64, 1931 C. 719, 1932 O. 141, *Foll*) Agreement not to sell property in execution—Omission to certify—Sale in spite of—Application to set aside sale—Limitation 40 L.W. 622. Limitation—Application by one judgment debtor to certify payment by another—Limitation—Execution sale of properties of one judgment-debtor—Application to set aside on ground of satisfaction of decree by uncertified payment by co-judgment-debtor—Maintainability after 90 days—S. 47—If applicable 17 Pat.L.T. 195. When two of the four joint decree-holders apply for execution and the judgment debtor induces the third decree-holder to come forward and depose to a payment said to have been made out of Court more than two years before, such decree-holder does not act on his own initiative in attempting to certify the payment and hence certification cannot be allowed in respect of the shares of other decree-holder. 156 I.C. 1003=31 N.L.R. 271=1935 N. 25. Decree-holder purchasing property in Court sale and taking possession in pursuance of

3. Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of two or more Courts, any one of such Courts may attach and sell the entire estate or tenure.

Lands situate in more than one jurisdiction.

4. [S. 223, para. 5.] Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras [or Bombay] such Court may send to the Court of Small Causes in Calcutta, Madras, [or Bombay], as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

5. [S. 223, last para.] Where the Court to which a decree is to be sent

Leg. Ref.

¹ For the words 'Bombay or Rangoon' the words 'or Bombay' have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

agreement with judgment-debtor—Application by latter to record satisfaction—Limitation—Starting point. 69 M.L.J. 77.

FRAUD.—Omission to certify the adjustment of the decree does not amount to fraud. 5 P.L.J. 70=55 I.C. 890. Decree-holder's failure to report satisfaction is fraud upon the Court, and subsequent purchase of the judgment-debtor's property in execution is vitiated by fraud and is a nullity. 45 I.C. 222=5 O.L.J. 92. Court would not allow execution of a decree where decree-holder is fraudulently denying satisfaction of decree made out of Court. 40 B. 338=33 I.C. 232. Sons of a decree-holder cannot execute a decree after father's death if he had during his lifetime exempted judgment-debtor from all liability, though he has not certified the adjustment to Court. 14 I.C. 574=16 C.W.N. 951. In case of fraud judgment-debtor must inform the Court and protect himself, but he can't evade Art. 174, Limitation Act. He has his remedy by a proper suit. 13 I.C. 424=16 C.W.N. 396. Adjustment made by fraudulent arrangement between decree-holder and judgment-debtor should be certified. 13 I.C. 326=15 C.L.J. 451. In case of fraud, the defrauded party will have his right of action. 46 B. 226=1922 B. 380. Order 9, R. 9 (Restoration) does not apply to an application under this rule. 63 I.C. 855. An application to set aside an *ex parte* order certifying adjustment of a decree under R. 2 is maintainable. 30 Punj L.R. 512=115 I.C. 467.

BURDEN OF PROOF.—In an application under R. 2 (2), the burden is on judgment-debtor to prove the adjustment set up. When he asks the Court, in the face of a denial by the decree-holder, to hold that the latter has agreed to substitute for his decree an oral agreement for delivery of some property when admittedly no property has as yet been delivered, the burden is heavily on the judgment-debtor to prove the agreement and the factum of adjustment of the decree.

Nor is the burden discharged by evidence of talk of compromise or by proof of the terms which he was putting forward to secure such a compromise. 1935 A.M.L.J. 97. See also 19 N.L.J. 175.

APPEAL.—An order refusing a certificate of payment is appealable. 146 I.C. 1018=1933 P. 634. An appeal lies against an order dismissing an application under this rule. 14 M. 99; 18 M. 26; 16 A. 129, 3 P.L.T. 487=1 P. 644.

REVIEW.—Negligence on the part of a party or his agent is not any sufficient reason analogous to those mentioned in O. 47, R. 1 (1). Where therefore through negligence, the agent or pleader of a party has certified full satisfaction of decree, the executing Court has no power to review the order striking off execution as fully satisfied. 150 I.C. 44=1934 N. 143.

O. 21, R. 3.—This rule is new, and follows the ruling in 12 C. 307. See also 12 C.L.R. 404 and 23 W.R. 154. Court having no jurisdiction over immovable property cannot validly sell it in execution of a decree, except under this rule. If Court sells property entirely outside its jurisdiction, the sale is a nullity. 27 C.W.N. 542=1923 C. 619. [17 C. 699 (F.B.), *Foll.*] 1933 S. 231.

O. 21, R. 4.—Rule 4 applies to decrees of foreign Courts. 40 I.C. 670=33 M.L.J. 539. Once decree has been transferred after notice to judgment-debtor, the transferee Court must take the transfer to be valid and execute the decree; it has no jurisdiction to determine the correctness or propriety of the order transferring the decree to it. 165 I.C. 625=9 R.C. 436=40 C.W.N. 267. Decree in suit excluded from cognizance of Small Cause Court—Order transferring decree for execution to Small Cause Court—Validity of order—No jurisdiction for Small Cause Court to question. (*Ibid.*)

O. 21, R. 5.—When a decree passed by a Munsiff in one District is sent direct for execution to the Court of a Munsiff in another District, the Court to which the decree is sent has no jurisdiction to execute it without an express order of the District Judge under R. 88. 22 C. 764. But see 15 M. 345; 164 I.C. 917 (L.) which held that it was only an irregularity in procedure which

Mode of transfer. for execution if situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

Loc. Ams.—[Allahabad and Oudh] Rule 5 For the word "District" where it occurs after the words "same" and "different" read "Province".

[Rangoon] Rule 5. The following proviso shall be added—

Provided that where the Court to which the decree is sent for execution is presided over by the same Judge as passed the decree, such transfer may be effected by recording a formal order of transfer in the diary of the execution proceedings.

Procedure where Court desires that its own decree shall be executed by another Court. 6. [S. 224.] The Court sending a decree for execution shall send—

- (a) a copy of the decree;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and
- (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

Loc Ams.—[Allahabad, N.-W.F.P. and Oudh] Rule 6 to be re-numbered 6 (1) and the following sub-rule (2) be added.—

Notes.

could be waived and did not affect the jurisdiction of the transferee Court. A Munsiff transferred a decree for execution to the Subordinate Judge in the same district, though there was no express prayer for the transfer by the decree-holders. There was some irregularity in the manner of transfer but the decree-holders acquiesced in it. *Held*, that the Munsiff could transfer the decree as both the Courts were situate in the same district, and the irregularity in the manner of transfer did not prevent the Subordinate Judge from having seisin over the execution. 64 C.L.J. 47=1936 C. 571. Transfer of decree to another District—Certificate of non-satisfaction sent to Senior Subordinate Judge instead of to District Judge—*Held*, that it was only an irregularity, and that the proceedings in execution taken before the Subordinate Court are not illegal and *ultra vires*, especially when no objection is taken at the earliest opportunity by the judgment-debtor. 164 I.C. 693=38 P.L.R. 505=1936 P. 765. The Court ought to send it back to the Judge that sent it for adopting the correct procedure and not dismiss the execution application. 28 I.C. 682 It is open to the parties to question at any stage the jurisdiction of the Court to execute it. 49 I.C. 374=4 P.L.J. 49. But see 164 I.C. 917 (L.) where it was held that the party who allows the Court to exercise jurisdiction in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation and negligence.

O. 21, R. 6—An order of transfer of a decree takes effect from the date on which the order is made and the Court to which the decree is so transferred can from that date entertain an application for execution even though a copy of decree has not been received by it. (35 M. 588, Appr.; 55 M.L.J.

120, Overr.) 56 M. 692=144 I.C. 923 (2)=65 M.L.J. 137. The words "copy of any order for the execution of the decree" in Cl. (c) mean a copy of any subsisting order. 13 B. 371. Judgment of a Native State is a foreign judgment. British Indian Court has power to see whether a foreign Court had jurisdiction. R. 7 applies only to British Court. 40 B. 551=36 I.C. 363. No formal order necessary as to transfer when the transferring Court and the Court to which a decree is transferred are presided over by same Judge. 105 I.C. 654=5 R. 613. Notice to execute can be issued only by Court to which the decree is transferred. 63 I.C. 116=26 C.W. N. 292. Where decree has been transferred to another Court for execution, decree-holder need not make a second application to the latter Court to execute it. Where notice is issued under O. 21, R. 22, the application must have been in form and substance one for execution and not only for transfer. 2 P. 909=74 I.C. 753. Certificate wrong—Court to which the decree is transferred need not get the certificate amended, but can execute decree. 93 I.C. 257=1927 P. 807. On this section, see also 31 C.W.N. 1052. Omission to send certificate through no default of decree-holder is only an irregularity. 35 C.W.N. 308=134 I.C. 944=1931 C. 649. Order for—Simultaneous execution—Notice to judgment-debtor—Necessity. 39 C.W.N. 165=1935 C. 268. Simultaneous execution—Order of transfer of decree while execution pending—Power to make. (*Ibid*) Application to take decree papers from Court—Practice of Sind Judicial Commissioner's Court. 27 S.L.R. 312=1933 S. 343.

O. 21, R. 6 (2) (Allahabad)—It is open to a decree-holder, who obtains personally the certificate and copy of the decree in accordance with R. 6 (2), either to take them to the Court to which they are sent, or to return the

(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent.

[Rangoon.] Rule 6 The following proviso shall be added —

Provided that where a transfer is effected under the proviso to R. 5, it shall not be necessary to send the above documents.

7. [S. 225.] The Court to which a decree is so sent shall cause such copies and certificates to be filed, without any further proof of the decree or order for execution, or of the copies thereof, unless the Court, for any special reasons to be recorded under the hand of the Judge, requires such proof.

8. [S. 226.] Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction.

Execution of decree or order by Court to which it is sent.

9. [S. 227.] Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction.

Application for execution.

10. [S. 230, para. 1.] Where the holder of a decree desires to execute it.

Notes.

copy and the certificate to the Court which issued them. If he takes the latter action then the Court which passed the decree becomes again seized of the matter, and is either able to grant execution itself, or to grant a new certificate for transfer. 163 I.C. 231=1936 A.L.J. 254=1936 A. 369.

O. 21, R. 7—Executing Court cannot question the jurisdiction of the Court passing the decree. 38 B. 194, 9 P. 829=1931 P. 27, 61 M.L.J. 520; 9 R. 480 (F.B.), 11 P. 94, 138 I.C. 376=1932 L. 601; 13 P. 17=151 I.C. 368 (2)=1934 P. 203, 38 Bom.L.R. 1023. But see 54 C.L.J. 593=137 I.C. 375=1932 C. 380; 46 I.C. 419=22 P.R. 1919, 9 Luck. 435=147 I.C. 1209=11 O.W.N. 169=1934 O. 75 (F.B.); 152 I.C. 135 (2)=35 P.L.R. 482=1934 L. 652. See also 10 Bur.L.T. 159=36 I.C. 10; 1931 P. 27. But see 1931 A.L.J. 653=1931 A. 689. But if decree is a nullity, executing Court can refuse to execute it. 1930 R. 337 (2)=8 R. 409. Rule does not apply to a foreign decree transmitted to a British Court. 1913 M.W.N. 605=20 I.C. 704 (See on appeal 26 I.C. 287=27 M.L.J. 535) Judgment-debtor allowing minor to prosecute appeal—Newly appointed executor not impleaded—Objection to decree raised in execution—Sustainability—Waiver. 31 Bom.L.R. 1254.

O. 21, R. 8.—The mode of sending the decree for execution under O. 21, R. 5 is a necessary part of the conferring of jurisdiction and without the mode being carried out as prescribed in the statute no jurisdiction is conferred. 1933 L. 839. Order forwarding a decree for execution need not be signed by the District Judge himself. 23 C. 481. See 22 C. 764. Court having no jurisdiction over a decree transmitted to it cannot execute the

same. The rule in execution is, a Court can only act through its officers within its territorial jurisdiction. 33 M.L.J. 750=43 I.C. 79. But see 152 I.C. 891=1934 M. 573=40 L.W. 284, where the words "competent jurisdiction" have been held to mean "competent to sell in execution" and not referable to territorial jurisdiction. The law of limitation prevailing at the time of application must be applied. 1 M. 52. When there are different laws of limitation in force in two Courts, the law applicable is the law of the Court to which the decree is sent for execution. Beng.L.R. Sup., Vol. 970. But see 17 C. at 497. When decree of a Court of a foreign state is being executed in British India the law of limitation applicable is the law which would have been applicable in case the decree had been passed in British India. 14 C. 570.

O. 21, R. 9.—The "manner" of execution refers to the procedure under which the execution is to be had, and has no reference to limitation. 24 C. 473 (491). When the Original Side of the High Court executes its own decree it is at the same time the Court which passed the decree and the Court which executes it. But in no way can the Original Side of High Court be said to be a Court which passed the decree which actually was passed by the Court of Small Causes. In the case of a decree passed by the Small Cause Court and transferred to High Court for execution High Court cannot exercise its powers under R. 233 of the Original Side Rules and direct the payment of decretal amount by instalments. 149 I.C. 763=1934 R. 197.

O. 21, R. 10.—An application for transfer of a decree for execution by another Court is not a substantive application for execution.

Application for execution. he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court, then to such Court or to the proper officer thereof.

Loc. Ams —[Lahore] Add the following proviso to R. 10—

"Provided that if the judgment-debtor has left the jurisdiction of the Court which passed the decree, or of the Court to which the decree has been sent, the holder of the decree may apply to the Court within whose jurisdiction the judgment-debtor is, or to the officer appointed in this behalf, to order immediate execution on the production of the decree and of an affidavit of non-satisfaction by the holder of the decree pending the receipt of an order of transfer under S. 39."

[Rangoon.] Add the following, namely:—

Rule 10.—At the time of presenting the application for execution or at the time of admission thereof the holder of a decree may, if he wishes, deposit in the Court the fees requisite for all necessary proceedings in the execution.

Rule 10-A —If no application is made by the decree-holder within six months of the date of the receipt of the papers, the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by S. 41.

11. [S. 256.] (1) Where a decree is for the payment of money the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

Notes.

The transmission order in such case is a ministerial and not a judicial order. Such an order can be passed *ex parte* and the Court passing it has no jurisdiction to decide whether a subsequent application in the transferee Court will be within limitation or not. Therefore, an order passed by the transferring Court cannot be regarded as a final adjudication on the question of limitation and an application for execution filed in the transferee Court more than 12 years after the passing of the decree is beyond time and cannot be considered a continuation of the prior applications before the transferring Court. 158 I.C. 127=1935 L. 508. There is nothing in the Code to prevent separate and successive applications for execution in respect of each item decreed 18 C. 515. Where judgment-creditor has obtained a decree for principal and interest to date of payment and costs and has applied for execution and has executed it in respect of the principal and costs subsequently puts in a fresh application for interest only—a prayer omitted in the prior application—the application is not sustainable. 57 B. 468=35 Bom L.R. 620=1933 B 364. Where persons entitled to separate amounts under a decree join in one application for execution, and if one of them withdraws, the application can continue in the name of the remaining applicants. 1935 A. 402=1935 A.W.R. 98=157 I.C. 429. Where in a partition suit which was dismissed, three defendants were allowed separate costs and one decree was actually drawn up, one application by all of them for execution of the decree stating that they are entitled to the separate amounts of costs set forth is maintainable as the law does not require that separate applications should be made. (*Ibid.*) Rule governs only applications made to continue the suit but not made after the termination

of the suit 48 I.C. 840=41 M. 510. The person appearing on the face of decree as the decree-holder is entitled to execute it unless it be shown by some other person under R. 16, that he has taken the decree-holder's place. 18 C 639. See also 2 M. 216 A person claiming under the decree-holder can also apply See S 146 Every decree-holder must apply for execution, and no exception is made in cases arising under O 38, R. 11. 12 B 400. Until the Court has received a decree it has no jurisdiction to entertain an application for execution. 27 L.W. 423. In case where decree is transferred, application for execution must be made to transferee Court and not to parent Court. 1931 L. 14=130 I.C. 521; 152 I.C. 128=1934 L 728 Execution petition against a dead judgment debtor is not in accordance with law and does not save limitation. 148 I.C. 131=1934 A. 463

O. 21, R 11—As to applicability of this rule to application for restitution, see 1937 M. 173 Section 51 of the Code should be read along with this rule and O. 40, R. 1. 35 C.W.N. 1066 Burden of proving application is not time-barred and in accordance with law is on applicant. 134 I.C. 1182=1931 S. 160. Mistaken entry as to date of decree in the application is an immaterial irregularity. (*Ibid.*) Where relief asked for is for sale of property outside jurisdiction of Court, the application is not in accordance with law. (*Ibid.*) Applications for execution of a decree are proceedings in the suit 20 B. 198. Where an erroneous order of Court has prevented decree-holder from proceeding with execution of his decree, Court may treat a subsequent application to amend the previous one, as a fresh application itself. 53 I.C. 111. A defective application for the execution of a decree, unless it is cured, is liable to be

(2) [S. 235.] Save as otherwise provided by sub-rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely:—
(a) the number of the suit;

Notes.

dismissed. 11 I.C. 696 (1). Refusal to correct mistakes pointed out by Court, and consequent dismissal of execution petition—Effect on limitation 131 I.C. 33=1931 A. 722. Application under S. 73 for rateable distribution is not one in execution, but Court can allow amendment of same 9 O.W.N. 1079. Execution application without giving necessary particulars is mere scrap of paper. 7 P.L.T. 350=1926 P. 533. Rule makes no mention of a temporary alienation of land. 58 I.C. 603=2 Lah.L.J. 398 Rule does not apply to applications for an order absolute under S. 89 of the Act (O. 34, R. 5). 21 C. 818 A mortgage decree cannot be executed against some of the owners of the equity of redemption 47 I.C. 907 A mortgagee decree-holder having obtained delivery of possession found out subsequently that the execution proceedings became infructuous owing to the property having been transferred *pendente lite* by the mortgagor, and applied for execution afresh against the transferee. *Held*, that the application was one under R. 11 and not under R. 97, 55 A. 235=144 I.C. 70=1933 A.L.J. 113=1933 A. 201 See also 153 I.C. 422=1935 A.W.R. 534=1935 A. 179 Rule does not bar the maintenance of concurrent execution. Court may allow amendment and R. 17 does not bar it. 4 P. 328=71 I.C. 741. An order by Court at the time of the decree that the attachment effected before the judgment shall continue is not an order in execution. Nor can an application made by the plaintiff under O. 39, R. 6, for sale of the goods attached before judgment be regarded as an application for execution of a decree as contemplated by O. 21, R. 11 or by rule 10 of Ch. 27 of the High Court (O.S.) Rules 40 C.W.N. 1317. All decree holders desirous of enforcing their decrees must apply for execution. There is no exception in cases arising under O. 38, R. 11 12 B. 400 But where the property is described in the plaint and in the mortgage decree and a plan of the property is also on the record, it is doubtful whether an application in the form prescribed under R. 11 is in every case necessary Where a final decree has been passed and the decree-holder applies to the Court to sell the property, it is the duty of the Court to sell the property on such application after obtaining the necessary particulars from decree-holder. 149 I.C. 1066 (1)=1934 L. 58. Non-compliance with immaterial provisions will not vitiate an execution application. 65 I.C. 14=1922 S. 29; 96 I.C. 554=1926 C. 1146. Mere omission from execution application of particulars required by R. 11, would not always make it otherwise than in accordance with law, if the omissions are not such as to make it impossible for Court to

issue execution on it. If application, though defective in some particulars is one on which execution could be lawfully ordered, then the application must be held to be one in accordance with law. What has to be looked at is whether the executing Court would or would not issue execution on the application as preferred to it. An application in substantial compliance with law is effectual to stay the progress of limitation under Art. 182 (5), Limitation Act, whether the Court admits, or rejects, or returns the application or allows it to be amended. 36 Bom.L.R. 643=1934 B. 307. Failure to file affidavit and encumbrance certificate along with execution petition in respect of final mortgage decree for sale does not render application not in accordance with law. 1932 A.L.J. 578=1932 A. 484=139 I.C. 201. Nor does failure to specify mode of execution. 1932 L. 534=138 I.C. 249 Nor omission to state names of persons interested in decree. 33 P.L.R. 549=139 I.C. 151 Nor omission to mention uncertified payment out of Court 151 I.C. 1015=38 C.W.N. 163=1934 C. 465. Application headed as one under R. 11 but not in proper form—Court acting thereon and granting relief—Application is one in execution and order is legal. 1928 M. 129 (2). A person appearing on the face of the decree as the decree holder is entitled to apply for execution, unless it be shown by some other person that he has taken the decree holder's place 18 C. 639. An application for execution made by A as guardian of B, who was a major at the time of execution, cannot be considered as an application of B under this rule. 28 M. 396. But see 1930 L. 603 Where an application for execution was presented by the son of a decree-holder on his behalf and the Court returned the application for amendment as not being made by the proper person under R. 11 (2), no mention being made in the application that the son was acquainted with the facts of the case; *Held*, that the application was rightly returned by the Court under R. 11 (2), and such application could not be said to be pending in Court when it was not filed afterwards by making proper amendment. 1937 Sind 108. The Code in its provisions relating to execution does not seem to provide for the execution of a conditional decree which is to become absolute upon the failure of defendant to do a certain thing. 10 C.W.N. 306. Application for execution—Decree affirmed on appeal—Appellate decree not expressly mentioned in application—Effect 9 P. 829.

VERIFIED—An application verified by the general attorney for the decree-holder, is properly verified even if the principal is residing within the jurisdiction of the Court. 26 A. 154. Requirement as to verification—

- (b) the names of the parties;
- (c) the date of the decree;
- (d) whether any appeal has been preferred from the decree;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between parties subsequently to the decree;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed;
- (h) the amount of the costs (if any) awarded;
- (i) the name of the person against whom execution of the decree is sought; and
- (j) the mode in which the assistance of the Court is required, whether—
- (i) by the delivery of any property specifically decreed;

Notes.

Pleader conducting trial, application filed by—Presumption—Saving of limitation. 31 Bom.L.R. 355=117 I.C. 526=1929 B 196; 151 I.C. 886=1934 N 224. Where there are a number of decree-holders some not acquainted with the facts of the case, all that the law requires is that the application should be verified by some person acquainted with the case. 2 P. 809=4 Pat.L.T. 513. Decree-holder's disappearance—Nothing known as to his death—Pleader can apply. 7 Pat.L.T. 220=1925 P. 692

O 21, R. 11, Cl. (b).—When a decree is binding upon a minor, execution might be sought against him through his guardian 16 C. 40; 18 W.R. 56.

Clause (d).—Where the judgment-debtor objected to execution of decree on the ground that decree-holders were trying to execute the decree of the first Court, which had been superseded by the appellate decree, which alone could be executed, *held*, that what the decree-holders were trying to execute was the mandatory part of the decree of the first Court as affirmed by the Court of appeal, and it would be the merest technicality to say under these circumstances that the decree-holders were asking for the execution of the decree of the first Court as something distinct from the decree of the appellate Court. 9 P. 829=129 I.C. 138=1931 P. 27. (Case-law reviewed.)

Clause (e).—Decree-holder was bound to state in his application any adjustment between the parties after decree, whether such adjustment had or had not been certified to the Court. 10 B. 288. Sale in execution is invalid where decree holder ignored part-payment of decree amount and applied for the entire decree amount. 11 P. 796. A certification of payment made by decree holder after the decree is barred, is not a step in aid of execution and cannot revive limitation. 1933 S. 365=147 I.C. 30.

Clause (f).—An application which does not contain the particulars mentioned in this clause is only formally defective, and substantially complies with the requirements of the rule. 16 M. 142; 65 I.C. 120. Executing

Court must either allow a defective application to be amended or reject it. 2 L.L.J. 104=55 I.C. 16. A *bona fide* mistake can be amended. 26 M.L.J. 83=21 I.C. 782. A defective application is in accordance with law. 40 M. 949=32 M.L.J. 621. *See also* 96 I.C. 554=1926 C. 1146. Where a person relies upon a particular ground as reviving limitation for an execution application, it is incumbent upon him to specify that ground in the application. If he fails to do so, it is not open to him to take advantage of it subsequently. 1933 S. 365=147 I.C. 30.

Clause (g).—Interest from date of application and date of sale may be ordered, even though not specifically claimed. 36 C.W.N. 404=138 I.C. 718=1932 C. 555. Purchaser under sale in execution is not bound to inquire whether judgment-debtor had a cross-judgment for a higher amount 14 C. at 25 (P.C.). Omission to state date of prior application is not a material defect but omission to mention the existence of cross-decrees however may be a material defect. 71 I.C. 1054=1924 C. 398.

Clause (j): SCOPE OF.—Any method suggested by the decree-holder for the satisfaction of his decree which method is not actually prohibited by law, falls within the purview of R 11 (2) (j) (v). 1928 L. 7. As regards proper form of decree, *see* 19 B. 34. The method of executing is one of procedure and not a substantive right. 9 I.C. 800. Judgment-debtor should be arrested only when he shows bad faith or negligence in satisfying decree. 11 I.C. 848=246 P.L.R. 1911. A decree declaring a party entitled to a constantly recurring right to receive certain payments in kind, valued at a certain annual sum, cannot be executed, as the applicant would not be able to state definitely, as required by the Code, to what extent relief was desired. 4 M. at 220. *See also* 27 I.C. 804=13 A.L.J. 136. In an application for execution of a decree to remove a building, the assistance of the Court should be asked for in the manner provided by R. 32 8 C. 174, 18 C. at 465; 17 C. 532. "Otherwise as the nature of the relief may require" includes several methods. Sale without attachment is one method of execution, attachment of a

(ii) by the attachment and sale, or by the sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

Loc. Ams—[Allahabad.] **Rule 11.**—*Substitute* for clause (j) of sub-rule (2)—

“(f) The date of the last application, if any”; and *add* the following proviso to sub-rule (2) —

Provided that when the applicant files with his application a certified copy of the decree the particulars specified in clauses (b), (c) and (h) need not be given in the application.

[Madras.] (a) *Insert*—(ff) Whether the original decree-holder has transferred any part of his interest in the decree and if so, the date of the transfer and the name and address of the parties to the transfer.

(b) *Add* the following to sub-rule (2) (j) :—

“In an execution petition, praying for relief by way of attachment of a decree of the nature specified in sub-rule (1) of R. 53 of this order, there shall not be included any other relief mentioned in this clause.”

(c) *Add* the following proviso at the end of sub-rule (2) —

“Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application.”

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part II, pp. 1394-1396.)

[Nagpur] **Rule 11**—After sub-clause (v) of clause (j) of sub-rule (2) of R. 11, *insert* the following proviso:—

“Provided that, when the applicant files with his application a certified copy of the decree the particulars specified in clauses (b), (c) and (h) need not be given in the application.”

[Oudh] In R. 11 for clause (f) of sub-rule (2), *substitute* the following —

“(f) the date of the last application, if any”

12. [S. 236] Where an application is made for the attachment of any movable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

Application for attachment of moveable property not in judgment-debtor's possession.

Application for attachment of immovable property to contain certain particulars.

13. [S. 237, para. 1] Where an application is made for the attachment of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

Notes.

decree or debt is another. An application for execution by one method cannot be converted into another method. 91 I.C. 240 Ejectment for money decree is a method under Oudh Rent Act, S 61 19 I.C. 38=15 O.C. 381 Rateable distribution is not a form of execution—C. P. Code, S. 73. 25 N.L.R. 94=116 I.C. 665=1929 N 148. Except in a case where decree itself directs the appointment of a receiver to work out the relief, no decree-holder has a right to ask for appointment of a receiver only under clause 4 of R. 11. It would always be an alternative mode to the relief mentioned in cl. (2) (i) of R. 11, i.e., attachment and sale. 114 I.C. 839=1929 M 20.

O. 21, R. 11, Cl (3).—Order for a copy of decree is wholly needless when the Court in which the application is filed is the very Court which passed the decree. 57 C. 996.

O. 21, R. 12.—Execution of decrees falling

under S. 52 must be accompanied by an inventory 28 Bom.L.R. 1322=98 I.C. 941=1927 B. 52. The rule does not contemplate any enquiry before Court whether the property belongs to judgment-debtor or not. 12 W.R. 329. A reasonable and accurate description of what is sold is required. A wrong date of the sale does not invalidate the title acquired at such sale. 9 I.C. 729=9 M.L.T. 319. Execution creditor is liable for damages for wrongful seizure of property belonging to a stranger. 3 B 74. Scope—Father of Hindu joint family sued—Death of father after decree—Sons impleaded as parties in execution—Decree-holder whether need file inventory. 31 Bom.L.R. 1291.

O. 21, R. 13.—Intention of the rule is that the description in notice of attachment should be sufficient to identify the property. 12 W.R. 488; 14 A. 190; see 17 C. 631 (F.B.) under R. 17. Application not giving particulars required by this rule is one not in ac

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

The following shall be substituted for O. 21, R. 13:—

Loc Am.—[Rangoon.] "13. (1) When application is made for execution of a decree relating to immovable property, included within the cadastral or Town Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest *kawn* or town map, with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immovable property must also be furnished so far as they are not given in the plan. In the case of other immovable property a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied.—(1) If the property to be sold is agricultural land which has been cadastrally surveyed and of which survey maps exist, the area, *kawn* number, latest holding number (if different kinds of holding; e.g., rice land and garden holdings, are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding, year of *kawn* map from which the holding number is taken), and revenue last assessed upon the land, must be given; (2) in the case of other agricultural land, the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified; (3) in the case of land in large towns the area, block or quarter, name or number, the lot number (if there are separate series of lots, the series should be stated, and where the land forms part only of a lot particulars regarding that part), the holding number in the latest town survey map, if any, and year of the map, the rent or revenue last assessed on the land, must be given; (4) in the case of buildings situated in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name nor number, the quarter or block name or number, the number of the building in the street or, if it has no number, the lot number must be given; (5) in the case of immovable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given; (6) the purpose to which land or buildings are put, the material and age of buildings, all incumbrances and municipal taxes should be stated; (7) the judgment-debtor's share or interest in the property should be specified. (2) The cost of the certified extract shall be reckoned in the costs of the application."

14. [S. 238] Where an application is made for the attachment of any land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

Notes.

cordance with law for purposes of limitation. 32 Bom.L.R. 1368=129 I.C. 159=1931 B 128. Court can call for an amendment to furnish necessary particulars. 65 P.L.R. 1016=35 I.C. 955. List of properties filed not with application but at a time when execution is barred—Order of dismissal—Effect. 1926 M. 260. An application for execution which refers to a list filed with a previous application is valid. 12 C. 161. But see 18 C. at 465 and 17 C. 631. Where decree is not clear regarding proclamation of property, decree-holder in his execution application can give an amplified description of the property giving the value of the property. 35 I.C. 368. In case a decree-holder fails to specify an incumbrance which he holds, he is estopped from suing on it. 15 M. 412. See also 100

I.C. 493=52 M.I. J. 222. Decree-holder has the right to choose the property against which he will proceed. 27 L.W. 594=109 I.C. 872=1928 M. 713 (F.B.). Erroneous description of judgment-debtor's interest in the property sold, due to gross negligence of decree-holder, will render him liable to pay damages to the auction purchaser. 27 N.L.R. 318=134 I.C. 269=1931 N 116.

O. 21, R. 14.—An application by the decree-holder for a certificate that the extract from the revenue register is necessary, to enable him to obtain such a copy from the Collector's Office, is a step-in-aid of execution. 5 M. 141. Application for attachment is unnecessary in a decree passed for sale of mortgaged property. 47 I.C. 639; 167 I.C. 34=1937 O.W.N. 169=1937 O. 233.

15 [S. 231.] (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any conditions to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased.

Notes.

O. 21, R. 15: JOINT DECREES.—It is not open to one of several decree-holders to apply for execution of a joint decree in respect of his share only, nor can the Court allow such execution for a share only. 1936 A.M.L.J. 32. It is incumbent on the applicant to state specifically in the application that it is filed on behalf of all the decree-holders. Omission to so state is fatal to the application. (*Ibid*) For scope of rule, *see* 57 M 696=1934 M 330=66 M.L.J. 656. Object of rule explained. 13 Pat.L.T. 579=140 I.C. 393=1932 P 359. Rule refers to a decree which has been passed jointly in favour of more than one plaintiff. It does not apply when the decree is passed in favour of one person only. 152 I.C. 776=1934 P 627. Joint decree includes cases where rights of several parties have been determined by one and the same decree. 11 P. 445=1932 P. 261=139 I.C. 397. When once a joint decree is given, it ever after remains a joint decree, any act or conduct of the decree-holder notwithstanding. 8 W.R. 132. *See also* 17 W.R. 497. It is not competent to one of several joint decree holders to grant full discharge of the decree out of Court or to certify to Court complete satisfaction of the decree without concurrence of all the decree holders. 45 A. 401=74 I.C. 687=1923 A. 494; 20 I.C. 457=16 O.C. 146. In the case of joint decree-holders a payment made out of Court by the judgment debtor to one of them can only absolve the judgment debtor in respect of the share of that particular decree holder. 1935 N 25=156 I.C. 1003=31 N.L.R. 271. Where out of four joint decree-holders two decree-holders have themselves applied for execution and the third decree-holder has admitted payment, and the remaining decree-holder has taken no interest in the proceedings, Court is fully justified in permitting execution by the decree-holders without making any order as to calling the other decree-holders. (*ibid*) A decree obtained by a father becomes a joint decree on the son subsequently obtaining a decree against the father declaring his right to a share of the debt due under the decree obtained by the father. 14 M 252; *see* 5 A. 27; 10 A. 570. *See also* the observations in 12 M.L.J. 181=25 M 431. Validity of execution application by one of several surviving co-parceners. *See* 29 Bom L.R. 75. A manager of a joint Hindu family can give full discharge and the other members have no right beyond their share. 27 I.C. 603=60 P.L.R. 1915, *see also* 21 I.C. 177=25 M.L.J. 442. The rule is not applicable to the case of joint decree holders, the execution of whose decree is conditional on their joint performance of a particular act. 6 A. 69. *See also* 152 I.C. 443=1934

Pesh. 40. One of joint decree-holders is entitled to apply for an order absolute without joining the other party, subject to such orders as the Court might see fit to pass to safeguard the other party's rights. 11 I.C. 700=34 A. 72. *See also* 152 I.C. 443. And the judgment-debtor is entitled to look for a valid discharge to him who executes the decree. 7 Pat.L.T. 708=103 I.C. 75=1927 P. 329. No necessity to state in execution application that it is made by one decree-holder for the benefit of all the decree-holders—Application must not be dismissed merely because the name of one of the decree-holders is not mentioned in it. 1930 L. 603. But *see* 1936 A.M.L.J. 32 (noted *supra*). The judgment-debtor has no right to object to any one of several joint decree-holders executing the whole decree. 8 N.L.J. 91=54 I.C. 924. Such an objection cannot be raised appellate Court when it has not been raised in executing Court. 24 L.W. 711=97 I.C. 375=1926 M. 1198. Judge has a discretion to allow one of several decree-holders to execute the decree. 36 M 357=24 M.L.J. 541. Where two of three decree-holders have certified satisfaction but an assignee from the third applies for recognition of the assignment and execution, Court has a large discretion under R. 15 and though it cannot entertain a plea of uncertified adjustment by judgment-debtor, yet if it smells fraud, Court is entitled to disallow execution. 56 M 316=1933 M 157=64 M.L.J. 22. The rule does not contemplate a case where a decree is passed in favour of two Hindu widows, and one of them alone applies for execution of the entire decree. 26 A 318; 15 M 343; 25 M. 431 (F.B.) and 7 C. 831. Where a decree is passed in favour of two brothers and only one of them signs the execution application and purchases property in execution, the other brother is also entitled to a share in that property. (42 I.A. 177, Foll) 157 I.C. 482=1935 L. 484. A member of the joint Hindu firm in whose favour the decree existed is entitled to apply for execution of the whole decree for the benefit of them all, especially when all the other members of the firm have come forward in Court and stated that they had no objection to the execution of the decree by him. 151 I.C. 575=1934 Pesh. 76 (2). Decree in favour of firm can be executed by some of the partners. 131 I.C. 376=1931 L. 507. Suit in the name of a firm—Names of partners not disclosed—Payment of decree amount to a partner of the firm after dissolution operates as a valid discharge. 105 I.C. 892=1928 S 37. Court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on record the legal representatives of a deceased decree-holder which must be

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

16. [S. 232.] Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any

Application for execution by transferee of decree.

decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee

may apply for execution of the decree to the Court which passed it; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder:

Notes.

made to the Court passing decree. So the execution of a decree so transferred need not necessarily be stayed. 55 I.C. 156. A decree for costs in favour of 13 defendants cannot be executed by two defendants in respect of their proportionate share of the sum awarded 18 M. 464. Non compliance with requirements of R. 15—Court can allow amendment subsequently 122 I.C. 179=1930 A. 188. As to decree for costs in different Courts, see 58 I.C. 212=1 Pat.L.T. 426. On the death of one decree-holder the surviving decree-holders can execute on behalf of the legal representatives also. The Court can inquire into the heirship in the course of execution when any person raises that question. 43 I.C. 1008. It is not obligatory on the Court to issue notice to the other joint decree holders 33 C. 366; 25 M. at 447 (F.B.). See also 96 I.C. 692=30 C.W.N. 562=1926 C. 811; 7 Pat.L.T. 27=1925 P. 591. But see 1931 L. 600=32 P.L.R. 290. Any one of the decree-holders may, unless the decree imposes a condition to the contrary, apply for execution of the whole decree. 29 I.C. 181; 1928 M. 800. A joint decree cannot be executed by one of several joint decree-holders in respect of his own share 4 Pat. L.J. 575=53 I.C. 803, 2 Luck. 259; 97 I.C. 896=1926 O. 605. But see 32 C.W.N. 1107=1928 C. 861. Joint decree—Some applying for execution of portion of decree giving up the rest—Others not objecting though parties—Subsequent application for execution as to balance—Maintainability. 56 C. 12=117 I.C. 677=1928 C. 559. One of two joint owners of a decree, though such decree was passed in favour of one single decree-holder, can execute the decree, if the other joint owner refuses to join in executing it. When the latter has been impleaded as a party to the execution and has been served with notice, but takes no interest in the matter, his rights need not be safeguarded as required by R. 15, but the applicant cannot on that ground be refused permission to execute the decree 39 C.W.N. 961. Where the heirs of a deceased decree holder are themselves parties to an execution application there is no question of any order having to be made under sub R. (2). 1933 P. 609.

LIMITATION.—This rule is controlled by S. 7, Limitation Act. 130 I.C. 403=1931 L. 5. Where one only of several joint decree-holders is a minor, S. 7, Limitation Act,

saves an application for execution by the minor decree-holder from being barred. 28 C. 465. See also 25 M. 431 (F.B.). Application though defective saves limitation 1 P. 609=69 I. C. 668. An application for partial execution is a step-in-aid of execution 15 B. 242. If notice under this section amounts to "revivor", See 15 P. 102. Court can allow execution of cross-claims under the same decree providing safeguards for the rights of other parties. 44 I.C. 445. Similarity between the rights of each of the parties does not make partition decree a joint decree in favour of co-sharers. 43 M. L.J. 379=70 I.C. 296=1922 M. 456. No appeal is provided against an order under R. 15 or R. 16. 70 I.C. 329=1924 M. 518. Where in execution of a decree for sale in favour of joint decree-holders, one of them purchases the property with previous leave of the Court to execute the decree on behalf of all, the other joint decree-holders have in equity a right to recover from him their share. 11 I.C. 517=33 A. 563. The decree can be executed by the decree-holder or the transferee as per S. 49 and O. 21, R. 16. Although portions of a decree can be legally transferred, the decree must be executed as a whole. 39 I.C. 654=15 P.R. 1917. See also 2 Luck. 259. An assignee of a portion of the decree amount must apply for execution on behalf of all. Where a certificate is issued on behalf of all the decree-holders there is in fact a discharge of the decree and the other decree-holders cannot execute the decree. 49 I.C. 141=1918 M.W.N. 507. Where in a joint and several decree against B and C, they were individually awarded costs as against A, A is entitled to execute his decree against only one of the judgment-debtors without deducting the costs of both, but after deducting the costs due to that judgment-debtor alone. 34 I.C. 388=3 L.W. 267.

O. 21, R. 16 SCOPE AND APPLICATION OF RULE.—This rule does not apply to case of devolution by survivorship 140 I.C. 393=1932 P. 359. Under R. 16, Court has no discretion and the assignee of decree is entitled to execution as of right, provided the other conditions mentioned in the rule have been satisfied. 1934 L. 648 (2). Assignee by operation of law (by succession or inheritance) can execute decree. 59 B. 417=37 Bom.L.R. 150=1935 B. 298. Where decree-holder died pending execution application,

Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution:

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his heir and legal representative can continue the same provided he obtains order under this rule, and he need not resort to a separate proceeding. 134 I.C. 720=33 Bom.L.R. 818=1931 B 423; 55 M. 352=62 M.L.J. 1 (F. B.) (*Overruling* 50 M. 1). This rule supersedes 9 B 179 and 20 C. 388 at 395, 396 and gives effect to 19 M. 306, 17 C. 341; 17 M.L.J. 391. The rule does not mean that each time the assignee comes to execute the decree he should come in under this rule. 31 C.W.N. 921=104 I.C. 4=1927 C 694. *See also* 149 I. C. 98=1934 R. 101. There can be no assignment of rights pending suit under this rule even though a decree is passed subsequently. 28 Bom.L.R. 761=1926 B. 406. The rule also applies to assignees of awards filed in Court, 27 C.W.N. 666=1924 C 117, and to assignees of part of a decree. 44 M. 919=41 M.L.J. 816 (F.B.), 24 W.R. 11; 26 M. 101; 17 M.L.J. 475, 17 M.L.J. 503, 48 A. 432=24 A.L.J. 430 =1926 A. 346; 27 L.W. 544=109 I.C. 872=1928 M. 142. The transferee of a portion of an indivisible decree cannot execute it even partially. 35 A 204=19 I.C. 304=11 A.L.J. 249, 58 B 226=35 Bom.L.R. 1162=1934 B. 59. But unless the whole interest is exhausted there is not a transfer within the meaning of this rule. 66 I.C. 679=1922 A. 101. *Also* 39 I.C. 654=15 P.R. 1917. A decree-holder succeeding as heir to part of the property attached to a deceased judgment-debtor can proceed against the property for the whole debt. 103 I.C. 911=1927 M. 937. A decree obtained by two persons was sought to be executed by one of them alleging that the other had relinquished his right during pendency of suit. On an objection being raised the other decree-holder gave a *purshis* stating that he had no objection if the decree were executed by the applicant alone. The application ultimately failed for want of prosecution. A question being raised whether application was according to law and served as a step-in-aid of execution *held*, that the statement made by the other decree-holder in the *purshis* did not amount to a relinquishment or to an assignment of his interest in the decree. The application made in reliance of the alleged relinquishment was mistaken. It was however made by a person entitled to make it and was thus in accordance with law. 58 B. 428=36 Bom.L.R. 437=1934 B. 216. The rule lays down how a decree has to be transferred in case the transferee desires to have it executed, and recognizes only two modes of transfer, *viz*, (1) transfer by assignment in writing, and (2) transfer by operation of law. An assignee under an oral assignment has, as such, no *locus standi* to apply for execution. 15 B. 307. An execution application based on an oral assignment cannot be a step-in aid of execution. (1911) 2 M.W.N. 559=13 I.C.

78. Oral assignment is not valid. 43 C. 990=43 I.A. 108=31 M.L.J. 248 (P.C.); *also* 16 I. C. 807; 134 I.C. 194=1931 L 116. No particular form of assignment is prescribed in the case of decrees. Anything in writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient. What is required is an assignment in substance which is in writing. 44 L.W. 336=1936 M. 543=71 M.L.J. 161. Where pending a partnership suit, the Court with a view of protecting the assets of the partnership, itself sells a decree in Court, by auction through Commissioner to the highest bidder from amongst the parties, a formal assignment in the sense of document which in form purports to assign the decree is not required by law provided the orders of the Court amount to an assignment of the decree in substance. (*Ibid.*). A receipt acknowledging money paid for the sale of a decree is not an assignment in writing within the meaning of O 21, R. 16. 1934 L. 328 (2). A transfer by operation of law means a transfer on the death or by devolution or by succession and a transferee by operation of law would be a legal representative of the deceased decree-holder or the person in whom the interest of the decree holder has become vested under a statute, *e.g.*, the Official Assignee of an insolvent or the purchaser at a Court sale in execution of a decree. Where the plaintiff's adoptive grandmother had during her management of the estate obtained a money decree against a certain person and plaintiff having subsequently established his right to the estate as against the grandmother sought to enforce the decree obtained by her, *held*, that the execution proceeding was not legally sustainable and that all he could do was to apply for the appointment of a receiver or follow the procedure laid down in O 21, R. 53. 57 B. 513=35 Bom.L.R. 795=1933 B 367. The words "operation of law" cannot apply to a case where a person has become the owner of a decree by some transaction *inter vivos*. 44 L.W. 336=1936 M. 543=71 M.L.J. 161. An assignment of a decree by partition is not valid. 9 I.C. 349=13 Bom.L.R. 22. A release by the benami assignee to the real assignee does not amount to an assignment and the real assignee cannot then execute the decree. 8 P.L.T. 163=101 I.C. 616=1927 P 170. True owner can execute a decree obtained in the name of benamidar. 114 I.C. 495. Decree-holder of decree-holder does not become transferee by operation of law. 5 P. 511=7 P.L.T. 793=96 I.C. 446=1926 P. 320. The transfer of a decree made by an instrument in writing takes effect from the date of the instrument and not from the date of its recognition by Court. 106 I.C. 54; 26 S.L.R. 153=1932 S. 71. Assignment of personal decree does not require registration. 106 I.C.

Provided also that, where a decree for the payment of money against two

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485=1928 M. 142. Assignee of a part of decree can apply for its execution 1928 L. 70=107 I.C. 603. When one of several decree holders assigns the decree, and an application to recognize the assignment is filed, Court cannot recognize the assignment in respect of whole decree in favour of the assignee but only the interest of the assignor-decree holder. 145 I.C. 891=1933 L. 473 (1). Transfer of decree by a decree-holder after insolvency—Official Receiver can object to execution. 1928 M. 360 (2)=109 I.C. 832. Amendment of decree subsequent—Fresh notice necessary under R. 16 (1)—If omission to give notice is of a technical nature it is cured by S. 99, C.P. Code. 1930 M.W.N. 166 Where transfer was recognised by Court, which passed the decree, and execution is transferred to another Court, the latter Court cannot question transferee's right to execute. 11 P. 94=1932 P. 168=137 I.C. 472 An agent acting under the power of attorney obtained decrees on mortgages and pending proceedings for the sale of the mortgaged properties, the principal applied under O. 21, R. 2 for satisfaction of the decrees. But the agent assigned the decrees to a third party who applied under R. 16 for recognition of the assignment and for execution. *Held*, that it was not open to the Court to go into the question whether the alleged satisfaction was *bona fide* or fraudulent, and that the decree being alleged to have been satisfied, the petition should be dismissed. 144 I.C. 237=1933 M. 523=64 M.L.J. 732

APPLICATION.—Transferee should apply for execution of decree, and cannot apply merely for recognizing him as transferee. 14 M.L.J. 393, 14 M.L.T. 513=21 I.C. 609; 105 I.C. 611=4 O.W.N. 1025. Application by transferee to be brought on the record without asking for execution of decree is not an application in accordance with law, as it is not an application for execution of the decree, (Case-law discussed.) 27 S.L.R. 314=1933 S. 341. *See also* 1935 S. 26 But *see* 1933 R. 55. The prayer for substitution is necessarily implied in an application by a transferee for execution of the decree under R. 16 and the substitution of his name is in practice generally made before execution is proceeded with. 1935 N. 230. Application by assignee, for notice to issue under this rule, is an application for execution. 29 C. 235 *See also* 1936 A.M.L.J. 79. Application under—If can be combined with application under S. 39—Form and contents of—Tabular statement—Necessity—Calcutta High Court Rules (Original Side), Ch 17, Rr 1 and 2 *See* 39 C.W.N. 961. *Assignee of the decree*, and not merely the *transferee of the property* forming the subject-matter of the suit, can apply 66 I.C. 878=1922 A. 98, 3 Pat L.T. 625=69 I.C. 959=1922 P. 563, 4 A.L.J. 759 *See also* 55 I.C. 983=28 P.L.K. 1920. If a person obtains a decree for possession of certain property and sells portions of it to others the vendees

could not apply to execute the decree. 4 A.L.J. 759; 98 I.C. 856=1927 M. 240. As to whether transferee of a pre-emption decree can apply under this rule, *see* O. 20, R. 14. Transferee of a decree for costs can apply. 7 A. 457. When decree has been assigned by one assignee to another the second assignee can apply under this rule even though the first assignee has not applied. 9 A. 46 A creditor who attaches a decree is in much the same position as the transferee of a decree under this rule. 15 C. at 376 Assignment during pendency of execution proceedings dates back to the date of execution application 9 I.C. 549=13 Bom.L.R. 22. The provisions of this rule are mandatory, non-compliance renders all proceedings void. 2 L. 230=63 I.C. 884. *Also* 56 I.C. 461, 5 Pat.L.J. 390=57 I.C. 250; 54 C. 624 Transferee is entitled to the benefit of an attachment obtained by his transferor and can apply to execute for further sums becoming due under the decree in addition to the sum originally sought to be executed for. 13 M.L.T. 145=18 I.C. 691. Where properties were sold "with all arrears of rent" the purchaser should be treated as the assignee of the rent decrees as well. 57 I.C. 874=25 C.W.N. 863 But *see* 59 C. 297=137 I.C. 857=1932 C. 439. The assignee of a decree *pendente lite* is entitled to execute the appellate decree. 35 M.L.J. 294=44 I.C. 849. Where the assignee of a decree, has, at the time of assignment, knowledge of a suit pending at the instance of the assignor's judgment-debtor against the assignor, he purchases the decree subject to the right of the judgment-debtor to claim a set-off when he comes to execute his decree. 161 I.C. 45=8 R. Pesh. 154=1936 Pesh. 33 If there is an assignment pending proceedings in execution taken by decree-holder, there is nothing in the Code debaring Court from recognizing transferee as the person to go on with execution. 26 C. at 253 *See also* 16 A. 133, 12 M.L.J. 348; 167 I.C. 575=1937 Pesh. 18. [1931 B. 423; 1930 C. 614, 1926 C. 957, 3 I.C. 324; 26 Cal. 250; 1932 M. 73 (F.B.); 1921 P. 180, 1924 P. 576 and 1930 Sind. 283, Rel. on; 1927 All. 165. (F.B.), Diss.] Assignee of a preliminary mortgage-decree for sale cannot ask for execution, and for passing of the final decree under this rule. He must first get a final decree. 32 I.C. 981. Regarding assignment of preliminary decree in partition suit, *see* 24 L.W. 392=97 I.C. 754=1926 M. 1129. It is not necessary that transfer should be effected before the death of the judgment-debtor. If effected after his death, transferee can take out execution against his legal representatives. 11 B. 727 If the assignor is dead the assignee will be required to produce a succession certificate. 15 M. 419. But it may be produced at any time during the pendency of the proceedings. 19 C. 482. When a minor succeeds to an estate which, up to the date it fell into his hands, had been in possession of the executrix, there is a succession or transfer by operation of law 16 C. 347 at 349, 11 B. 368 *See* 4 C.W.N. 785 and

or more persons has been transferred to one of them, it shall not be executed

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21 M. 353 at 356. If a Hindu female such as a widow or daughter suing on behalf of an estate to recover property represents the ultimate male heirs entitled to the estate, they are bound by the litigation and they can take the benefit of it. But there is no principle which can avail the widow of the last male owner to enable her to execute the decree wrongly obtained by a person claiming to be the adopted son of the last male owner but whose adoption was subsequently found to be invalid 1933 M.W.N. 1148. Assignee of a decree which has been attached can still execute it, but subject to the rights of the attaching creditor 17 I.C. 323=13 M.L.T. 227. Assignment of decree is not affected by subsequent order of attachment, 26 S.L.R. 158=1932 S. 164, 26 S.L.R. 153. Till a transferee is brought on record he has no right to execute the decree. He cannot question attachment of the decretal amount deposited to the credit of his assignor if before that his assignment had not been recognised 4 R. 426=99 I.C. 309=1927 R. 55. Assignee can enter up satisfaction without an execution application 17 I.C. 617=12 M.L.T. 592. He can execute the decree and his rights can be determined even though he himself has not filed the execution application. 4 Lah L.J. 259=1922 L. 396 Assignment of rights prior to decree 30 I.C. 831. Equities between decree-holder and judgment-debtor will be taken into consideration against transferee. Plea of partial failure of consideration for assignment, if can be raised by the assignor as well as by the judgment-debtor. 4 P. 120=1925 P. 449; 137 I.C. 715=1932 M.W.N. 326=1932 M. 327. Judgment-debtor cannot plead uncertified payment in application by transferee 149 I.C. 218=1934 A.L.J. 763=1934 A. 445, 1934 S. 205. Judgment-debtor cannot question on assignment for inadequacy of consideration for assignment. 20 I.C. 685=18 C.W.N. 450 But he has got a right of appeal against an order recognising transfer of a decree. Order allowing execution by assignee-decree-holder is not appealable as an order but is appealable under S. 47 1934 L. 328 (2), 26 I.C. 944=2 L.W. 109. In the absence of allegation of fraud, want of consideration is immaterial, if the transferor and transferee are agreed. 26 I.C. 685=18 C.W.N. 450, or unless the assignment is a sham transaction 49 I.C. 141=1918 M.W.N. 507 See also 1932 M. 327=137 I.C. 715=1932 M.W.N. 326 When transferee applies under this rule judgment-debtors cannot contend that the decree was obtained by fraud 15 B. 307; but can contend that transfer was fraudulent. 23 I.C. 951=1 L.W. 206. See also 28 C.W.N. 963=1925 C. 23 Where a decree is handed over to a trustee by the decree-holder and the trustee makes no application under R. 16, but a joint application for execution is made by the trustee and decree-holder, the joint application can be looked upon as two separate applications of two different sets of persons amalgamated

for purposes of convenience and hence even though the trustee can be disallowed to execute the decree, the decree-holder can be allowed to do so. 146 I.C. 872=1933 L. 638

TO WHAT COURT APPLICATION MADE.—Application can be made only to Court which passed the decree 25 A. 443; 27 C. 418, 132 I.C. 183=1931 L. 499. 11 P. 94=137 I.C. 472=1932 P. 168; 1937 Oudh 111 (noted *infra*); 39 C.W.N. 961. But an order by a Court to which the decree is sent for execution is not void. 17 M.L.J. 300, 1934 L. 648 (2) The provision contained in R. 16 does not mean that the Court, which passed the decree and to which an application has to be made for execution by a transferee of the decree, ceases to be an execution Court. The application of the transferee must be an application for execution of the decree 1934 A. L.J. 768=149 I.C. 218=1934 A. 445. The legal representatives of the decree-holder can be brought on record even in the Court to which a decree is transferred for execution. 71 I.C. 409=1923 N. 105 1935 S. 26. So also the official liquidator of a bank under liquidation. 161 I.C. 662=1936 L. 152. The Court must enquire into the validity of an assignment if questioned. 23 I.C. 951=1 L.W. 206. See also 24 I.C. 766; 28 C.W.N. 963=84 I.C. 68=39 C.L.J. 590=1925 C. 23; but should not enquire into the bad faith of the transferee, while recognising the transfer. 33 I.C. 71 (Doubting 19 M. 230). Objection to execution by transferee of decree on the ground that transferee is merely *benamidar* for judgment-debtor, should be raised in the course of proceedings taken on the application under R. 16 Such an objection could not be entertained by the Court to which the decree is transferred for execution 165 I.C. 891=1936 O.W.N. 1236=1937 Oudh 111. The decree-holder can always execute the decree if the transferee is not on record and has not applied for execution. 29 M.L.J. 698=31 I.C. 542, 34 I.C. 791=3 L.W. 521, 1933 S. 119=144 I.C. 50; 146 I.C. 872=1933 L. 638; 152 I.C. 443=1934 Pesh 40; 1935 A.L.J. 1179=1935 A.W.R. 1108=1935 A. 1001, 1935 N. 230. Where the decree is satisfied the transferee decree-holder cannot thereafter apply to execute the decree over again. Whatever rights he may have are available only against the executing decree-holder and not against the judgment debtor 41 L.W. 295=1935 M. 383=68 M.L.J. 392. The executing Court cannot refuse to allow execution at the instance of the transferor till the transferee is formally recognized by the Court by substitution of his name for that of the original decree-holder. Whether such substitution is accomplished by an order of the Court passed upon a separate application made by the transferee under O. 22, R. 10 or upon an application by him for execution of the decree under O. 21, R. 16, C.P. Code, is immaterial 1935 N. 230. It is also immaterial whether assignment is before filing or during pendency of execution petition. 37 Bom L.R. 489=1935 B. 331 The judgment-debtor

against the others.

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cannot object on the ground that the decree has been assigned. 18 I.C. 97=16 O.C. 70. Auction-purchaser, purchasing certain decrees of his judgment-debtor, is a transferee of those decrees. 22 M.L.J. 161=13 I.C. 324. Judgment-debtor cannot plead uncertified adjustment in opposition to application under R. 16, by the decree-holder. (47 B. 643, Not foll.) 55 M. 720=1932 M. 372=62 M.L.J. 562 (F.B.) But it can be pleaded when the adjustment is recited in the deed of transfer itself. In such cases, transferee cannot execute for whole amount ignoring uncertified payments (1937) 1 M.L.J. 296.

NOTICE.—A transfer by operation of law is not an assignment and no notice is necessary under the proviso. 152 I.C. 776=1934 P. 627. A decree passed in favour of brothers was allotted to one of the brothers on partition. Execution application was filed by such brother for his own benefit and notice of application was sent only to judgment-debtor *Held*, that the case came within R. 16 and not under R. 15, that notice to the other brothers was necessary under law, that failure to issue notice though it affected the validity of the execution proceedings, did not warrant the dismissal of the application and that notice should be sent to the other brothers. 145 I.C. 715=1933 L. 432. *See also* 1933 P. 658=147 I.C. 101 Where notice of assignment and warrant of attachment were issued, but the judgment-debtor objected, it was held that the attachment ought not to be allowed before hearing the objections. 12 I.C. 547=36 B. 58 The judgment-debtor cannot be said to have acquiesced in an order of attachment, when no notice of assignment is served on him. (*Ibid.*); 39 I.C. 952=118 P.L.R. 1917 Execution sale by transferee of mortgage decree—Subsequent mortgagee not served—Sale binds mortgagor though not mortgagee. 1930 A. 627=52 A. 898 Failure to serve notice on the judgment-debtor or his representatives renders void the proceeding in which the failure occurred as well as subsequent proceedings. 1930 M.W.N. 1187=137 I.C. 171=1931 M. 192 But executing Court has to presume that due notice was given to the judgment-debtor. If there is any defect in the execution application the judgment-debtor should make his objection to the Court which passed the decree. Where he does not do so he cannot object that he had no notice of the transfer and that the executing Court was not competent to execute the decree. 30 S.L.R. 249=1936 Sind 191. Omission to object to a notice of assignment amounts to ratification 83 I.C. 142=1925 A. 206 (2), 8 Pat.L.T. 163=101 I.C. 616=1927 P. 170 Where an assignee of a decree files an application for execution and sends notice to the assignor and judgment debtor under O. 21, R. 22, but not under R. 16 and the judgment debtor does not let in evidence challenging the assignment, the assignee is entitled to proceed with the execution without proving, in the first place, the assignment

in his favour. 149 I.C. 1003=1934 P. 9. Substituted service of notice is good service 28 I.C. 219=1 L.W. 351. The notice is not about the assignment but of the execution proceedings. 62 I.C. 30=6 P.L.J. 358. Therefore he can appeal against the order of recognition. 33 I.C. 71 When want of notice is not pleaded in prior execution proceedings, the judgment-debtor cannot do so in his application to set aside sale. 57 I.C. 707=5 Pat.L.J. 639. Sale held in execution of a decree by assignee without notice to assignor is nullity 54 C. 624=105 I.C. 193=1927 C. 781, 117 I.C. 614=1929 A. 437. If a decree was transferred by assignment after the death of the judgment-debtor notice of the transfer may be served on his legal representatives. (*Ibid.*) *See also* 30 M. 541. The proper stage to object to a transfer is when the notice is served, and not when the transferee tries to execute the order 87 I.C. 436=1925 A. 662, 30 S.L.R. 249=1936 Sind 191. Issue of a combined notice under O. 21, Rr. 22 and 16 upon the judgment-debtor is sufficient under the law to save limitation 1933 P. 658. Under R. 16, if a person applied to the Court for his being recognised as an assignee decree-holder and for transmission of the decree from that Court to another, it is clearly a petition for execution. A transferee decree holder must not only ask for his being brought on record but must in the same petition apply for execution of the decree Where the Court makes an order recognising the assignment to a decree holder after notice to judgment-debtor, but the decree holder takes out another application within one year from the date of the last order against the party against whom execution is applied for, no notice is necessary owing to proviso to R. 22, O. 21 145 I.C. 974 (1)=65 M.L.J. 682=1933 M. 797 Proviso (2).—The proviso refers to a decree for money personally due by two or more persons. It does not apply to a case in which nothing is due from the assignee of the decree, personally 11 C. at 396. *See also* 5 A. 27. Nor to a case where decree-holder by inheritance acquires an interest in the estate of one of the judgment-debtors 54 A. 448=1932 A. 704=137 I.C. 50. "Decree for money against several persons" is not restricted to personal decrees for money. 19 N.L.R. 151=1924 N. 41. But a mortgage decree for sale is not a money decree. 12 I.C. 70=16 C.W.N. 132, 49 M. 508=1926 M. 623=51 M.L.J. 139. The proviso therefore does not apply to mortgage decrees as such, but it comes into operation only after the property is sold and a personal decree is passed 1937 Sind 112 The proviso has no application to the converse case where the decree-holder acquires a share in the estate of one of the judgment-debtors. The decree-holder is, however, bound to give credit for a proportionate amount of the decree. 157 I.C. 651=1935 O.W.N. 887=1935 Oudh 449. If the assignee is a joint judgment debtor, he cannot execute it. 28 I.C. 966. *See also* 44 I.C. 269.

Loc Ams.—[Calcutta.] O. 21, R. 16. In the first proviso to R. 16, O. 21 *omit* the words "and the decree shall not be executed until the Court has heard their objections (if any) to its execution" and *substitute* therefor the following words—

"and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferor admitting the transfer or an instrument of transfer duly registered be filed the Court may proceed with the execution of the decree pending the hearing of such objections."

[Lahore] In the first proviso *omit* the words "and the judgment-debtor"

[Nagpur] **Rule 16**—In R. 16, after the words "which passed it" *insert* the words "or to any Court it has been sent for execution"

[N.-W.F.P.] For the first proviso, *substitute* the following proviso—

"Provided that where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor, and unless an affidavit by the transferor admitting the transfer is presented with the application the decree shall not be executed, until the Court has heard his objections (if any) to its execution"

[Rangoon] The following proviso shall be substituted, namely—

"Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor, and, unless an affidavit by the transferor admitting the transfer is filed with the application, the decree shall not be executed until the Court has heard his objections (if any) to its execution."

Notes.

=27 C.L.J. 110; but can sue for contribution 20 I.C. 569=18 C.W.N. 113 But a transfer to the pledger for the judgment-debtor does not satisfy the decree, though assigned to him in trust for his clients. If called upon he is bound to assign the decree to them, but upon equitable terms only 22 C.W.N. 491=44 I.C. 13 Transfer brought about by death is not excluded from the operation of the proviso 98 I.C. 26 (2)=1926 M. 1141=51 M.L.J. 443 Proviso is one of procedure only and does not create rights and liabilities. 1930 K. 308=128 I.C. 584 Where the Court recognises the original decree-holder on the record as entitled to execute the decree and allows him to proceed with the execution and the decree is satisfied thereby, the transferee decree-holder cannot thereafter apply to execute or be heard to say that he should execute the decree over again, when he has not taken any steps previously to get himself recognised as the transferee decree-holder. Whatever rights he may have are available only against the executing decree-holder and not against the judgment debtor. 41 L.W. 295=68 M.L.J. 392=151 I.C. 589=1935 M. 383=1935 M.W.N. 203

A BENAMID ASSIGNEE can execute 37 A. 414=29 I.C. 593, 20 I.C. 685=18 C.W.N. 450. See also 43 I.C. 801=7 L.W. 201, 62 I.C. 299=13 B.L.T. 173; 21 M. 388. But where the transferee of a decree is found to be a benamidar for the judgment-debtor, the Court is bound to refuse execution. 32 I.C. 952=40 M. 296. Also 35 M. 659=12 I.C. 657. Whether transferee is benamidar for judgment-debtor must be decided by Court. 95 I.C. 706=1926 L. 666; 131 I.C. 229=1931 L. 545. This is so even though the assignee is benamidar for one of the judgment-debtors. (4 C.W.N. 334, Foll.) 43 M.L.J. 761=1922 M. 510. Also 35 I.C. 624=4 L.W. 534 An arrangement between decree-holder and some of the judgment debtors that they must pay the entire decree amount to him and that he must execute the decree against the other judgment-debtors and realise the amount due and pay it to them is

not prohibited by this rule 99 I.C. 902=1927 M. 322=52 M.L.J. 59. A benamidar is competent to take out execution of a decree as the transferee thereof. 39 C.W.N. 1073 The real transferee owner of a decree cannot apply for execution on the ground that the transferee was his benamidar and his agent. Only the benamidar is entitled to execute. 48 M. 553=48 M.L.J. 419, 8 L. 35=100 I.C. 545 (1)=1927 L. 110; 119 I.C. 542. An alleged real owner cannot apply to the Court to recognize and allow him to execute the decree The existence of a declaratory decree to the effect that a benami relationship exists between the two parties does not make any difference. 149 I.C. 122=1934 M. 471=67 M.L.J. 87. But where the ostensible decree holder has executed a deed of relinquishment in favour of her husband alleging therein that the latter was the real decree holder, the deed of relinquishment amounts to an assignment of the decree and the husband is entitled to apply under R. 16. (48 M. 553, 1927 P. 170, Dist.) 146 I.C. 626=1933 A.L.J. 248=1933 A. 188. Benamidar—Transferee—Application by—Maintainable, where the alleged real owners are parties to the application and assent to its being entertained. 1929 P. 1=7 P. 726. Transfer of a decree to a relative of a judgment-debtor does not amount to a transfer to a judgment-debtor. 1929 A. 792. The rejection of an application for substitution in the place of the decree holder does not operate as *res judicata* to a subsequent application under this rule. 1925 O. 417=12 O.L.J. 538. No suit will lie to establish a right to execute a decree, when an order dismissing an application under this rule has been allowed to become final 28 A. 613. But see 20 A. 539; 10 M.L.J. 27; 1 A.L.J. 61. See also 7 A. 457 In such a case the assignee can sue the assignor for recovery of the money paid. 16 M. 325; 20 A. 539. An appeal lies against an order refusing an application by assignee. 1 A.L.J. 61=25 A. 443, 25 M. 383. See also 12 C. 610, 16 A. 483 and 27 C. 670 No appeal lies against an order dismissing an application to be brought in as the lega-

17. [S. 245] (1) On receiving an application for the execution of a decree as provided by Rule 11, sub-rule (2), the Court

Procedure on receiving application for execution of decree.

shall ascertain whether such of the requirements of Rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

Notes.

representative of a deceased judgment-creditor. 16 M.L.J. 27.

O. 21, R. 17.—Where an application for execution of decree which is presented within time is illegally returned by the Court to the decree-holder for correction and the decree holder files it some months after it had been returned, the application presented is not a fresh one but the original one itself and R. 17 has no application. 144 I.C. 288 = 1933 O. 288. See also 145 I.C. 891 = 1933 L. 473. Under R. 17, execution, Court has a discretion to allow amendments in an application for execution 60 I.A. 83 = 60 C. 662 = 1933 P.C. 68 = 64 M.L.J. 421 (P.C.). If power to order amendment is defined by this section 39 C.W.N. 1144. Under S. 245 of the old Code the Court was bound to reject an application not amended as per orders. Under the present rule time for amendment may be extended, or applicant can show that no amendment is necessary 17 N.L.R. 179 = 63 I.C. 971, 60 C. 662 = 60 I.A. 83 = 64 M.L.J. 421 (P.C.). Also 23 C. 217. For the case-law under the old Act, see 16 M. 142; 17 C. 631 (F.B.) and 26 M. at 103 "As nearly as may be." For the meaning of these words, see 16 B. at 114. As to defects which could or could not be cured by an amendment, see 49 I.C. 982 = 32 P.W.R. 1919. Also 118 P.R. 1912 = 18 I.C. 516. Court has power either to return for amendment or to reject an application not complying with Rr. 11 to 14 of this order. 1 P. 149 = 69 I.C. 200. Decree-holder is not bound to proceed against properties of judgment-debtors first 1926 L. 110. An application to file a fresh list of properties against which execution is also prayed for, is not an amendment of the execution petition. 2 P. 787 = 74 I.C. 144. Where a vakil is duly authorized to present an application for execution, the fact that the *vakalat* was not dated, does not make the application one not in accordance with law. 26 M. 197 (198). But see 34 L.W. 546 = 61 M.L.J. 516. Defects of form not affecting the merits should be allowed to be remedied. See 17 C. at 636. When an amendment is not made within the time allowed, the application does not stand rejected unless an order is made to that effect. 8 C. 479. A rejected application under this rule is not a step in aid of execution. 37 I.C. 916 = 21 C.W.N. 835; also 8 N.L.J. 91; 28 C.W.N. 988 = 34 I.C. 747 = 1925 C. 102. When permission is granted with no time fixed to file list of immoveable property,

if the list is filed after the period of limitation, the execution application is barred. 22 I.C. 337 = 18 C.L.J. 538. Amendment of execution petition by addition of a fresh list of properties—Objection not taken by judgment-debtor at the time—Subsequent objection that decree was barred at the time of amendment not entertained. 34 C.W.N. 139. A filing of a fresh list of properties sought to be attached and sold should be treated as a continuation of the original application. 22 C.W.N. 540 = 44 I.C. 553. If application is within twelve years but amendment is after 12 years, the application is not barred 45 M.L.J. 651 = 924 M. 367; the amendment will be deemed to have effect from the date of first presentation 35 I.C. 876 = 31 M.L.J. 561. As to competency of application to amend execution petition after 12 years from date of decree, see 71 M.L.J. 256. Amendment of execution application—Principle governing—Substantive application barred—Amendment of the same whether permissible 8 P. 462 = 1929 P. 407. Where application for execution though wrong has been admitted by Court not noticing the defect, and afterwards Court allows the application to be amended though period of limitation has been over, the amendment is effective from the date of the admission of the application. 152 I.C. 443 = 1934 Pesh. 40. So also where an execution application is filed within the time *bona fide* against a wrong representative and amendment is allowed bringing right person, but after 12 years period of limitation 41 L.W. 173 = 1935 M. 161 = 68 M.L.J. 261. Execution application against only one of two executors—Subsequent amendment by addition of other executor is permissible 11 P. 508 = 1932 P. 306 = 139 I.C. 840. So also amendment as to right to execute decree by survivorship instead of by succession 59 C. 1266 = 36 C.W.N. 618 = 1932 C. 766. So also amendment of application for rateable distribution under S. 73 into execution application under this rule. 9 O.W.N. 1079. Permission to amend may be granted not only when application is presented but also at any subsequent date 11 P. 546 = 13 P.L. T. 318 = 1932 P. 222. In execution of final mortgage decree for sale, if affidavit and encumbrance certificate is filed later, the Court should deal with him under this rule. 1932 A.L.J. 578 = 1912 A. 484 = 139 I.C. 201. Amendment of execution application—Final decree in mortgage suit—Execution—Subject decision of appeal from preliminary decree—Necessity to amend final decree or

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application:

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

Loc. Ams.—[Allahabad.] Between the words "been complied with" and "the Court may" insert the words "and if the decree-holder fails to remedy the defect within a time to be fixed by the Court".

[Calcutta.] O. 21, R. 17 (1).—In sub-rule (1), R. 17, O. 21, cancel the words "the Court may reject the application or may allow the defect to be remedied then and there, or within a time to be fixed by it" and *substitute* therefor the following words:—"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it. If the defect is not remedied within the time fixed the Court may reject the application".

[Lahore.] For the words "and if they have not been to be fixed by it" in sub-rule (1) of R. 17, *substitute* the following words:—

"and, if they have not been complied with, the Court shall fix a time within which the defect shall be remedied, and if it is not remedied within such time, may reject the application."

[Madras] (a) *Substitute* the following for sub-rule (1):—

"(1) On receiving an application for the execution of a decree as provided by R. 11, sub-rule (2), the Court shall ascertain whether such of the requirements of Rr. 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application if the defect is not remedied within a time to be fixed by it."

(b) *Add* the following proviso at the end of the rule:—

"Provided that where an execution application is returned on account of inaccuracy in the particulars required under R. 11 (2) (g), the endorsement of return shall state what in the opinion of the returning officer is the correct amount."

(Vide *Ft. St. George Gazette*, dated 20—10—36, Part II, pp. 1394-1396.

[Nagpur] Rule 17.—In sub-rule (1) of R. 17, for the words "and, if they have not been complied with within a time to be fixed by it" *substitute* the words "and if they have not been complied with, the Court may allow the defect to be remedied then and there, or may fix a time within it should be remedied and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application".

[Oudh] In Oudh for "and, if fixed by it" *substitute* "and if they have not been complied with the Court may allow the defect to be remedied then and there or may fix a time within which it should be remedied; and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application".

[Rangoon] 17 (1). For the words "The Court may reject the application or may allow the defect to be remedied then and there or within a time to be fixed by it" the following shall be *substituted* namely—"the Court may reject the application if the defect is not remedied within a time to be fixed by it."

18. [S. 246.] (1) Where applications are made to a Court for the

Notes.

for fresh final decree—Amendment of execution petition in accordance with modification in appeal—Procedure (1937) 1 M L J. 407.

O. 21, R. 17 (4)—See 152 I. C. 1028; 153 I. C. 1024=1935 P. 143. Decree holder applying for attachment of land as belonging to judgment-debtor—Mutation in favour of third person—Court, cannot decline to attach. 37 P. L. R. 33=152 I. C. 1028=1935 L. 114. Rent decree—Execution as money decree—Objection to decree holder's valuation of properties—Power of Court to take evidence and to release part of the properties. 153 I. C. 1024 (1)=1935 P. 143.

O. 21, Rr. 18—20. PRINCIPLE OF THE RULES.—If X has a decree against A and A

and B have a decree against X, it is clear from illustration (b) to R. 18 as well as on principle, that X cannot insist on a set-off. But if B and A both ask for the set-off and it appears that A incurred the debt to X on behalf of himself and B, the set off need not necessarily be refused. It is true that under Rr. 18 to 20 of O. 21, C.P. Code, the set-off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstances that both decrees arise out of the same transaction. Whatever they arise from, circuity of proceedings thereunder can be avoided and should be avoided—this is the principle of the rules. 64 I. A. 67=16 P. 127=41 C. W. N. 449=1937 P. C. 39=(1937) 1 M L J. 254 (P. C.).

Execution in case of cross-decrees. execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

Notes.

All that R. 20 lays down is that the provisions of Rr. 18 and 19 shall apply to cross-mortgage decrees, *i.e.*, if two contending parties hold mortgage decrees against each other then they will be able to set-off decrees one against the other. There is nothing in the provisions of R. 20 which will warrant the Court in holding that a decree obtained on foot of a mortgage becomes a decree for payment of money and therefore it can be set-off against a simple money decree held by the opposite party. 1936 A.W.R. 405=1936 A.L.J. 562=1936 A. 639.

O 21, R. 18 CROSS-DECREES AND CRO-S CLAIMS.—The provisions as to set-off contained in R. 18 are exhaustive and no set-off on grounds other than those mentioned in it is permissible. Nor can S 151 be invoked for such purpose. 138 I.C. 285=1932 L. 537. The rule deals only with cross-decrees and has no application to cross-claims under the same decree. 5 A 272. To these R 19 applies, and this rule and R. 19 apply only when a step in execution and a counter-claim have come into existence. 9 A. at 67. This rule applies only where both the decrees which are sought to be set-off against each other are before the Court for execution (*i.e.* there must be applications for execution from the holders of the two decrees) and each of the decrees must be capable of execution at the same time by the Court (*i.e.*, there is no attachment or other impediment). If either of those conditions is not fulfilled, then the prayers to set-off cannot be granted. 156 I.C. 477=42 L.W. 767=1935 M. 587. See also 1935 L. 914. 16 W.R. 303; 24 A. 481; 21 I.C. 32=11 A.L.J. 763; 126 I.C. 516=1930 L. 508; 1933 M. 215=145 I.C. 767. The decrees must also be under execution at the same time. 7 W.R. 535. A decree to be adjusted by set-off must be capable of execution at the time when the adjustment is made. When a decree for maintenance is passed payable partially immediately and partially periodically in favour of a woman and another decree is passed against her in favour of those against whom decree for maintenance is passed, instalments of maintenance which are to become due subsequent to the date of adjustment cannot be adjusted by set-off. Only those instalments which are due and which can be executed on the date of adjustment can be adjusted by set-off. 1933 L. 372. A statute barred debt cannot be set-off against the claim of plaintiff. 40 I.C. 816=21 C.W.N. 1147. When the decrees themselves lead to the construction of a set-off, execution applications under both the decrees are not necessary. 52 I.C. 746=1919 Pat H.C.C. 372. The parties should not fill distinct characters in the two cases. 38 A. 669=36 I.C. 948. In order to admit of a set-off, the parties must be the same, and the sum due under each

decree must be definite. 5 W.R. (Mis.) 12, A decree directing plaintiff to recover the decree amount by sale of properties, but not directing payment by defendant, is a decree for money, and the provisions of this rule apply to it. 29 M. 318, 13 I.A. 106=14 C. 18 (P.C.), 16 W.R. 303, 5 W.R. 52. See also 15 C. 557, 26 M. 428. A mortgage decree is not a decree "for the payment of sums of money" within the meaning of R. 18 and consequently the decree-holder cannot set-off the claim thereunder as against a personal decree obtained against him. 7 R. 505. See also 1936 A.L.J. 562=1936 A.W.R. 405=1936 A. 639. Decree-holder in a pre-emption suit can deduct his costs from the deposit made by him. 4 Lah.L.J. 354=2 L. 294. Judgment-debtor is entitled to set-off a decree obtained by him against decree-holder, although the latter is alleged to be a mere benamidar in respect of the decree obtained by him. 3 M.L.J. 220. When a pauper plaintiff obtains a decree for a portion of his claim, and defendant is allowed proportionate costs the right to set-off does not arise until the claim of Government is satisfied. 9 A. 64; 10 A. 188. As regards rights of assignee of decree to set-off, see 16 C. at 621, 7 M.L.J. 227; 26 M. 428. Where there are essentially cross-decrees, the decree for the smaller sum becomes absorbed in the one for the larger sum and no order of attachment can have any operation, or affect the legality of the set-off. 2 A. 866. See also 46 C. 168=45 I.C. 241. Also 22 I.C. 73=1 L.W. 3; 1929 A. 502=117 I.C. 103. The purchaser of a decree held by A against whom B holds a cross-decree, takes it subject to a set-off on account of B's decree. 10 W.R. 32 (F.B.). See also 12 I.C. 205=4 Bur. L.T. 254. Set-off allowed against an attaching decree-holder, for sums against the original decree-holder. 28 C.W.N. 988=1925 C. 102. *Obiter*—An attaching decree-holder cannot be treated as an assignee within the meaning of R. 18, C.P. Code. 156 I.C. 477=42 L.W. 767=1935 M. 587. There is no room for the application of R. 18 (2) unless the person claiming set-off has come on the scene in time. The assignee claiming set-off must have got the assignment before applications are made to execute the decree. 20 N.L.J. 70. A judgment-debtor may set-off against the amount of the decree against him, the amount of a decree which he has obtained against the decree-holder and other persons. 9 C. 479. See also 14 A. 339, 2 A. 91. A decree in favour of all the partners of a firm in their individual capacity and a decree by the defendant against the firm can be set-off. 29 Bom.L.R. 396=104 I.C. 319=1927 B. 255. If personal remedy against the mortgagor is barred decree ceases to be a decree for payment of money and Rr. 18 and 19 of O 21 will not apply. 143 I.C. 542=14 Pat.L.T. 189.

(a) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall not be deemed to apply unless—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

Illustrations

(a) A holds a decree against B for Rs. 1,000. B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule.

(b) A and B, co-plaintiffs, obtain a decree for Rs. 1,000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this rule.

(c) A obtains a decree against B for Rs. 1,000. C, who is a trustee for B, obtains a decree on behalf of B against A for Rs. 1,000. B cannot treat C's decree as a cross-decree under this rule.

(d) A, B, C, D and E are jointly and severally liable for Rs. 1,000 under a decree obtained by F. A obtains a decree for Rs. 100 against F singly and applies for execution to the Court in which the joint-decree is being executed. F may treat his joint-decree as a cross-decree under this rule.

Execution in case of cross-claims under same decree. 19. [3, 247.] Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of money from each other, then—

Notes.

=1933 P 210 (2). It is doubtful whether a mortgage decree is a joint and several decree, for the application of the rule of set-off. 39 I.C. 560=15 A.L.J. 327. See also 57 C. 855; 7 R. 505. An appeal lies against an order passed under this rule. 16 C. 619. For a case of set-off under agreement is not under the Code, see 36 Bom.L.R. 643=1934 B. 307. Application of rule—Conditions, 38 C.W.N. 1089=39 C.L.J. 500. See also 152 I.C. 889=1934 C. 820. As to whether this rule is inconsistent with S. 49 of the Code, see 1937 A.W.R. 191=1937 A. 351.

O 21, R 19—Executing Court has inherent powers to give effect to a claim to set-off, although the case does not come within the strict terms of R. 19. 60 C.L.J. 281=39 C. W.N. 106. See also 1936 C. 409. Decree for specific performance—Direction to plaintiff to deposit certain amount within specified time—Direction that on such deposit defendant was to execute and register deed of conveyance—Costs allowed to plaintiff—Plaintiff deducted costs and interest out of amount to be deposited, and deposited only the balance. Held, that the plaintiff was entitled to make the above deductions by way of equitable set-off and that the deposit

made was proper, assuming that O 21, R. 19, C. P. Code, was inapplicable to the case independent of that rule on general principles, and in the exercise of the Court's inherent powers such a claim to set-off could be given effect to. 44 L.W. 34=1936 M. 626=71 M.L.J. 506. Although ordinarily nothing can be set-off against a rent decree, still under O 21, Rr. (2) (g) and 19, the decree should be executed in respect of only the difference between the amount of arrears of rent awarded to decree-holder and proportionate costs awarded in favour of judgment-debtor by the same decree. 13 L.R. 397 (Rev.)=17 R.D. 46. This rule applies only when a step in execution and a cross-claim have come into existence. 9 A. at 67. See also 1930 A. 726. Rule not limited to cross-claims of precisely same nature. Even costs may be set-off. 24 I.C. 376. In order to render this rule applicable, the parties entitled under the decree must hold the same character and possess identical rights for enforcing execution. 5 A. 272. Where in a suit on a mortgage some of the defendants who were impleaded as subsequent mortgagees were awarded costs against the plaintiff, the plaintiff cannot under R. 19, be allowed to deduct the amount of such costs from his decree amount because

(a) if the two sums are equal, satisfaction for both shall be entered upon the decree, and

(b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum, shall be entered upon the decree.

20. The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge.

Cross decrees and cross-claims in mortgage suits.

21 [S. 230, para. 2.] The Court may, in its discretion, refuse execution at the same time against the person and property of the judgment-debtor.

Simultaneous execution.

Notice to show cause against execution in certain cases.

22. [S. 248.] (1) Where an application for execution is made—

Notes.

the subsequent mortgagees are under no obligation to satisfy the mortgage debt due to the plaintiff 146 I. C. 525 If execution is taken out for the smaller sum this fact does not render subsequent proceedings void. 14 C 18 (P. C.). Simultaneous execution against person and property should be encouraged. Refusal to grant both the reliefs should be an exception and not a rule. 6 L. 548=93 I.C. 54=1926 L. 110. Costs awarded to garnishee in original decree—Right to set-off. 152 I C 96=4 A.W.R. 386=1934 A. 1056.

O 21, R. 20—The words, "decrees for sale in enforcement of a mortgage or charge", cannot be restricted to personal judgments such as may be given under O. 34. R. 6. 64 I.A. 67=16 P. 127=41 C.W.N. 449=1937 P.C. 39=(1937) 1 M.L.J. 254 (P.C.). The application of R 20, is not confined to cases where both decrees are mortgage decrees. A decree for sale in enforcement of a charge can, therefore, be set-off against a decree for mesne profits. (*Ibid.*) Applicability of rule when one is a money decree and the other a mortgage decree 140 I.C. 378=63 M.L.J. 722; 143 I C 542=14 P.L.T. 189=1933 P. 210 (2). The right of set-off of decree is a right created by law and must be enforced unless it is lost under the law. Right is not lost by merely asking the Court to notify the encumbrance of decree under O 21, R. 66 143 I C. 542=14 P.L.T. 189=1933 P. 210 (2).

O. 21, R. 21—Code gives decree-holder right to decide whether he should execute the decree in one way or the other or both. If Court considers he should not exercise the right in the manner he desires, it must give reasons. It is not enough to say that there is property against which he may proceed and therefore he must proceed against that first, for that is precisely what the Code states he need not do. 150 I C. 95=1934 N. 140

O. 21, R. 22.—The case of a transferee of a decree is not covered by provisions of this rule. 28 O.C. 330=2 O.W.N. 73=1925 O. 448. Provisions, if mandatory, 1928 C. 60=55 C. 96 See also 1935 R. 42. Notice under this rule presupposes the presentation of an application for execution and pendency of such application in a Court. 27 A. 557. Under the amended R. 22, there is no power in a

Court to restrict the option of the decree-holder and compel him to purchase property at any minimum price. 26 A.L.J. 1325=112 I C 620=1929 A. 85 (1). R. 22 does not apply in the case of summary procedure contained in S. 111, Madras Estates Land Act. 118 I. C. 818=1929 M. 517. Last order against party includes order which has been vacated. 9 P. 499. Order under—Judge omitting to record reasons is only an irregularity and does not render order of arrest illegal. 35 C.W.N. 228=58 C. 940 Applicability of rule to award creating mortgage for definite period and in case of failure to pay within certain period. 146 I C. 681=1933 Pesh 71.

NOTICE—Object and scope of. 146 I.C. 1024=1933 L. 826. See also 1926 C. 86. Simultaneous issue of notice under this rule and order for arrest, is not illegal. 58 C. 940=35 C.W.N. 228=132 I C. 244=1931 C. 443 But see also 11 P 143; 1932 P 315; 1932 A 692 Provisions are mandatory and proceedings without notice are void 105 I. C. 65=46 C.L.J. 579, 95 I.C. 711=1926 C. 539; 35 C.W.N. 220; 58 C. 825; 144 I.C. 14=1933 Pesh. 41; 1935 R. 42 But see 60 C.L.J. 584=39 C.W.N. 510. When an application is made simply to transfer decree for execution to another Court, no notice appears to be necessary. 22 C. at 924. Reasons must be recorded if notice is dispensed with under Cl. (2). 40 I C. 670=33 M.L.J. 539; 30 L.W. 230=1929 M. 718. But see 34 Bom. L.R. 987 (where it was held that omission to record reason does not invalidate proceedings). The notice must issue from the executing Court. To decide whether a decree is capable of execution is a judicial act and cannot be delegated. 43 C 903=20 C.W.N. 889 (F.B.). Irregular service has a different effect from that of non-service. 6 P.L.J. 319=61 I.C. 823. See also 149 I.C. 828=13 P. 467=15 P.L.T. 273=1934 P. 274, 60 C.L.J. 584=39 C.W.N. 510. In order to be valid notice must give sufficient time to enable judgment-debtor to come and oppose the application 1928 M. 1052=116 I. C. 363 Case as to sufficiency of notice 35 C.W.N. 332=134 I C. 80=1931 C. 546. Objection to the sufficiency of notice should be taken at the earliest opportunity. 21 W.R. 148 As to waiver, objection for want of notice, see 1935 R. 42=155 I.C. 959. Objection may be raised even in the appellate

(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends

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In rule 22 of O. XXI, in 1 (b) after the words "party to the decree" the following shall be inserted :—

"or where an application is made for execution of a decree filed under the provisions of section 44-A." (Act VIII of 1937).

506=40 C. 10. Notice of execution—If a judgment-debtor appears and contests the execution application the objection of non-service of notice cannot be given effect to 40 C. 59; 35 C.W. N. 9. One notice is sufficient. Once a notice is served, no fresh notice need be served for every execution application made more than one year after the last order 2 P. 916=4 P. L.T. 721. Also 74 I.C. 202; 1919 P.H.C.C. 386. Notice must issue in every subsequent execution application more than one year old unless the proviso make it unnecessary 6 Pat L.T. 290=5 P. 1=87 I.C. 531 (F.B.). Under certain circumstances, notice issued is sufficient even though some of the judgment-debtors are minors, and no guardians are appointed, for them 64 I.C. 25=35 C.L.J. 9. Notice served on an intermeddler, though sufficient for the time, will not bar the true legal representative from raising objections subsequently 63 I.C. 248=45 B. 1186. Mere issue of notice is not sufficient under this section. It must be served. 64 I.C. 476=25 C.W.N. 972. Proof of service—Order sheet stating issue and service of notice—Not conclusive. 152 I.C. 467=15 Pat L.T. 505=1934 P. 211. Service of notice by affixing it on the wall of the house in which defendant resides is sufficient 5 M.H.C.R. 100. Service of notice—Failure of judgment-debtor to object—Effect of 1933 P. 658. See also 151 I.C. 235=1934 Pesh. 64. Issuing of a notice under this rule gives a fresh starting point for limitation 15 A. 84. Even if the application under which the notice was issued was defective or irregular 34 I.C. 280=19 O.C. 17. The application for issue of notice is a step-in-aid of execution 35 C.L.J. 82=1922 C. 44; 1925 C. 668. The date of issuing a notice is the date on which Court orders

But see 4 Pat. L.J. 645=52 I.C. 125. If judgment-debtor dies after order for attachment and sale, and if legal representatives are not brought on record, the sale is valid. 45 M.L.J. 413=47 M. 63. As to the effect of non-compliance with the provisions of this rule. see 28 A. 193, 21 B. 424 (F.B.) See also 21 C. 19, 10 C.W.N. 306; 43 L.W. 238=1936 M. 205=70 M.L.J. 162 (F.B.) The mandatory character of the provision as it stands only applies when application is being first taken out. 30 L.W. 995=117 I.C. 705=1929 M. 275. Execution for arrest of judgment-debtor taken out over one year from date of decree—Summons issued without notice to judgment-debtor—Legality—Objection not raised—Order whether appealable—Revision 7 R. 110=1929 R. 161. Sale is void when no notice is issued 46 I.C. 221=27 C.L.J. 528, 41 I.C. 853=22 C.W.N. 390, 44 C. 954=21 C.W.N. 776=38 I.C. 493; 42 C. 72=27 M.L.J. 150=41 I.A. 251 (P.C.); 64 I.C. 476=25 C.W.N. 862; 48 I.C. 39=5 O.L.J. 551. But See 159 I.C. 762=42 L.W. 943=69 M.L.J. 862 (absence of notice) and 60 C.L.J. 584=39 C.W.N. 510=1935 C. 356. (Non-service of notice) where it was held that the sale would be rendered only voidable and not void thereby. The mere fact that a notice under R. 66 has been issued and has not been complied with by the legal representative does not estop him from questioning the sale under R. 90 146 I.C. 681=1933 Pesh. 71. Notice issued but suppressed—Sale set aside and fresh sale held to the knowledge of the judgment-debtor—Issue of fresh notice not necessary. 7 P. 790=1929 P. 79. Any order passed in the absence of any notice, is not binding on the judgment-debtor. 34 I.C. 144. Judgment-

Loc Ams —[Allahabad, Nagpur and Oudh] (1) In O. 21, *substitute* the words "three years" for "one year" both in R. 22 (1), (a) and in the second line of the proviso to R. 22.

(2) O. 21, R. 22.—The following proviso is added in Allahabad, Oudh and Nagpur — "provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."

[Bombay and N-W F.P.] In R. 22 of O. 21 the words "two years" shall be substituted for the words "one year" wherever they occur.

[Calcutta] O. 21, R. 22 (3).

Add the following as sub-rule (3), R. 22, O. 21—

"(3) Omission to issue a notice in a case where notice is required under sub-rule (1), or to record reasons in a case where notice is dispensed with under sub-rule (2), shall not affect the jurisdiction of the Court in executing the decree.

[Lahore] In R. 22 the words "two years" shall be substituted for the words "one year" wherever they occur.

Notes.

debtor dying during execution — Person already on record sufficiently representing the estate—Fresh notice under R. 22 is not necessary. 30 L.W. 995=117 I.C. 705. But see *contra* 11 I.C. 893=20 C.L.J. 337. Where it is said it is only voidable and not void. If the judgment-debtor had been given an opportunity to show cause why the decree should not be executed, absence of notice is not very material. 55 I.C. 816=5 Lah. L.J. 67. Where a decree is passed against father and son and son dies before institution of execution proceedings and execution is taken out against father not as heir of his son but against him personally, notice under R. 22 is not necessary. 162 I.C. 482=1936 P. 253. Non-service of notice on a defendant after attaining majority is a serious irregularity and will vitiate subsequent proceedings, until met by a valid defence. 63 I.C. 903=14 L.W. 638. Judgment-debtor's father and son—Son becoming major at execution though minor at trial of suit—Fact of majority not brought to Court's notice—Notice under R. 22 served on father but not on son—There is no illegality and son is estopped from challenging sale. 117 I.C. 705=1929 M. 275. But see 152 I.C. 467=15 Pat. L.T. 505=1934 P. 211. As to proper form of notice to legal representative, see 11 P. 241. Sale without notice to the legal representative of a deceased judgment-debtor, is not valid as against other judgment-debtor. 45 I.C. 699; but see also 86 I.C. 745=1925 C. 1257. Where however it appeared that the judgment debtor or his agents were fully aware of the steps that had been taken in connection with the sale and further the parties had agreed that the sale should take place upon the terms of the consent order and the sale was held in pursuance of that agreement, held, that under the circumstance the sale could not be avoided by judgment-debtor for want of proper notice under R. 22. 11 R. 79=143 I.C. 299=1933 R. 52. Where an adult legal representative is already on the record and notice has gone to him under R. 22, it is not mandatory that notice should also go to others. 30 L.W. 995=117 I.C. 705=1929 M. 275. Notice to wrong person as legal representative. Effect on real representative. 99 I.C. 211=13 O.L.J. 813; 3 O.

W.N. 771=1926 O. 613. Legal representatives—Hindu father—Decree against—Execution against sons—Insolvency and death of father after attachment of joint family property—Sons—If liable to be proceeded against. 38 Bom. L.R. 977. Insolvency of judgment-debtor pending execution, Official Receiver should be substituted for judgment-debtor—Sale in his absence—Void. 1929 M.W.N. 168; 28 Nag. L.R. 317. Whether sale is void, where decree-holder is not aware of insolvency. 38 C.W.N. 424. Official Receiver or Official Assignee, if legal representative. See 68 M.L.J. 78. No notice need be served on a judgment-debtor who has no interest in the property against which execution is sought. 88 I.C. 1039. Sale held while attachment subsists but without notice is not without jurisdiction, but is merely irregular and not liable to be set aside. 43 M. 57=37 M.L.J. 216. Where the legal representative of a deceased judgment-debtor makes an application to set aside an auction sale on the ground that he was not served with the requisite notice under R. 22, the sale is not invalid entirely, but only to the extent of the applicant's share. 142 I.C. 658=1933 M. 224 (2). An attachment without notice is not invalid but is a mere irregularity. 26 O.C. 288=1924 O. 120. When a notice is issued to a person as guardian, it must be presumed that he was appointed guardian by implication, by the Court. 5 C.L.J. 434. Appeal lies from an order setting aside a sale without notice to the auction-purchaser. 3 Lah. L.J. 463, 91 I.C. 711=1926 C. 539. If no reasons were recorded for dispensing with notice it being only discretionary, the appellate Court may consider the executing Court's use of its discretion on the merits. 42 M.L.J. 422=45 M. 875. Notice must go when a revivor of a decree is sought on the analogy of this rule. 33 M.L.J. 533=40 M. 1127. An applicant by a decree-holder to continue the execution proceedings against the legal representative of the deceased judgment-debtor is expressly provided for by S. 50 and R. 22. Such an application need not necessarily be made by a fresh application for execution but it may be made by an application in the pending execution against judgment-debtor. Such an application, if made, is not a 'fresh appli-

Add the following proviso at the end of the rule.

"Failure to record such reasons shall be considered an irregularity not amounting to a defect in jurisdiction."

(1) (a) Where from the particulars mentioned in the application in compliance with R. 11 (2) (ii) *supra*, or otherwise, the Court has information that the original decree-holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the transferee, where he is a party to the transfer.

In sub-rule (1) of R. 22, after cl. (b), *insert* the following—"Or (c) where the party to the decree has been declared insolvent, against the assignee or receiver in insolvency."

[Madras.] (i) *Substitute* the following for sub-rule (1) —

"(1) where an application for execution is made—

(a) more than two years after the date of the decree, or

(b) against the legal representative of a party to the decree, or

(c) where the party to the decree has been declared insolvent, against the assignee or Receiver in Insolvency, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution, if the application is made within two years from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him."

(ii) *Add* the following proviso to sub-rule (2) of R. 22 —

"Provided that no order for execution of a decree shall be invalid owing to the omission of the Court to record its reasons unless the judgment-debtor has sustained substantial injury as the result of such omission."

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part II, pp. 1394-1396.)

[Rangoon.] R. 22 (1). In clause (a) for the words "one year" *substitute* "three years"

In the second line of the proviso to sub-rule (1) of the R. 22 for the words "one year" *substitute* "three years".

23. [S. 249.] (1) Where the persons to whom notice is issued under the last preceding rule does not appear or does not show

Procedure after issue of notice.

cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the

decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

Process for Execution.

24. [S. 251.] (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall,

Process for execution.

unless it sees cause to the contrary, issue its process

for the execution of the decree.

Notes.

'cation' within S. 48 134 I.C. 730=33 Bom. L.R. 858=1931 B. 425 (2). See also 11 P. 241=138 I.C. 99=1932 P. 199. As to limitation for suit to set aside sale for want of notice, see 54 C.L.J. 591=137 I.C. 378=1932 C. 381. Decree not drawn on non-judicial stamp—Execution—Objection that decree invalid and unexecutable—Subsequent validation by affixture of proper stamp—Execution after one year from the date of original decree—Notice—Not necessary 38 C.W.N. 1118.

O. 21, R. 23—See 22 C. 558 and 28 M. 466 (F.B.). Where there is more than one legal representative of the judgment-debtor and

notice is not issued to one of them the sale is invalid only as against the person to whom no notice was given. 35 C.W.N. 220=58 C. 825. Application for substitution and execution by heirs of decree-holder—*Ex parte* order after notice to judgment-debtor—Execution case ultimately struck off—Fresh application—Plea by judgment-debtor that prior application was not in accordance with law—*Res judicata*. 1935 A.L.J. 642=1935 A. 727.

O. 21, R. 24.—The words "unless it sees cause to the contrary" do not confer any discretionary power on the Court 10 C. 817. Seal of the Court is imperatively necessary. Without it the warrant is illegal

(2) [S. 251] Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

Loc. Ams.—[Allahabad, Oudh and Calcutta] *Add* at the end of sub-clause (3) of R. 24 after the words "be executed"—"and a day shall be specified on or before which it shall be returned to Court."

[Bombay and Sind] The following proviso shall be *added* to sub-rule (2) of R. 24 of O. 21, namely,—

"Provided that a First-class Subordinate Judge may, in his special jurisdiction, send a process to another Subordinate Court in the same district for execution by the proper officer in that Court."

[Madras.] *Substitute* the following for sub-rule (3).—

"(3) In every such process a day shall be specified on or before which it shall be executed and a day shall be specified on or before which it shall be returned to Court."

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part II, pp. 1394-1396.)

[Nagpur.] R. 24.—In sub-rule (3) of R. 24 for the word "executed" *substitute* the words "returned to the Court".

[Calcutta and Rangoon.] R. 24 (3).—*Add* "and a day shall also be specified or before which it shall be returned to the Court".

25. [S. 343 includes latter part of S. 251] (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and if the latest day specified on the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

Loc. Ams.—[Allahabad and Oudh] O. 21, R. 25 (2).—*Substitute* the following for paragraph (2):—

"(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result."

[Madras.] (1) *Amend* O. 21, R. 25 (2) as follows:—

Insert the words "or cause him to be examined by any other Court" after the words "examine him"

(2) *Add* the following proviso to R. 25 (2):—"Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause"

Stay of Execution.

26. [S. 239.] (1) The Court to which a decree has been sent for execu-

Notes.

and resistance to it will be no offence 3 Pat. L.J. 636=49 I.C. 171; 5 P. 216=93 I.C. 146=1926 P. 237. As to the effect to be given to a warrant which is not signed by the Judge, see 7 A. 507; 22 C. at 604. A warrant not specifying period within which to be executed is not a good one. It should be executed only by the person authorised to execute it. It is not an offence to resist a bad warrant. 1 Pat. L.J. 550=36 I.C. 871. The warrant cannot be executed after the period specified therein has expired. 10 C. 18; 1933 A.L.J. 1=1933 A. 46. Where the process has a date fixed for its return, it

cannot be executed after that date; and any person meddling with property so attached is not guilty under S. 424, I.P. Code. 55 A. 119=144 I.C. 32=1933 A. 46. Warrant of arrest—Delegation by Nazir to subordinate officer—Permissibility. 1932 A. 227=140 I.C. 118=1932 A.L.J. 179. The period fixed may be enlarged. See S. 148.

O. 21, R. 26.—The Court which passes decree retains control of execution proceedings, and it can transfer the decree to two Courts at the same time for execution. 5 R. 397=104 I.C. 133=1927 R. 258 (2). Judgment debtor is not obliged to furnish security; he may if he wants stay. 26 P.L.R.

When Court may stay execution
 tion shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) [S. 240.] Before making an order to stay execution or to the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose conditions upon, judgment-debtor as it thinks fit.

Power to require security from, or impose conditions upon, judgment-debtor.
 Loc. Ams.—[Allahabad, Nagpur, N.W.F.P., and Oudh] In Allahabad, Oudh and Nagpur for "may" in sub-rule (3) read "shall unless good cause to the contrary is shown".

[Calcutta.] O. 21, R. 26 (3).—In sub-rule (3), R. 26, O. 21, cancel the words "the Court may require such security from, or impose such conditions upon the judgment-debtor as it thinks fit" and substitute therefor the following words:—"the Court shall require security from the judgment-debtor unless sufficient cause is shown to the contrary."

[Lahore].—For the words "the Court may" substitute the words "the Court shall, unless sufficient cause is shown to the contrary" in sub-rule (3).

[Rangoon.] R. 26 (3) For the word "may" substitute "shall, unless sufficient cause is shown to the contrary".

27. [S. 241.] No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debtor from being re-taken in execution of the decree sent for execution.

Liability of judgment-debtor discharged.

Order of Court which passed decree or of appellate Court to be binding upon Court applied to.

28. [S. 242.] Any order of the Court by which the decree was passed, or of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which decree was sent for execution.

29. [S. 243.] Where a suit is pending in any Court against the holder of

Notes.

634=1925 L 552. Execution can be stayed only by the Court to which the decree is sent for execution, and that too only temporarily. 7 A. 330. Such Court may refer the objector to the Court which passed the decree. 9 C 916, 4 M. 324; 5 C. 736; 7 B. 481. For enforcement of liability of surety, see S. 145. Power to demand security. See 91 I C. 772 =1925 L. 552. Order requiring security must specify a day on or before which it is to be given. 12 M.L.J. 34. Duty of executing Court where decree sought to be executed has been modified in appeal 4 R. 562. An appeal lies against an order requiring security. 12 C. 624. Order for stay cannot be made on application by decree-holder 133 I C. 643=1931 L. 690.

O 21, R. 28.—An *ex parte* decree obtained at L was transferred to P for execution and certain property belonging to judgment-debtors was sold. Judgment-debtors put in objections before executing Court for setting aside the sale and at the same time applied in the Court at L for setting aside the *ex parte* decree. The Court at L, at the

instance of the judgment-debtors issued a *robkar* to Court at P directing that proceedings with respect to the confirmation of the sale should be stayed, the words used being '*karwas i-mansurs mulawi ki jawe*'. Executing Court ordered that confirmation of the sale was to be postponed but rejected the objections by judgment-debtors. The sale was confirmed by successor of the Judge. Held, that the *robkar* clearly meant that all proceedings leading up to the confirmation of the sale were to be stayed and not merely postponement of confirmation of sale. Held further, that executing Court had no jurisdiction to consider the objections of judgment debtors after it had received the *robkar* and its order dismissing the objections was *ultra vires* and the order of confirmation of sale was also without jurisdiction. The executing Court having assumed jurisdiction not vested in it, the orders were open to revision. 162 I C 416=1936 Pesh 97.

O 21, R. 29.—A stay under this rule is purely a matter of discretion; the appellate Court, as a rule, will not interfere with the discretion of the Judge who passed it. 159 I C. 495

Stay of execution pending suit between decree-holder and judgment-debtor

a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

Loc Am —[Allahabad] O 21, R. 29 —Add "or any person whose interests are affected by the decree, or by any order made in execution thereof" after the words "was passed" and before the words "the Court may" in O 21, R. 29

Mode of Execution.

30. [S. 254.] Every decree for the payment of money, including a decree

Notes.

=1935 R. 389 R 29 is permissive Thereunder the Court is given the discretion of staying the execution whereas R. 92 is imperative by enacting that in the absence of an application under R 89, R 90 or R. 91 or where such application has been disallowed, the Court is bound to order confirmation of the sale. When these two rules are read together as they should be, the result is that the Court may in its discretion stay execution under R. 29 only before the operation of R 92 takes place, i.e., before the sale of the property in question where the execution is by sale of the property attached. Hence an application for stay of execution after the sale of it but before confirmation is not maintainable. 13 R. 351=156 I.C. 521=1935 R 151. Principles of the rule have no application to the granting of an injunction to postpone sale. 148 I.C. 727=1933 N. 153. Liability of a surety for satisfaction of a decree does not cease on a decree in a suit by the judgment-debtor to set aside the decree but he will be liable if the suit be dismissed in appeal unless there is a limitation as to his liability in the surety bond 3 R. 496=105 I.C. 602=1927 R. 321 Conditional order for stay has effect from date of order, even though the condition is fulfilled only later. 25 L.W. 108=99 I.C. 632=1927 M. 391. The word 'decided' means finally decided 32 C.W.N. 181. But see *contra* 58 C. 1113=35 C.W.N. 540=134 I.C. 939. The words "until the pending suit has been decided" mean after all rights of appeal have been exhausted and not merely until a decree has been passed by the Court. 32 C.W.N. 181 As to the meaning of the word "suit," see 32 C.W.N. 181. "Such Court," meaning of 122 I.C. 182 Under Ss. 37 and 42 Court to which a decree is transferred has powers to stay execution of a decree under O. 21, R. 29. 60 C. 1119=37 C.W.N. 846=57 C.L.J. 444 Court has no power to stay execution if no suit was pending against decree-holder on the part of judgment-debtor 75 I.C. 419=1923 L. 514. Court has power to stay execution when there is a suit by the judgment-debtor against the assignee-decree-holder for damages for breach of an agreement between them whereby the defendant agreed to receive in satisfaction of the assigned decree certain bonds and to get satisfaction entered up. 43 L.W. 493=1936 M. 102=70 M.L.J. 120 Execution cannot be stayed on the ground that a stran-

ger to the decree impeaches it on the ground of fraud. 8 B 532. Holder of mortgage-decree has nothing to do with disputes between the representatives of his mortgagor. Suits respecting such disputes form no ground for stay. 7 C 773. As to stay of execution of a decree on an award, see 35 B. 196. An appeal lies from an order refusing stay 20 M 366, 10 A 389. But see 9 C. 214. Also from an order staying execution 13 C. 111. Security for the full amount of the decree under R. 29, being within the discretion of the Court, High Court will not interfere in revision, unless the discretion was improperly used. 116 I.C. 101=1929 S 110. As to quantum of security, see 132 I.C. 507=33 Bom L.R. 370=1931 B. 247. Applicability of rule to execution proceedings pending before one Judge while suit is pending before another Judge of the same Court (*ibid*)

O. 21, R. 30.—Decree-holder not bound to proceed against properties first. 1926 L 110. See also 153 I.C. 422=1935 A 179 A regularly perfected attachment is an essential preliminary to sales in execution of simple money decrees. Where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void. 5 A. 86 (F.B.) The words "attachment and sale" must be taken together and not distributively 8 W R 415. Attachment is necessary only when no specific immoveable property is affected by the decree. 2 P 768=73 I.C. 598. In the case of mortgage decrees no attachment is necessary 4 B 515. See R 21 An order directing the refund of money paid as compensation under the Land Acquisition Act may be enforced under this rule. 32 C. 921 Where a judgment-debtor conceals himself, arrest and attachment of his property can simultaneously be made in execution of a decree against him even though he owns considerable property and is a *lambardar* and *kursimashin*. 145 I.C. 609=34 P.L.R. 856=1933 L. 307 (2) Where there is already sufficient security for the realisation of the decretal amount and the procedure of the decree-holder savours rather of harassment than a genuine desire to realise the decretal amount, the Court may in its discretion refuse the relief against the person of the judgment-debtor 160 I.C. 685=1936 P 28. Decree-holder made an application for execution of his simple money decree by attachment and sale of property. Judgment-debtor filed objection stating that

Decree for payment of money, for payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of judgment-debtor, or by the attachment and sale of his property, or by both.

31. [S. 259.] (1) Where the decree is for any specific movable, or for any share in a specific movable, it may be executed by the seizure, if practicable, of the movable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment-debtor, or by the attachment of his property, or by both

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and in other cases, such compensation as it thinks fit and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease

Loc Ams —[Allahabad] O 21, R. 31 —In sub-rules (2) and (3), wherever the words "six months" occur, *substitute* "three months or such extended time as the Court may, for good cause, direct"

[Calcutta] O 21, R. 31 (2) and (3).

In sub-rules 2 and 3, R 31, O. 21, *substitute* the words "three months" for the word "six months"

[Lahore] In sub-rule (2) for the word "six" *substitute* the word "three."

Add the following proviso after sub-rule (2) —

"Provided that the Court may, in any special case, according to the special circumstances thereof, extend the period beyond three months, but it shall in no case exceed six months in all"

In sub-rule (3) for the words "six months" *substitute* the following words — "three months or such other period as may have been prescribed by the Court"

[Madras] (a) *Substitute* the following for sub-rules (2) and (3) —

(2) Where any attachment under sub-rule (1) has remained in force for three months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any), to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing it which he is bound to pay, or where, at the end of three months from the date

Notes.

he had hypothecated a certain house which had been attached in lieu of the amount due to the decree-holder by a security bond and that as long as the decree-holder did not file a suit in the Court on the basis of the security bond and obtain a decree for sale and enforcement of the hypothecation lien, the said house could not be sold in execution of the decree for the amount according to law. *Held*, that although it was open to the decree holder to proceed on the security, if he desired to do so, his rights under the simple money decree did not cease to exist by reason of the hypothecation lien. 153 I C 422=

1935 A W R 534=1935 A. 179

O. 21, R 31 —Execution of money portion of decree in terms of O 20, R 10. 31 C W. N. 850. In a decree for moveable property the money value is inserted under O. 20, R 10 as an alternative if delivery cannot be had. The judgment-debtor is given no option either to surrender the property or pay the money. Money can be recovered only after delivery cannot be had. 13 M L J. 444; 39 M. 1=29 M L J 342 (F.B.) Strict proof of facts bringing the case under S. 11 of the Specific Relief Act is necessary to have the benefit of the stringent provisions of this rule.

of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease."

(b) Add the following as sub-rule (4):—

"(4) The Court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period not exceeding six months on the whole as it may think fit."

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part II, pp. 1394-1396.) [Nagpur.] R. 31.—In sub-rules (2) and (3) of R. 31, for the words "six months" wherever they occur, substitute the words "three months or such further time as the Court may, in any special case, for good cause shown, direct".

[Oudh.] In sub-rules (2) and (3), wherever the words "six months" occur, substitute "three months or such further time as the Court may, in any special case, for good cause shown, direct".

[N.-W.F.P. and Rangoon.] In R. 31, sub-rules (2) and (3) for the words "six months" substitute "three months".

Add as sub-rule (4).—"The Court may, on application extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in (all) the whole as it may think fit."

32. [S. 260] (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced [in the case of a decree for restitution of conjugal

Decree for specific performance, for restitution of conjugal rights, or for an injunction.

Leg. Ref.

¹ Inserted by Act XXIX of 1923.

Notes.

O. 21, R. 32.—Applicability to Scheme decree—Clause in decree directing payment by trustee—Executability. 71 M.L.J. 87. There is no provision of law which entitles holder of a decree for an injunction to apply to Court for the issue of a special order or notice embodying the terms of the decree and for having it served through Court on the defendant. It may be that Court has an inherent power to do so, but decree-holder has no right to ask Court to do so. Where it is not shown that defendant has done any act which can be construed as disobedience or failure to obey the decree of Court, no such application is maintainable, under R. 32, especially when it is admitted that the time for enforcing the injunction has not yet arrived. 44 L.W. 308=1936 M. 706=71 M.L.J. 286. It is futile to argue that the only remedy of a decree-holder is to bring a separate suit for damages, where the judgment-debtor deliberately chooses to disobey the injunction issued by the Court permanently prohibiting him from holding a fair on certain lands. R. 32 specifically provides for the execution of a decree for injunction. 154 I.C. 744=1935 A.W.R. 406=1935 A.L.J. 416=1935 A. 480. As to limitation for executing a decree for injunction, see 37 P.L.R. 576=1935 L. 702. Relief claimed must be consequential upon an infringement of a legal right 44 I.C. 737=3 P.L.J. 106. Decree for specific performance on contract of sale—Omission in plaint and in decree as to delivery of possession—Executing Court not debarred from granting possession to plaintiff 12 Pat L.T. 636=131 I.C. 529=1931 P. 179. (38 M. 698, Diss.) Sub-rule (5) is new. It has been added to remedy a defect disclosed in practice See 8 C. 174 and 18 W.R. 282. In executing

a decree for injunction, the Court is not justified in ordering Police to interfere or in appointing a Commissioner to see that the decree-holder is not interfered with. 40 A. 648=48 I.C. 26. When a decree directs a wall to be demolished, a second wall built in its place, cannot be demolished by executing the same decree. Another suit must be filed 59 I.C. 594=20 P.W.R. 1921. The Court can enforce obedience by punishment but cannot order a security bond. 3 L.W. 261=32 I.C. 698. The rule applies to a compromise decree as well, and on breach of the decree execution must be taken and no separate suit for damages will lie. 45 I.C. 689=7 L.W. 563, 1930 M.W.N. 609. Where a Court dismisses a petition for execution on the ground that the petitioning decree-holders had not then afforded to the judgment-debtor, an opportunity of obeying the decree, a subsequent application made after such opportunity had been afforded is not barred. 21 C. 784 (P. C.); 7 Bom H.C. (O.C.J.) 122. A decree for the restitution of conjugal rights between Mahomedans or Hindus, may be enforced under this rule. 1 B. 164, 9 Bom.H.C.R. 290, 11 M.I.A. 551. See also 1 A. 501, 11 M. 327. Under O. 21, R. 32, C.P. Code, if the judgment-debtor wilfully refused to obey the decree, the only remedy open to the decree-holder is to proceed to attach the property of the judgment-debtor. The Court cannot compel the wife against whom a decree for restitution of conjugal rights has been passed to go and live with her husband. 150 I.C. 307=35 P.L.R. 655. An effective decree for restitution of conjugal rights, where the wife is a minor, can be made by ordering her parents to hand her over and in default Court can proceed against their person and property 23 I.C. 828. If a person who has been directed to refrain from preventing his daughter returning to her husband's house, permits her to reside at his house, such con-

rights by the attachment of his property, or, in the case of a decree for the specific performance of a contract or for an injunction] by his detention in the civil prison, or by the attachment of his property, or by both

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Illustration.

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the costs of such removal from A in the execution proceedings.

Loc Ams—[Allahabad and Oudh.] O 21, R 32—In sub-clause (3) of O. 21, R. 32 read "three months" for "one year" and at the end of sub-clause (3) add the following—

Notes.

duct does not amount to interference. 1 A 501. Art. 182, Limitation Act, does not apply to an application under this rule. 28 A. 300. The decree-holder is not bound to take action on every petty infringement. 29 M. 314. A valid subsisting attachment is a condition precedent to a sale under this section.

O. 21, R. 32 (1)—Decree for injunction against father as manager of joint family may be executed against son as legal representative. 33 Bom L.R. 1118=134 I.C. 968=1931 B. 482; 55 B. 709 (doubting 42 B. 504). See also 1931 B. 280.

O. 21, R. 32 (2)—Object of rule explained. 56 C.L.J. 140.

O. 21, R. 32 (3)—Where property is sold under this rule, judgment-debtor has no *locus standi* to apply to set aside the sale under O. 21, R. 89. 56 C.L.J. 140.

O. 21, R. 32 (4)—A wife sued her husband for return of her jewels or their value and obtained decree in December, 1928. Prior to that the husband sued his wife for restitution of conjugal rights and obtained a decree therefor in March, 1929, and he also

got an attachment of the wife's decree in March, 1929. In 1930, both parties applied to execute their respective decrees. Court while allowing the husband's prayer for attaching the wife's decree rejected the wife's prayer to allow execution against the person of her husband for money due to her under her decree, apparently on the ground that her decree was under attachment. The wife having appealed against both orders, held, that the attachment effected in March, 1929, by the husband had ceased under R. 32 (4) after one year and that the new attachment ordered in 1930 was not therefore bad; that the fact that her decree was under attachment was no bar to her executing that decree, so long as R. 53 (2) that the proceeds are to go in satisfaction of the decree against her is not disregarded. 41 L.W. 694=1935 M. 413=68 M.L.J. 461.

O. 21, R. 32 (5).—Rule applies to cases of mandatory injunctions and not to cases of simple prohibitory injunction. 38 C.W.N. 101. See also 1935 A.W.R. 406=1935 A.L.J. 416.

"The Court may for good cause extend the time". in **Oudh add** "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year".

[Calcutta.] O. 21, R. 32 (3).

Substitute the words "three months" for the words "one year" in sub-rule (3), R. 32, O. 21.

[Lahore.] In sub-rule (3) for the words "one year" substitute the words "three months", and add the following proviso to sub-rule (3) —

"Provided that the Court may for sufficient reasons, on the application of the judgment-debtor, extend the period beyond three months, but it shall in no case exceed one year in all."

In sub-rule (4) for the words "one year", substitute the words "three months or such other period as may have been prescribed by the Court."

[Madras.] Substitute the following for sub-rules (3) and (4) —

"(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for three months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any), to the judgment-debtor on his application. The Court may on application extend the period of three months mentioned herein to such period not exceeding one year on the whole as it may think fit."

"(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing it which he is bound to pay, or where, at the end of three months from the date of the attachment or of such extended period which the Court may order under sub-rule (3), no application to have the property sold has been made, or if made has been refused, the attachment shall cease."

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part II, pp. 1394-1396.)

[Nagpur.] In R. 32—

(a) in sub-rule (3)—

(i) for the words "one year" substitute the words "three months";

(ii) after the word "application" insert the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year"; and

(b) in sub-rule (4), for the words "one year" substitute the words "three months, or such further time as may have been fixed by the Court under sub-rule (3)".

[N.-W.F.P.] In sub-rule (3) for the words "for one year", substitute the words "for three months or such further period not exceeding one year in the whole as may be fixed by the Court".

[Oudh.] In Oudh substitute "three months, or such further time as may have been fixed by the Court under the previous sub-rule" for "one year" in sub-rule (4) of R. 32, O. 21.

[Rangoon.] R. 32 (3).—For the words "for one year" the words "for three months or for such further period, not exceeding one year in the whole, as may be fixed by the Court on the application of the judgment-debtor" shall be substituted.

33. (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree ¹[against a husband] for the restitution of conjugal rights or at any time afterwards, may order that the decree ²[shall be executed in the manner provided in this rule].

Discretion of Court in executing decrees for restitution of conjugal rights.

(2) Where the Court has made an order under sub-rule (1) ³ [***] it may order that, in the event of the decree not being obeyed within such period

Leg. Ref.

¹ Inserted by Act XXIX of 1923.

² Substituted for words "shall not be executed by detention in prison" by *ibid*.

³ The words "and the decree-holder is the wife" omitted by *ibid*.

Notes.

O. 21, R. 33 (1).—For form of decree for restitution of conjugal rights, see 59 I.C. 887. When at the time of suit the husband is out of caste, the Court can pass a decree conditioned on plaintiff's obtaining restoration to caste 8 A. 78. Ordinarily a decree for restitution of conjugal rights against a wife should direct that it should not be executed

by detention of the wife in prison 44 B. 972 = 59 I.C. 361; 73 I.C. 716 = 1924 L. 244. Also 10 I.C. 177. But if she persists in leading an immoral life, she must be detained in jail. 75 I.C. 24 = 1923 L. 595 (2). A Hindu wife is justified in leaving her husband's protection if he habitually treats her with cruelty 19 C. 84. As to what amounts to cruelty, see the judgment of Mookerjee, J., in 34 C. 971. In an action for specific performance of a contract to sell certain property with cultivating rights Court can compel defendant under cl. (5) to prosecute the application before the Revenue Divisional Officer thus enabling the performance of the contract. 1926 N. 465.

as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same, either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

34. [S. 261.] (1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) [S. 262.] The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely:—

“C. D., Judge of the Court of
(or as the case may be), for A. B., in a suit by E. F., against A. B”,
and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officer as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

35. [S. 263.] (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been

Notes.

O. 21, R. 34.—As to the procedure to be adopted in the case of failure on the part of a defendant to execute a document as directed in the decree, see 10 C.W.N. 345. A decree directing transfer of shares and registration in favour of the plaintiff can be executed on defendant's failure to obey the directions. 41 I.C. 77. A defendant can execute the decree in his favour. 24 Bom.L.R. 496=46 B. 990. As to the period of limitation within which an application should be made, see 10 B. 91. A compromise decree providing for the execution of document can be enforced under this rule and no suit is necessary. 61 I.C. 535=25 C.W.N. 68. Execution of compromise decree providing for execution of patta.

95 I.C. 179=1926 C. 975. The Registrar of High Court has authority, when so directed by an order of Court, to execute a conveyance on behalf of a party refusing to do so, so as to pass his estate, but has no authority to bind him by entering into any covenants on his behalf. 16 C. 330. Action taken by Court in execution of decree for specific performance of a contract of lease, is a proceeding in the suit and *lis pendens* does not cease. 48 I.C. 188=14 N.L.R. 176.

O. 21, R. 35. SCOPE OF RULE.—“Any person bound by the decree” includes besides the judgment debtor, any person who may be deemed to be bound under law, e.g., a sub-lessee in respect of a decree for ejectment against the lessee 35 C.W.N. 1132. Under

adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access,

Notes.

R. 35 (1) formal delivery is actual delivery. It is symbolic when under R. 35 (2), 36 or 96. Scope—Co-sharer not in possession—Decree for possession in favour of, against another in possession—When can be given. 112 I.C. 143=51 A. 303=1928 A. 472 (F.B.). When possession under a decree for possession has not been obtained, subsequent suit for possession is barred. 3 Lah L.J. 138=59 I.C. 770. But see 35 C.W.N. 12=131 I.C. 698=1931 C. 427. A decree-holder entitled to possession of land is entitled to the land and the standing crops thereon 26 M. 438. Also to any erections made thereon after suit. 18 W.R. 527. As to right of judgment-debtor's right to remove crops after delivery of possession, see 61 C.L.J. 586. When possession of a village is decreed, the decree-holder is entitled to possession of the account-books and other papers relating to the village. 11 B. 485. A decree may be executed partly under this rule and partly under R. 36 7 W.R. 376; 9 W.R. 454. See also 17 W.R. 80; 5 B. 554 and 10 C. 993. Delivery of possession to an agent without power of attorney is valid. 13 N.L.R. 87=40 I.C. 689. A reasonable degree of force can be used to remove persons bound by decree to vacate. 42 C. 313=28 I.C. 1000. Possession actually given is not the less effective by reason of an irregularity in taking it. 5 B. 387. Decree for symbolical possession—Non-compliance with requirements of R. 35 (2) and possession not delivered as required by law—Suit for possession by successor-in-interest of decree-holder—Limitation. 145 I.C. 345=34 P.L.R. 839=1933 L. 427. See also 1936 L. 749 (case of joint possession). An application for actual possession can again be put in after it has once been dismissed after delivery of formal possession. 45 I.C. 7. Decree for possession once satisfied by the plaintiffs being put in actual possession, cannot afterwards be re-executed on plaintiffs being dispossessed 6 W.R. Mis. 108. Nor on the ground that he got only symbolical possession in the prior proceedings. 60 C.L.J. 246. See also 32 I.C. 44=29 M.L.J. 504. But where delivery of possession in execution of a final decree for partition, which entitled applicant to get actual possession, is not complete, owing to existence of some huts standing on a portion of the land, applicant can maintain a second application and Court acts within its jurisdiction in ordering a fresh delivery of possession by removing the huts 152 I.C. 764=38 C.W.N. 832=1934 C. 793. When a stranger obstructs delivery, remedy is criminal pro-

ceedings or a suit for damages. 43 M.L.J. 179=1923 M. 25. Symbolic delivery by mistake where actual delivery ought to be given is as good as actual delivery, so far as regards persons bound by the decree. 71 I.C. 999=3 Pat. L.T. 628. See also 97 I.C. 705. (2). Symbolic delivery will interrupt judgment-debtor's adverse possession 24 I.C. 850=10 N.L.R. 60. Also 43 I.C. 268=34 M.L.J. 97 (P.C.); 96 I.C. 481=1926 C. 1172; 1926 L. 35; 1936 A.W.R. 69=1936 A.L.J. 80=1936 A. 85. But the fact that the person in possession continues to be in enjoyment of the property just after the formality under R. 35 is over, does to all intents and purposes amount to an immediate dispossession of the decree-holder after he has been put in possession. The decree-holder must under Art. 142, Limitation Act, come within 12 years to recover possession again and if he does not, his suit is time barred. 160 I.C. 441=1936 Pesh. 7. Actual possession must be given if the judgment-debtor is in possession. Mere formal delivery will not prevent limitation running in favour of the judgment-debtor 71 I.C. 885=1924 L. 301; 1925 M. 1140=49 M.L.J. 303. The sub-rule (2) merely lays down the manner of executing a decree for joint possession. 11 I.C. 87. See also 20 B. 351. The prescribed procedure for symbolic delivery must be followed. When no actual or symbolic delivery has been obtained, no subsequent suit lies for fresh possession. 20 P.R. 1917=39 I.C. 753. Failure to affix warrant of delivery vitiates symbolic delivery. 1923 L. 693=74 I.C. 1; 55 I.C. 19=2 Lah.L.J. 202. But where with the approval and consent of the judgment-debtor, delivery of possession was proclaimed merely by beat of drum without affixing a copy of the warrant on the property as required by R. 35 (2), the delivery of possession must be deemed to be valid and effective as against the judgment-debtor. 166 I.C. 404=1937 O.W.N. 58. Joint possession of one co-sharer as against another in actual enjoyment can only be symbolical 19 A.L.J. 783=63 I.C. 806. It is neither real possession nor equivalent to it. 36 B. 373=14 I.C. 447. Symbolical delivery of possession in favour of some co-sharers—Effect of—No right to eject other co-sharer in possession—Separate partition proceeding necessary. 14 L.R. 150 (Rev.)=17 R.D. 249. Publicity of delivery is what sub-rule (2) requires. 68 I.C. 182=2 Lah.L.J. 563. A decree for joint possession is valid unless unreasonable. 34 A. 150=13 I.C. 79. A usufructuary mortgagee of father's share cannot have joint possession.

the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

36. [S. 264] Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

Arrest and detention in the civil prison.

37. [S. 215-B.] (1) Notwithstanding anything in these rules, where an application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court ¹[shall] instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be speci-

Leg. Ref.

¹ In sub-rule (1) of rule 37 of Order XXI for the word "may" the word "shall" has been substituted, and to the sub-rule the proviso has been newly added by Act XXI of 1936.

Notes.

with the son 25 I.C. 401=16 M.L.T. 229. Delivery of symbolical possession—Decree providing for *khas* possession—Remedy of decree-holder. 35 C.W.N. 12=131 I.C. 698=1931 C. 427. Presumption that formalities as to delivery have been complied with, *see* 31 P.L.R. 1001=132 I.C. 181. Where judgment-creeitor fails to apply for removal of an obstruction under O. 21, R. 97 within 30 days he is not debarred from making an application under R. 35 to obtain a fresh warrant for possession. He need not file a suit for that purpose. Article 165 of the Limitation Act has nothing to do with such an application for warrant for possession but it will be applicable notwithstanding the fresh order for possession to a subsequent application in respect of the same obstruction. And if the obstruction is by the same person and in the same character, the mere fact that the decree-holder is applying under a fresh warrant for possession would not make the obstruction a fresh obstruction. 146 I.C. 112=35 Bom.L.R. 1033=1933 B. 457 (F.B.)

O. 21, R. 36.—Rule applies only to person holding exclusive possession of property and not bound by the decree. 97 I.C. 170=1926 L. 668. There is nothing in this rule to prevent the applicant from obtaining possession without the aid of the Court. 22 W.R. 406; 15 W.R. 99; 18 C. 520; 13 M.L.J. 375. No delivery is effected when the provisions of this rule are not complied with. 41 I.C. 752=52 P.W.R. 1917. Symbolic possession in case not contemplated under the Code is not effective. 46 B. 932=24 Bom.L.R. 499. Where there is obstruction to actual posses-

sion by one entitled to a right of residence, only symbolic delivery under this rule can be given. 201 C. 571. The present rule applies when the property is in the possession of a mortgagee. 52 I.C. 269=22 O.C. 278. Symbolical possession under the rule will give the purchaser a fresh starting point for limitation. 105 I.C. 781=1928 O. 8. As to whether symbolical possession irregularly delivered interrupts adverse possession, *see* 1935 L. 612. After formal possession is given under this rule the plaintiff is entitled to bring a fresh suit to eject the defendant. 11 C. 93. If there is a decree for partition and the lands are in possession of tenants, delivery can be given under this rule. 26 M. 76. No possession need again be claimed when a usufructuary mortgagee in possession gets a decree for pre-emption. 23 I.C. 876=12 A.L.J. 521. When the decree-holder asked for possession with the crops on the land, but possession of land only was given, he should again ask for whole possession and not for crops only. 97 I.C. 567=1927 M. 71.

O. 21, R. 37.—(N.B.—Note the amendment made in the rule by Act XXI of 1936, which lays down when notice is not obligatory) An application for a warrant of arrest may be presumed when the warrant is issued in the presence of the decree-holder's pleader. 19 I.C. 394=15 Bom.L.R. 205. Arrest may be applied for only when means, other than by sale of land, fail. 73 P.L.R. 1915=29 I.C. 152. But *see* 7 Lah.L.J. 165=1925 L. 379. Where the whole of the property of the judgment-debtor is under attachment and it is not shown that he has other means of satisfying the decree, the order of the executing Court refusing to arrest the judgment-debtor is justified. It is open to the decree-holder to proceed with the execution of his decree by attachment and sale of the judgment-debtor's property. The order of High Court staying the sale of

fied in the notice and show cause why he should not be committed to the civil prison:

[Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment-debtor is likely to abscond or leave the local limits of the jurisdiction of the Court.]

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor.

38. [S. 337.] Every warrant for the arrest of a judgment-debtor shall direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

Warrant for arrest to direct judgment-debtor to be brought up.

Loc. Am.—[Rangoon.] In O. 21, the following shall be inserted as R. 38-A:—
"38-A. The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be, and shall not be charged to the judgment-creditor."

39. [S. 339.] (1) No judgment-debtor shall be arrested in execution of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer in charge of the civil prison.

(5) [S. 340.] Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit:

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

Loc. Ams.—[Allahabad, Calcutta, Lahore and Oudh] In sub-rule (5) *delete* the words "in the civil prison" occurring in two places.

[Madras.] O. 21, R. 39.—*Delete* the present sub-rules (4) and (5) of R. 39 of O. 21 and *substitute* the following:—

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil

Notes.

the property in execution of another decree is no bar to his proceeding against that property. 1934 L. 166 Grounds for belief of ill-health are sufficient to exercise discretion to issue notice in the first instance. 9 I.C. 746=14 O.C. 36. A warrant of arrest fixing date of return should be issued when applied for, even though the judgment-debtor resides outside the jurisdiction of the Court. Such warrant should be executed by Court having jurisdiction 44 I.C. 296=3 Pat L.J. 95. When notice has been served on individual members of a firm, even though the firm is insolvent, they may be proceeded against per-

sonally. 1925 L. 379=7 Lah L.J. 165. Execution by sale—Mortgage decree—Executing Court cannot direct arrest of judgment-debtor. 121 I.C. 293=1930 L. 103. Simultaneous issue of notice and warrant is illegal. 1932 A. 692; 11 P. 743=1932 P. 315=13 Pat. L.T. 502. But see also 58 C. 940=35 C.W.N. 228=1931 C. 443.

O. 21, R. 38.—When a warrant directs a Nazir to arrest the judgment-debtor, the Nazir may authorise a deputy to execute the warrant, by endorsing his name on it. 6 A. 385. As for the liability of the Nazir for negligence in having allowed the debtor to escape, see 4 B. 65.

prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and cost of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit.

[Nagpur] To sub-rule (1) of R. 39 the following words shall be added, *viz.*, "and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court-house." For sub-rules (4) and (5) of R. 39, the following sub-rules shall be substituted, namely:—

"(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and the cost of the conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit."

[N-W.F.P.] For sub-rule (4) substitute the following—"All payments shall be made to the officer-in-charge of the civil prison." In sub-rule (5), omit the words "in the civil prison."

[Rangoon] In Rule 39 (5), the words "in the civil prison" shall be deleted. In O. 21, R. 39, the following shall be inserted as sub-rule (2-A) —

"(2-A) When a civil prisoner is kept in confinement at the instance of more than one decree-holder, he shall only receive the same allowance for his subsistence, as if he were detained in confinement upon the application of one decree-holder. Each decree-holder shall, however, pay the full allowance for subsistence, and when the debtor is released, the balance shall be divided rateably among the decree-holders and paid to them."

1[40. (1) When a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his

Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison.

Leg. Ref.

¹ New R. 40 of Order 21 has been substituted for old R. 40 together with any alterations therein or additions thereto made under S. 122 of the Code (Act XXI of 1936)

Notes.

O. 21, R. 40.—"Other sufficient cause" must be based on evidence. 54 I.C. 782. Security under cl. (3) must be substantial and not illusory. (*Ibid.*) Court is not bound to enforce execution by arrest of the judgment-debtor in every case. Court, on the other hand, has a discretion under R. 40 to disallow application for arrest on any of the grounds specified in that rule, though the rule does not provide that recourse must first be had against the property of the debtor. 153 I.C. 506=1935 O.W.N. 17=1935 O. 57. Judgment-debtor practising lawyer and owning properties—Difficulty in raising money—Ground for exemption from arrest and detention. Such circumstances constituted "sufficient cause" preventing the judgment-debtor from being able to pay the amount of the decree within the meaning of

O. 21, R. 40, and that it was a proper case in which the Court should in the exercise of its discretion refuse to enforce execution by arrest. 153 I.C. 506=1935 O.W.N. 17=1935 O. 57. Where judgment-debtors who were arrested pleaded poverty and inability to pay and Court ordered pending inquiry into those facts the release of judgment-debtors on furnishing security and they put in a surety bond which stated that the surety would be liable if judgment-debtors failed to appear or pay the decretal amount and Court having ultimately rejected the plea of judgment-debtors the decree-holder sought to enforce the security bond. *Held*, that Court had no jurisdiction to take the bond and that it could not be enforced. 35 P.L.R. 101=1934 L. 217. A surety under R. 40 (3) for production of the judgment-debtor cannot be rendered liable under S. 145 for the debt due. 18 R.D. 243=15 L.R. 285 (Rev.). The words "some part thereof" in sub-S. (2) (d) refer to payment of money generally and are not limited to instalment decrees only. 7 Bur.L.T. 242=23 I.C. 833. Grounds for refusal of the arrest of judgment-

(2) Pending the conclusion of the inquiry under sub-rule (1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.

(3) Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of S. 51 and to the other provisions of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest:

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) When the Court does not make an order of detention under sub-rule (3), it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.]

Loc Ams—[Allahabad.] Add the following proviso to R. 40 (5):—

"Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding 10 days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period, if the decree be not sooner satisfied. When the Court sees fit to leave a judgment-debtor in the custody of an officer of the Court and the judgment-debtor does not pay the costs incidental to such intermediate custody, it shall be competent for the Court to require the decree-holder, on pain of his application for arrest being disallowed, to pay into Court such sum as the Judge deems sufficient to cover such costs including fees for process-server, subsistence of the judgment-debtor and cost of conveyance, if any; and sums disbursed by the decree-holder under this proviso shall be deemed to be costs in the suit."

[Madras.] Substitute for old Rule 40—"40 (1) When a judgment-debtor appears before the Court in obedience to a notice issued under R. 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, and it appears to the Court that an insolvency petition has been presented by or against the judgment-debtor or that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the burden of proving the inability to pay being on the judgment-debtor, the Court may, upon such terms (if any) as it thinks fit, make an order disallowing the

Notes.

debtor. 94 I.C. 279 (1)=27 P.L.R. 229. If debtor can pay a substantial part of the decretal amount, or instalment, and does not do so, poverty is no plea for release. (*Ibid.*) When all the properties movable and immovable have been sold in execution by other creditors, it would be improper to order his imprisonment. 4 Lah.L.J. 266=1922 L. 259, or when the judgment-debtor's property is vested in receiver on an application by another creditor for the judgment-debtor's adjudication in insolvency. 1931 L. 121=131 I.C. 208. The mere fact that the Insolvency Court has granted leave to execute a decree, does not take away the duty of the executing Court to satisfy itself as to whether all the circumstances exist which would justify ordering arrest of the insolvent debtor. 13 Rang. 623=1935 Rang. 415. The lunacy of a judgment-debtor is a good cause for disallowing an application for his arrest. 22 B. 961. See 22 B. 731 under S. 55. Release of judgment-debtor—Matters to be consider-

ed by Court—Failure by Court to consider such matters—Procedure to be followed. 118 I.C. 312 (2)=1929 P. 728. Where a judgment-debtor against whom a warrant is issued applies to Court for an enquiry into his pauperism after the issue of a warrant against him without notice and before he is arrested, it is not necessary to invoke the provisions of S. 151, as it is still open to him to surrender himself in Court and then to move it to pass an order under R. 40 (3). 116 I.C. 101=1929 S. 110. The order under O. 21, R. 40 of the C.P. Code need not be in writing and when the Court acting under the proviso to R. 40 (5) directs the judgment-debtor, when arrested, to pay detention batta for two days, it means he is allowed two days to satisfy the decree but he is in the custody of the officer. If he escapes during that period, he is guilty of an offence under S. 225-B of the Penal Code. 142 I.C. 242 (1)=1933 M. 278.

APPEAL—See 21 M. 29. See also 144 I.C. 255=14 Pat.L.T. 271=1933 P. 248 (1).

application for his arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-rule (1), the Court shall take into consideration any allegation of the decree-holder touching any of the following matters, namely,—

(a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account;

(b) the transfer, concealment or removal by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree,

(c) any undue preference given by the judgment-debtor to any of his other creditors;

(d) refusal or neglect on the part of the judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it;

(e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court, for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1), it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provisions of this Code, commit him to the civil prison.

Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding ten days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

When the Court sees fit to leave a judgment-debtor in the custody of an officer of the Court and the judgment-debtor does not pay the costs incidental to such intermediate custody, it shall be competent for the Court to require the decree-holder, on pain of his application for arrest being disallowed, to pay into Court such sums as the Judge deems sufficient to cover such costs including batta for process-server, subsistence of the judgment-debtor and costs of conveyance, if any, and sums disbursed by the decree-holder under this proviso shall be deemed to be costs in this suit.

(5-A) During the temporary absence of the Judge who issued the warrant under R. 37 or 38, the warrant of committal may be signed by any other Judge of the same Court or by any Judicial Officer superior in rank who has jurisdiction over the same locality, or where the arrest is made on a warrant issued by the District Judge, the warrant of committal may be signed by any Subordinate Judge or District Munsif, empowered in writing by the District Judge in this behalf.

(6) No judgment-debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (2) unless and until the decree-holder pays into Court such sum as the Judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort for the journey to and from the prison. Sub-rule (5) of R. 39 shall apply to such payments."

Attachment of Property.

Examination of judgment-debtor as to his property.

41. [Cf. S. 267.] Where a decree is for the payment of money, the decree-holder may apply to the Court for an order that—

Notes.

O. 21, R. 41—This rule applies to all the properties of judgment-debtor out of which decree can be satisfied either by delivery in obedience to decree or by sale. 17 B. 514 In a suit for recovery of money due on settled accounts, an application was filed for appointing a receiver and for an order directing defendant to produce certain books of account not connected with the suit in order that plaintiff, if he gets a decree, may be in a better position to realise his decree debt. *Held*, the

Court cannot order the production. 57 M. 635=148 I.C. 79=1934 M. 199=66 M.L.J. 498. Court cannot prescribe to decree-holder what property he is to attach. 3 W.R. Mis. 16. Judgment-debtor can be examined at any stage of the execution proceedings. Order for such examination may be made *ex parte*. On proper cause being shown, such order may be set aside. It is not necessary that all usual methods of execution should be exhausted before applying this rule. 34 I.C. 287=43 C. 285.

- (a) the judgment-debtor, or
- (b) in the case of a corporation, any officer thereof, or
- (c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

42. [S. 225.] Where a decree directs an inquiry as to rent or mesne profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment of movable property other than agricultural produce in possession of judgment-debtor.

43. [S. 269, paras. 1 and 2.] Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Notes.

O. 21, R. 41 (c) —Garnishee should deny or admit the debt in express words in the affidavit and in the event of admitting the debt, the extent of such debt. 1933 S 350. There is no rule under which a copy of the petition by which a garnishee had denied the claim of judgment-debtor, could be required to be given by him to decree-holder. Even if there is such a rule, it is the duty of Court to investigate the claim and not to dispose of the matter summarily without hearing the garnishee. O. 17, R. 3, gives a discretion to Court in the matter and does not make it obligatory to proceed forthwith. 151 I.C. 679=1934 L. 560

O. 21, R. 42.—The rule does not apply to a suit for partnership accounts 93 I.C. 306=1926 S 178. The words "any other matter" in the rule cannot include a preliminary decree directing the taking of accounts in a partnership suit. 40 C.W.N. 1393. This rule covers also an enquiry into accounts in a scheme suit under S 92 41 I.C. 89. On this section, see also 19 C 139

O. 21, R. 43.—A person who attaches under a warrant must have the warrant with him. Else the taking of the property is not lawful 27 A. 258. As to responsibility of attaching officer, see 1931 A. 567=134 I.C. 836=1931 A.L.J. 865 (F.B.) (Overruling 48 A. 510). "Seize," meaning of—Removal of articles with help of coolies—Amin present—Attachment deemed to be effected. 1930 M.W.N. 487 Attachment of cattle—Actual physical seizure not necessary. Where cattle have already been tied and secured, it is sufficient if the officer goes sufficiently near them to explain to others that he has come to attach the property and to intimate his intention to do so. 32 L.W. 23=1930 M. 670 Removal of property by attaching officer is illegal. 1928 C. 815=56 C. 460=48 C.L.J. 288. A

warrant of attachment affixed to the outer door of a warehouse in which goods belonging to the judgment-debtor were stored, constitutes a good attachment although the door is not broken open and goods taken physical possession of. 27 M. 346 See also 11 B at 454; 30 M. 207. The rule does not affect the liability of a surety for attached movables if he fails to produce them. 62 I.C. 719=19 A.L.J. 247. The watchmen appointed by the Commissioner to look after the attached property are not liable at the instance of the judgment-debtor for the value of missing articles, either as custodians or as sureties. The person responsible for the safe custody of the articles is the attaching officer himself. 144 I.C. 361=1933 A.L.J. 579=1933 A. 385. A *suparddar* of attached property must produce them when called upon, even though the execution application is dismissed for default, and the attachment ends. 51 I.C. 653=60 P.R. 1919. He is bound to hold the property till the *amin* asks for it or directs him to hand it over to the judgment-debtor. If the same property is re-attached pending the first attachment, it is not necessary that the fresh order of attachment should be communicated to *suparddar*. It is enough if the order is communicated to the *amin*. Consequently where the *suparddar* having no knowledge of the subsequent attachment of the property in his custody, makes over the property to judgment-debtor on satisfaction of the decree in which it was first attached, he cannot plead want of notice of the second attachment so as to escape his liability. 149 I.C. 950=1934 A.L.J. 1200=1934 A. 357. The proper execution procedure against a surety for attached property is to sue on the security bond first having it assigned in the decree-holder's name. 39 M.L.J. 472=60 I.C. 134. See also 47 I.C. 956=16 N.L.R. 178 Attachment of

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

Loc Ams —[Calcutta.] O. 21, R. 43.—O. 21, R. 43 shall read as follows:—

Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and save as otherwise prescribed, the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof:

Provided that, when the property seized does not, in the opinion of the attaching officer, exceed twenty rupees in value or is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

[Lahore.] O. 21, R. 43.—The Rule was numbered as sub-rule (1) and the following further proviso and sub-rules (2) and (3) were added.—

“and provided also, that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder, or of any person claiming to be interested in such property, leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15-A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided, and the remuneration of the officer for a period of fifteen days at such rate as may from time to time be fixed by the High Court be paid in advance; or

(c) in the charge of a village lambardar or such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No. 15-B of Appendix E with one or more sureties for its production.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in R. 55, 57 or 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) When property is made over to a custodian under sub-clause (a) or (c) of clause (1), the schedule of property annexed to the bond shall be drawn up by the attaching officer in triplicate, and dated and signed by—

(a) the custodian and his sureties;

(b) the officer of the Court who made the attachment,

(c) the person whose property is attached and made over,

(d) two respectable witnesses.

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian.”

[Note.—Additional Forms Nos 15-A and 15-B have been inserted See App E] Rules 43-A to 43-D—

“43-A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to R. 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

(3) A custodian appointed under the second proviso to R. 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him.

(4) When any property is taken back from a custodian, he shall be granted a receipt for the same

43-B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is retained shall provide for its

Notes.

movables—Bond executed by attaching creditor on taking possession of goods—Subsequent sale—Order for production of goods — Non-compliance — Forfeiture of bond is illegal 1927 M.W.N 919. Mere application for attachment of “movable property” is not sufficient to attach a debt due from third parties. 9 I.C. 240 A right to sue for breach of contract cannot be attached. 1925 S 98. The attaching officer

entrusting the attached property to a third person, without the permission of the Court must, if the property be lost, make good the loss himself. 95 I C 828=48 A. 510=1926 A. 406. See also 1934 A. 357; 1933 A. 385. Attachment removed — Suit for declaration by decree-holder that property belonged to judgment-debtor — Decree not by itself effective to restore attachment—Fresh seizure necessary 1930 R. 247=8 R. 491.

maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock, from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

43-C. When an application is made for the attachment of live-stock or other movable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for 15 days. If within three clear days, before the expiry of any such period of 15 days the amount of such costs for such further period as the Court may direct be not paid into Court, the Court on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

43-D. Any person who has undertaken to keep attached property under R. 43 (1) (c) shall be liable to be proceeded against as a surety under S. 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him."

[Madras.] For O 21, R. 43, substitute the following rules, *viz.*—

43. (1) Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once; and

Provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15-A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for; or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may, from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in R. 55 or R. 57 or R. 60 of this Order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment

43-A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to R. 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43-B (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited under these rules be recovered as costs of the attachment from any party to the proceedings.

[Note.—An additional Form, being Form No. 15-A, has been inserted in App E.]

[N-W.F.P.] Add the following further proviso.—

Provided further that when the attached property consists of live-stock or articles which cannot conveniently be removed, and the attaching officer does not act under the first proviso to this rule, he may leave it in the village or place where it has been attached in the charge of a village lambardar or such other respectable person as will undertake to keep the property, subject to the orders of the Court, if such person enters into a written bond for its production.

Any person who has so undertaken to keep attached property may be proceeded against as a surety under S. 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him.

[Patna] O. 21, R. 43.—*Substitute* the following for R. 43 of O. 21:—

43 Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall be responsible for the due custody thereof:

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

O. 21, R. 43-A. *Insert* the following as R. 43-A below R. 43 in O. 21:—

(1) The attaching officer shall, in suitable cases, keep the attached property in the village or locality either—

(a) in his own custody in any suitable place provided by the judgment-debtor, or in his absence by any adult member of his family who is present, on his own premises or elsewhere,

(b) in the case of live-stock, and provided the decree-holder furnishes the necessary funds, in the local pound, if a pound has been established in or near the village, in which case the pound-keeper will be responsible for the property to the attaching officer, and shall receive the same rate for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon;

(c) in the custody of a respectable surety, provided the decree-holder furnishes the cost of maintenance and other costs, if any.

(2) If in the opinion of the attaching officer the attached property cannot be kept in the village or locality, through lack of a suitable place, or satisfactory surety, or through failure of the decree-holder to provide necessary funds, or for any other reason, the attaching officer shall remove the property to the Court at the decree-holder's expense. In the event of the decree-holder failing to provide the necessary funds, the attachment shall be withdrawn.

(3) Whenever attached property is kept in the village or locality as aforesaid, the officer shall forthwith report the fact to the Court, and shall with his report forward an accurate list of property seized, such that the Court may thereon at once issue the proclamation of sale prescribed by R. 66.

(4) If the debtor shall give his consent in writing to the sale of the property without awaiting the expiry of the term prescribed in R. 68, the officer shall receive the same and forward it without delay to the Court for its orders.

(5) When property is removed to the Court it shall be kept by the Nazir on his own sole responsibility in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Nazir, he may, subject to the approval by the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical, and the Court may fix the remuneration to be allowed to the persons, not being officers, of the Court, in whose custody the property is kept.

(6) When property remains in the village or locality where it is attached and any person other than the judgment-debtor shall claim the same, or any part of it, the attaching officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, maintain the attachment, and shall direct the claimant to prefer his claim to the Court.

(7) (a) If the decree-holder shall withdraw an attachment or it shall be withdrawn under sub-rule (2) or sub-rule (9), the attaching officer shall inform the debtor, or in his absence, any adult member of his family, that the property is at his disposal.

(b) In the absence of any person to take charge of it or in case the officer shall have had notice of claim by a person other than the judgment-debtor, the officer, shall, if the property has been moved from the premises in which it was seized, replace it where it was found at the time of seizure.

(8) Whenever livestock is kept in the village or locality where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer, but the latter shall, if required by the decree-holder, and on his paying for the same at the rate to be fixed by the District Judge, and subject to the orders of the Court under whose orders the attachment is made, engage the services of as many persons as may be necessary, for the safe custody of it.

(9) In the event of the judgment-debtor failing to feed the attached livestock in accordance with sub-rule (8), the officer shall call upon the decree-holder to pay forthwith, for feeding the same. In the event of his failure to do so, the officer shall proceed as provided in sub-rule (2), and shall report the matter to the Court without delay.

(10) When attached livestock is brought to Court, the Nazir shall be responsible for the safe custody and proper feeding of it so long as the attachment continues.

(11) If a pound has been established in or near the place where the Court is held, the Nazir shall be at liberty to place in it such attached livestock as can be properly kept, in

which case the pound-keeper will be responsible for the property to the Nazir and shall receive the same rate for accommodation and maintenance thereof as are paid in respect of unpounded cattle of the same description, or such less rate as may be agreed upon.

(12) If there be no pound available, or if, in the opinion of the Court it be inconvenient to lodge the attached livestock in the pound, the Nazir may keep it in his own premises, or he may entrust it to any person selected by himself and approved by the Court. The Nazir will in all cases remain responsible for the custody of the property.

(13) Each Court shall, from time to time, fix the rates to be allowed for the custody and maintenance of the various descriptions of livestock with reference to seasons and local circumstances. The District Judge may make any alteration he deems fit in the rates prescribed by Courts subordinate to him. Where there are two or more Courts in the same place, the rates shall be the same for each Court.

44. Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited.

and another copy on the outer door or on some other conspicuous part of the house in which the judgment-debtor ordinarily resides or, with the leave of the Court, on the outer door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain; and the produce shall thereupon be deemed to have passed into the possession of the Court.

Loc. Am.—[Bombay] After R. 44 of O. 21, the following shall be inserted, as R. 44-A, namely:—

44-A Where the property to be attached is agricultural produce, a copy of the warrant or order of attachment shall be sent by post to the office of the Collector of the District in which the land is situate.

45. (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of, the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

Notes.

O 21, R. 44.—An attachment which is not in accordance with the provisions of R. 44, would no doubt, not operate to transfer possession of the property to the Court. But the presumption of law is that anything which is done by the officer of the Court is properly done until the contrary is shown. 162 I.C. 653=1936 A.L.J. 283=1936 A. 364; 1935 A.L.J. 390=1935 A. 436; 1935 A.L.J. 63=1935 A. 214; 156 I.C. 697=1935 R. 186. Where attachment of movable crops is made

by beat of drum and the procedure prescribed by R. 44 is not followed, the produce cannot be deemed to have passed from the possession of the judgment-debtor into that of the Court. 129 I.C. 715=1931 A. 142. See also 145 I.C. 818=1933 R. 267; 1935 A. 218=153 I.C. 428. Where the bailiff executing the warrant of attachment does not affix a copy thereof on the residential house of the judgment-debtor, there is no compliance with R. 44, and the attachment is not a legal or valid attachment. 29 S.L.R. 190.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion, make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

Loc Ams.—[Bombay] The following words shall be added to sub-rule (1) of R. 45: of O. 21 after substituting a semicolon for the full stop—"and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time"

[Calcutta] O. 21, R. 45 (1).

Add the following to sub-rule (1), R. 45, O. 21—"and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time"

[Lahore] O. 21, R. 45.—Add the following proviso to sub-rule (1) of R. 45—"and with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court"

[Madras] Substitute the following for sub-rule (1) —

"Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient, and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered; and the applicant shall deposit in Court within a date to be fixed by Court, such sum as the Court may deem sufficient to defray the cost of watching and tending the crop till such time." (Vide *Fort St George Gazette*, dated 20th October, 1936, Pt. II, pp. 1394-1396)

[Rangoon] After R. 45 of O. 21, insert the following rules as Rr. 45-A and 45-B.—

45-A (1) Before issuing a warrant for the attachment of moveable property which it will be necessary to place in charge of one or more peons, permanent or temporary, the Court shall satisfy itself that the attaching decree-holder has produced a receipt in Form 15-A, Appendix E, from the Bailiff that he has paid in cash as process-fees under Rr. 17 (1) (e) (ii) (2) of the Process-Fees Rules not less than Rs. 10, for each person whom the Bailiff considers should be employed

(2) In sending the warrant for execution to the Bailiff, the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record. The Bailiff shall then endorse on the warrant the name of the process-server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property, the process-server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced

(3) At the time of granting the receipt in Form 15-A, for payments made by the decree-holder as required by sub-rule (1), the Bailiff shall state in the lower portion of the Form the date on which the fees paid will be exhausted, warning the decree-holder that the property will not be kept under attachment after the date, unless further fees are paid before that date

If the further fees required are not paid, the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree-holder as costs

(4) The payment of fees under sub-rule (1) shall be made in cash to the Bailiff and the amount shall be at once entered in Bailiff's Register in No. II. The Court Clerk shall on receipt of the Bailiff's acknowledgment (Form 15-A) file it in the record and make an entry to that effect in the diary

(5) Temporary peons employed for the custody of the attached property shall be remunerated at the rate provided for in R. 15 of the Rules regarding process-serving establishments, provided that the total remuneration disbursed shall in no case exceed the amount of the process-fees actually paid under the foregoing sub-rules. Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilized, the fees paid shall be credited direct into the Treasury to "Process-servers' Fees"—"XVI-A. Law and Justice"—"Courts of Law"—"Court-fees realized in cash".

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge.

Before passing such order, the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid

does not exceed the amount of the fees deposited with the Bailiff, or, if any payments have already been made in the case of the unexpended balance of such deposits, and that all amounts previously drawn have been disbursed to the proper persons.

(7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register II. If, however, the amount has been transferred to Bailiff's Register I, the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a re-payment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I.

(8) When the attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons, that the total amount of the fees actually paid under sub-rules (1) and (3) exceeds the total amount that is chargeable for peons including the amount of the last payment he shall direct that the excess be refunded to payer.

(9) The Judge shall, in all cases in which a refund is to be made, issue to the Bailiff an order, a copy of which shall be placed on the record, to make such refund. If a sufficient portion of the amount paid by the decree-holder to pay such refund is in the hands of the Bailiff, that officer shall make the refund in the ordinary way prescribed in his Register II for repayments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed Treasury form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund order, the Judge must satisfy himself that the amount is available for refund by examining Bailiff's Register I and the record. The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or sub-treasury.

45-B. (1) In addition to the fees payable before a warrant issues for the attachment of moveable property under R. 45-A, the Bailiff shall require the attaching decree-holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit.

Explanation.—The costs in question might be, for example, (a) rent of building in which to store attached furniture, (b) cost of conveying the attached property from the place of attachment to Court or to a secure place of custody, (c) cost of feeding and tending live-stock, (d) cost of proceeding to the place of attachment to sell perishable property.

(2) If the attaching decree-holder fails to comply with the Bailiff's requisition, the warrant shall not be issued.

(3) Sums thus deposited shall be entered in the Bailiff's Registers I and II and any re-payments thereof shall be made according to existing orders. A receipt for such sums shall be granted by the Bailiff in Form 15-A, Appendix E.

(4) In the receipt given for the sums deposited, the Bailiff shall state the period for which such sums will last, and if the attaching decree-holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted.

(5) The officer actually attaching the property shall, unless the Court otherwise directs, give the debtor, or, in his absence, any adult member of his family who may be present, the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the Court. Where the attached property consists of cattle, these may be employed, so far as is consistent with R. 43, in agricultural operations.

(6) If no such suitable place be provided, or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is a growing crop, when R. 45 applies. Whenever live-stock is placed at the place where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer.

(7) Whenever property is attached, the officer shall forthwith report to the Court, and shall with his report forward an accurate list of the property seized.

(8) If the judgment-debtor shall give his consent in writing to the sale of property without awaiting the expiry of the term prescribed in R. 68, the officer shall receive the written consent and forward it without delay to the Court for its orders.

(9) When the property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Bailiff, he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical.

(10) If there be a cattle-pound maintained by Government or any local authority in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live-stock as can be properly there kept, in which case the pound-keeper will be

responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

(11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it, the officer, shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court.

(12) If the decree-holder shall withdraw an attachment or if it shall cease under sub-rule (2) or (4), the Bailiff's officer shall inform the debtor or, in his absence, an adult member of his family that the property is at his disposal.

(13) If any portion of the deposit made under sub-rule (1) or (4) remains unexpended, it shall be refunded to the decree-holder in the manner prescribed for such refunds in sub-rule (9) of R. 45-A. Any difference between the cost of attachment of moveable property (other than the costs referred to in R. 45-A) and the sums deposited by the attaching decree-holder shall, unless the difference is due to the default of the Bailiff, be recovered from the sale-proceeds of the attached property, if any, and if there are no sale-proceeds, from the attaching decree-holder on the application of the Bailiff. If there is still a deficiency, the amount shall be paid by Government.

Attachment of debt, share and other property not in possession of judgment debtor.

46. [S. 268.] (1) In the case of—

(a) a debt not secured by a negotiable instrument,
 (b) a share in the capital of a corporation,
 (c) other moveable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of, any Court,
 the attachment shall be made by a written order prohibiting,—

Notes.

O 21, R 46 SCOPE—Effect of garnishee order in England and in India. 54 M. 727=132 I.C. 297=61 M.L.J. 774. Principal and agent—Debtor and creditor living in Indore—Debtor having branch office at Bombay—Separate accounts—Debt where payable. 60 I.A. 211=57 B. 474=1933 P.C. 150=65 M.L.J. 37 (P.C.) A prohibitory order to a person outside the Court's jurisdiction is illegal. 39 C. 104=16 C.W.N. 402. But see 60 C. 782=143 I.C. 785=37 C.W.N. 439=1933 C. 379; 148 I.C. 176=30 N.L.R. 92=1933 N. 167. See also 177 P.L.R. 1915=30 I.C. 487; 107 I.C. 663 (1)=1929 L. 645; 118 I.C. 908 (2), 1934 S. 135=151 I.C. 879. So also attachment and sale of moveable property outside Court's jurisdiction. 35 C.W.N. 1096. Annuity until it falls due is not a debt, nor money expected to reach a public officer until actual receipt. 14 C.L.J. 127=16 C.W.N. 14. Whether an attaching creditor who has attached a debt but not the decree on the debt, can execute the decree. See 92 I.C. 1021=1926 M. 371=50 M.L.J. 79. Mortgage debt can be validly attached under this rule. 144 I.C. 175, 143 I.C. 785, 20 C. 805; 26 B. 305; 37 M. 51, 46 A. 917=80 I.C. 890. A mortgage debt is moveable property within the meaning of this rule. 26 B. 305, 39 M. 389=28 M.L.J. 338; 144 I.C. 175=1933 R. 61, 60 C. 782=143 I.C. 785=37 C.W.N. 439=57 C.L.J. 205=1933 C. 379, 26 I.C. 508=27 M.L.J. 239; 16 I.C. 816, 22 M.L.J. 105=37 M. 51; 50 I.C. 157=21 O.C. 400; 46 A. 917=1924 A. 796. See also 1912 M.W.N. 879=16 I.C. 438, 1930 O. 473. But see 125 P.L.R. 1913=18 I.C. 318. Court within which mortgagee resides and not Court within which mortgaged property is situated has jurisdiction to attach

11 P. 473. But see 60 C. 782=143 I.C. 785=1933 C. 379. There is no debt in a purely usufructuary mortgage. The proper procedure is to attach his interest in the immoveable property. 35 B. 288=10 I.C. 812. See also 1928 M. 648; 1931 P. 63. *Contra* 1929 M.W.N. 138. The first defendant held an anomalous mortgage and under its terms was in possession of the property. Plaintiff obtained a decree against him, attached his interest in the mortgage under R. 46, and purchased it in Court auction. In a suit by him, as purchaser of the mortgage interest, for possession and mesne profits it was contended by the lessee of the property that though under R. 46 the mortgage debt was validly attached there was so far as the right to possession was concerned no legal attachment. *Held*, that the security followed the debt and it was difficult to distinguish between one part of the security, i.e., the right of bringing the property to sale and the other part of it, namely, the right to possession. 39 L.W. 792=1934 M. 498=66 M.L.J. 695. Order for attachment under this rule is not an injunction or order staying a suit within the meaning of S. 15, Limitation Act 13 A. 76. See also 14 A. 162. In attaching a debt, it is not the business of Court to determine whether debts are really due or not. 28 A. 262, 4 R. 100=97 I.C. 247 (2)=1926 R. 175. See also 1931 M. 570=61 M.L.J. 863. When garnishee denies debt, he can make application under O. 21, R. 58, and Court may pass order under R. 63. 1931 B. 288=133 I.C. 248=33 Bom.L.R. 396. But see 59 M. 966=1936 M. 152=70 M.L.J. 20. Where it was held that when an objection by the garnishee denying the debt is disallowed, the objection and the order of the executing

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court,

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon;

(iii) in the case of the other moveable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the Court-house, and another copy shall be sent, in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other moveable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the

Notes.

Court disallowing the objection and ordering him to pay into Court do not come within the purview of O 21, Rr 58 to 63, so as to preclude him from denying the debt in a suit subsequently instituted against him by the decree holder as receiver for realising the debts on the basis of the attachment. Where a garnishee denies the debt and objects to jurisdiction of Court to compel him to deposit the debt, but does not ask to have the matter investigated and there is no investigation or decision on the point raised by him, and Court orders sale of the debt for whatever it is worth, the garnishee can raise the matter in the subsequent suit by the purchaser. 1936 N. 218. The appointment of a receiver is not irregular. 27 I.C. 812. When there is an attachment before judgment, time for the consideration of the question whether the attached debt is due to judgment-debtor can be decided when the garnishee order is going to be enforced. 146 I.C. 457=1933 A. 481. The absence of attachment does not render a sale invalid. 36 I.C. 292. Attachment of debt when completed. 152 I.C. 795=1934 P. 619. When shares in company are purchased, the proceedings come to an end. Nothing more is to be done by the Court 42 M.L.J. 449=45 M. 537. Service of notice on the authorised attorney of the managing director sufficient. 5 R. 685. What is proper service of notice. 152 I.C. 795=1934 P. 619. No notice to the judgment-debtor is necessary in attaching his money in the hands of the decree-holder himself, if it is not secured by a negotiable instrument 17 I.C. 420=15 O.C. 289.

WHAT CAN BE ATTACHED.—Payments to be made to a railway contractor for work done as well as the salary and the allowance of a servant of a railway company cannot be attached under R. 46 107 I.C. 663 (1). The unpaid portion of the loan does not constitute a debt due by the mortgagee to the mortgagor and as such cannot be attached. 147 I.C. 773 (2)=1934 A. 448; 1934 A.L.J. 713=1934 A. 449. Attachment of agricultural produce in the hands of a third person comes under this rule 64 I.C. 1007=15 S.L.R. 128. An attachment of money in the hands of a receiver made without the previous permission or sanction of the Court is improper and irregular. 21 C. 85. Attach-

ment of debt due when a prior order appointing a receiver has been made is invalid. 102 I.C. 413=29 Bom.L.R. 409. Money deposited by a third person as due to the judgment-debtor can be attached under this rule 43 A. 272=60 I.C. 881. As regards the attachment of money or other valuable securities deposited as security for the due performance of one's duty, see 9 M. 203 (206). If attachment is made after a cheque is delivered to the payee, the payment of the cheque cannot be stopped. 3 B. 49. And the attachment is of no avail. 12 I.C. 869=4 Bur. L. T. 148. Undivided share in ancestral joint family business cannot be attached when the decree is personal. 50 I.C. 157=21 O.C. 400. Even if a share of a debt, i.e., a debt due to the judgment-debtor and other persons jointly, cannot be attached under R. 46, or under any other rule prescribed, a prohibitory order similar to one under R. 46 can be made under the inherent powers of Court where Court finds it necessary for the ends of justice. 41 C. W.N. 410=1937 C. 199. After attachment of share in a company, company cannot by resolution appropriate share towards debts due to it. 105 I.C. 246. Debt—Life Insurance Policy—Amount payable under, to representatives of assured, on proof of death of assured—If a "debt" before such proof is given. 56 M.L.J. 299=26 L.W. 209. A deposit with an association which is re-payable as per rules only when membership ceases can be attached but judgment-debtor cannot be compelled to resign. 29 Bom I R. 416=102 I.C. 418 (1)=1927 B. 365. When after Court sale and before its confirmation judgment-debtor leases the property and realised portion of rent, the purchaser can obtain prohibitory order under S. 151 though not under this rule or S. 47 136 I.C. 4=1932 L. 295. Attaching officer has no power to seal up premises other than that used by judgment-debtor 11 P. 493=139 I.C. 834=1932 P. 279.

O. 21, R. 46 (2)—Attachment of a mortgage-debt without copy of attachment order being fixed to the Court-house is ineffectual 9 C.W.N. 693; 27 A. 378; 29 A. 259, 30 M. 207; 17 M.L.J. 488. Where procedure prescribed is not followed, the attachment is not legal. 1928 R. 285=30 Cr L.J. 748.

O. 21, R. 46 (3).—In case the debtor

amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

Loc. Ams.—[Calcutta.] O. 21, R. 46.

Add the following after R. 46, O. 21—

46-A. The Court may in case of a debt, other than a debt, secured by a mortgage or a charge or by a negotiable instrument, which has been attached under R. 46 or 51 of this order, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt calling upon him either to pay into Court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so.

Provided that if the debt in respect of which the application aforesaid is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court, the Court shall send the execution case to the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge will deal with it in the same manner as if the case has been originally instituted in that Court.

Such application shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment-debtor.

46-B. Where the garnishee does not forthwith pay into Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

46-C. Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders upon the parties as may seem just.

46-D. Where it is suggested or appears to be probable that the debt belongs to some third person, or that any third person has a lien or charge on, or other interest in, such debt, the Court may order such third person to appear and state the nature and particulars of his claim (if any) to such debt and prove the same.

46-E. After hearing such third person and any other person or persons who may subsequently be ordered to appear, or where such third or other person or persons do not appear when so ordered, the Court may make such order as is hereinbefore provided, or such other order or orders upon such terms, if any, with respect to the lien, charge or interest, if any, of such third or other person as may seem fit and proper.

46-F. Payment made by the garnishee on a notice under R. 46-A or under any such order as aforesaid shall be valid discharge to him as against the judgment-debtor and any other person ordered to appear as aforesaid for the amount paid or levied although such judgment may be set aside or reversed.

46-G. The costs of any application made under R. 46-A and of any proceeding arising therefrom or incidental thereto, shall be in the discretion of the Court.

46-H. An order made under R. 46-B, 46-C or 46-E shall be appealable as a decree [Rangoon] Delete R. 46 (3).

Notes.

admits the debt, Court should order debtor to pay the debt to the decree-holder. 97 I.C. 467. A debtor can always get a valid discharge by payment into Court if any dispute exists as to persons entitled to the money. 112 P.L.R. 1913=18 I.C. 205. Payment contemplated in R. 46 (3) is payment into the attaching Court so as to be available for the attaching decree-holder and not payment into the particular Court even when the payment is earmarked for some other purpose. If a debtor pays the amount not in attaching Court but in another Court not under compulsion on behalf of the judgment debtor, such payment is not sufficient to discharge him from his liability to the attaching creditor. 43 I.W. 713=1936 M. 251=71 M.L.J. 243. If decree holder was not entitled to recover his debt, the debtor of judgment-debtor must contest his liability and will not be absolved from the liability if he pays the amount. 28 I.C. 317=50 P.L.R. 1915. The debtor can plead that one claimant and not

another is entitled to the debt. 11 M.L.T. 262=15 I.C. 193.

RIGHT OF SUIT.—A judgment-debtor whose debt has been attached can sue for his debt though he cannot recover it until the decree against him is satisfied. 10 I.C. 569; also 49 I.C. 88=5 O.L.J. 766. When a debt due from a third party to judgment-debtor is attached but the liability is denied, a receiver with power to sue may be appointed or the debt may be sold. 35 I.C. 469=10 Bur. L. T. 6, 1927 A. 41=97 I.C. 467. *Vide* 84 I.C. 1022=1924 C. 1068. A suit by an alleged assignee of a debt when it has been realised by a decree-holder is governed by Art. 62 or 120 of the Limitation Act and time begins to run from the date of receipt of money from Court. 38 M. 972=26 M.L.J. 166. In a suit on bond debts purchased, evidence to identify debt can be let in when it has been wrongly described in execution. 6 L.W. 712=42 I.C. 609. In the suit garnishee can show that no debt was due. 1926 M. 1011=97 I.C. 780.

47. Where the property to be attached consists of the share or interest of the judgment-debtor in moveable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

Attachment of share in moveables.

48. (1) Where property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of

Attachment of salary or allowances of public officer or servant of railway company or local authority.

section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order of such officer as 1[the Central Government or the Provincial Government may by notification in their Official Gazette] appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by 1[the Central Government or the Provincial Government, as the case may be] in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind 1[the Central Government or the Provincial Government] or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends, and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India, and 1[the Central Government or the Provincial Government] or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

Leg. Ref.

¹ In sub-rule (1), for words 'the Government may by notification in the Gazette of India or in the Local Official Gazette, as the case may be' the words 'the Central Government or the Provincial Government may by notification in their Official Gazette'; in sub-rule (2) for words 'the Government' the words 'the Central Government or the Provincial Government, as the case may be'; and in sub-rule (3) for words 'the Government' the words 'the Central Government or the Provincial Government' have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937

Notes.

O. 21, R. 47.—Mode of recovery of fine levied on a Hindu coparcener is that prescribed by this rule, by issuing a prohibitory order or appointment of receiver, and there cannot be attachment of moveables by way of seizure. 55 M. 1041=63 M.L.J. 142=1932 M. 538 Where on objection under O. 21, R. 58 Court finds that claimant has half-share in moveable property attached, it would be the

better course to release the entire property and to proceed by way of attachment under this rule. 59 C. 808=1932 C. 408=137 I.C. 672 *Quære*—Whether R. 47 applies to the members of a Hindu coparcenary, one of whom happens to be a judgment-debtor? 43 L.W. 760=1936 M. 560=70 M.L.J. 717.

O. 21, R. 48.—This rule is new and supercedes the rulings in 2 B. 44, 29 B. 405, 28 B. 198 and 30 C. 713 Prohibitory order on an Auditor of a Railway Company not to pay out security deposited will bind the company subject to its lien if any. 7 Bur.L.T. 238=24 I.C. 725. No order under sub-r. (3) can be made against Government without bringing the Government on record as a party. 93 P.R. 1912=14 I.C. 737 Attachment—Power of Court to which decree is transferred *See* 1 Luck. 46=1927 O. 112=91 I.C. 1043=13 O. L.J. 174. R. 48 has no application in the case of persons who are in private service. 1929 N. 333=120 I.C. 209 Pay or pension for month is due on last day of month and can be attached on last day. 1930 R. 161 (1). Order refusing attachment of pay is one

Loc. Am —[Madras] Substitute a comma for the period at the end of the last sentence of sub-rule (1) and add the following at the end of sub-rule (1):—

Such amount or instalment being calculated to the nearest anna by fractions of an anna, of six pies and over being considered as one anna and omitting amounts less than six pies.

49 (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

Attachment of partner-
ship property.

(2) The Court may, on the application of the holder of the decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub-rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

Execution of decree
against firm

50. (1) Where a decree has been passed against a firm, execution may be granted—

Notes.

under S. 47 and hence appeal lies thereon, and no revision. 144 I.C. 897=35 Bom L.R. 360=1933 B 185 Order attaching pay of Government servant in spite of objection raised by Secretary of State that the pay was not attachable, is not subject to revision, whether it is treated as an order under O. 21, R. 58 or as under S. 47. 1936 L. 761.

O. 21, R. 49.—The provisions of R. 49, are imperative. A sale of partnership property in execution of a decree, which is not passed against the firm or the partners thereof, is therefore invalid and inoperative. 60 C.L.J. 464, 155 I.C. 842 (2)=1935 C. 275. A decree can be passed against an individual partner. 23 C.W.N. 500=51 I.C. 597. An assignee of a share in partnership who has also obtained a decree against a partner cannot (except to the limited extent provided in R. 49) force the other partners to account by securing the appointment of a receiver especially when the partnership is still subsisting and the partnership has not been dissolved. 10 P. 792=133 I.C. 40=12 Pat. L. T. 361. As to partnership property, it is only the interest of the partner who is the judgment-debtor

which vests in the receiver, and not the entire partnership. 1932 A.L.J. 516=1932 A. 468=141 I.C. 128

O. 21, R. 50 (1).—No order under this rule could be passed making the shareholders liable when the decree is against a limited liability company. Such an order must be deemed to be a nullity and must be ignored by the executing Court. 164 I.C. 513 (Lah). R. 50 does not require the holder of a decree against a firm to first exhaust his remedy provided in cl. (a) of the rule and then proceed under cl. (b), and failing satisfaction under those two clauses, proceed under cl. (c). Under the rule he has three courses open to him, any of which he may pursue regardless of the order in which they are set out. 141 I.C. 453=34 P.L.R. 190=1933 L. 472. An award against a firm having the force of a decree under S. 15 of the Indian Arbitration Act is not sufficient to have recourse to the provisions of this rule. 29 Bom L.R. 660=104 I.C. 94=1927 B 428. *Contra* 1929 S. 28; 1931 S. 82=131 I.C. 712; 134 I.C. 1026=1931 L. 736=62 C. 833=61 C. L.J. 515; 30 S.L.R. 6=165 I.C. 826=1936 S. 211. This rule is limited in its operation to

- (a) against any property of the partnership;
 (b) against any person who has appeared in his own name under Rule 6 or Rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner;
 (c) against any person who has been individually served as a partner with a summons and has failed to appear;

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply

Notes.

the case of a partner who was living at the time of the decree. 87 I.C. 992=1925 S. 298. Under sub-r. (1) and under English Law, partners not served and who have not appeared are not liable. 36 M. 414=22 M.L.J. 109. Also 30 C.W.N. 11. Where summons were affixed on refusal to accept, and the party did not appear, execution could proceed against him personally as partner under sub-r. (1) (c). 26 I. C. 866=19 C.W.N. 1008. Appearance under protest—Remedy of party in execution. 31 C.W.N. 1004, 41 C.W.N. 566. But if he once pleads his non-liability and asks the Court to frame an issue on the point, he cannot then be allowed to turn round after the issue is decided against him and urge that all proceedings in the trial Court *qua* this matter subsequent to his appearance under protest were without jurisdiction and that he was still entitled to claim the benefit of sub-r (2), R. 50. 157 I.C. 1025=1935 L. 520. A partner against whom execution is levied in respect of decree against firm, cannot plead alternatively, denying his partnership, and the authority of the others to enter into the transaction which gave rise to the liability. 34 Bom L.R. 617=1932 B. 334=138 I.C. 314.

O. 21, R. 50 (2).—As to the nature of application under this rule, and limitation for the same, see 34 Bom.L.R. 1112=140 I.C. 519=1932 B. 516; 1935 M. 926. *Ex parte* decree obtained against firm mentioning individuals constituting it—Application to set aside *ex parte* decree dismissed on footing that decree was against firm—Sale of personal properties of partners without leave of Court—Validity—Decree-holder, if can contend that decree was against individuals composing firm. 163 I.C. 34=1936 P. 496. An application under R. 50 (2) may be filed at any time so long as the decree sought to be executed is alive. 1935 S. 12=154 I.C. 339. Person admitting that he is partner cannot dispute the decree. If he wants to dispute the decree, he should take proceedings in the suit and cannot contest it in execution. 151 I.C. 749 (1)=1934 S. 135 (2). Decree against firm—Partners disputing liability—Remedy of decree-holder. (*Ibid.*) As to scope of inquiry under this rule, *ibid*. The provisions of O. 30 do not in any way militate against sub-r. (2). The Court which passed the decree as well as the Court to which it is sent for execution can enquire into as to who constitute

the firm. 86 I.C. 1013=1925 S. 293. See also 108 I.C. 528, 1929 L. 228=115 I.C. 536; 134 I.C. 1026=1931 L. 736; 34 Bom L.R. 737; 26 S. L.R. 228=1932 S. 199. As to whether executing Court can go behind the order of trial Court, see 156 I.C. 930 (P.). The presumption arising under S. 264, Contract Act, that the objectors were partners of the firm as no public notice of the dissolution had been given does not avail the creditor if he is a customer of the firm after its dissolution. For the expression "persons dealing with a firm" occurring in this section does not cover persons dealing with a firm for the first time after dissolution. 146 I.C. 847=34 P.L.R. 1032=1933 L. 591. Where in a suit by a firm a counter-claim was set up and a decree was passed and the solicitors of the firm closed the names of the partners, the fact of their being partners could be agitated in execution. 51 B. 794=103 I.C. 256=1927 B. 447. Application for leave to execute is one in execution and not in suit. 1931 L. 736. The application falls under Art. 182 and not Art. 181 of the Limitation Act. The application can be made at any time during which the decree remains capable of being executed; and a decree-holder can apply for execution against an individual partner, obtaining leave, if necessary, even if more than three years have elapsed since the passing of the decree, provided the execution is not barred in any other way. 30 S.L.R. 88=1936 S. 138. Court to which decree is transferred has power to grant leave. 1931 L. 507=131 I.C. 376. *Contra* 1931 S. 82=131 I.C. 712=30 S. L.R. 290=161 I.C. 524=1936 S. 11. No special leave is necessary as regards a person who has appeared in his own name under O. 30, R. 6 or who had admitted in pleadings that he is a partner, or who has been served with summons. 89 I.C. 401. Sub r. (2) applies only in the absence of the conditions of sub-r. (1). 26 I.C. 866=19 C.W.N. 1008. Also 28 I.C. 260=1915 M.W.N. 180. The term "partner" in R. 50 (2), includes his legal representative; and the question of the liability of the legal representative of a deceased partner of a firm can therefore be raised and decided in execution proceedings. 30 S.L.R. 6=1936 S. 211. *Contra* 41 C.W.N. 566. The sub-rule covers also the case of a deceased partner. 24 Bom.L.R. 1037=1923 B. 66. A decree against a firm after death of a partner can be executed against his legal representative. 100 I.C. 204=1927 S. 130 (F.B.); 1927 S.

to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

51. [S. 270.] Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure; and the instrument shall be brought into Court and held subject to further orders of the Court.

52. [S. 272.] [Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:]

Notes.

247. See also 29 Bom L.R. 1296 Partnership—Decree against, in its firm name—Execution of—Partner who had died before institution of suit—Legal representatives of—Execution of decree against; *held*, that execution could not issue against legal representatives. R. 50 (2) would apply only when the decree is sought to be executed against any person as being a partner in the firm. O. 30, R. 4 only gives legal representatives a right to apply to be made party to suits in the name of the firms. But it does not enable a decree-holder to claim the right claimed in the present case. 119 I.C. 603=57 M.L.J. 344 (F.B.). See also 1935 S. 12 If the decree is against a firm and personally against some specified partners, unnamed partners can be made liable under this rule. 18 S.L.R. 146=1925 S. 317 For the purpose of sub-r. (2) "Court which passed the decree" is the Court of transfer. 43 A. 394=19 A.L.J. 137 But *contra* 11 P. 580=13 Pat. L.T. 751=1932 P. 323 The provisions of this rule apply to proceedings to enforce an award against a firm 35 Bom L.R. 941=1933 B. 433 The question whether all or any of the persons served with notices of an award or of its filing in Court are partners in a firm can only be litigated when an application under R. 50 is made against persons alleged to be partners and permission is sought to enforce the award against them. Such a question cannot be gone into in proceedings for filing the award and the hearing of objections directed against it. 29 S.L.R. 292=1936 S. 121

O. 21, R. 50 (3)—The exact meaning of the words "conditions as to appeal or otherwise as if it were a decree" is "the conditions whether as to appeal or in other respects as if it were decree". They consequently include conditions imposed by orders or rules outside of the Civil Procedure Code.

Held, that an appeal from an order made under R. 50 (2) is an appeal from an original decree and is as such liable to *ad valorem* Court-fee. 37 C.W.N. 227=60 C. 530=146 I.C. 123=1933 C. 546. Deputy Registrar empowered to grant leave under this rule cannot determine liability of a contesting party. 4 Bur.L.J. 116=1925 R. 317. *Ex parte* order granting leave to apply for execution does not have the force of decree. 27 A.L.J. 553=115 I.C. 865=1929 A. 390 See also 31 Bom.L.R. 995

O. 21, R. 50 (4) does not affect sub-r. (2). 68 I.C. 627=1923 B. 66 Even though the firm is insolvent execution can proceed against partners personally when they have been served with notice. 7 Lah.L.J. 165=1925 L. 379 Sub-r. (4) does not mean that a person sought to be made liable ought to be served with summons in the suit itself. 30 C.W.N. 11=53 C. 214

O. 21, R. 51.—Negotiable instrument not in custody of Court or public officer—Attachment of—Notice to debtor restraining him from paying to debtor—If effective against him. 56 M.L.J. 73

O. 21, R. 52—The order under this rule is judicial, not administrative. 1925 C. 354. There is no warrant in the Code for the practice prevailing in Bombay regarding charging orders. 29 Bom L.R. 689=1927 B. 405

SCOPE—R. 52 deals not only with money deposited in Court in pursuance of a decree but also with money which comes into the hands of an officer of the Court in various ways. 1935 S. 214. Court having custody of money has jurisdiction until money is transferred to attaching Court. 35 C.W.N. 517. The rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer, but applies only to money actually in his hands. 22 B. 39.

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment, or otherwise, shall be determined by such Court.

Loc. Am —[Madras.] Add the following as proviso (ii) and re-number the existing proviso as (i) —

"(ii) Provided further that, where the Court whose attachment is determined to be prior receives or realizes such property, the receipt or realization shall be deemed to be on behalf of all the Courts in which there have been attachments of such property in execution of money decrees prior to the receipt of such assets.

Explanation —Priority of attachment in the case of attachment of property in the custody of Court shall be determined on the same principles as in the case of attachment of property not in the custody of Court."

(See *Fort St George Gazette*, dated 6-8-35, p 933)

Notes.

Also 44 C. 1072=25 C.L.J. 595; 24 I.C. 617=26 M.L.J. 364. The Court has no power to refuse an application for attachment under this rule. 8 C.L.R. 7. Attachment of money in another Court, in another district is illegal. Proper procedure is to have the decree transferred to that Court. 26 I.C. 941=7 Bur.L.T. 277. Attachment of money in another Court made without notice to that Court is irregular. 11 I.C. 859=4 Bur.L.T. 192. Attachment before judgment in force —Another decree-holder without giving notice to Court putting to sale property in execution of his decree and purchasing it—Property again sold in execution of decree, in which it was attached before judgment—Right of decree-holder previously purchasing property to damages. 1936 C. 112. The proviso is intended to prevent an unseemly conflict between two Courts. 19 B. 710. As to construction and scope of proviso, see 19 N.L.J. 287. Regarding mode of distribution when the fund is attached by different Courts, see 29 Bom.L.R. 689=1927 B. 405. Property in the custody of the attaching Court—Attachment of—Issue of precept unnecessary. 108 I.C. 173=1928 L. 593. Property in custody of Court—Precept received for attachment—Attachment, when takes effect. 1935 L. 914

MEANING OF WORDS—"Any Court" includes also the executing Court. A subsequent formal attachment does not render infructuous a prior subsisting one. 28 I.C. 123=20 C.W.N. 412. Leave of Court is necessary before attachment of property in hands of a receiver appointed by Court. 130 I.C. 836=12 Pat.L.T. 318=1931 P. 204. But see 149 I.C. 774=1934 R. 174 (as to receiver appointed in a suit for dissolution of partnership). Money with receiver is supposed to be in Court's custody. 35 I.C. 589=1 Pat.L.J. 449. So also money with Official Assignee 49 B. 638=1925 B. 344. The Court of a Deputy Collector is a "Court" within the meaning of this rule 10 W.R. 43. See also 21 A. 405. The Official Trustee is a "Public Officer". 12 M. 250. *Suparddar* with whom Amin leaves custody of attached properties is not a "Public Officer". 149 I.C. 950=1934 A. 357. The interest which a judgment-debtor has, in property held by the Official Trustee, is not validly attached by a notice given to the

Official Trustee under this rule. 12 M. 250 "Interest or dividend," meaning of. See 39 B. 88=17 Bom.L.R. 133. Two or more judgment creditors can attach same property—Property in custody of Court—Attachability. 1930 M. 4. The expression "further orders of the Court" in the rule is wide enough to cover any order that the Court may make. 156 I.C. 409=1935 Pat. 201 (2).

PRIORITY.—When certain property belonging to judgment-debtor was in the hands of the Tahsildar, two creditors obtained decrees against him, one of them in a Munsiff's Court and the other in a sub-Court, within the same district. The former obtained an order for attachment earlier in date than the latter but before the money could be received from the Tahsildar, the latter also applied for attachment. *Held*, that (i) the words "in the custody of the Court" in R. 52 imply actual custody; (ii) the property could not be deemed to be "assets held by a Court" on the date when the attachment order was issued by the Munsif to the Tahsildar or even when it was received by the Tahsildar, (iii) therefore the decree-holder in the Munsif's Court was not entitled to priority merely on the ground of his being the first attaching decree-holder 1933 M. 342 (2)=65 M.L.J. 347. A custody Court has no authority to make any rateable distribution unless it be the attaching Court as well. Under R. 52 it can only determine the question of priority and thereafter act under the instructions of the attaching Court. 146 I.C. 791 (1)=37 C.W.N. 820=1933 C. 814. Priority of payment is in favour of those applying for execution by attachment of a fund, see 44 M. 100=39 M.L.J. 608 (F B); 42 M. 692=50 I.C. 925, also 29 I.C. 239=38 M. 221. A decree-holder attaching is entitled to complete payment, even though a prior attachment before judgment subsists in favour of a suitor. 37 A. 578=29 I.C. 622. Attachment of a decree debt when a prior order appointing a receiver has been made is invalid 102 I.C. 413=29 Bom.L.R. 409. Notice attaching money in the hands of the receiver in a pending administration suit—Priority conferred by—Question arises only if estate proves insolvent. 32 Bom.L.R. 1315.

APPLICATION OF THE RULE.—An execution application and notice to judgment-debtor

53. [S. 273.] (1) Where the property to be attached is a decree for the payment of money or for sale in enforcement of a mortgage or charge, the attachment made,—

(a) if the decrees were passed by the same Court, then by order of the Court; and

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decrees unless and until—

Notes.

are necessary to effect an attachment. 1926 M. 1104=51 M.L.J. 436. When the money of a judgment-debtor who has not yet been declared insolvent is in Court, it should be made available to an attaching decree-holder. 33 I.C. 723=14 A.L.J. 236. A letter containing currency notes sent by a third person to a judgment-debtor can be attached under this rule while it is still in the Post Office. 13 M. 242; 21 C. 85. Creditors of a partnership can attach partnership assets even before account is settled among the partners. 29 Bom.L.R. 689=1927 B. 405. Rule not intended to apply to a case where Court appoints a receiver of rents of immovable property. 60 C. 345=1933 C. 417=144 I.C. 142. See also 1936 R. 83.

RIGHT OF SUIT—A regular suit will lie for setting aside an order contemplated by the proviso. The mode of investigation and the nature of the order to be made is provided for in Rr 58 to 63. 19 C 286; 7 C 553; 19 B. 710.

APPEAL.—Where the order of payment is made by a Sub-Court, an appeal lies to the District Court from that order. If presented in a wrong Court, it ought not to be dismissed but returned for presentation to the proper Court. 38 I.C. 772=5 L.W. 264.

O. 21, R. 53: SCOPE.—See 58 C. 934=133 I.C. 181. Under R. 53 it is open to execute the decree. An attachment obtained by the judgment-debtor does not prevent the holder of decree from proceeding with execution after allowing the decree of the judgment-debtor to be set off. 58 C.L.J. 150=38 C.W.N. 67. Where a decree in favour of a judgment-debtor is attached in execution of a decree against him it is open to the judgment-debtor as judgment-creditor of his decree to execute that decree even during the pendency of the attachment, subject to the condition that the amount realized by him by the execution of that decree would not be paid to him but would have to be deposited in Court for the benefit of his judgment-creditor. 159 I.C. 170=37 Bom.L.R. 747=1935 B. 416. This rule does not apply to a case where creditor of mortgagee attaches deposit made in Court by mortgagee to redeem before sale in execution. 59 C. 1464=36 C.W.N. 955. Money decree cannot be sold, and procedure laid in this rule should be followed. 13 P.L.T. 612=1932 P. 349. The rule does not render the decree attached under it permanently incapable of execution. It merely operates as a

stay of execution. 13 M.L.J. 205. applies only to cases where the right is a right expressly settled by the decree and not a right arising from the decree of restitution. 24 M. 341. It applies to a decree for redemption has to be 10 B. 444. Also to a mortgage decree. I.C. 924=8 A.L.J. 1327. The decree of the Revenue Court cannot be attached under this rule. 21 A. 405. The procedure in this rule must be followed where the judgment-debtor desires to render a decree of his judgment-debtor available for satisfaction of his own decree. 6 M. 41. The plaintiff's adoptive grandmother during her management of the estate obtained a money decree against a certain person and the plaintiff having subsequently published his right to the estate as a grandmother sought to enforce it. Held, that the proceeding was not legally sustained, that all that he could do was to apply for appointment of a receiver or follow the procedure laid down in R 53. 57 B. 1. C. 792=35 Bom.L.R. 795=1933 C. 792. proceeding in execution and subsequent proceedings are not invalid, merely because Court which passed the decree as not being covered by the rule when really this rule applies. 85 I.C. 1925 A. 264. The order of attachment made by executing Court as the Court which passed the decree is valid. 323=13 M.L.T. 227. A decree for unpaid mesne profits is a decree for execution. M.L.J. 288. A preliminary decree in a suit for dissolution of partnership is not a decree for the payment of money within the meaning of R. 53 and therefore not attachable and subject to execution. 40 C.W.N. 1393 A. under O. 21, R. 71 is attachable as a decree for payment of money. 95 I.C. 1 L.J. 385=1926 A. 379. See also 461. Attachment of same decree by different decree-holders—Right to rateable division—Decree-holder starting execution—If entitled to benefit of entire decree. C.W.N. 1249.

O. 21, R. 53 (1) (b).—The default of an application to execute the attached decree does not put an end to the attachment of the decree itself, the decree having been made by order of Court which passed the decree in favour of the decree-holder. Nor does the decree cease under R. 53 (1) (b) (ii), when the decree-holder applies to execute it.

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1) or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attach-

Notes.

decree. The attached decree does not cease to be such when the attaching decree-holder makes an application to execute it R. 53 (1) (b) (ii) relates not to the date of cessation of attachment, but only the manner in which the attachment is to be effected. 15 L. 910=37 P.L.R. 196=1935 L. 194 (2) Notice signed by head clerk for Judge, who was then ill, did not invalidate attachment. 9 R. 140=1931 R. 185=134 I.C. 506 Attachment is completed by receipt of notice in the Court (*Ibid.*) If after receipt of order of attachment, a Court proceeds to execute the decree, and sells property in execution, the sale is invalid. 32 C. 1104. See also 15 L. 910=1935 L. 194

O. 21, R. 53 (2)—Cross-decrees between husband and wife for restitution of conjugal rights and for money—Execution of. See 68 M.L.J. 461.

RIGHTS OF ATTACHING DECREE-HOLDER.—Under R. 53 (3) a person who attaches a decree before judgment must be deemed to be the representative of the holder of the attached decree and is, therefore, a person entitled to make an objection in the execution proceedings of that decree 4 A.W.R. 1366=1935 A. 125 The attaching decree-holder has the same remedies against surties of the judgment-debtor as the decree-holder himself has. 44 P.R. 1919=46 I.C. 584 Where a person attaches the interest which the judgment-debtor has in a certain decree he becomes the representative of the latter on the day when the attachment was ordered and not on the day when he applied for the same In such a case the person applying for attachment cannot exercise any right such as filing a suit for a declaration that a certain property was liable to attachment at the instance of the judgment-debtor unless the suit by the latter had not itself become time barred. 6 O.W.N. 710=1929 O. 413 Revival of attachment—Attachment of *ex parte* decree passed in favour of judgment-debtor—*Ex parte* decree set aside but decree again passed on merits. 1933 R. 346. An attaching decree-holder will be liable in damages to his judgment-debtor if he allows the attached decree to lapse 35 M. 622=21

M.L.J. 577. The attaching creditor can himself execute the decree even when the decree attached and the decree sought to be executed are decrees of one and the same Court 15 C. 375. If it is found that the attaching decree-holder who has executed and realised the attached decree had no right he must be regarded as trustee of the person beneficially entitled to the profits of the decree 5 R. 595=6 Bur.L.J. 221. Attachment of decree—Effect—Payment to wrong person—Order for refund. 150 I.C. 174=36 P.L.R. 147=1934 L. 142

SALE OF ATTACHED DECREES.—Preliminary decree passed in partition suit is liable to be proceeded against in execution according to procedure prescribed by cl. (4) and not cl. (1) of R. 53 58 C. 934=133 I.C. 181 Case of preliminary decree for foreclosure attached 1933 O. 349. A decree for dissolution of partnership can be regarded as a money decree and can be attached but cannot be sold. 27 B. 556. No decree can be sold in execution of another decree See 20 C. 111; 2 A. 290 Also 45 B. 343=59 I.C. 541. But see 44 I.C. 232=16 N.L.R. 72. A decree for mesne profits cannot be sold The right procedure is to execute it. 4 P.L.J. 336=48 I.C. 188, 1 R. 360=1924 R. 21. Where the decree attached is a maintenance decree charging immovable property it can be purchased and a separate suit brought for its sale. Or as representative of the maintenance decree-holder, he can also directly bring the property to sale. 23 M.L.T. 355=47 I.C. 630. See also 148 I.C. 196=1934 N. 83 The transfer of a decree by the holder thereof, after it has been attached in execution of another decree passed against him and in a fraudulent and dishonest way, is invalid and confers no rights on the transferee. 18 R.D. 606=15 L.R. 703 (Rev.). The assignee of an attached decree cannot execute it 11 M.L.T. 144=13 I.C. 659. But see 23 N.L.R. 20=99 I.C. 635=1927 N. 132; 7 P. 726=1929 P. 1.

SAVING OF LIMITATION.—Since an attached decree can be executed, an application for execution even though dismissed will save limitation. 11 M.L.T. 144=13 I.C. 659.

ment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

Loc Ams—[Allahabad and Oudh] O 21, R 53 (1) (b).—Add "and to any other Court to which the decree has been transferred for execution" after the words "such other Court" in sub-clause 1 (b) and in sub-rule (4).

And in sub-rule (6), for the words "after receipt of notice thereof" read the words "after receipt of notice, or with the knowledge thereof".

[Calcutta] O 21, R 53. In sub-rule (1) (b), R 53, after the words "to such other Court" insert the words "and to any Court to which it has been transferred for execution and also insert therein the words "or Courts" after the words "requesting such other Court".

In sub-rule (1) (b) (ii), *ibid*, cancel the words "to execute its own decree" and substitute therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court".

In sub-rule (4), *ibid*, insert after the words "by sending to such other Court", the words "and to any Court to which it has been transferred for execution".

In sub-rule (6), *ibid*, substitute the words "in contravention of the said order with knowledge thereof" for the words in "contravention of such order after receipt of notice thereof".

[Lahore] (1) Add the following words under sub-rule (1) (b), after the words "to such other Court"—

"and to the Court to which it has been transferred for execution"

Notes.

O 21, R 53 (6) applies to attachment before judgment as well, 14 I.C. 285=22 M.L.J. 394. The transfer of a decree by the holder thereof, after it has been attached in execution of another decree passed against him and in a fraudulent and dishonest way, is invalid and confers no rights on the transferee 18 R.D. 606=15 L.R. 703 (Rev.). Attachment before judgment—Decree—Insolvency of judgment-debtor—No right of creditor to proceed under O 21, R. 53 145 I.C. 695=29 N.L.R. 303=1933 N. 229. Attachment is complete without notice to judgment-debtor. Any adjustment after attachment is invalid 48 I.C. 109=9 L.W. 32. See also 50 M. 677=1927 M. 728=53 M.L.J. 150 (F.B.); 9 R. 140=134 I.C. 506=1931 R. 185, 1932 A.L.J. 792. Payment to the judgment-debtor while the attachment of the decree subsists is invalid. 24 I.C. 795 (A.). On payment of attached decree amount into Court interest on both the decrees cease. 64 I.C. 780=35 C.L.J. 901. A Court, merely because a decree has been attached, will not recognize a payment or adjustment of that decree which has not been duly certified or recorded under O 21, R. 2. 145 I.C. 525=1933 R. 239.

ATTACHMENT—CLAIM BY THIRD-PARTY—

REVISION—A decree-holder has a right to ask that the property of the judgment-debtor should be attached in execution of his decree. If the property did not belong to them, then it is open to the person claiming to be owner of the property to come forward and file objections. The only method by which a third person can object to an attachment is to file objections after the attachment has been made. He can come to Court and file objections under R. 58. There is nothing in the Code which allows a third party to come forward with objections before an attachment has been made. Where, therefore, the lower Court permits the objections of a third party to be filed before attachment and allows them, the procedure adopted by it as altogether wrong and *ultra vires* and the case is one in which the High Court will interfere in revision 1935 A.W.R. 246=1935 A. 343.

O 21, Rr. 53 and 54.—When a decree is for possession by partition of property, it is not even a preliminary decree for partition and hence if such a decree is to be attached, one has to proceed under R. 53 and attachment under R. 54 is invalid as it deals with attachment of immovable property 166 I.C. 867=1937 Pesh 13.

(2) In sub-rule (1) (b) (u), *substitute* the words "the attached" for the words "its own", and *add* the following proviso to the same:—

"with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court."

(3) In sub-rule (6), *substitute* the words "with the knowledge", for the words "after receipt of notice".

[Madras.] (i) *Add* the following as sub-rule (1) (c) to R. 53 of O. 21 —

"(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it."

(u) *Substitute* the following for sub-rule (1) (b) (u) —

"(u) the holder of the decree sought to be executed or his judgment-debtor if he has obtained the consent in writing of the decree-holder or the permission of the attaching Court, applies to the Court receiving such notice to execute the attached decree."

(Vide *Port St George Gazette*, dated 20th October, 1936, Part II, pp 1394-1396.)

[Nagpur] R 53 —In clause (b) of sub-rule (1) and in sub-rule (4) of R 53, *after* the words "to such other Court" *insert* the words "and to any other Court to which the decree has been transferred for execution".

Rule 53 —In sub-clause (u) of clause (b) of sub-rule (1) of R. 53—

(a) *after* the word "judgment-debtor" *insert* the words "with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court",

(b) *for* the words "its own" *substitute* the words "the attached".

[N.W.F.P.] In sub-rule (1) (b) and in sub-rule (4), *after* the words "to such other Court", *add* the words "or to any other Court to which the decree has been transferred for execution"

In sub-rule (1) (b) (u), *for* the words "its own decree", *substitute* the words "the attached decree".

In sub-rule (6) *for* the words "after receipt of notice thereof", *read* "after receipt of notice or with the knowledge thereof"

[Rangoon] (1) R 53 (1) (b) —*After* the words "to such other Court" occurring in the second and third lines of the clause, the words "and to any Court to which it may have been transferred for execution" shall be *added*, and *for* the word "its" occurring in the 3rd line the word "the" shall be *substituted*

(2) R 53 (1) (b) (u) *For* the words "its own" the words "the attached" shall be *substituted* and the following shall be *added*, namely —

"With the consent of the said decree-holder expressed in writing or with the permission of the attaching Court."

(3) In sub-rule (6) of R 53, *for* the words "after receipt of notice thereof", *read* the words "after receipt of notice, or with the knowledge thereof".

R 53 (6). *For* the words "after receipt of notice thereof" the words "with the knowledge thereof" shall be *substituted*.

54. [S. 274.] (1) Where the property is immovable, the attachment

Notes.

O. 21, R. 54: SCOPE.—Rent in a shrotrien village is 'revenue' under this rule. 46 M. 736=45 M.L.J. 263. Land includes sites as well as buildings thereon. 7 L.L.J. 501=1925 L 583 Under the Code, property may be attached without view to immediate sale. 14 M.I.A. 529. A debt secured by a mortgage, by a lien upon immovable property cannot be regarded as immovable property within the meaning of this rule. 12 C 546 (550) See also 9 M. 5; 1933 R. 61=144 I.C 175 But it is otherwise if it is a purely usufructuary mortgage. 1931 P. 63. This rule has no application to the attachment of a decree for redemption. 10 B. 444; 20 C. 895. The attachment of the equity of redemption of the mortgagor can be effected under this rule. 21 B 226, also 62 I.C. 167=33 C.L.J. 7. A judgment-debtor, whose property is under attachment, cannot transfer it privately to another. 16 L. 328=157 I.C. 806=1935 L. 71.

REQUIREMENTS OF A VALID ATTACHMENT.

—As to how an attachment is to be effected, see 7 L.L.J. 501=1925 L 583 Attachment is complete only when the procedure prescribed by this rule is followed. 39 I.C. 562; also 42 M. 844=37 M.L.J. 375 (F.B.); 51 M. 349 (P.C.), 151 I.C. 337=1934 R. 207. See also 34 I.C. 34. But see 42 M. 1=35 M.L.J. 387 But attachment may be presumed to be regular, in the absence of positive evidence to the contrary and no contention was raised in lower Court 58 C. 598=134 I.C. 561=1931 C. 763. See also 151 I.C. 221=1934 P.C. 217=67 M.L.J. 641 (P.C.). Issue of a prohibitory order under sub-r. (1) does not mean or include the service of a copy of the order on the judgment-debtor or defendant as the case may be. 164 I.C. 1044=1936 R. 403. Proclamation necessary for a valid attachment 4 L 211=1923 L. 423, 104 I.C. 340=1927 C. 885, 1929 A 846. Non-affixure of the attachment order is a fatal defect. 60 I. C. 527=152 I.C. 630=35 P.L.R. 735. Omis-

Attachment of immovable property.

shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from

such transfer or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate

Loc Ams—[Allahabad, N -W F P and Oudh] *Add the following as sub-rule (3) to O 21, R 54.*—

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made "

[Bombay] The following shall be *added* to sub-rule (1) of R. 54 of O 21 —
"Such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the party was transferred or charged "

[Calcutta.] O. 21, R. 54 (3). *Add the following as sub-rule (3) —*
"(3) Such order shall take effect, where there is no consideration for such transfer, or charge, from the date of the order, and where there is consideration for such transfer or charge from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged or from the date when the order is proclaimed under sub-rule (2) whichever is earlier "

Notes.

sion to post order of attachment in Collector's Office is not fatal 69 I C. 563=1923 N. 78. *See also* 7 A 731 But *see* 9 P. 860. Nor omission to affix order in Court-house. 63 C L.J. 560=40 C.W.N 1338 As to what is conspicuous part of the property in the case of a fishing right in a river, *see* 44 I C 412=1918 P 33. Non-affixure of the proclamation order on the property is a material irregularity. 1923 L. 671. When attachment is disputed certified copy containing report of posting of notice of attachment is not legal evidence, but may be used as basis of evidence. 3 Bur L.J. 287=85 I C 308 As to how to prove service of prohibitory order when the records are lost, *see* 83 I.C. 878=1924 A. 747. A prohibitory order cannot be treated as notice to the world. 29 B. at 202 The requirements of this rule must precede the posting of the notices in Court-house, as required by R 68 7 C 34 at 39 *See also* 5 M L J 70, 59 C. 1176=36 C.W.N. 733. As to the effect of failure to have the drum beaten, *see* 10 B. 504, 1933 A.L.J 73=55 A. 182=1933 A. 747 Mere oral proclamation where beat of drum was resisted by judgment-debtor was held sufficient. 136 I C. 335=1932 O. 76. A proclamation of sale by beat of drum is sufficient The drum need not be beaten at the time of sale 56 I C 523. No other notice of sale except the publication provided for by this rule is necessary. 89 I. C. 107. *See also* 1926 O. 45 In the case of a joint family member, his undivided share is to be attached. 53 I C 336=10 L.W. 449 Separate proclamation is not necessary to be served in every mouza comprising an estate or a tenure. 105 I.C. 689 (2)=6 P. 588. Properties situate near one another—Copy

of sale proclamation affixed to one of them —Compliance with the section. 121 I C. 369. For the effect of such an attachment, *see* 89 I C. 291. Immovable property in custody of Receiver in another suit—Attachment—Calcutta High Court Original Side Rules, Ch XXVII. 60 C 345=144 I C 142=1933 C 417. When a single parcel of land with the buildings thereon is to be attached, the attachment is validly made, within the terms of sub-r (2), R. 54, if a copy of the order of attachment is affixed on some one part of the property 164 I C. 1044=1936 R. 403.

EFFECT OF ATTACHMENT.—Attachment under this rule does not constitute disposition of the property in actual possession 4 B 529. A private alienation of property after an order of attachment which has not been effected is valid. 26 I.C. 204=1 O.L.J. 549. *See also* 31 Bom.L R 1111. Sale on date of attachment—Attachment irregular—Validity of sale. 146 I.C. 693=1933 R. 198 (2). A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree 6 C. 129 *See also* 16 A 133. *See also* 34 I C. 34.

WHERE NO ATTACHMENT IS NECESSARY.—In the execution of a decree for the enforcement of a mortgage, property liable by virtue of the decree to be sold, need not be attached. 4 B 515, 20 C. 805 No attachment is necessary in execution of a decree charging immovable property with payment of decree amount—Procedure 24 L.W. 836=99 I.C. 656=1927 M. 190. The process of attachment is intended only for the protection of the decree-holder, and even if there is no attachment as required by the Code, a sale in execution is valid. 30 M. at 264. *See also* 34

[Lahore] The following was added as sub-rule (3) for R. 54:—

"(3) The order shall take effect, as against persons claiming under a gratuitous transfer from the judgment-debtor, from the date of the order of attachment, and as against others from the time they had knowledge of the passing of the order of attachment or from the date of the proclamation whichever is earlier."

[Madras] Add the following as sub-rule (3) —

"(3) The order of attachment shall be deemed to have been made as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2), whichever is earlier."

(Vide *Fort St. George Gazette*, dated 20—10—1936, Pt II, pp 1394-1396)

[Nagpur] Rule 54—After sub-rule (2) of R. 54, insert the following sub-rule —

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made."

[Rangoon.] Add as sub-rule (3) to O. 21, R. 54 —

"(3) The order of attachment shall take effect, as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2), whichever is the earlier."

55. [S. 275.] Where—

Removal of attachment after satisfaction of decree.

(a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

Notes.

C. 787; 18 C. 188; 15 B. 222 (P.C.). Security bond executed by judgment-debtor for performance of decree—Enforceability in execution—Formal order of attachment not necessary 8 P 801. Attachment of properties under money decree—Sale of some items and partial satisfaction of decree—Subsequent transfer of properties to another jurisdiction—Decree transferred to Court having jurisdiction for execution—Order for sale by that Court without fresh attachment—Legality. 30 L. W. 649=1929 M. 852.

O 21, R. 54 (3) (Nagpur).—The word "purchaser" in sub-r. (3) to R. 54 is used in its technical English legal sense and includes a mortgagee. 19 N L J. 94. A creditor who takes a mortgage from his debtor to secure his debt cannot be deemed to be fraudulent in so doing, even though he knows that another creditor has obtained an order of attachment of the property mortgaged and even though the mortgage is for an amount higher than his pre existing debt. Such a mortgage cannot be held to be one not made in good faith—When such a mortgage is effected and completed before the attachment of the property is actually effected by affixing the order on the property in question, the mortgage is not void under S 64. 19 N L J 94

O 21, R. 55—The moment sale is held attachment does not *ipso facto* cease 74 I C 37. Attachment continues until the confirmation of sale 27 S.L.R. 256. See also 15 L. 910=1935 L. 194. In the case of an instalment decree, the instalment which has become due and in respect of which attachment has been made is

the amount decreed in R. 55. 105 I C. 799. Omission to mention encumbrance in sale application—Order that the petition is closed—Attachment does not terminate. 1928 M. 398=106 I C 138 Attachment cannot be deemed to be withdrawn when only part satisfaction is certified. 15 I C. 677=10 A. L.J. 165. Money paid to remove attachment is not available for rateable distribution but must be paid to attaching creditor. 63 I.C. 599=21 Bom.L.R. 975. But see 1930 S. 350; 13 P 446=1934 P. 685. If the reversed decree on first appeal raises the attachment, the confirmation of the decree on second appeal revives the attachment. 48 I C. 386. Where an attachment is released owing to the reversal of the decree, it should not be deemed to have revived on the passing of the decree once again after remand, and to relate back to the date of the original attachment. When the first attachment is removed, there is no bar left to any alienation until a second attachment takes place. 163 I C. 892 (Lah.). Cessation of attachment apart from this rule—Claimants for rateable distribution—Position of. 4 A.W. R. 1236=1934 A. 1057. See also 150 I C. 770=1934 A. 896.

O 21, R. 55 (2) (b) (as amended by Oudh Chief Court).—R. 55 (2) (b), as amended by the Oudh Chief Court, undoubtedly means that unless along with the decree of the attaching creditor, the decree of an applicant for rateable distribution is also satisfied, the attachment shall not be deemed to be withdrawn. In other words, the meaning is that the original attachment shall endure for the benefit of the decree-holder who has applied for rateable distribution of assets under S. 73 of the Code. This, how-

(c) the decree is set aside or reversed, the attachment shall be deemed to be withdrawn, and in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

Loc Ams —[Allahabad] O. 21, R. 55.—*Substitute the following for R. 55 —*
 "55 (1) Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under S. 73 (1) in respect of the property of the same judgment-debtor by persons other than the holder of the decree for execution of which the original order was passed.

(2) Where—

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or

(b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)], is otherwise made through the Court or certified to the Court, or

(c) the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-section (1)] is set aside or reversed, the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule."

[Oudh.] O. 21, R. 55 (1) [*Substituted by Oudh Chief Court*] —

"55 (1) Where an application has been made to the Court under section 73, sub-section (1), for rateable distribution of assets in respect of the property of a judgment-debtor by a person other than the holder of the decree for the execution of which the original order of attachment was passed, notice shall be sent to the sale officer executing the decree.

(2) Where—

(a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] with costs and all charges and expenses resulting from the attachment of any property is paid into Court, or

(b) satisfaction of the decree [including any decree passed, against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] is otherwise made through the Court or certified to the Court, or

(c) the decree [including any decree passed, against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] is set aside or reversed, the attachment shall be deemed to be withdrawn, and, in the case of immovable property the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule."

56. [S. 277.] Where the property attached is current coin or currency

Order for payment of coin or currency notes to party entitled under decree.

notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the

decree to receive the same.

57. Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is

Determination of attachment.

unable to proceed further with the application for execution, it shall either dismiss the application or

for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

Notes.

ever, does not and cannot mean that the attachment will enure for the benefit even of those who may apply for execution by rateable distribution of assets in future. The words "notice of which has been sent to the sale officer under sub-r (1)" clearly show that R. 55 (2) can be availed of only

by those decree-holders who have applied for rateable distribution prior to the satisfaction of the decree 164 I.C. 1031=1936 O.W.N. 861

O. 21, R. 57: SCOPE —Construction and applicability of rule. 33 Bom L.R. 1130=55 B. 693; 1933 P. 609; 1935 M. 212=68 M.L.J. 265. Under the old Code attachment did not

Loc Ams.—[Calcutta] O. 21, R. 57. Add the following words at the end of R. 57, O. 21:—

"unless the Court shall make an order to the contrary."

[Madras.] Substitute the following for R. 57.—

"57 (1) Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a further date, it shall state whether the attachment continues or ceases. Provided that when the Court dismisses such an application by reason of the decree-holder's default the order shall state that the attachment do cease."

Notes.

ipso facto cease as under the present rule. 23 C.W.N. 608=23 C.L.J. 411; also 36 M. 553=24 M.L.J. 545. Order for attachment—Subsequent transfer of properties to another jurisdiction—Execution application transferred to Court of that place—Attachment order continues in force 30 L.W. 649. The rule does not refer or apply to a case where the attachment ceases on account of an explicit order of Court. 66 I.C. 642. Object of the rule is to prevent continuance of attachment for an indefinite period by the practice of "striking off" for statistical purposes 28 I.C. 62=1915 M.W.N. 159. An order such as "striking off" is unknown to law, and its effect is to be determined according to circumstances in each case. It may amount to an adjournment *sine die*. 15 I.C. 406=1912 M.W.N. 407; 31 Bom.L.R. 1209; 123 I.C. 113. An order striking off the execution does not terminate the attachment. 107 I.C. 574. An execution petition which is "closed" does not stand dismissed so as to attract the mischief of O. 21, R. 57. The attachment under it is still effective 41 L.W. 325=1935 M. 212=68 M.L.J. 265=156 I.C. 525. The rule is mandatory and will take effect in spite of an erroneous order continuing attachment. 38 C. 482=15 C.W.N. 428. But see 44 A. 274=20 A.L.J. 113; 1930 M. 414; 1930 R. 325. The rule operates even when the Collector to whom the execution is transferred, dismisses it 68 I.C. 643=1923 N. 18; also 18 N.L.R. 152=1923 N. 267. An attachment made under O. 38, *i.e.*, an attachment before judgment does not cease on the dismissal of the execution application 14 I.C. 345=16 C.W.N. 1097, also 42 M. 1=35 M.L.J. 387; 22 I.C. 351=26 M.L.J. 215. But see 20 I.C. 149=19 C.L.J. 248, 1925 M.W.N. 887, 92 I.C. 833=1926 M. 211=51 M.L.J. 172; 31 Bom.L.R. 1101=1929 B. 455. See also 1930 M. 303. Applicability—Attachment before judgment—Passing of decree—Darkhasts claiming relief against movables—Dismissal—Effect—Application for rateable distribution of sale proceeds—Whether amounts to application for sale. 53 B. 543=31 Bom.L.R. 652=119 I.C. 769=1929 B. 321. When a suit is dismissed attachment before judgment terminates without any order of the Court and if the judgment is reversed on appeal or annulled on review the judgment does not revive it so as to affect alienations made before the date of such reversal. Even where the plaintiff on the reversal of the decree of the first Court dismissing his suit appeals and on appeal gets a decree in his favour and re-attaches

the property in suit, his claim is not one enforceable under the original attachment. 1933 A.L.J. 1501. But see 48 I.C. 386. "Default" means want of prosecution and not merely default in appearance. Thus where a decree-holder admitted mistake in property sold, and agreed to apply again, there is default. 41 A. 157=49 I.C. 113. See also 150 I.C. 1053=36 P.L.R. 241=1934 L. 395, 3 L. 7=1922 L. 108, 1929 N. 82; 35 P.L.R. 604=1934 L. 697. When the judgment-debtor accepts part satisfaction and agrees to give time, this amounts to default 4 Pat.L.T. 418=71 I.C. 881. See also 40 L.W. 883=67 M.L.J. 801. Omission to apply for issue of notice under R. 66 is default. 38 C. 482=15 C.W.N. 428. There is no default by decree-holder when the Court strikes off execution proceedings to suit its own convenience 48 A. 698=97 I.C. 102=1926 A. 734. See also 107 I.C. 574. Nor a bare omission to carry out a direction of Court, constitutes default 40 L.W. 263=1935 M. 275. Order directing attachment to subsist while petition is dismissed for default, though irregular is binding on the parties to it. 87 I.C. 349=1925 A. 456. The presumption is that an attachment is subsisting. 31 I.C. 911. Where by way of caution a decree-holder applies for a second attachment, he does not abandon or waive the original attachment. 13 M.L.J. 221. See also 56 C. 416=119 I.C. 113=1929 C. 465. Judgment-debtors objecting to proceedings in execution must state at the earliest opportunity all their objections to the execution and cannot be allowed to delay proceedings by putting forward their objections piecemeal at whatever time they think most convenient to themselves 121 I.C. 845=1930 M. 303. Decree in one Court attached by another—Execution petition by decree-holder dismissed by former Court—Effect on attachment. 1931 M.W.N. 211. See also 132 I.C. 667=1931 L. 705. Attachment of property in execution of decree—Mortgage of such property after attachment has ceased and before fresh attachment. Held, that the mortgage was valid and that mere knowledge of the mortgagee about the long pending execution against mortgagor did not make the transfer made *bona fide* for value invalid 146 I.C. 954=1933 R. 169.

DISMISSAL OF EXECUTION APPLICATION—Until the formal order dismissing the application, all executions are pending. 39 M. 570=29 M.L.J. 96. An attachment is not disturbed by an order for stay of execution. 46 C. 64=44 I.C. 249. In execution proceedings, the Court finding that all the representatives of the deceased decree-holder were not

(2) Where the property attached is a decree of the nature mentioned in sub-rule (1) of R. 53, and the Court executing the attached decree dismisses the application for execution of the attached decree, it shall report to the Court which attached the decree the fact of such dismissal. Upon the receipt of such report the Court attaching the decree shall proceed under the provisions of sub-rule (1) and communicate its decision to the Court whose decree is attached." (*Vide* Fort St. George Gazette, dated 20th October, 1936, Pt II, pp 1394-1396.)

[Nagpur.] For R 57, substitute the following rule —

"57 Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to have ceased to exist."

[N.-W.F.P.] Cancel the concluding sentence of R 57, "upon the dismissal . . . shall cease", and substitute the following — "In dismissing such application the Court shall direct whether the attachment shall continue or cease. In the absence of any such directions the attachment shall be deemed to cease."

[Oudh.] Order 21, Rule 57 [substituted by Oudh Chief Court].—Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to subsist.

[Rangoon.] In O. 21, the following shall be inserted as R. 57-A.—

"57-A. A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court."

Investigation of claims and objections.

58. [S. 278.] (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection

Investigation of claims to, and objections to attachment of, attached property

Notes.

included in the application for substitution, passed an order consigning the application to the record room, though the attachment in that execution was to remain in force. *Held*, that the order was erroneous to the extent that instead of consigning the proceedings to the record room, it should have got the application for substitution amended. But the order was not tantamount to dismissal of the application for execution, nor did it have the effect of terminating the prior attachment. All that the order meant was that execution proceedings should stand adjourned *sine die* (1922 All. 62 and 1926 All. 734, Rel on) 1936 Lah 873. See also 23 O. C. 166=57 I.C. 509. Where an objection is filed by a person to an attachment of property in execution of decree on the ground that he has a lien over it, the Court should investigate into the matter and not hastily allow the objection and dismiss the execution application 145 I.C. 730=1933 L. 421. An order "proclamation not filed" amounts to dismissal and the attachment ceases 18 I.C. 441=17 C.W.N. 204. Whether an attachment ceases on the dismissal of an execution application depends on the facts of each case 44 I.C. 565=1917 M.W.N. 816, also 23 I.C. 155=7 L.W. 16; 38 I.C. 300=5 L.W. 204, 35 I.C. 240=3 L.W. 601, 46 B. 942=1923 B. 30. When an execution application is dismissed on the judgment-debtor's objection and an application for review of the order is pending, the attachment continues. 34 A. 490=15 I.C. 49. Attachment of decree—Application by attaching decree-holder to execute—Dismissal for default—Attachment, if ceases. See 15 L. 910.

REVIVAL OF ATTACHMENT—Restoration of an execution application to file revives attachment. 18 N.L.R. 152=64 I.C. 420. On a sale being set aside, a fresh execution application revives the old attachment 45 I.C. 589=3 Pat.L.J. 310. A revival of attachment on the revival of an execution application does not affect the rights acquired by third parties in the meantime 14 C.L.J. 476=16 C.W.N. 332. But see 24 A.L.J. 901=97 I.C. 102=1926 A. 734. Strangers to the petition and order need only look to the order and nothing which took place behind their back will bind them. 1925 M. 1113=48 M.L.J. 116.

O. 21, R. 57 (Oudh Chief Court).—Where further execution proceedings after attachment are stayed on account of insolvency application filed by judgment-debtor, *held*, that the attachment did not absolutely cease to subsist during the pendency of the insolvency proceedings, but was merely dormant, and there was no bar to the application of the decree-holder being regarded as being in continuation of the former execution application, the obstacle to the continuance of the previous execution proceedings having been removed by the order annulling the adjudication of the insolvent. 158 I.C. 807=1935 O.W.N. 1107.

O. 21, R. 58. SCOPE.—Nature of objection under this rule. 1936 A.L.J. 142=1936 A.W. R. 251=161 I.C. 107=1936 A. 378. Rule of *res judicata* in execution proceedings 26 L.W. 106. The rule is only permissive. Such a claim is never compulsory 40 C. 598=40 I.A. 56 (P.C.). Also 18 A. 410, 23 B. 266; 18 M. 13 (17); 4 A.L.J. 574; 20 B. 403 (407). See also 41 L.W. 550=68 M.L.J. 518. This

with the like power as regards the examination of the claimant or objector, and

Notes.

rule does not contemplate the investigation of a claim by a tenant of the judgment-debtor to occupancy rights in the property advertised for sale and an order on that claim directing it to be notified and stating that the sale shall not prejudice the rights of the claimant is not conclusive under O. 21, R. 63. 58 M. 936=41 L.W. 550=1935 M. 547=68 M.L.J. 518; 153 I.C. 577=1935 A. 183, 39 C.W.N. 457. A Small Cause Court can neither attach immovable property nor investigate claim resulting therefrom. 28 C. W.N. 16=1924 C. 198. The rule does not apply in the case of a mortgage decree for sale. 1925 N. 185. See also 68 I.C. 271=26 C.W.N. 50, 18 I.C. 215; 55 I.C. 895=2 L.L.J. 343, 58 P.R. 1918=44 I.C. 986. 50 I.C. 448=1919 P. 79, 117 I.C. 815=1929 L. 167, 1929 L. 760=116 I.C. 882; 1930 M. 712, 1932 L. 618. But see 8 Bur.L.T. 214=29 I.C. 941. When an attachment of mortgaged property in a decree for its sale has actually been made although such an attachment was unnecessary, an objector is entitled to come into Court and make an objection under R. 58. [29 I.C. 941 (F.B.) and 1928 M. 525, *Foll.*, 33 I.C. 603, *Dist.*; 1918 L. 368, 18 B. 98; 19 A. 480; 1930 M. 712 and 18 I.C. 215, *Not Foll.*] 161 I.C. 194=8 R.Pesh. 165=1936 Pesh. 53. R. 58 does not apply to a tenure or holding attached in execution of a decree for arrears of rent thereof. 10 P.L.T. 118=1929 P. 195. See also 17 P.L.T. 385. Objection can be prepared under this rule only after attachment and not before. 156 I.C. 801=1935 A.L.J. 344=1935 A. 343. This rule applies only to attachments after decree. 58 P.R. 1918=44 I.C. 986. It does not apply to attachment before judgment. 41 M. 849=35 M.L.J. 231 (F.B.). Also 42 I.C. 554=6 L.W. 518. Objection can be taken to an attachment after the decree even though an attachment before judgment was not objected to. 38 C. 448=10 I.C. 305. A claim preferred within a reasonable time after the decree and the application for execution is not "designedly or unnecessarily delayed" within the meaning of proviso to R. 58. The question of delay should be decided with reference to the date of the application for execution made by the decree-holder and it is only according to that date that conditions laid down in the proviso to R. 58 (1) should be decided. (38 C. 448 and 1921 N. 57, *Foll.*, 1929 L. 865; 1927 A. 593 and 41 M. 849=35 M.L.J. 231, *Dist.*) 31 N.L.R. 426=158 I.C. 353=1935 N. 222. Court has no jurisdiction to enquire into question of title but should confine itself to determine the question of possession. 1928 M. 163=54 M.L.J. 321, 103 I.C. 12=1927 N. 286, 115 I.C. 167=1929 N. 66. But see 98 I.C. 888=1927 S. 114, 155 I.C. 419=1935 P. 267. The words "possessed" and "possession" in these rules include constructive possession or possession in law of debts and other intangible property. 27 M. 67 (F.B.). But see 22 W.R. 36 and 4 B. 323. As to extent of investigation necessary when judgment-debtor is in possession and claim made by third party, see

156 I.C. 586=1935 R. 161. It is not a condition precedent in all cases for a claimant to show that he was in possession before he could attack the validity of an attachment. 119 I.C. 33=1929 M. 383. In a claim arising under O. 21, R. 58, the Court is not entitled to go into the questions of benami. 119 I.C. 909=1929 P. 273. But see 155 I.C. 419=1935 P. 267. Claimant transferee in possession of colliery with entire rights issuing bills to previous customers of transferor in name of transferor payable to transferee—Attachment of bills by transferor's decree-holder—Property in bills held to belong not to transferor and other disallowing claim of claimant held to be without jurisdiction and was set aside in revision. 1929 P. 751. Where a claim is made by a Hindu wife to a house purchased in her name, which is attached in execution of a decree against her husband, if she is found to be in possession on the date of the attachment her claim should be allowed. It is not enough for the decree-holder to plead that she is only a *benamidar* for her husband, the judgment-debtor. Nor will the suspicion that it is a *benami* transaction be a ground for the Court disallowing the claim, when the claimant's possession has been made out. 64 C.L.J. 399. In a claim case under R. 58, the Court must come to a finding as to whether the claimant had at the date of attachment some interest in or was possessed of the property attached. When the Court is satisfied that the property was in possession of the claimant it must be found whether he held it on his own account or in trust for the judgment-debtor and in certain cases in order to determine this question it may be necessary incidentally to go into the basis of the claim put forward by claimant. 119 I.C. 909=1929 P. 273, 155 I.C. 419=1935 P. 267, 14 R. 516=164 I.C. 608=1936 R. 306. Where the objector is in possession of the property, the burden of proving that that property is in fact that of the judgment-debtor is on the decree-holder. It is not sufficient for him merely to show that it is not the objector's property. 146 I.C. 1023=10 O.W.N. 1017=1933 O. 473. The proviso regarding delay applies even to cases where the executing Court not having jurisdiction over the property, exercises it. 41 I.C. 446. In claim investigations, Court will enquire into who was in possession at the time of attachment and not whether such possession was fraudulent or void. 13 Bur. L.T. 214=64 I.C. 66, 132 I.C. 666=1931 L. 666. The Court is bound to decide the question of possession. 87 I.C. 189=48 M.L.J. 603. Also 49 M.L.J. 706; 1928 M. 163=54 M.L.J. 321. Court has no power to entertain an objection after sale of property. 4 P.L.T. 544=74 I.C. 87, 5 R. 751. See also 15 I.C. 53=16 C.W.N. 1023, 87 I.C. 168 (1). Whether claim can be heard after sale, see 1926 C. 468. An investigation may be refused, but once it is made an order must be passed. 39 I.C. 345=11 Bur. L.T. 41. Also 44 M.L.J. 141=1923 M. 295. When a claim is rejected Court will not again interfere by a revision. 74 I.

in all other respects, as if he was a party to the suit:

Notes.

C 540=1923 O 208. Where claim is accepted in default of decree-holder, latter's remedy is only by suit, and he cannot apply for restoration and rehearing of the claim 1930 Pesh. 115 When an objection to execution proceedings is dismissed under R. 58 as being made after unnecessary delay the order is one made under R. 63, and the time within which to bring a suit to establish the applicant's claim is limited to one year. 57 B 213=35 Bom L.R. 147=1933 B. 190 In a proceeding under this rule the Court cannot enquire whether the execution is time barred. 60 I.C. 375=2 P.L.T. 275. Civil Court executing warrant issued by Magistrate which becomes its decree under S. 386, Cr. P. Code -- Mere difference between procedures of Civil and Criminal Courts does not entitle executing Court to go behind decree. 119 I. C. 33=1929 M. 383. A direction to proceed with sale after simply notifying claim amounts to an adverse order 1925 M. 368=82 I.C. 737. But see *contra* 1926 M. 216=91 I.C. 985=49 M.L.J. 706 It is not within the scope of the enquiry in applications for removal of attachment to decide whether the attaching creditor had the right to execute the decree and an order cannot be refused merely because the application in execution was time-barred. 7 R. 132=117 I. C. 578=1929 R. 152 Execution sale--Objection by alleged purchaser--Sale not registered--Possession taken by purchaser not sufficient 34 C. W.N. 254=1930 C. 390 Execution of rent decree, claim if lies 17 P. L.T. 385 Decree for rent against wrong person--Execution--Claim by third party--Maintainability 15 P. 812 Where objection is to the execution sale of property and not to attachment, the ground being that there was a prior execution sale in objector's favour, the matter does not fall under this rule. 31 N.L.R. 301=1935 N. 171

CLAIMS UNDER THIS RULE.—WHO CAN BRING CLAIMS.—A person who has only a beneficial interest in property can prefer a claim. 11 M.L.J. 346. Also the assignee for value of a decree subsequently attached in execution of a decree against the assignor, and who seeks to have the decree released from attachment. 10 M.L.J. 116=5 R. 395 A claim by a garnishee also comes within this rule. 38 B. 631=25 I.C. 375, 133 I.C. 248=33 Bom.L.R. 396=1931 B. 288 See also 1931 M.W.N. 259=1931 M. 570=135 I.C. 543 Attachment of debt--Garnishee denying any debt due--Order disallowing objection and directing him to pay--Subsequent suit by decree-holder as receiver for realising debt attached--Plea of denying debt--If barred. 70 M.L.J. 20. Claim by a judgment-debtor as a trustee comes under this rule. 38 I.C. 152. See also 4 O.W.N. 102=1930 N. 293; 17 Pat.L.T. 810. Or by his legal representative as trustee 75 I.C. 1053=1924 A. 183 (2). Purchasers after attachment cannot bring claim proceedings. 9 I.C. 194=16 C.W.N. 542. Transferee of property subject to a contract of a sale, prior to attachment comes under this rule. 38 I.C.

107=5 L.W. 234. A transferee of property attached in execution of a money decree can object under this rule. 123 P.L.R. 1912=13 I. C. 563. Also Administrator-General when empowered to collect the assets of a deceased person 23 B 428 Also Official Assignee, after a vesting order has been passed. 21 B. 205 (218). See also 68 M.L.J. 78 The claim of the Official Receiver under S. 34 of the Provincial Insolvency Act where the vesting was after attachment does not come under this rule. 41 M.L.J. 334=69 I.C. 326. See also 68 M.L.J. 78 In a decree for money with lien on mortgaged property, claims may be enquired into 101 P.R. 1915=32 I.C. 43. A usufructuary mortgagee in possession does not come under this rule but under R. 100. 70 I.C. 306=1 P. 159. But see 1927 P. 51; 16 Bom H.C.R. 100 Also 97 I.C. 255. Attachment of equity of redemption continues even though a usufructuary mortgagee applies for the release of the property. 80 I.C. 428=1925 C. 296. A prior mortgagee cannot intervene under this rule as it does not apply to cases where the property has not been attached. 27 A. 700, 18 B. 98; 14 C. 63. Petition by simple mortgagee for insertion of his mortgage in sale proclamation comes under this rule and its dismissal amounts to an adverse order 25 A.L.J. 659=102 I.C. 792=1927 A. 593; 1929 L. 865=11 L. 369. But see 1926 N. 423; 1926 M. 593; 16 P. 54=17 Pat. L.T. 812=1937 P. 63 (F.B.). Where the interest of a claimant accrued after the attachment, he is not a person who could come under R. 58 152 I.C. 902=1934 P. 511. A claim by a widow in possession of a house in lieu of a deferred dower, comes under this rule 31 I.C. 722=80 P.R. 1915. Money paid to avert an attachment, cannot be claimed back under this rule. 34 I.C. 492=9 S.L.R. 213 Objection by the judgment-debtor as being wakf property comes under this rule 1 P. 637=67 I.C. 438 If the objection is raised by judgment debtor in his own behalf or in a representative capacity in which he has been sued, it is a question to be decided under S. 47. 15 C. 437 (443). But see 17 C. 711 (F.B.); 10 M. 117 (119); 10 M.L.J. 85; 2 A. 752; 23 M. 165 (F.B.) See also 6 Pat.L.T. 725=1925 P. 482 Claim by a legal representative in the same capacity does not come under this rule 38 I.C. 360=5 L.W. 158. Also 3 Pat.L.T. 613=38 I.C. 369; 1932 A.L.J. 125=1932 A. 263; 1935 M. 923. Mortgage decree--Execution against legal representatives of mortgagor--Objection to validity of decree--If open. 37 P.L.R. 123=1935 L. 549. Burden of proof--Decree against Hindu coparcener--Execution against joint family property--Objection by other coparceners--Onus of proof of binding character of decree. 1936 P. 319. The objection by the executor that the decree cannot be executed against him as he was not a party is one under S. 47 and cannot be treated as one under O. 21, R. 58. 149 I.C. 926=58 C.L.J. 487=1934 C. 258. Objection by an exonerated defendant does not come under this rule. 54 I.C. 536=37 M. L.J. 624. See also 1925 N. 185 (Mortgage

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

Notes.

decree) Rent suit—One of the tenants not impleaded—Decree against co tenants—Claim by tenant not party—Maintainability—Effect of Ss. 143 and 170, Bengal Tenancy Act. See 45 C.L.J. 229=102 I.C. 125=1927 C. 381. Suit for rent by landlord against occupancy tenant—Transfer of holding by tenant *pendente lite*—Non-joinder of transferee—Landlord having knowledge of transfer—Decree—Execution against holding—Claim by transferee—Maintainability 40 C.W.N. 683=1936 C. 279

PARTIES TO CLAIM.—Judgment-debtor is not a necessary party to a claim. 22 B. 875 (882); 15 C. 674. A defendant, discharged, not because he was an unnecessary party, is discharged not from the suit but from liability and it is the decree itself that discharges him from liability. He therefore continues to be a party to the suit. See also 10 Pat.L.T. 75=1929 N. 179.

APPEAL.—Order of dismissal of objection by judgment-debtor stating that he has no saleable interest, is appealable. 28 O.C. 175=85 I.C. 997. See also 1927 L. 895=28 Punj. L.R. 121. Where a joint application was made by a party and another not a party, objecting to the attachment, and the parties acquiesced in the application being heard under this rule, an order on the application under these circumstances is appealable. 5 R. 110=101 I.C. 794=1927 R. 137. See also 57 M. 822=40 L.W. 144=151 I.C. 24=1934 M. 435 (1)=67 M.L.J. 36. But see 1933 S. 126=143 I.C. 702. An order on the original side dismissing an application under R. 58 is not appealable under cl. 15, Letters Patent, because of the prohibition contained in R. 63. 60 C. 915=37 C.W.N. 641=1933 C. 715.

AMENDMENT.—This can be allowed by substituting the name of the real claimant, where Court is satisfied that the wrong name has been used through a *bona fide* mistake, and where the other parties are in no way misled or prejudiced. 21 B at 210

EFFECT OF ORDER.—See 45 M. 84=41 M.L.J. 393; 24 A.L.J. 334=1926 A. 244. An order in favour of a claimant must be the result of an investigation. 118 I.C. 634=1929 R. 123. Judgment-debtor is not bound by orders in claim proceedings to which he is not a party. 110 I.C. 511. See also 10 Pat.L.T. 581=1929 P. 604. Where the application of the petitioner's father under R. 58 is dismissed and the order has become conclusive, the petitioner who derives his rights from him is bound by the order. 149 I.C. 1059=36 P.L.R. 89=1934 L. 193 (2). The claimant whose claim was rejected as too late is incompetent again to apply under R. 100, praying to be restored to possession. The finality of the order rejecting claim petition subject only to the result of a suit under R. 63 is not affected by the fact that the order dismissing the claim was irregular. 148 I.C. 334. See also 1935 P. 122.

LIMITATION for fresh suit begins to run from the time of refusal to investigate. Art.

11 of the Limitation Act applies. 45 A. 438=21 A.L.J. 342. But see 43 M.L.J. 467=45 M. 827. When once a claim order is made, limitation begins to run. The filing of a fresh execution application after dismissal of the prior one, does not give a fresh starting point. 66 P.R. 1916=35 I.C. 321. Where the order is an improper one and runs as follows:—"Whatever right the defendant has will pass by the sale. The claim put forward by the petitioner will be noted in the sale proclamation." Limitation for suit does not run from the date of the order. 44 M.L.J. 141=1923 M. 295. But see *contra* 93 I.C. 335=1926 M. 593, also 49 M.L.J. 706. Where a claim is dismissed or struck off without any adjudication, a fresh claim may be entertained. 16 W.R. 59. See also 21 B at 210. But see 1928 M. 525=110 I.C. 567; 113 I.C. 318=1931 A. 608. Claim under—Rejection—Court declining jurisdiction—Suit after one year—Maintainability. 150 I.C. 40=1935 P. 31.

RESTORATION after dismissal for default—Power of Court 143 I.C. 584=29 N.L.R. 176=1933 N. 176. Acceptance of claim in default of decree-holder cannot be re-heard on decree-holder's application. 1936 Pesh. 115.

RIGHT OF SUIT.—A suit is the only remedy against an adverse order. 89 I.C. 888=1925 N. 288; 130 I.C. 200=1930 A.L.J. 1322. Unless a claim is put in under this rule a suit for bare declaration would be barred by S. 42 of the Specific Relief Act. 5 R. 699. A defeated claimant cannot re-agitate his claim in a suit by the successful party. 1925 M. 368=92 I.C. 737. But if the attachment ceases later on account of the dismissal of the execution petition, he will not be precluded from raising the question of title in defence, even after a year. 1925 M. 1113=48 M.L.J. 616. The party against whom an adverse order is passed in claim proceedings and has become final by his failure to bring a suit under R. 63 is not precluded from going behind that order in a subsequent suit by him based on an entirely different title. 60 C. 1406=149 I.C. 410=1934 C. 356. Objection by judgment-debtor that attached property is not liable to sell under S. 60, is governed by S. 47. 133 I.C. 858=33 Bom.L.R. 781=1931 B. 446. Claim petition dismissed—Suit by defeated claimant—Burden of proof on the question of title is on the plaintiff. 10 Lah. L.J. 42, 144 I.C. 315=1933 R. 91, 152 I.C. 441, 40 L.W. 685=1934 M. 587=67 M.L.J. 585; 1933 R. 103. The right to suit is not affected by the sale of the property. 70 I.C. 332=3 P.L.T. 832. An attachment in itself gives no cause of action for declaring the other person's title. 10 L. 543=1929 L. 90 (2)=10 Lah.L.J. 491. Claim to attached property even after sale until satisfaction is made through Court after payment of full purchase money is entertainable. 1931 M. 782=61 M.L.J. 884; 27 S.L.R. 256=145 I.C. 142=1933 S. 198.

REVISION.—A wrong order can be set aside

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

Postponement of sale.

Loc Ams.—[Allahabad and Oudh] O 21, R 58 (2) —In Allahabad and Oudh *add*, "or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided" at the end of sub-clause (2) in R 58, O. 21.

[Calcutta] *Add* the following words at the end of sub-rule (2), R 58, O 21 — "upon such terms as to security, or otherwise, as to the Court shall seem fit".

[Lahore] *Add* the following proviso under sub-rule (1) —

"and that if an objection is not made within a reasonable time of the first attachment the objector shall have no further right to object to the attachment and sale of the same property in execution of the same decree, unless he can prove a title acquired subsequent to the date of the first attachment."

[Nagpur.] *In* sub-rule (2) of R. 58, after the word "objection" where it occurs for the second time, *insert* the following words.—

"or, where the property to be sold is immovable property, the Court may, in its discretion, direct that the sale be held, but shall not become absolute until the claim or objection is decided."

59 [S. 279] The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Evidence to be adduced by claimant.

Notes.

in revision. 1925 M. 588=48 M.L.J. 603, 103 I.C. 12; 1929 P. 746, 7 R. 132; 132 I.C. 666=1931 L. 666; 145 I.C. 444=1933 A.L.J. 1177=1933 A. 751 (1). But *see* 151 I.C. 668=1934 R. 230; 1934 R. 212=154 I.C. 123, 1935 A. 343. The remedy by way of objection under R. 58 is a summary remedy provided by legislature in lieu of a suit, and a refusal of the Court to entertain an objection under the rule can be legitimately considered in revision. 164 I.C. 1012=1936 Pesh. 185. Dismissal of an objection summarily on the ground that there is an unnecessary delay without giving an opportunity to the objector or his Counsel to explain the delay is open to revision. 166 I.C. 337=1937 O.W.N. 48=1937 O. 268. Where a claim is based on a sale deed and possession, and it appears on the facts appearing on the face of the sale deed itself that the sale is invalid in passing any title, the Court must in order to determine whether possession of claimant is on his own behalf or on behalf of the judgment-debtor inquire into the question of title. And where the Court fails to consider the question of the validity or otherwise of the sale-deed and refuses to go into the question of title, it fails to exercise jurisdiction vested in it by law and its order is open to revision. 14 R. 516=1936 R. 306.

APPEAL.—An order passed by the Court under R. 58, is conclusive and can only be challenged in a suit brought under R. 63. No appeal lies against such order. 165 I.C. 519=9 R.L. 254=1936 L. 830. Objection to attachment by judgment-debtor in his capacity of trustee—Order upholding objection—Appealability—C. P. Code, S. 47. 50 A. 801=113 I.C. 171; 17 Pat L.T. 810. If objection is really under S. 47 even though wrongly described and dealt with under R. 58, the order nevertheless operates as a decree and is appealable. 137 I.C. 258=1932 L. 376.

Receiver of properties of judgment-debtor—Attachment of monies in his hands in execution of decree against judgment-debtor—Objection by receiver—Order allowing—Appeal—S. 47. 30 S.L.R. 288. But *see* 160 I.C. 383=1936 S. 2.

O. 21, Rr 59-63—Nowhere is the Court given power to declare in the course of proceedings under Rr. 59, 60, 61 and 63 that a person who has applied for removal of attachment is subject to a decree which was not passed against him. 154 I.C. 1045=1935 R. 11.

O. 21, R 59.—Principles of Rr. 59 to 61 govern investigation of claims as to property attached before judgment. 146 I.C. 9=1933 N. 297. The rule does not mean that if the claimant establishes that he has some interest he can succeed irrespective of the question of possession, nor should his claim be disallowed if he fails to establish the interest set up, irrespective of the question of possession of judgment debtor. 24 I.C. 62. Ordinarily Court enquires into possession only, occasionally into title as well. 39 I.C. 275=13 Bur L.T. 14. But the enquiry is not necessarily confined only to possession. 10 I.C. 994; also 48 I.C. 182=11 Bur L.T. 118. But *see* 24 I.C. 62; also 59 P.C. 947=43 M. 760, 8 I.C. 117=35 M. 35. Where judgment-debtor claims to hold under a title of his own and the claimant sets up an adverse title and is not in possession of the property at the time of attachment, he has so far as R 59 is concerned, no interest in the property. 146 I.C. 9=1933 N. 297. *See also* 1934 R. 212=154 I.C. 123.

EVIDENCE.—The applicant has a right to establish what the law requires, by any evidence sufficient for the purpose, and the Court has no power to require from him any particular kind of evidence. 22 W.R. 392. If no evidence of possession is adduced the

60. [S. 280.] Where upon the said investigation the Court is satisfied that

Release of property from attachment

for the reason stated in the claim or objection such property was not, when attached in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property wholly or to such extent as it thinks fit, from attachment.

61. [S. 281.] Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account

Disallowance of claim to property attached.

of any other person, or was in the possession of some

Notes.

Court should deal with the question of title only. 32 I.C. 34 When a Judge refuses to receive evidence, any order passed by him is *ultra vires* 22 W.R. 422; 27 A. 16 (F.B.). A revision lies if the Court acts with material irregularity. 76 I.C. 677=1 R. 276. See also 60 I.C. 616.

O. 21, Rr. 59 and 60 SCOPE AND EFFECT.—The 'interest' referred to in R. 59 is not necessarily an interest in land in the sense that expression is used in S. 54, Transfer of Property Act. The C. P. Code and the Transfer of Property Act are not *in pari materia* and there is no reason to suppose that it was within the contemplation of the legislature that the interest referred to in R. 59 should exclude all rights which are not interests in land. On the contrary, R. 60 shows beyond a possibility of doubt that the word 'interest' is used in a wider sense. A party, in whose favour there is a contract of sale, can enforce specific performance of that contract against a transferee with notice. 157 I.C. 1104=41 L.W. 739=1935 M. 193=68 M. L.J. 67.

O. 21, R. 60. SCOPE OF RULE.—An order for release has not the effect of putting an end to an attachment duly made 33 C. 1158. When crops were wrongly attached but were subsequently released from attachment on claim preferred by an objector and the crops were accidentally burnt and destroyed during attachment, and while in the custody of the *supratdar*, the objector would be entitled to recover the value of the crops burnt. 1936 N. 257.

NATURE OF INVESTIGATION.—The investigation under this rule should be confined to determining whether or not the property attached was in the possession of the claimant on his own account 10 C. 1057. See also 18 C. 290; 110 I.C. 365 The Court should decide on merits when a claim is put in and not drive the claimant to a regular suit. 248 P.L.R. 1914=27 I.C. 256 The extent to which the investigation should be carried out depends on the circumstances of each case 15 C. 521 (P.C.); 1 C.W.N. 617 See also 29 C. 543; 18 M. 265; 12 C. 108. If a claim is made by the decree-holder that the persons in possession are only in possession on behalf of the judgment-debtor, the

Court should investigate the claim of title. 1934 R. 212=154 I.C. 123. When an intervenor claims a share of attached property the Court should determine the respective shares of the debtor and intervenor. 27 A. 464. See also 29 M. 225. A conditional order on a claim should not be passed. 44 I.C. 1007. On this rule, see also 91 I.C. 414=1926 M. 355. Building contract—Builder assigning moneys due under Loan Society—Attachment of such moneys by creditors of builder—Validity. 49 C.L.J. 51=115 I.C. 362=1929 C. 225

APPLICATION OF THE RULE.—A mortgagee in possession holds the property in trust for the mortgagor to the extent of his interest therein, and so far it must be released from the attachment. 10 I.C. 994 When a claimant has a half share in attached moveable property the proper procedure is to release the entire property and to proceed by way of attachment under O. 21, R. 47. 59 C. 808=1932 C. 408 See also 1935 R. 11.

IN TRUST.—These words apply to cases in which the possession of a claimant as a trustee is of such a character as to be really the possession of the debtor, and not to cases in which very intricate questions of law may arise as to whether valid trusts may result in particular instances. 14 C. 617 (620). See also 21 B. 287; 1933 R. 259. Transfer of property after release from attachment on claim is liable to be set aside if the order itself is set aside by a regular suit. 62 I.C. 348=25 C.W.N. 544 See also 2 Bur.L.J. 113=1923 R. 237. When in order to prevent the taking to Court of property attached, the claimant pays to the *Amin* the amount of the decree, he must, if he wants to have the money refunded, file a regular suit. The Court cannot direct a refund. 22 B. 473 An order in favour of a decree-holder does not enure for the benefit of the other decree-holders who are not parties to the proceedings. 18 A. 413.

APPEAL.—No appeal lies from an order passed under this rule. 28 B. 458. Whether appeal lies under S. 15 of the Letters Patent against order dismissing a claim See 25 M. 555.

O. 21, R. 61.—The Court cannot merely on suspicion hold that the claim is untenable. 29 C. 543. If necessary, a Judge can go into the question of the validity of a registered

other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

62. [S. 282.] Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

63. [S. 283.] Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

Notes.

or other document, if this entailed a consideration of the *bona fides* of the sale, or the legal effect of the deed of conveyance including the circumstances of the registration of it [42 I.C. 182, 15 Cal. 521 (P.C.) and 1924 C. 744, Foll.] 1935 R. 395 Effect of order. See 17 C. 260. Possession of a claimant under a fraudulent and collusive sale must be deemed to be in trust for the judgment-debtor. 17 I.C. 12=16 C.W.N. 959. When a claim is disallowed but the attachment is raised a suit for possession within one year under Art. 13 of the Limitation Act is not necessary 45 B. 561=59 I.C. 774. Where in a suit against the father and one of the sons, the entire property was attached and a subsequent purchaser of the shares of other minor sons not impleaded in the suit claimed a share of the property, held, that if the share of the minor sons was to be treated as not attached, they or the purchaser of their shares had no *locus standi* to come to Court; but in fact the whole of the property, including the minor's shares, were attached, as the decree-holder was entitled to do so in a suit against the father though the minors were not parties to the suit 146 I.C. 516=1933 M. 839=65 M.L.J. 752

O. 21, Rr. 62 to 66—The Civil Procedure Code makes a distinction between the case in which property is expressly sold subject to a mortgage under R. 62, and the case in which notice of an alleged mortgage is given in the sale proclamation under R. 66. In the former case the Court sells under the judgment-debtor's equity of redemption and the purchaser takes the property subject to the mortgage and he is not entitled to question the mortgage. In the latter case, the executing Court does not decide whether the mortgage exists or not. If there is really a mortgage, the purchaser has to redeem it; but if the mortgage notified in the proclamation of sale turns out to be invalid the purchaser takes the property free of the mortgage 10 Luck. 343=153 I.C. 57=11 O.W.N. 1475=1935 O. 23. Property sold subject to mortgage and notice of encumbrance given in proclamation—Distinction between. 38 L.W. 813=1933 M. 879=65 M.L.J. 819.

O. 21, R. 62. SCOPE.—Code makes a distinction between a case in which property is sold subject to a mortgage and a case in which notice of an alleged mortgage is given in a proclamation of sale. The former is provided by this rule, the latter by R. 66 28

A. 418 at 420, 10 Luck. 343=153 I.C. 57=11 O.W.N. 1475=1935 O. 23. See also 41 B. 561=36 I.C. 627; 132 I.C. 767=1931 O. 157. Comparison of this rule with O. 23, R. 1 20 N.L.R. 106=1925 N. 2.

APPLICATION OF THE RULE.—A mortgagee in possession can prefer a claim. 10 Bom. H.C.R. 100. A sale subject to a charge, on the application of a person in possession claiming a charge of maintenance on the property is valid 44 B. 860=58 I.C. 217. See also 35 B. 275=10 I.C. 913. A purchaser under a sale subject to a mortgage, cannot dispute the mortgage. 47 C. 446=24 C.W.N. 269. See also 29 I.C. 690=21 C.W.N. 401; 50 I.C. 909, 15 N.L.R. 15=1923 N. 282; 30 I.C. 238, 2 O.L.J. 225; 50 I.C. 580, 12 Bur. L. T. 43. A decree holder purchaser can contest the declaration of lien under this rule, by a suit brought within one year of the declaration 1931 A. 139=52 A. 1032=131 I.C. 674. But where Court did not direct the sale of the property subject to a mortgage, but the mortgage is simply declared at the time of sale, the auction-purchaser is not precluded from questioning the validity of the mortgage. 36 I.C. 732=3 O.L.J. 422. Order for sale with notice of mortgage—Property—Proper order to be passed 34 C.W.N. 254=1930 C. 390, 9 R. 367=134 I.C. 746=1931 R. 310. A purchaser of property subject to a mortgage can plead limitation in a suit by the mortgagee. 23 I.C. 448=17 O.C. 38.

O. 21, R. 63. OBJECT AND SCOPE.—Suit to show that claimant has a title to the property and that order of attachment was not properly made would lie under the rule 37 L.W. 437=1933 M. 328=142 I.C. 395. Terms of R. 63 are wide enough to include a suit based on title; and in order to prove that the claimant has a right to the property in dispute, a consideration of his title as well as of possession will be relevant. The two questions cannot be separated from each other. 68 M.L.J. 590. See also 41 L.W. 550=68 M.L.J. 518. The object of the suit is to get rid of the attachment. Therefore no suit need be filed when attachment is raised and suit abates on removal of attachment. 1917 M.W. N. 851=42 I.C. 683. But see 26 I.C. 532=26 M.L.J. 499. See also 1926 N. 197=93 I.C. 997; 7 L. 235=1926 L. 348. No suit where decree-holder himself withdraws the attachment 110 I.C. 511, 122 I.C. 865; 41 L.W. 578=156 I.C. 880=1935 M. 544. But see 1929 R. 228. An order passed by executing Court on an objection filed under R. 58 which

Loc. Ams.—[Calcutta.] O. 21, R. 63-A. Add the following as R. 63-A, O. 21.—

Notes.

1. Not pressed subsequently and is therefore dismissed is an order covered by O. 21, R. 63. 7 O.W.N. 1173=1931 O. 1 (F.B.) A regular suit is a continuation of the claim proceedings 1925 N. 82. The institution of a suit by the attachment creditor under R. 63 is not merely a continuation of the original claim proceedings, but is really in part a new legal proceeding. Nature of suit under R. 63 considered with reference to provisions of S. 16 (2) (b), Provincial Insolvency Act, 1907. 119 I.C. 46 (2)=1929 M. 323=56 M.L.J. 489. It is in the form of an appeal because the summary investigation might not have furnished sufficient material for decision. 90 I.C. 196. A suit can be instituted even when the attachment had virtually ceased the decree having been satisfied from other properties of the judgment-debtor 9 C. 10; 18 B. 241; 21 B. 58, 31 C. 228; 29 M. 225. But see 27 C. 714, 16 A. 165 (169) (F.B.), 18 B. 260; 12 C. 696 (701); 17 C. 436; 22 B. 640. There is no doubt or difficulty in applying R. 63 to a case of attachment before judgment. 49 C.L.J. 51=115 I.C. 362=1929 C. 225. When attachment before judgment ceases on the dismissal of a suit, it does not effect an abatement of a suit under this rule. 27 I.C. 800. Whether suit decides the question of title arising in execution 43 M. 760=39 M.L.J. 350 (F.B.) overruling 43 I.C. 651=33 M.L.J. 705=41 M. 612 (F.B.) and 34 I.C. 778=30 M.L.J. 565. The Court is not restricted to determine only the question of the attachability of the property but can also question the validity of the decree itself. 23 I.C. 755. Rule covers not merely a declaratory suit, but also one for consequential relief. 40 M. 733=31 M.L.J. 394. If attaching creditor withdraws the attachment, a suit by him is maintainable not under this rule but under S. 42 of the Specific Relief Act. 33 I.C. 124=9 Bur L.T. 89; 29 M. 151 (F.B.). See also 41 L.W. 500=1935 M. W.N. 331=34 I.C. 125=9 Bur L.T. 19, 5 R. 699. A suit under S. 42, Specific Relief Act, before sale would be premature. 52 I.C. 157. Non-objection does not amount to consent, and suit under this rule is not one to set aside a consent order. 28 I.C. 536=1915 M.W.N. 237. Cause of action for suits under R. 63 is that comprised in the claim petition.—Causes of action arising subsequent to the dismissal of claim petition need not be joined. 1928 M.W.N. 336=28 L.W. 82=110 I.C. 554=1928 M. 840=56 M.L.J. 52. Distinction between case under this rule and one under S. 64—Attachment raised owing to misapprehension—Intervening charge—Subsequent attachment—Effect. 7 R. 201. Decree against firm—Decree-holder seeking to attach property of respondent on ground that he was joint with one of judgment-debtor—Objection by respondent under R. 58 that it was his exclusive property upheld—No suit filed—Decree-holder subsequently obtaining leave to execute decree against

respondent under O. 21, R. 50 (2)—Execution against same property—Permissibility. *Held*, that all that was decided in the previous execution proceeding was that the property sought to be attached was the exclusive property of the respondent, and that although after that order the property could no longer be attached in execution of the decree as it originally stood, that order could not stand in the way of the appellant executing the decree against the property of the respondent after he had obtained an order from the trial Court that he was entitled to proceed against the respondent and his property as he was a partner in the judgment-debtor firm 14 P. 857=1935 P. 409. An order on the Original Side dismissing an application under R. 58 is not appealable under Cl. 15, Letters Patent, because of the prohibition contained in R. 63. 60 C. 914=37 C.W.N. 641=1933 C. 715. Dismissal of claim by mortgagee—Failure to sue within one year—Execution sale and purchase by decree-holder—Delivery of possession—Application by mortgagee under R. 100—If barred 17 Pat. L. T. 812 (F.B.) See also 42 L. W. 649. Where a person has been actually in possession of certain properties adversely to the owner thereof, the dismissal of a claim petition preferred by him under R. 63 does not operate as an interruption of that adverse possession by operation of law, especially when the attachment is raised subsequently. 1936 M.W.N. 1113=44 L.W. 617. The fact that the attachment is raised only beyond a year of the dismissal of the claim does not make any difference, because once it is raised, it ceases to be effective even from the date of the attachment itself. An attachment, further, does not operate as a disturbance of the possession. (*Ibid*) The words "the right which he claims to the property in dispute" show that it is not necessary for the plaintiff to establish his own "title" in the property in question, but what he has to establish is, either the claim to have the property attached, or to have it released from attachment. 17 L. 668=1936 L. 524.

NATURE OF ORDER IN A CLAIM.—The dismissal for default of a claim amounts to negating it. 26 C.W.N. 126=1922 C. 166. Also 15 I.C. 683=16 C.W.N. 882, 64 I.C. 209=24 O.C. 213; 97 I.C. 178=22 N.L.R. 94=1926 N. 423. But an order 'not pressed, dismissed' is not one under the rule. 1925 M. 265=80 I.C. 233. *Contra* see 131 I.C. 77=1931 O. 1. Where a claimant applies for withdrawal of claim stating that he will bring a suit and the claim is dismissed, a suit need not be filed within one year as the order does not fall under O. 21, R. 63. [41 M. 985=35 M.L.J. 335 (F.B.), Expl., 110 I.C. 511, Foll.] 156 I.C. 906=41 L.W. 500=1935 M. 328. See also 41 L.W. 578=1935 M. 544. Also the dismissal of a claim petition for want of jurisdiction does not come under this rule 41 M.L.J. 198=63 I.C. 431. The order is conclusive even when the claim is rejected as no evidence is adduced

When an attachment of movable property ceases, the Court may order the restora-

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to prove it 32 C 527 Also 17 M.L.T. 223 =28 I.C. 244 Also where it is dismissed as being made after unnecessary delay. 35 Bom. L.R. 147=144 I.C. 993=1933 B. 190 See also 39 C.W.N. 457=61 C.L.J. 5 An order for removal of attachment is final even though passed *ex parte*. 2 Bur L.J. 60=1923 R. 156. Order under this rule is conclusive 66 P.R. 1916=35 I.C. 321; 8 N.L.J. 170=1925 N. 390. The word "conclusive" means final, i.e., not appealable 1 R. 276=1923 R. 195. The order in a claim case is conclusive only with regard to the parties to the claim and the disputed property. 44 C. 698=21 C.W.N. 222. Also 18 A. 413 The judgment-debtor when a party is bound by a claim order only to the extent of the adjudication The purchaser takes it subject to rights as determined by the Court 37 M.L.J. 547=54 I.C. 530 When a claim that attached properties should be sold as subject to a mortgage or lease has been decided by an executing Court, the provisions of O. 21, R. 63 apply to the decision. (1926 N. 423, Overruled.) 26 N. L.R. 136=123 I.C. 474=1930 N. 116 (F.B.) Such an order would bind the judgment-debtor if he is a party to it, and the question whether he was a party to it will depend upon the circumstances under which it was made and the terms of it 13 M.L.J. 367. But decree-holder purchaser can impeach validity and *bona fides* of the mortgage within a year. 52 A. 1032=131 I.C. 674=1931 A. 139. Even an order passed without investigation is conclusive 27 I.C. 944=2 L.W. 205, 104 I.C. 289=1927 L. 680 See also 6 N.L.J. 66=71 I.C. 404, 69 I.C. 522=1923 N. 69, 1 R. 481 =2 Bur.L.J. 173; 116 I.C. 81. But see 22 B. 875 (882). Also 27 C. 714 (722). An order dismissing an objection under R. 58 whether it is an order disposing of the case on the merits or whether it is an order which held that the objection was not entertainable on the preliminary ground that a certain legal provision was a bar to the maintainability of the application is a disposal of the application under R. 58 after hearing the parties and therefore is an order contemplated in O. 21, R. 63 and Art 11, Limitation Act 115 I.C. 703, 1929 P. 116. Dismissal of claim petition by Court having no jurisdiction—Finality 112 I.C. 619. Mere recording of objections without an adjudication does not amount to an order against the objector 52 I.C. 938=1919 M.W.N. 805 But see 37 M.L.J. 159=52 I.C. 720 Where a claim petition is summarily rejected on the ground that "the execution has already been transferred to the Collector," the order is an ambiguous order which must be construed in favour of the claimant, it is not an order "against" the claimant within the meaning of R. 63 19 N.L.J. 308=1937 N. 170. An order that the allegation of the claimants will be notified to bidders is one made against the claimants and amounts to a rejection of a claim petition 41 M. 985=35 M.L.J. 335 (F.B.). See also 1925 M. 365. Claim by tenant of

judgment-debtor to occupancy rights—Order notifying claim and sale not to prejudice rights of claimants—Effect of—Right of purchaser to possession. 41 L.W. 550=68 M.L.J. 518. This rule does not introduce an exception to the rule that the defendant is bound to set up every defence available to him 17 M. 389 But see 10 B. 659 Attachment—Objection by lessee upheld—Subsequent suit by purchaser for ejectment—Lease objected to on the ground of S. 57 T.P. Act—Maintainability See 104 I.C. 292=1927 A. 657. Dispute only as to priority between attaching creditor and petitioning claimant—Claim dismissed—Dismissal not set aside by suit—The only effect is that attaching creditor gets priority—Property attached under mortgage decree though unnecessarily—Claim preferred and rejected—Claimant must sue within one year. 110 I.C. 567=1928 M. 525. Claim by two persons—Dismissal of—Suit by one of them impleading the other as defendant—No independent suit by the other—Order against him also subject to suit. 152 I.C. 267=36 Bom.L.R. 227=1934 B. 189 Order allowing claim by judgment-debtor's wife—Subsequent insolvency of judgment-debtor—Petition by decree-holder to annul transfer. *Held*, that the application was not barred by reason of the prior claim order under R. 63, because he was acting only in his personal capacity in the claim proceedings, whereas in the insolvency proceedings he was acting in representative capacity, that is, on behalf of all the creditors The personal disability of the creditor arising from the prior adverse claim order cannot bar the right of the creditors to re-agitate the question 42 L.W. 215=1935 M. 670=69 M.L.J. 120.

SUIT IS THE ONLY REMEDY—An unsuccessful party must bring a suit to establish his right He cannot be permitted to raise any defence in any other way 1922 C. 164; 71 I.C. 45 (1) See also 6 L.W. 281=41 I.C. 684; 1928 A. 327, 115 I.C. 912=1929 R. 104. He must impeach the validity of the order directly as a plaintiff and not indirectly as a defendant. 156 I.C. 586=1935 R. 161 On dismissal of an execution petition on an objection, an appeal or a suit lies, but no revision. 38 I.C. 299. But if the claim is disallowed, no appeal lies 38 A. 537=35 I.C. 6; 38 I.C. 152; 34 I.C. 759=3 L.W. 377. Since no proper order without proper investigation can be passed, the findings are subject to question in second appeal being mixed questions of law and fact 37 I.C. 92=19 I.C. 357.

APPLICABILITY OF THE RULE—Where the attachment is raised within a year from the date of the order, no suit need be filed. 97 I.C. 178=22 N.L.R. 94=1926 N. 423; 94 I.C. 120=1929 R. 228; 1931 L. 74. Attachment raised after a year but decree satisfied otherwise. No difference. 131 I.C. 225=1931 L. 74 So also in the case of a summary order of dismissal of objections when the attachment itself is subsequently released owing to

tion of the attached property to the person in whose possession it was before the attachment.

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the reversal of the decree, and the property in question is not sold. 163 I.C. 892 (L.). A suit by a decree-holder under this rule against a reversioner claimant is not barred under S. 47, C.P. Code 71 I.C. 1012=1923 A. 192. A suit against judgment-debtor for refund of consideration by an unsuccessful claimant is not a suit under this rule and need not be brought within a year. 46 A. 45=1924 A. 302. The rule applies even when a garnishee objects but his objection is overruled. If he does not bring a suit, to declare that nothing was due to judgment-debtor, the claim order would be final and conclusive. 44 M.L.J. 588=1923 M. 562; 1931 M.W.N. 259=1931 M. 570. See also 151 I.C. 679=1934 L. 560. Attachment of pro-note—Objection by executant that debt discharged—Order for sale without investigation—Subsequent suit on pro-note by purchaser in execution—Plea of discharge. *Held*, that in the execution proceedings there was no order under R. 61, and therefore R. 63 did not apply. Therefore it was open to the executant to take the same objection again. 1937 N. 149. A suit for bare declaration under this rule would be barred by S. 42 of the Specific Relief Act unless a claim has been put in under R. 58, 5 R. 699. See also 103 I.C. 763=1927 L. 631. The order of rejection of a claim need not be set aside within one year when there is only an order of attachment, but no actual attachment effected. 51 M. 349=55 M.L.J. 122=1928 P.C. 139 (P.C.). So also in the case of absence of valid attachment. 160 I.C. 835=1936 Pesh. 41.

LIMITATION.—The suit must be brought within one year from the passing of the order complained of. 15 C. 521 (P.C.), 22 B. 640; 20 B. 801; 11 C. 673 (678); 26 C. 778. 35 Bom.L.R. 147. Art. 11 of the Limitation Act does not come into operation until an adjudication on the merits of an objection is made. 3 L. 7=1922 L. 108. Also 44 M.L.J. 141=1923 M. 295. Plaintiff's suit for a declaration that the defendant has no title in the property is one falling under R. 63 and governed by Art. 11 of the Limitation Act. 130 I.C. 200=1930 A.L.J. 1322. A mortgage suit more than one year after claim was disallowed, would be barred, even though no actual attachment was made in pursuance of an order of attachment. 41 M.L.J. 594=45 M. 90. See 38 M.L.J. 397=56 I.C. 481. See also 37 M.L.J. 159=52 I.C. 720; 1927 A. 593. Where a suit in which an attachment before judgment was obtained was dismissed, but on appeal the decree was reversed, the reversal does not restore the attachment. The period of limitation therefore starts from the date of dismissal of a fresh claim at the time of executing the appellate decree. 87 I.C. 756 (2)=1925 C. 1147. Where claim is disallowed on the ground that claimant's interest accrued only after the attachment, such an order is not one under this rule. 152 I.C. 902=1934 P. 511. Where the claim is disallowed but the attachment ceases under

R. 57, the question of title can be raised even after a year. 1925 M. 1113=48 M.L.J. 616. See also 39 M.L.T. 108=104 I.C. 424=1927 M. 893, 133 I.C. 318=1931 A.L.J. 856=1931 A. 608; 56 A. 537=148 I.C. 676=1934 A. L.J. 19=1934 A. 267 (F.B.). The conclusiveness of an order on a claim petition is conditional on the continuance of the execution proceedings and of the attachment issuing therefrom. Where after the disallowance of a claim, the execution proceedings come to an end by reason of the execution sale being set aside, the attachment goes and with it the order disallowing the claim also goes and becomes useless and inoperative. A suit brought by the defeated claimant for declaration of his title to the property in question beyond one year is not therefore barred under Art. 11 of the Limitation Act, as the order on the claim is no longer a bar. 165 I. C. 84=40 C.W.N. 146. Art. 11, Limitation Act, will have no application whether the execution proceedings terminate as a result of the setting aside of the sale, within or beyond one year after the adverse claim order. (*Ibid.*) Claim on behalf of idols—Dismissal of—Suit by prospective representative—Limitation 1928 C. 514. Where an attachment is released as invalid and claim accepted—Suit to declare gift in favour of claimant invalid—Suit is not one under this rule—Art. 11, Limitation Act, does not apply, but only Art. 170. 144 I.C. 378=38 P.L.R. 443=1933 L. 449.

FOR COSTS OF CLAIM PETITION.—See 20 L. W. 557=83 I.C. 89=1925 M. 233 (1). Suit by defeated claimant—Cost of claim proceedings—If can be decreed. 119 I.C. 213 (1)=1929 R. 128 (1); 1933 R. 91=144 I.C. 315.

JURISDICTION.—In a suit to establish a right to attached property the value of the subject-matter of the suit for determining jurisdiction will be the amount of the decree in satisfaction of which it is sought to bring the property to sale. 2 A. 799, 9 A. 140, 17 A. 69. The valuation for jurisdiction of a suit, involving avoidance of transfer under S. 53, T. P. Act, must be the value of the properties transferred and not the amount of the decree sought to be executed. This valuation cannot be the sum-total of the debts due to all the existing creditors, for the term 'creditor' includes not only creditors at the time of the assignment but also those who subsequently become creditors. But when the suit of the attaching creditor does not involve the avoidance of any transfer of property, the Act has no application and the suit need not be brought as a representative suit, and its valuation for jurisdiction would be the amount of the decree sought to be executed or the value of the property whichever is less. 152 I.C. 555=1934 R. 302. See also 12 R. 670=1934 R. 332. The value of the declaratory suit is the value of the decree in execution of which the property was sold and not the value of the property sold. 40 A. 505=45 I.C. 494. Also 38 A. 72=31 I.C. 879; 253 P.L.R. 1914=25 I.C. 180. But see 82 P.R.

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1913=18 I.C. 820, 17 I.C. 190=41 P.R. 1913, 29 L.W. 349=56 M.L.J. 489=1929 M. 323, 39 M. 602, 17 A. 69; 137 I.C. 54=1932 R. 20. The valuation of the suit in cases where the value of the property is greater than the amount of the decree, is the amount of the decree. (38 A. 72, Appr., 17 A. 69, Overruled.) 55 A. 315=1933 A.L.J. 222=1933 A. 249 (F.B.) The amount which settles jurisdiction is the amount which the execution creditor will recover if he is successful, and not the value of the property attached 15 C. 104. The nature of the claim and the right sought to be enforced, determine the Court in which the suit has to be instituted 7 C. 508. A Revenue Court has no jurisdiction to try a suit under R. 63 of the Code (51 M. 774 and 1932 M. 716, Rel. on) 146 I.C. 600=1933 M. 865=65 M.L.J. 775. Where in execution of rent decree a certain land was attached but, on intervention of an objector, the land was held not liable to attachment, a suit by the decree-holder to determine the rights between the objector and himself is not one which the Revenue Court, the jurisdiction of which is strictly limited, is competent to entertain under S. 77 of the Punjab Tenancy Act. Having regard to S. 88 of the same Act and the rules made thereunder, O. 21, Rr. 58 to 53, apply to the case and the matter could only be determined by a suit under R. 63 brought in a Civil Court 39 C.W.N. 89=15 L. 836=61 I.A. 371=1934 P.C. 217=67 M.L.J. 641 (P.C.).

COURT-FEE—See 16 A. 308 (F.B.); 10 B. 610 (F.B.), 17 M.L.J. 618 (P.C.); 13 C. 162, 64 I.C. 49.

RIGHT TO SUE.—The proper procedure for a party to adopt, when the objection to his right to attach is made and it is found on enquiry that there has been no valid attachment, is not to institute a suit under R. 63, but to apply to Court for the issue of a fresh warrant of attachment 156 I.C. 697=1935 R. 186. A receiver appointed by High Court brought a suit against a father and son. The father was exonerated and a decree obtained against the son. The father and the second son put in a claim which was dismissed and thereupon filed a suit under R. 63 without obtaining sanction to sue the receiver *Held*, that the rule forbidding the bringing of a suit against a Receiver is a mere procedure of Court not resting on any statutory authority, whereas the right to bring a suit under R. 63 was statutory; that a statutory right to sue cannot be defeated by any rule of practice, that proceedings under R. 63 being only a continuation of the suit, no sanction was in fact necessary; and that even if sanction was necessary, the sanction by the Sub-Judge was sufficient. 37 L.W. 346=1933 M.W.N. 152=1933 M. 340. Where a widow objected to attachment in execution of a decree against her deceased husband on the ground that the attached property was her own and did not form part of the estate of her husband, *held*, that that did not remove

the case from the operation of S. 47, and no separate suit will lie, but that the matter has to be determined in execution proceedings and an appeal will lie in the ordinary course. 58 B. 513=152 I.C. 168=36 Bom.L.R. 608. See also 1935 A.L.J. 74=1935 A.W.R. 39=153 I.C. 577=1935 A. 183 (Case of objection by legal representative) Where in claim proceedings the objectors have impleaded both the decree-holders and the judgment-debtor but an order is passed on the failure of the judgment-debtor to appear even though he was served, the proceedings would be *ex parte* so far as he is concerned; the order passed in the claim objections is one made against both the judgment-debtor and the decree-holders. That being so, R. 63 gives him right to institute a regular suit for a declaration without having to do anything more 158 I.C. 825=1935 L. 534. Decree *benami*—Attachment in execution of decree against real owner—Objection by *benamidar* allowed—Suit by decree-holder for declaration—Maintainability. 41 L.W. 34=1935 M. 140=68 M.L.J. 129. A creditor having attached and brought to sale the one-third share of the judgment-debtor which he had inherited from his mother, the latter's daughter objected under R. 58 on the ground that she was a mortgagee of the whole property from the mother. Her objection was upheld and the share was sold subject to her mortgage. She filed a suit on her mortgage whereupon the creditor objected to the mortgage and also brought a suit under R. 63, for a declaration that the mortgage was collusive and without consideration. It was contended that the creditor firm had no *locus standi* and could not be allowed to challenge the mortgage as being without consideration. *Held*, that the firm by purchasing land at the Court auction succeeded to the rights of the judgment-debtor his mother's property and he, being the representative of his mother, the firm was also a representative of the mother and therefore had a right to challenge the mortgage and to assert that it was a sham and collusive transaction and without consideration. 161 I.C. 342=1936 R. 2.

FRAME OF SUIT.—Suit under this rule by defeated decree-holder—If one under S. 53, T.P. Act. 62 C.L.J. 548. The terms of R. 63, are wide enough to include a suit based on title; and in order to prove that the claimant has a right to the property in dispute, a consideration of his title as well as of possession will be relevant. The two questions cannot be separated from each other 1935 M. 596=41 L.W. 726=68 M.L.J. 590. In a suit under this rule the attachment is the cause of action, and different purchasers of the attached property can be joined as defendants in the same suit 27 M. 94; 28 A. 41, 16 B. 615. See also 17 C. 436 (P.C.); 23 B. 266; 4 M. 131; 13 B. 72; 10 B. 659, 17 M. 389; 7 C. 608. An ordinary creditor, much less an attaching decree-holder, need not sue in a representative character to set aside a fraudulent alienation

[Lahore] O. 21, R. 63. The following rule shall be added after R. 63.—

63-A. (1) When the property attached is a debt, the Court executing the decree shall investigate the claims of the judgment-debtor against the garnishee in respect thereto and may order the garnishee to pay the amount of the debt to the Court.

(2) The garnishee shall be deemed to be a party to the suit in which the decree was passed within the meaning of S. 47 and subject to the provisions of that section the orders passed by the Court as a result of such investigation shall be conclusive between the judgment-debtor and the garnishee and no separate suit relating thereto shall lie." [N.B.—See 1935 Lab. 26.]

Notes.

42 M. 143=36 M.L.J. 231. Also 59 I.C. 947=43 M. 760 (F.B.); 71 I.C. 20; 133 I.C. 118=1931 L. 430. When a suit is brought under the provisions of R. 63, by an attaching creditor to establish his right to attach and bring to sale certain property, and in order that he may succeed it is necessary to avoid a transfer of the property on the ground that the transfer has been made with intent to defeat or delay the creditors of the transferor, the suit must be brought in the form of a representative suit, on behalf of or for the benefit of all the creditors of the transferor, and the provisions of O. 1, R. 8 will be applicable, and the transferee and the judgment-debtors as transferors, will be necessary defendants in such a suit. 12 R. 670=1934 R. 332. See also 152 I.C. 555=1936 A.M.L.J. 104. It is not obligatory on a plaintiff in a suit under R. 63 to press the whole of the claim raised by him in the objection under R. 58. If he realises that part of his claim in objection cannot be sustained, he is entitled to omit it when bringing a suit under R. 63. 1936 Pesh. 206.

PARTIES TO THE SUIT—When after a claim is disallowed, the claimant sells his interest in the property to a third person, the rule does not prevent the purchaser from bringing a suit. 26 A. 89. Auction-purchaser in execution of decree can be added as party. 103 I.C. 763=1927 L. 631. The auction-purchaser is a necessary party and if there is no suit in which he is a party until more than a year after the dismissal of objection to the attachment, the order dismissing the objection is conclusive in favour of the auction-purchaser. 155 I.C. 272=1935 Pesh. 29. Decree-holder is not a necessary party in a claim suit by a defeated claimant when the purchaser was a third party. 70 I.C. 168=1923 M. 58; 103 I.C. 763=1927 L. 631. A decree-holder is not a necessary party to a suit under R. 63, O. 21, C. P. Code, by an unsuccessful objector. 105 I.C. 799. But see 165 I.C. 252=1936 Pesh. 189, where attached property was sold in execution. To a suit by a defeated claimant against the attaching decree-holders, the claim being based on a sale-deed executed by the judgment-debtor to the claimant, the judgment-debtor is not a necessary party. 40 L.W. 685=1934 M. 587=67 M.L.J. 585. See also 144 I.C. 524=1933 L. 573. So also in the case of decree-holder claiming to attach property purchased *benami* of the judgment-debtor in the name of his wife, 1935 R. 489. See also 1934 R. 302. But he is a proper party to the suit, though he was not party in claim proceedings. 161 I.C. 950=1936 R. 56. A judgment-debtor who throughout contested the claim is a party and can bring the suit under this rule. See 22 I.C. 797=84 P.R. 1914. Also 1 L.W. 772=25 I.C. 700. Suit against receiver. 1933 M. 340=1933 M.W.N. 152.

PARTY AGAINST WHOM ORDER IS MADE.—A plaintiff to whom notice of the claim proceedings has not issued cannot be considered as a party against whom an order has been made. 25 M. 721.

THE BURDEN OF PROOF lies on the unsuccessful party. 13 I.C. 455=22 C.L.J. 380; 60 I.C. 751; 50 I.C. 884=47 P.L.R. 1919; 77 I.C. 50=1923 N. 334, 35 I.C. 427=19 O.C. 64; 53 I.C. 892, 37 I.C. 767=10 Bur.L.T. 238; 14 I.C. 813=5 Bur.L.T. 47, 41 M. 205=34 M.L.J. 295, 107 I.C. 782; 113 I.C. 358, 31 P.L.R. 394, 58 C. 813=35 C.W.N. 75=1931 C. 490 (Omission to state value). See also 1927 P.C. 237; 1933 A. 198=144 I.C. 1002=55 A. 266; 40 L.W. 685=1934 M. 587=67 M.L.J. 585, 1933 L. 855, 144 J.C. 851=1933 R. 129. In cases of a defeated claimant the burden of proving that transfer was in good faith and for consideration lies on him. 162 I.C. 495=1936 L. 72. See also 17 Pat.L.T. 785=1937 P. 76; 167 I.C. 48=1937 N. 1. In such suit if he once establishes the consideration, good faith follows, as a matter of course, except in cases of exceptional nature. 1937 N. 85. See also 18 N.L.J. 329. In cases under R. 63 the burden of proving validity of the alienation is on the plaintiff. Defendant however cannot escape the burden at some stage or other. If plaintiff produces his deed and swears that it is genuine and for full consideration and defendants have nothing to say to the contrary plaintiff will succeed and where the burden of plaintiff is so light, it is scarcely worth enquiring whether it is more correct to say that the burden is originally on the defendants or upon the plaintiff. But where defendant has something substantial to say to the contrary, the real burden must inevitably fall upon plaintiff to establish the right which he claims. 55 M. 748=137 I.C. 879=1932 M. 302=62 M.L.J. 236=1937 N. 9; 1937 N. 143. Onus—Gift held to be fraudulent—Fraud not pleaded or raised in issue—Dismissal of suit—Correctness of. 34 P.L.R. 205=1933 L. 550. The onus of proving that the property is the judgment-debtor's lies on plaintiff, and whether or not defendant has a title, the plaintiff must prove the title of the judgment-debtor. 17 B. 94 (99). As to burden of proof in suit by creditor and in suit by claimant, see 157 I.C. 309=16 Pat.L.T. 367=1935 P. 231. Transfer to another creditor after decree but before attachment by itself is no indication of fraud. 100 I.C.

[Rangoon] Add the following rules —
"Garnishee Orders."

63-A. Where a debt has been attached under R. 46, the debtor prohibited under Cl (1) of sub-rule (1) of R. 46 (hereinafter called the garnishee) may pay the amount of the debt due from him to the judgment-debtor into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

63-B. Where a debt has been attached under R. 46, and the garnishee does not pay the amount of the debt into Court in accordance with the foregoing rule, the Court, on the application of the decree-holder, may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree together with the costs of execution. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment-debtor.

Notes.

993 (1)=6 Bur L J 8=1927 R 168. But if the plaintiff adduces evidence sufficient to raise a presumption that the alienation to defendant might be fraudulent, then the onus lies upon the defendant to prove *bona fides*. 67 I.C. 876=3 Lah L J 198. Proof by unsuccessful claimant is required not only of execution of document but of the passing of consideration and delivery of possession. 4 O.W.N. 794=105 I.C. 208=1927 O. 440. And also that the transaction was genuine. 142 I.C. 112=34 P.L.R. 363=1933 L 537. See also 32 C.W.N. 28=105 I.C. 788=1927 P.C. 237=53 M.L.J. 388 (P.C.); 113 I.C. 358=1928 M. 1259, 118 I.C. 897=1929 L 455; 8 P 890=1926 P 579. But see 32 L.W. 57. Regarding proof and shifting of onus, see 1926 L. 25, 143 I.C. 419=1933 N 185 when passing of consideration and transfer of possession is proved, the onus is shifted on the defendant to show that a fraud was intended. 55 I.C. 72, 1926 N. 293. Also 89 I.C. 953 (1). The onus of proving *mala fides* and want of consideration on the plaintiff's part is on those who resist the claim. 55 I.C. 205. Plaintiff can also show that there was no attachment or that it was invalid. 1927 M. 450=99 I.C. 989. But see 44 L.W. 728=1936 M. 971=(1937) 1 M.L.J. 133, where it was held, that the fact that the attachment is invalid will not absolve the plaintiff from proving his title to the property.

DEFENCES.—The defendant may impeach a transaction voidable as against him. 55 I.C. 752. A plea of fraudulent transfer is a good defence to a suit by a transferee. 57 I.C. 430=22 Bom L.R. 743. Also 43 M. 760=36 M.L.J. 350 (F.B.), overruling 41 M. 612=43 I.C. 651 (F.B.) and 34 I.C. 778=30 M.L.J. 565. See also 54 I.C. 798=16 N.L.R. 3. An auction purchaser cannot question the title of the mortgagee when his purchase is subject to the mortgage. 51 I.C. 100=45 P.L.R. 1919. Suit under R. 63 is in essence a continuation of the execution proceedings. Such a suit is for decision of a question of title and there is no reason for holding that a plaintiff may not rely upon points which he had not raised in the summary objection proceedings to begin with but which he urged during these proceedings later on. 166 I.C. 869=1937 Pesh. 13.

PROCEDURE IN THE SUIT.—The question of title of claimant should be enquired into as on the date of claim. In a suit to set aside claim order, subsequent perfection of title is not a valid defence. 33 M.L.J. 316=42 I.C.

438. It is irregular to admit the depositions of parties in the claim investigation. The finding in the suit must be based on the evidence tendered and taken in the suit itself. 22 I.C. 676; 14 W.R. 95. In the suit though the claim was with reference to the whole of the property, the Court can pass a decree declaring a partial interest. 28 I.C. 576=21 C.L.J. 302. Where certain property is attached and ordered to be sold but before sale a suit is filed under O. 21, R. 63, for a declaration that he has a subsisting and valid mortgage over the property and that the property should be sold subject to his mortgage the Court should enquire into the existence and genuineness of the mortgage set up and should not leave it to the bailiff to make intimation to the bidders that there is a claim that the mortgage existed. 157 I.C. 507=1935 R. 207.

EFFECT OF DECREE IN THE SUIT.—The decree in the suit by a decree-holder revives the attachment. 48 I.C. 386=5 O.L.J. 647; 1929 C. 524, 7 O.W.N. 887. A transfer of property pending a suit is *lis pendens*. 38 M. 535=26 M.L.J. 449. The decree that the property could not be sold, renders void all proceedings taken in execution. 20 I.C. 790=18 C.W.N. 910. Where suit under this rule to declare a mortgage has been dismissed, fresh suit to enforce the mortgage is barred. 44 M. 268=40 M.L.J. 7. Declaratory suit dismissed on ground of ceasing of attachment due to dismissal of execution proceedings does not decide title to the attached property. 146 I.C. 758=1933 R. 190. Claim petition was subject to the "result of the suit" and that expression included the result of the appeal against the decree in the suit. 7 O.W.N. 213=121 I.C. 902.

O. 21, R. 63 (A): LAHORE.—There is an implied contract in the case of a mortgage that the mortgagee is to pay the whole of the amount for which the land is mortgaged, and that a suit is maintainable by the mortgagor to recover the unpaid balance of the mortgage-money from the mortgagee. Where money is reserved with the mortgagee in trust for payment to the creditors of the mortgagor, a suit by the mortgagor to recover the money so reserved on default of payment is maintainable and therefore money so left with mortgagee becomes a debt due to the mortgagor and the mortgagee becomes a garnishee within the meaning of R. 63 A. 159 I.C. 763=1935 L. 26. Where the garnishee in the above case objected to the attachment of the money on the ground

63-C (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the costs of execution, and if he does not appear in answer to the notice issued under R. 63-B or does not dispute his liability to pay such debt to the judgment-debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him.

(2) If the garnishee appears in answer to the notice issued under R. 63-B and disputes his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

63-D Whenever in any proceedings under the foregoing rules it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has a lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt and prove the same if necessary.

63-E After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules, or make such other order as the Court shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as shall seem just and reasonable.

63-F Payment made by or levied by execution upon the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment-debtor, and any other person ordered to appear under these rules, for the amount paid or levied, although such order or the judgment may be set aside or reversed.

63-G The cost of any application for the attachment of a debt or under the foregoing rules, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree-holder shall, unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree.

Sale generally.

Power to order property attached to be sold and proceeds to be paid to person entitled

64. [S. 284.] Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the pro-

Notes.

that the amount had been adjusted in some other account with the mortgagor and there was no money left with him to be attached and his objection was rejected and he filed a suit for declaration that the money left with him had been adjusted and there was no money to be attached. *Held*, that his remedy was to file an appeal from the order of the executing Court and the suit was incompetent under R. 63-A. 159 I.C. 763=1935 L. 26. Attachment of debt due to judgment-debtor—Judgment-debtor's claim against garnishee becoming barred during investigation by Court. *Held* that it was competent to the Court to order the garnishee to pay the amount in spite of the expiry of limitation after attachment or at any rate during investigation under R. 63 (A). 1937 L. 255. On an application by the decree holder under R. 63 (A) to secure adjudication as to the indebtedness of other persons to his judgment debtor, a court fee stamp of only one rupee is payable, and the decree holder cannot be required to pay an *ad valorem* court fee on such an application. 17 L. 467=38 P.L.R. 199.

O. 21, R. 64.—This rule does not apply to a money decree. It cannot be sold in execution. Once such a decree is attached the procedure indicated in O. 21, R. 53 should be followed. 13 P.L.T. 612=1932 P. 349. A

debt can be sold under this rule. 35 I.C. 469=10 Bur.L.T. 6. Court cannot sell property not attached. 42 I.C. 259, also 9 I.C. 918=13 C.L.J. 243. But sale so held is not void. 151 I.C. 382=1934 R. 188. Writ of attachment giving wrong number—Sale proclamation giving correct number—Validity of sale. 57 C. 1206. Moveable property need not be in the custody of the Court at the time of sale. 28 I.C. 62=1915 M.W.N. 159. Although an order absolute for sale of all the mortgaged property has been passed, the executing Court is not bound to sell the whole of the property. 27 A. at 265. Execution sale, when the decree is for larger amount than what was due, is not vitiated. 14 I.C. 839=15 C.L.J. 423. When property has once been sold in execution it cannot again be sold at the instance of another decree-holder. 12 C. 317. But see 30 C. 559 (F.B.). Court cannot refuse to sell on the ground that a stranger to the suit impeaches the decree. 5 B. 532; 15 B. 98. The material date for determining the status of a defendant in execution as to whether he is an agriculturist or not, under the Dekkan Agriculturists' Relief Act, is the date of the order for sale under R. 64, and not the date of the order subsequently made after notice under R. 66. 152 I.C. 589.

AN APPEAL will lie from an order passed under this rule. 4 C.L.R. 27. Order under

ceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

65. [S. 286.] Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

Loc Ams.—[Nagpur] Rule 65—In R. 65 of O. 21, the following sentence shall be added, namely:—

"Such officer or person shall be competent to declare the highest bidder as purchaser at the sale, provided that, where the sale is made in, or within the precincts of the Court-house, no such declaration shall be made without the leave of the Court."

[Rangoon.] In O. 21, the following shall be substituted for R. 65—

"65. (1) Sales shall be conducted by the Bailiff, or Deputy Bailiff, but the duty may be entrusted to a process-server when the property is movable property not exceeding Rs. 50 in value and when, in the opinion of the Court, for reasons recorded in the diary of the case, the Bailiff or Deputy Bailiff cannot personally conduct the sale.

(2) Subject to the terms of the proviso to R. 43 and of R. 74, some one day in each week shall be set apart and regularly observed for holding sales, in execution of decrees, and some well-known place in the vicinity of the Court-house or the public bazaar shall be selected for the purpose.

(3) Subject as aforesaid, and unless the Court is of opinion that for any special reason a sale on the spot where the property is attached or situated will be more beneficial to the judgment-debtor, all property, whether movable or immovable, attached in execution of decree shall be sold at the time and place selected.

The day to be set apart, and the place selected for holding the sales, and any changes therein shall be reported for the information of the High Court.

(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorized commission:—

When the proceeds of sale do not exceed Rs. 500—5 per cent.

Where they exceed Rs. 500 and do not exceed Rs. 5,000—5 per cent. on the first Rs. 500 and 2 per cent. on the remainder.

Where they exceed Rs. 5,000—at the above rate on the first Rs. 5,000 and one per cent. on the remainder. The calculation of the commission shall be on the whole amount realized in pursuance of one application for execution.

(5) Subject to the provisions of sub-rule (13) of R. 45-B, no further sum beyond this authorized commission and the cost of conveyance of property to the place of sale shall be deducted from the sale-proceeds.

Notes.

Rr. 64 and 66 directing properties to be sold in a particular order—Appeal. 156 I C 141 =1935 M. 714

O. 21, R. 65—A sale should ordinarily be conducted at some place within the jurisdiction of the Court ordering the sale. 13 B. 22 In the absence of the Sub-Judge, it is not competent to the District Judge mentioned in decree—Sale not liable to be set aside. 123 I C. 755 "Judgment-debtor"—Decree against Hindu father and son—Insolvency of father—Official Receiver impleaded in execution—Notice of sale proclamation is to be served on him. 41 L W. 309.

PROCLAMATION—The object of the proclamation is to give notice to intending purchaser and not to judgment-debtor. 12 W.R. 488 See also 20 A 412 Sale proclamation can be issued before objections are disposed of, but sale before the objections are disposed of cannot be held. 43 I C. 450. Separate proclamations are not necessary, when properties are situate in different villages unless proper notice could not otherwise be given. 9 I C 698=13 C.L.J. 192. That property to be sold in execution is the subject-matter of

a pending suit by a defeated claimant is a material circumstance for the bidder to know and must find a place in the sale proclamation. 1931 M.W.N. 1162=61 M.L.J. 683. Where sale proclamation stated that judgment-debtor was entitled to a half share in certain items of family property which formed the subject of an independent suit for partition and subsequently the partition suit ended in a decree. Held, that decree-holder was not bound to have sale proclamation amended so as to perform the duties required by this rule. 12 W.R. 238. After the property is knocked down on a bid, the purchaser will not be permitted to withdraw his bid. 21 C.L.J. 174=19 C.W.N. 633. Sale is complete when officer conducting the sale knocks down the property to the highest bidder. 1931 L. 78. And it is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it for higher amount. (1931 L. 78 and 1933 N. 123, Fol.) 1936 L. 555. In connection with the sale of immovable property subject to an incumbrance, the auction-purchaser is entitled to contest the factum and the validity of the incumbrance. 11 L. 90=120 I.C. 162.

Note.—As regards the travelling allowance of Bailiffs going out to sell property on the spot, see R. 43 of the Burma Travelling Allowance Rules.

(1) When a sale of immoveable property is set aside under the provisions of R. 92 (2) below, no commission shall be paid to the Bailiff for selling the property.

(7) No Officer of a subordinate Court shall receive any larger commission or fee in respect of any sale of property (mortgaged or otherwise) held in execution or in pursuance of any decree or order of the Court directing or authorizing such sale than that allowed by sub-rule (4) above.

(8) The gross proceeds of sales shall be entered in Register II and in Bailiff's Register I and shall be paid into the treasury.

66 [S. 287.] (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

Proclamation of sales by public auction.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(a) the property to be sold;

Notes.

O. 21 R. 66.—Court is entitled to presume that the provisions of this rule have been complied with 9 A 690. The words 'part of the estate, mean aliquot part of an estate. 11 Bom.L.R. 56. Where a debt is to be sold, and the debtor says that no debt exists, the Court should satisfy itself that a debt exists, before ordering its sale. 4 B. 323 See also 10 M. 194; 28 A 262. No duty is cast by this rule on the judgment-debtor to help Court by particulars. 105 I.C. 335. But see 27 A.L.J. 619=116 I.C. 448. Decree against Hindu father—Application to execute against interests of sons also—Maintainability. 53 B 777=31 Bom L.R. 1115 =1929 B 465. Sale on basis of final decree—Occupancy rights not as to include the specific items of property allotted to the judgment-debtor. 150 I.C. 1134=39 L.W. 396=1934 M. 260=66 M.L.J. 464. The failure to issue any proclamation at all does not *ipso facto* vitiate the sale. [21 C 66 (P.C.), Rel on] 151 I.C. 382=1934 R. 188

Notice.—Irregularity in service of Notice—Burden of proof 145 I.C. 915=1933 P 640. The provisions under this rule for notice are directory and not mandatory. They are not for the benefit of the judgment debtor but with a view to ascertain exact rights. 44 I.C. 252 Omission to issue notice on a fresh execution application for settlement of terms of proclamation does not constitute an irregularity 65 I.C. 988=24 O.C. 391, also 90 I.C. 351=1926 O 76 Omission to give notice of sale to the judgment-debtor renders the sale void. 38 I.C. 98=11 Bur.L.T. 40 But see *contra* 99 I.C. 95=1927 L 84 So also want of notice to legal representative of judgment-debtor. 49 A. 830=102 I.C. 239=25 A.L.J. 507. See also 145 I.C. 731=1933 A 654 An *ex parte* order settling the terms of a proclamation does not operate as *res judicata* in an application for release of property which had been attached without notice to him. 46 M. 768=45 M.L.J. 346 The failure to pass a formal order under O. 5, R. 19 in respect of service

of notice under R. 66 is not a material irregularity: it does not vitiate the sale 1934 L. 985. "Judgment-debtor"—Decree against Hindu father and son—Insolvency of father—Official Receiver impleaded in execution—Notice of sale proclamation—If to be served on him. 41 L.W. 309=1935 M. 459

TIME AND PLACE.—The time of sale which is required to be set out means the time at which the sale would begin Bidding ought not therefore to start until the advertised time arrives. 1936 A.M.L.J. 13. No sale can take place except at the time advertised. 16 C. at 798 Date of proclamation is the day on which the public are made known of its subject-matter. Court can fix another date when the due date has already expired. 39 I.C. 715=4 O.L.J. 115 (Note) Non-mention of time of sale is a material irregularity 51 I.C. 864=15 N.L.R. 125; also 28 I.C. 184=18 O.C. 1; 37 C.W.N. 622=1933 C. 662 A proclamation which does not state the place of sale is irregular. 9 A 511. See also 5 Bur.L.J. 183. The sale should ordinarily be held at some place within the jurisdiction of the Court ordering the sale. 13 B. 22 A sale held at a time or place different from the one mentioned in the proclamation is not an illegality that invalidates sale *in toto*. It is only an irregularity which only makes the sale voidable at the instance of the debtor, if it has caused substantial loss 1933 Pesh 57

O. 21, R. 66 (2) (a) — Absence of plan of house does not vitiate sale 1925 O 150 (1). Omission to mention that the interest of the judgment-debtor was only one third does not amount to misdescription and does not vitiate sale. 134 I.C. 692=33 Bom L.R. 750=1931 B. 367 Where after due notice and with his full knowledge, judgment-debtor allows properties to be sold in execution, he is precluded from afterwards impeaching the sale on the ground that the mortgagee has caused to be sold in execution properties, which were not comprised in the mortgage and which could not therefore be lawfully sold. 40 C.W.N. 428.

(b) the revenue assessed upon the estate, or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered;

(e) [S. 237, last para.] Every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

Notes.

O. 21, R. 66 (2) (b).—Omission of statement of revenue assessed, in a sale proclamation is an irregularity on which a sale can be set aside. 45 M.L.J. 403=28 C.W.N. 593=75 I.C. 546=1923 P.C. 93 (P.C.).

O. 21, R. 66 (2) (c).—It is the duty of Court to obtain from all available sources, a list of existing encumbrances, but the Court does not and cannot guarantee that the list published contains all existing encumbrances or that the incumbrances notified are valid. 27 A. 97 (110) (F.B.). See also 30 C. at 606 (F.B.), 13 M.L.J. 227; 23 I.C. 871=1 O.L.J. 50; 50 I.C. 145=6 O.L.J. 67. Where property is in possession of a third person who has a valid title to the same to the knowledge of decree-holder, failure on the part of the decree-holder to make mention of such person's claim to property brought to sale amounted to neglect of the statutory duty imposed on him. 20 N.L.J. 111=1937 N. 140. Arrears of rates due to the corporation in respect of property are, under the Calcutta Municipal tax, a statutory charge on the premises. It is therefore the duty of the party having the carriage of the execution proceedings to find out any arrears of taxes and to have them mentioned in the proclamation of sale. 40 C.W.N. 41=63 C. 621. It is not necessary that the amount of interest on incumbrances should be calculated actually and the figure given. 150 I.C. 1134=1934 M. 260=66 M.L.J. 464. Non-mention of restrictive clauses in the matter of redemption, in the case of mortgages which were mentioned in the sale proclamation, does not render the sale liable to be set aside. 13 L.W. 444=62 I.C. 735. An omission to mention incumbrances in sale proclamation cannot by itself be injurious to judgment-debtor. Moreover that irregularity is distinctly waived by judgment-debtor if he agrees that the previous proclamation of sale should suffice and that there should be no further proclamation of sale. [3 I.A. 230 (P.C.).] 55 A. 519=1933 A.L.J. 1273=1933 A. 546. Sale proclamation referring to encumbrance—Sale is not made subject to encumbrance.—Purchaser not debarred from contesting the encumbrance. 126 I.C. 389. See also 11 L. 90; 155 I.C. 10=1935 R. 19, 1936 M. 70. A Court cannot in execution of the decree based on a puisne mortgage order a sale under R. 66 (2) (c) subject to prior mortgagee's decree. It can only notify the prior mortgagee's incumbrance. 132 I.C. 767=1931 O. 157. See also 1931 A.L.J. 398=1931 A. 549. With respect to property subject to several incumbrances, Court is not expected

to adjudicate on the rights of subrogation claimed by the rival incumbrances, it is enough to mention the fact that claims of subrogation are put forward. Whether or not those rights subsist cannot and should not be decided at that stage. 1933 A. 287=1933 A.L.J. 89=146 I.C. 477.

O. 21, R. 66 (2) (d).—Court is entitled to specify in the sale proclamation, and direct execution for, not only the sum due under the decree and interest to the date of the application for execution but also the further interest due from the date of the application to the date of actual sale, though the latter is not expressly included in the application. 36 C.W.N. 404=1932 C. 555.

O. 21, R. 66 (2) (e).—It is not obligatory to put down the value of the property in the sale proclamation. 138 I.C. 612=1932 A. 664. Omission to mention income from the property does not vitiate the sale. 39 I.C. 59=11 P.L.R. 1917=106 I.C. 138. Value cannot be put by Court before day fixed for hearing of the parties. 3 Pat.L.T. 342=65 I.C. 360. Undervaluation, when resulting in material injury, is a good ground for setting aside a sale. 13 I.C. 337=14 C.L.J. 541, also 9 I.C. 698=13 C.L.J. 192, 24 I.C. 468=7 Bur.L.T. 64. Value of property is a mere estimate but it must be a fair estimate. 1 P. 214. See also 48 I.C. 141=3 P.L.J. 518; 2 P.L.J. 130=37 I.C. 872, 55 A. 519=1933 A.L.J. 1273=143 I.C. 673=1933 A. 546. A sale can be set aside on the ground that a valuation other than one put by the Court was inserted in the sale proclamation. 73 I.C. 317, also 49 I.C. 195=4 P.L.J. 39. Valuation given by both the parties being inserted in the sale proclamation. See 83 I.C. 430=1924 C. 589. It cannot be laid down as a general proposition that Court must enquire and give a definite valuation of the property sought to be sold. Court might in the circumstances of a given case state two separate valuations of the property to be sold as given by the decree-holder and the judgment-debtor as it may not be possible to estimate the value even on an elaborate inquiry. 58 C. 377=132 I.C. 687=35 C.W.N. 142=1931 C. 520. If Court does not consider that value of the property should be mentioned in the proclamation on account of the peculiar nature of the property it may not do it, but if on the other hand it considers that the value is a material piece of information for an intending purchaser it should be put "as fairly and accurately as possible." Except in exceptional cases where it is not possible to ascertain the value or where it may be found that in the circumstances of the case the

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

Notes.

value need not be ascertained, Court is bound to put a fair and accurate value in the proclamation. Where the valuation put by the parties was not satisfactory and it appeared that the approximate valuation could be otherwise ascertained, it is a case wherein the Court should determine the valuation by summary inquiry and insert the same in the sale proclamation. 35 C.W.N. 907 (Case-law discussed.) (51 M. 655, Disappr.) As to the duty of Court in regard to valuation, *see* 37 C.W.N. 231=60 C. 581=144 I.C. 892=58 C.L.J. 218=1933 C. 511. *Also* 36 C.W.N. 347=1932 C. 576; 37 C.W.N. 622=60 C. 636. The Court is not at liberty to take any imaginary figure, or to state the value of the property at any figure it thinks to be proper; and though the judgment-debtor who objects to the decree-holder's valuation may fail to lead evidence on the point the Court cannot ignore the enquiry or materials directed by it and which are before it. 159 I.C. 358=37 Bom.L.R. 489=1935 B. 331. It must consider all the materials placed before it and must value the property at an adequate and proper figure. Failure to observe this will amount to material irregularity vitiating the sale. (*Ibid.*) Valuation by decree-holder—Objection by judgment-debtor—Court taking evidence and holding valuation—Order for release of part of property and sale of rest only—If bad. 153 I.C. 1024 (1)=1935 P. 143. The estimated value of the property and its income need not be stated. 8 C.W.N. 264. But *see* 8 C.W.N. 257. The property must be described with reasonable accuracy. (*Ibid.*) Omission to mention value of land is not a serious irregularity, unless it has a prejudicial effect. 1922 C. 93; 121 I.C. 360; 1930 N. 191, 58 C. 813=35 C.W.N. 75=1931 C. 490. Clause (e) does not require the Court to make an investigation into the question as to the value of the property to be sold. 31 C. 922 But *see* 165 I.C. 212=1927 M. 943. In order that a plea of undervaluation should be upheld it must not only be shown that there was under-valuation in fact but also that it prejudiced the judgment-debtor. 32 C.W.N. 309. Lease-hold right in mill—Determination of value. 149 I.C. 1043=1934 L. 146.

O. 21, R. 66 (3)—Verification by a person acquainted with the facts is enough. 59 I.C. 282=1 Pat.L.T. 647. Non-filing of verified statement is mere irregularity. 105 I.C. 335. But *see* 116 I.C. 65=1929 N. 305. Property of judgment-debtor stated by decree-holder to be ancestral and so found by Collector—Execution transferred to Collector—Contention by decree-holder that property not ancestral—*Res judicata*. 1932 A.L.J. 1118=143 I.C. 522=1933 A. 192.

RIGHT OF PURCHASER.—All that Court

sells is the right, title and interest of the judgment-debtor, as these existed at the date of sale and as these could have been honestly disposed of by judgment-debtor himself. 27 A. 684; *also* 20 I.C. 753. Sale of debt due to judgment-debtor—Suit to recover debt. Debtor can prove debt amount to be smaller than what was sold. 29 Bom.L.R. 285=101 I.C. 335=1927 B. 234. A purchaser of immoveable property buys at his own risk, unless the sale is vitiated by fraud. 9 Bur. L.T. 169=33 I.C. 1003. But when property is sold subject to a lien, the purchaser cannot question the lien. 47 I.C. 224. As to the validity of a purchase by an undivided brother of the decree-holder in Court auction, *see* 21 L.W. 226=86 I.C. 886 (1). A purchaser cannot question validity of prior mortgages. 24 I.C. 2=1 O.L.J. 175, *also* 45 I.C. 777=5 O.L.J. 114. But where a mortgage is simply notified at the time of sale, but the sale is not subject to mortgage, purchaser can question validity of mortgage. 44 A. 714=20 A.L.J. 722=1922 A. 443. *See also* 36 I.C. 732=3 O.L.J. 422; 28 I.C. 360=2 O.L.J. 140, 18 I.C. 461. But *see* 12 I.C. 855=4 Bur. L. T. 142. The purchaser can contest a mortgage even when it is notified in the proclamation. 43 A. 489=63 I.C. 895; 55 I.C. 354; 25 C.W.N. 942=34 C.L.J. 333. When a sale in which the decree holder was the purchaser is set aside, the judgment-debtor is entitled to set-off against the decretal amount, the net income derived by the decree-holder. 24 I.C. 468=7 Bur. L. T. 64. When the proclamation is ambiguous, the decree must be looked into to see what was actually sold. 96 I.C. 771=1926 A. 730.

ESTOPPEL.—A judgment-creditor is not estopped from raising plea of error in statement of decretal amount in sale proclamation, unless the other party is prejudiced thereby. 12 I.C. 97=10 M.L.T. 94. *See also* 64 I.C. 763=43 A. 703. Failure to serve sale proclamation does not vitiate the sale when judgment-debtor knows of it. 1922 C. 93. A judgment-debtor who was aware that the description in the sale proclamation was defective, and who stands by, cannot question the sale on that ground alone. 12 M. 91, 21 C. 66 (P.C.). *See also* 29 A. 612. A decree-holder cannot, subsequent to sale, set up an encumbrance in his own favour, not set up in execution proceedings. 47 C. 446=24 C.W.N. 269. Omission by decree-holder to specify in sale proclamation the existence of a first charge in his favour in respect of rent decrees does not estop him from enforcing his charge against a subsequent encumbrancer who is not in any way connected with the execution proceedings or otherwise prejudiced by the omission in the sale proclamation. 18 N.L.J. 274. When a judgment-debtor having notice of proceedings once

(4) [S. 287.] For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

Loc Ams —[Lahore and N -W F P] O 21, R. 66. *Add the following words to Cl (c) of sub-rule (2) —*

"Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property, but the proclamer shall include the estimate, if any, given by either or both of the parties."

[Madras] *Re-number* the existing Cl (c) to sub-rule (2) as (d) and add the following as Cl. (e) —

"the value of the property as stated (d) by the decree-holder and (e) by the judgment-debtor."

(Vide *Fort St George Gazette*, dated 20th October, 1930, Pt II, pp. 1394-1396.)

[Nagpur.] Rule 66. In Cl. (e) of sub-rule (2) of R. 66, after the word "property" insert the words —

"including the decree-holder's estimate of the approximate market price".

[Rangoon] In O 21, R. 60, the following shall be added at the end of sub-rule (2) —

Provided that no such notice shall be necessary in the case of immovable property not exceeding Rs 250 in value.

Notes.

fails to raise an objection, he cannot again challenge the sale on any ground 13 I C 337=14 C.L.J. 541; also 4 Pat L.T. 721=2 P 916, 49 M 333, 1927 M. 755=51 M.L.J. 165; *e.g.*, gross under-valuation, 37 C.W.N. 1054, limitation, 37 C.W.N. 752=1933 C. 855; or misdescription of property, 158 I C. 556=1935 C. 614 Failure to attend at the settlement of proclamation does not estop plea of non-liability to attachment. 46 M. 768=45 M.L.J. 346 When a party does not raise any objection to incorrect sale proclamation, he is estopped from questioning about any irregularity consequent on it. 38 M 387=25 M.L.J. 198, also 21 N.L.R. 23=88 I C 831. Refusal by trial Court to fix a particular order in which property is to be sold is no bar to the executing Court considering the same question. 96 I.C. 492=1926 M. 834=51 M.L.J. 135. Valuation by decree-holder—Court taking evidence and holding valuation—Order for release of part of property and sale of rest only not bad. See 153 I.C. 1024 (1)=1935 P. 143.

REVISION—An order for issue of proclamation is subject to revision by High Court. 2 P.L.J. 130=1917 P. 105.

APPEAL—An order under this rule is not appealable under O. 43, R. 1. 59 I.C. 282=1 Pat. L. T. 649. See also 1926 C. 1184. As to what kinds of orders under this rule are appealable, see 96 I.C. 492=1926 M. 834=51 M.L.J. 135. An appeal lies against an order disallowing the objection of the judgment-debtor. 30 C. 617. But see 27 M. 259 (F.B.). No appeal lies against an order under sub-r. (4). 36 I.C. 402=10 Bur. L. T. 115. Order settling the order in which properties are to be sold is appealable. 45 M.L.J. 478=1924 M. 365. See also 156 I.C. 141=1935 M. 714. An order fixing

upset price is not appealable 44 M.L.J. 599=1923 M. 619, 114 I C 652=1928 M. 1169. No appeal lies against an order settling the terms of a sale proclamation. 46 I C 564. But see 49 I C. 539. Order refusing to notify incumbrances is not appealable. 4 P. 731=6 Pat. L. T. 843. See also 48 A. 260=92 I.C. 644=1926 A. 268. No appeal against an order refusing to re-open valuation fixed in sale proclamation. 6 Pat L.T. 507=90 I C 276=6 O.W.N. 1085. An order accepting the valuation put upon a property is not appealable 22 I C. 548; also 17 I C. 88=16 C.W.N. 970. Order fixing valuation is not appealable. 38 I C. 616=2 Pat L J 13. See also 11 I.C. 759=14 C.L.J. 607; 99 I.C. 455; 91 I.C. 819=1926 C. 610; 1932 A.L.J. 859=1932 A. 696. No appeal lies against an order overruling objections as to inadequacy of price and as to the sale of the properties in separate lots. 134 I.C. 833=1931 A.L.J. 1084. An order for issue of sale proclamation when a stay has been ordered at the instance of the judgment-debtor is not appealable. 64 I C 547=35 C.L.J. 170. A liquidator is not a representative of the judgment-debtor within the meaning of S. 47. Where a liquidator of a co-operative society applied claiming priority over a mortgage decree and the Court passed an order under O 21, R. 66 giving priority, held, that the order was not appealable. 30 N.L.R. 240=148 I C. 714=1934 N. 201.

SECOND APPEAL.—If under-valuation and want of notice of sale are the grounds of a petition under R. 90, they properly come under R. 66 and a second appeal is competent. 1925 M.W.N. 701=1925 M. 1142.

STEP-IN-AID—An oral application for the settlement of terms of proclamation is a step-in-aid of execution. 2 P.L.J. 5=38 I C. 540.

Mode of making proclamation.

67. [S. 289.] (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation also shall be published in the 1[st] Official Gazette or in a local newspaper, or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

Loc. Am.—[Madras] Add the following as sub-rule (4) —

"(4) Unless the Court so directs it shall not be necessary to send a copy of the proclamation to the judgment-debtor"

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part II, pp. 1394-1396.)

68. [S. 290.] Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in the case of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale.

Loc. Ams.—[Allahabad and Oudh.] O 21, R. 68 —For the words "fifteen days" read the words "seven days".

[Lahore and N.-W.F.P.] In R. 68 for the word "thirty" read "fifteen" and for the word "fifteen" read "one week".

69. [S. 291.] (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment;

Leg. Ref.

¹ The word 'local' omitted by Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

O. 21, R. 67.—Omission to fix a copy of the sale proclamation in the Collector's office does not render the sale *ipso facto* void. 18 C 422 (F.B.), 12 B at 370. Failure to publish a sale proclamation by beat of drum, where it is possible to proclaim the sale in that manner, is a material irregularity, though the sale will not be set aside unless loss is proved to have been caused to judgment-debtor 1933 A.L.J. 73=55 A. 182=1933 A. 747.

O. 21, R. 68.—A sale held in contravention of this rule should, on the application of judgment-debtor or decree-holder, be set aside 7 A. 289, 21 C. 66 (P.C.) But the sale is not *ipso facto* void. 31 C. 385.

CONSENT.—An application made on the day of sale by judgment-debtor, that a part only of his property may be sold instead of the entirety, cannot be considered as such a "consent" as would do away with the necessity of proclamation being issued, 30 days before the day fixed for sale. 5 C. 259. See 6 C.W.N. at 57.

REVISION.—An order under this rule can be set aside on revision. 5 C. 878.

O. 21, R. 69 SCOPE.—The rule has no application to a case where sale is postponed on the ground that decree has been satisfied 4 Pat.L.T. 495=75 I.C. 676. Rule applies to

sales held in virtue of an order absolute for sale under S. 89 of the T. P. Act (O. 34, R. 5). 19 A. 205; 20 A. 354. But see 31 C. 373. When a sale is adjourned under this rule its provisions must be followed with exactitude. 20 M. 159. When a sale is adjourned the officer conducting the sale must record his reasons for such adjournment 1932 A.L.J. 357=1932 A. 369. Sale not held on date fixed, but subsequently held on date not advertised—As to validity. See 11 Pat. L. T. 743, O. 21, R. 69 (1) only provides that where the Court adjourns a sale the Court should specify the day and hour, but it does not provide that the officer making an adjournment should also specify the hour. Further, omission to specify hour is not a material irregularity. 4 A.W.R. 1465=1935 A. 182=153 I.C. 410. Sale could be adjourned on application by third party, although the rule does not specifically refer to such a case 156 I.C. 492=1935 M.W.N. 200=41 L.W. 192=1935 M. 295. Condition imposed on third party applicant for adjournment of sale to deposit money—Legality (*Ibid.*)

ADJOURNMENT.—Bidding by decree-holder—Sale kept open for some days to get higher bids—Does not amount to adjournment but is a continuous sale and no fresh proclamation is necessary. 6 P. 432=104 I.C. 215=8 Pat.L.T. 796=1927 P. 312. See also 1928 L. 699=115 I.C. 541. Sale should be adjourned to a specified day and hour and omission to specify this is a material irregularity. 31 C. 815 (818), 29 A. 196 (P.C.), 7 C. 34. See also

Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the cost of the sale) are tendered to the officer conducting the sale or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

Loc Ams —[Allahabad.] For R. 69 (2) *substitute* the following.—

"Where a sale has been once adjourned under sub-rule (1), a fresh proclamation under R. 67 shall be made, unless the judgment-debtor consents to waive it.

Provided that where the adjournment is for a period not longer than 14 days from the date originally fixed for sale, no fresh proclamation shall be necessary.

Provided also that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under R. 66."

[Bombay.] In sub-rule (2) of R. 69 of O. 21 "thirty days" shall be substituted for "seven days."

[Calcutta.] O. 21, R. 69 (2). *Substitute* the words "one calendar month" for the words "seven days."

[Lahore.] In sub-rule (2) of R. 69 "thirty days" shall be substituted for "seven days."

[Madras.] *Substitute* the following for sub-rule (2):—

"(2) Where a sale is adjourned under sub-rule (1) for a longer period than thirty days, a fresh proclamation under R. 67 shall be made, unless the judgment-debtor consents to waive it." (Vide *Fort St. George Gazette*, dated 20th October, 1936, Pt II, pp 1394-1396.)

[Nagpur.] In sub-rule (2) of R. 69, for the words "seven days" *substitute* the words "fifteen days".

[N.-W F P.] In sub-rule (2), for the word "seven", *substitute* the word "thirty" and *add* the following proviso—"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under R. 66."

Notes.

13 I.C. 337=14 C.L.J. 541; 49 A. 402=25 A.L.J. 302=1927 A. 241. Omission to specify hour is not material irregularity. 153 I.C. 410=4 A.W.R. 1465=1935 A. 182. But see 19 N.L.J. 103. But it would not be material irregularity where debtor has agreed to forego proclamation or notice, and hour of sale is not mentioned in adjournment order. 55 A. 519=1933 A.L.J. 1273=143 I.C. 673=1933 A. 546. Adjournment *sine die* is irregular and sale is liable to be set aside. 41 I.C. 68=3 Pat L. W. 357. As to whether a sale can be adjourned to a holiday, see 3 A. 333. When Court adjourns a sale, but the information not reaching Nazir in time, sale is concluded, the sale is void. 12 A. 96; 12 M.L.J. 97, 1935 L. 694. See 17 C. 152. But see 1930 L. 17. Where execution sale is not conducted within precincts of Court-house the officer conducting it has a discretion to adjourn the sale to next day. 107 I.C. 274.

O. 21, R. 69 (2).—To adjourn an execution sale from time to time beyond the period of seven days is not anything more than an irregularity. 117 I.C. 727=1929 M. 624. Non-issue of fresh proclamation under R. 69 (2) is a mere irregularity and in the absence of proof of substantial injury, sale cannot be set aside. 38 I.A. 200=39 C. 26=16 C.W.N. 1 (P.C.). Also 43 A. 433=19 A.L.J. 262; 2 Luck 490=100 I.C. 787=4 O.W.N. 273. But see 25 I.C. 17. Even though judgment-debtor consents, Court must issue a fresh proclamation in case judgment-credi-

tor requires it. 24 M. at 316. A fresh proclamation is essential. 2 Bur.L.J. 54=1923 R. 154. A waiver of fresh proclamation on postponement of sale does not amount to waiver of objections to the previous one. 14 C.L.J. 346=16 C.W.N. 704. The provisions of R. 69 (2) are modified in the Central Provinces by R. 10 of the rules in the Revenue Book Circular, Vol. 2-III, framed by the Local Government, R. 10 (2) of the said rules makes it clear that the final bid is not accepted and the purchaser is therefore not declared until the proceedings are adjourned to, and the bid approved by the Collector. Till the Collector accepts the bid, it is only an offer. 20 N.L.J. 80.

O. 21, R. 69 (3).—A bid may be retracted at any time before the hammer is down. 14 M. 235. The sale of a third lot is not vitiated by irregularity under sub-r (3) when money due under the decree is paid only after knocking down of the first two lots. 26 I.C. 273=1914 M.W.N. 873. A payment made under this rule cannot be called voluntary payment. 18 W.R. 503. When sale is so held, the person holding the equity of redemption can, at any time before sale, pay the decretal sum and costs and stop execution proceedings. 26 A. 28, 31 C. 863, 11 C.W.N. 495. Notice to the clerk in the Collector's office is not sufficient notice to the Collector that the amount has been paid into Court. It is the officer conducting the sale who has to be satisfied as to that or to whom the full amount must be tendered. 1935 L. 694.

[Oudh.] In R. 69 (2) for the word "seven" read the word "fourteen," and add the following proviso—

"Provided that where the principal judgment-debtor or one of the principal judgment-debtors, if there are more than one, appears and gives his consent, the Court may dispense with the consent of the other judgment-debtor or judgment-debtors who have failed to attend in answer to a notice issued under R. 66."

[Rangoon.] In R. 69 (2) for the words "seven days" the words "thirty days" shall be substituted.

70. [S. 287, last para.] Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

Saving of certain sales.

71. [S. 293.] Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from

Notes.

O 21, R. 71: SCOPE.—Intended to minimise hardship from purchaser's default. It applies unless defaulting purchaser would be substantially prejudiced. Omission of time and place of sale, and date of re-sale are mere irregularities. 21 L.W. 232=87 I.C. 1=1925 M. 631. Decree-holder misleading defaulting purchaser—Suppression of existence of encumbrance—Re-sale—Property purchased by decree-holder—Application to recover deficiency from defaulting purchaser—Not maintainable. 6 O.W.N. 407=118 I.C. 833=1929 O. 294. Rule is not exhaustive. Other remedies are also open. 50 I.C. 59=1919 P. 210. Court and not the Collector has jurisdiction to order recovery of the deficiency of price from defaulting purchaser, even where property was sold by Collector. 32 Bom.L.R. 750=134 I.C. 692. Judgment-creditor is not bound to proceed under this rule, and may proceed against other property belonging to judgment-debtor. 8 C. 291. See also 21 W.R. 149 and 2 B. 562. Provisions of this rule extend to all sales, whether of moveable or immovable property and also to re-sales held under Rr. 77, 84 and 86. 7 C. 337. Also to sales under the Provincial Insolvency Act. 62 I.C. 307=17 N.L.R. 49. Also when there is default, either in the initial deposit under R. 84 or of the balance under R. 85 44 A. 266=20 A.L.J. 105 (F.B.). No deficiency of price, which may happen on a re-sale by reason of purchaser's default can be claimed from him unless his bid has been finally accepted by Court. 118 I.C. 901=1929 L. 673. As to the effect of permission to bid given to decree-holder, when a heavy upset price was fixed, see 83 I.C. 379=1924 B. 515. Only decree-holder or judgment-debtor can apply under this rule. Attachment of the deposit by defaulting decree-holder enures for the benefit of all who are entitled to rateable distribution. 49 M. 570=97 I.C. 86=1926 M. 872.

RE-SALE.—Loss arising on a re-sale contemplated by R. 71 is not limited to a default in the payment of the whole purchase money, it includes a default in the payment of the 25 per cent. deposit required under R. 84. 141 I.C. 367=29 N.L.R. 52=1933 N. 198. At an execution sale the deficiency on re-sale by

reason of purchaser's default was not certified by the officer holding the sale in accordance with Form No. 31 in App E of the Code. Held, that the absence of such a certificate would not prevent decree-holder from recovering the deficiency arising on re-sale. (*Ibid*) Re-sale contemplated by this rule must be of the same property that was first sold, and under the same description. 16 C. at 58; 16 W.R. 14. Property re-sold must be substantially the same, and any difference will not matter, if that would occur in the ordinary course of things, or was brought about the first purchaser's default. 41 M. 474=34 M.L.J. 156. It must be held forthwith and no fresh proclamation is necessary. Auction-purchaser is not liable to pay deficiency when the re-sale is after six months. 32 I.C. 907. See also 28 O.C. 327=1925 O. 397, 1929 L. 744.

DEFAULTING PURCHASER.—A purchaser of property who fails to pay the deposit directed to be paid by R. 84, is a defaulting purchaser. 5 B. 575. Decree-holder may himself be the defaulting purchaser. 12 M. 454. Purchaser is liable only for the deficiency of price and the expenses attending re-sale and is not liable to pay interest. 9 W.R. 500, 3 W.R. 3; 16 W.R. 14; 14 M. 454. The real and not the ostensible purchaser is liable. 20 W.R. 80; 12 W.R. 236. The decree-holder who can recover the deficiency in price is not any decree-holder of the judgment-debtor or any decree-holder who is entitled to share rateably under S. 73 but the decree-holder who brings the property to sale. (49 M. 570, *Foll.*) 163 I.C. 175 (2)=1936 O.W.N. 559=1936 O. 277.

A SUIT by the purchaser lies to set aside an order to make good the deficiency. 12 I.C. 360=7 N.L.R. 134; also 19 A. 22. See *contra* 29 O.C. 18=1925 O. 360. An order under this rule is one under S. 47. A separate suit does not lie. 87 I.C. 284=1925 O. 360 (2).

AN APPEAL and a second appeal will lie against an order passed under this rule. 25 C. 99. See also 18 M. 439, 23 N.L.R. 14=100 I.C. 691 (2)=1927 N. 112. No second appeal lies when the decree is for less than Rs. 500. 59 I.C. 192=45 B. 223.

the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

Decree-holder not to bid for or buy property without permission

72. [S. 294.] (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

Where a decree-holder purchases, amount of decree may be taken as payment.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of section 73, be set-off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part

accordingly.

Notes

O. 21, R 72: SCOPE.—The rule does not apply to purchases made before its enactment. 8 Bom.L.R. 873. Leave contemplated by this rule should be very cautiously given. 16 C. 132, 7 C. 346. Price mentioned in sale proclamation—Object of—Decree-holder not bound to bid up to that amount. 150 I.C. 759=15 Pat. L.T. 552=1934 P. 345. An order for a set-off under this rule can be made only after sale has taken place. 133 I.C. 737=33 Bom.L.R. 503. But see 145 I.C. 957=38 L.W. 579=1933 M. 804=65 M.L.J. 569. Permission to bid and order to set-off decree debt is subject to the rights of other decree-holders, having right to rateable distribution. 59 I.C. 86=12 L.W. 328, 1930 C 781, 1933 A 666=1933 A.L.J. 1102. Where a valid order has been passed by a Court granting permission to decree-holder to set-off decretal amount against purchase-money, another Court of a superior grade before whom execution against the same property is pending has no power under S. 63 to cancel that permission. 55 B 473=133 I.C. 817=1931 B 350. Persons with rights under S. 73 not existing on date of sale or within fifteen days thereafter—Order under this rule is not subject to S. 73. 1931 M. 103=130 I.C. 458. When decree-holder has been given permission to bid and to set-off the amount of his bid and when his bid is less than the decree amount, the whole of the set-off must be deemed as made on the date of sale and the whole of the amount must be deemed to have been received or realised *eo instanti* the sale is made. In such a case S. 73 will give no benefit to other decree-holders who apply for rateable distribution after the conclusion of the sale, however soon after its conclusion their application may be made. 145 I.C. 957=38 L.W. 579=65 M.L.J. 569. Purchase by a decree-holder is subject to the final result of the litigation between him and judgment-debtor. 27 M. 98. Delay by the decree-holder purchaser in deposit of money is not a material irregularity and the sale is not vitiated, 2 Bur.L.J. 166=1924 R 81. Court can refuse to confirm a sale on failure to fulfil conditions subject to which permission to bid was given. 1 P. 235=69 I.C. 872; also 15 I.C. 888=10 O.C. 86. Decree-holder, allowed to purchase in full satisfaction of decree, must pay poundage. 27 A.L.J. 243=118 I.C. 378=1929 A. 266 (1). If Court permitted a

decree-holder to bid at the sale and consequently allowed him to set-off the purchase-money towards his decree, it is open to the Court afterwards on a good case being made out to withdraw that order and order him to deposit the purchase-money in cash for rateable distribution. Such an order to refund can be enforced by process in execution. The purchase-money is in such a case in the power and at the disposal of Court within the meaning of S. 73. 134 I. C. 616=1931 P. 405. See also 10 P 830. Executing Court has power under this rule to impose a condition to the permission given to decree-holder to bid, namely, that he must bid up to the decretal amount. But when his bid does not go up to that amount, executing Court, though it can refuse his bid, has no power to dismiss the execution case. Proper course is either to put the property again then and there for sale or to direct the decree-holder to take steps for the issue of a fresh proclamation. 39 C. W N 1293

O. 21, R 72 (2).—An order under R 72 (2), allowing a decree-holder to set-off the amount of his decree against the purchase-money is mere machinery which does not affect the rights of third parties who are entitled to rateable distribution. He cannot set-off against a portion of the proceeds of the sale which belongs to other parties. 37 Bom.L.R. 78=159 I.C. 505=1935 B. 176=59 B. 310. Right of set-off—When to be allowed—Attachment of same property under decree of another Court effected prior to attachment under decree under execution—When a bar. 1937 C. 55. See also 166 I.C. 873=17 Pat.L. T 847=1937 P. 50. Decree-holder was allowed by Court to bid and to set-off the purchase price against his decree. Before sale was held, judgment-debtor applied for insolvency. Later on he was adjudicated. Official Receiver without challenging validity of the sale applied that purchaser should submit purchase price to the Official Receiver. *Held*, that the Court could not go behind its previous order by ordering the purchaser to deposit the purchase-money with the Official Receiver. 159 I.C. 244=1935 M. 907. The decretal amount is set-off against the purchase price automatically by operation of law and no order of the Court is necessary in order that the respective amounts may be set-off against each other. The Court

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

Loc. Ams.—[Allahabad] In Allahabad *delete* sub-rules (1) and (3) of R. 72 and *read* sub-rule (2) as R. 72; and in the rules so read, *substitute* for the words "with such permission", "property sold".

[Bombay] After R. 72 of O. 21, the following shall be *inserted* as R. 72-A, namely:—

"72-A. If leave to bid is granted to the mortgagee of immoveable property a reserve price as regards him shall be fixed (unless the Court shall otherwise think fit) at a sum not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case the property is sold in lots) than such figure as shall appear to be properly attributable to it in relation to the amount aforesaid."

[N.W.F.P.] For sub-rule (1), *substitute* the following:—

"72. (1) The holder of a decree, in execution of which the property is sold, shall be competent to bid for or purchase the property without express permission of the Court, provided that the Court may on application of the judgment-debtor and for sufficient cause debar him from so bidding or purchasing."

In sub-rule (2) for the words "with such permission", *substitute* the words "the property"

Cancel sub-rule (3).

[Oudh] *Substitute* for sub-rule (1) of R. 72—"The holder of a decree, in execution of which property is sold, shall be competent to bid for, or purchase the property, provided that the judgment-debtor may by application, supported by an affidavit, apply to the Court to debar the decree-holder from purchasing the property, and the Court may, on such application, either debar the decree-holder from purchasing the property, or grant permission to do so on such terms as may seem just"

In sub-rule (2) for the words "with such permission" *read* the words "the property sold" *Cancel* sub-rule (3).

[Rangoon] R. 72 (2). For the words "with such permission" the words "the property" shall be *substituted*.

Rule 72 (1) and (3) shall be *cancelled*, and the figure and brackets "(2)" occurring at the beginning of sub-rule (2) shall be *deleted*.

Notes.

executing the decree has only to enter up satisfaction of the decree in whole or in part after the setting off has taken place. 1935 L. 690 (57 M. 38=68 M.L.J. 569, Foll.). Hence when a decree-holder has been given permission to bid and set-off, and when the amount of the successful bid is less than the decretal amount, the whole of the set-off must be deemed as made on the date of sale, and the whole of the amount must be deemed to have been received or realised *eo instanti* the sale is made. (*Ibid.*)

O. 21, R. 72 (3).—The sons of a judgment-debtor are not persons interested in the sale of ancestral property held in execution of a money-decree against their father, so as to be entitled to apply under this rule to set aside a sale. 13 M.L.J. 231 at 235. *See also* 11 M. 356 (359); 16 M. 287, 22 B. 271; 5 B. 130; 10 C. 757; 14 M. 498; 11 C. 731. Purchase by a benamidar of decree-holder is similarly only voidable. 44 B. 352=56 I.C. 349=22 Bom L.R. 296, *also* 27 C.W.N. 208=37 C.L.J. 403, 47 C. 377=24 C.W.N. 229 (F.B.). When no express permission was given but the decree-holder was permitted to bid without permission can be inferred; and without proof of loss the sale cannot be set aside. 6 P. 432=104 I.C. 215=1927 P. 312. Purchase by the decree-holder without per-

mission is not void altogether but only liable to be set aside on application and upon cause shown. 49 I.A. 312=1 P. 733=44 M.L.J. 718 (P.C.); *also* 39 I.C. 3=41 B. 357, 101 I.C. 89 (2). Proof of substantial loss is necessary to set aside a purchase by the decree-holder without permission. 13 L.W.616=62 I.C. 854

APPEAL.—An order refusing leave to bid is not appealable. 38 C. 717=15 C.W.N. 862=38 I.A. 126 (P.C.) No second appeal lies. 21 C. 789.

O. 21, R. 72-A (Bom.).—Applicability to original side, Bombay High Court. 52 B. 459=1928 B. 123. Omission to fix reserve price—Sale whether liable to be set aside. 32 Bom L.R. 436

O. 21, R. 72 (N.W.F. Province).—In N.W.F. Province, no permission is, of course, necessary for the decree-holder to bid at an auction in view of R. 72, as applicable to that province. 165 I.C. 554 (Pesh.).

O. 21, Rr. 72 and 73.—A mortgagee decree-holder was appointed receiver of certain mortgaged properties. Prior to such appointment he had obtained leave to bid at the execution sale, but he did not obtain any such leave as receiver. At the sale held in execution he purchased the properties in respect of which he had been appointed receiver. *Held*, (1) that leave given to a decree-holder as such cannot be taken to give him leave to

73. [S. 292.] No officer or other person having any duty to perform in connection with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

Restriction on bidding on purchase by officers.

Sale of moveable property.

Sale of agricultural produce

74. (1) Where the property to be sold is agricultural produce, the sale shall be held—

(a) if such produce is a growing crop, on or near the land on which such crop has grown, or

(b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder-stack on or in which it is deposited:

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

(a) a fair price, in the estimation of the person holding the sale, is not offered for it, and

(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day, or if a market is held at the place of sale, the next market-day, the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

75. (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored, but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.

Loc. Ams.—[Calcutta] O. 21, R. 75 (2)

(a) Insert the following words in sub-rule (2), R. 75, O. 21, after the words "where the crop from its nature does not admit of being stored" —

"or can be sold to greater advantage in an unripe state (e.g., as green wheat) "

(b) Cancel the word "and" between the words "tending" and "cutting" in sub-rule (2) and substitute therefor the word "or"

[Lahore and N.-W.F.P.] In O. 21, R. 75, sub-rule (2) after the word "stored" add the words "or can be sold to greater advantage in an unripe state, such as green wheat or gram"

[Madras] Substitute the following for the existing rule —

"75 (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, unless the Court decides to proceed under the provisions of sub-rule (2) hereunder, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing

(2) Where the crop from its nature does not admit of being stored, or can be sold to greater advantage in an unripe state, it may be sold before it is cut and gathered or in such unripe state, and the purchaser shall be entitled to enter on the land, and do all that is necessary for the purpose of tending and cutting or gathering it "

(Vide *Fort St George Gazette*, dated 20th October, 1936, Pt II, pp 1394-1396)

Notes.

bid when he was subsequently appointed receiver as the two capacities were entirely distinct, (2) that a receiver, being in a fiduciary position and having special opportunities of knowledge should not be allowed to figure as a purchaser at an auction as that would place him in a position in which his interest as a buyer would conflict with his

duties as receiver; (3) that the principle that he should not be allowed to purchase should be enforced by imposing an absolute prohibition and not with reference to the merits of individual cases; and (4) that consequently the sale should be set aside. 41 L.W 737= 1935 M. 421=68 M.L.J 597

O. 21, R. 73.—Pledgers of parties are not debarred from purchasing property sold in

[Nagpur.] Rule 75.—In sub-rule (2) of R. 75, after the words "being stored" insert the words "or, where it appears to the Court that the crop can be sold to greater advantage in an unripe state".

[Oudh.] O. 21, R. 75 (2).—In Oudh after the words "being stored" add "or where it appears to the Court that the crop can be sold to a greater advantage in an unripe state".

76. [S. 296.] Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

Negotiable instruments and shares in corporations.

77. [S. 297.] (1) Where moveable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the moveable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

78. [S. 298.] No irregularity in publishing or conducting the sale of moveable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery.

Irregularity not to vitiate sale, but any person injured may sue.

79. [S. 299.] (1) Where the property sold is moveable property of which actual seizure has been made, it shall be delivered to the purchaser.

Delivery of moveable property, debts and shares.

[S. 300.] (2) Where the property sold is moveable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

Notes.

execution. 10 M 111 But see 116 I.C. 65 Nor their clerks. 49 A. 292=25 A.L.J. 173=1927 A. 76. But where the pleader is instructed to purchase for his client, see 15 M. 98.

O 21, R. 76.—The Court is not bound to sell through a broker. 8 W.R. 415.

O. 21, R. 77.—The rule applies to the sale of moveable property other than a negotiable instrument or stock. 4 C. 946. The officer conducting the sale has discretion to allow the purchase-money to be paid at a reasonable time after sale. 4 N.W.P.H.C.R. 37. The word "forthwith" indicates that no fresh proclamation is necessary. 12 M. 454. A suit will lie to set aside the sale if the title is guaranteed. 2 B 258.

O 21, R 78.—There is no provision in the case for setting aside a sale of moveable property. 49 I.C. 140=12 P.R. 1919. See also 1927 A. 41; 115 I.C. 70. Money is not 'moveable property'. 1 R. 360=1924 R. 21. A sale of moveable property is void, where at the time of the actual sale, the judgment-

debtor is dead, and his legal representatives are not brought on the record. 8 M.L.J. 288. Effect of sale, where the attachment has not been duly made. See 5 A. 86; 2 B. 258 and 8 M.L.J. 288. Where the article sold was not of the particular description as offered and brought, the buyer can reject them and recover the money paid. 54 I.C. 315. There is no warranty of title in sales of moveables. 2 R. 202=97 I.C. 1029=1926 R. 214. No appeal lies against an order confirming a sale of moveable or immovable properties. 115 I.C. 70=30 Punj.L.R. 421. Order 21, R. 72 provides that the decree-holder can himself bid for and purchase the property unless debarred by an order of Court. Where therefore the officer in charge of the sale proceedings dishonestly sent away the decree-holder in order that he should not be in a position to raise the bids, there is a serious irregularity in the conduct of the sale resulting in loss to the decree-holder. 148 I.C. 132=11 O.W.N. 116=1934 O. 94 (2).

[S. 301. (3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

80. [S. 302.] (1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge, or such officer as he may appoint in this behalf, may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

(2) Such execution or endorsement may be in the following form, namely:—

A B by *C D*, Judge of the Court of (*or as the case may be*) in a suit by *E F*, against *A B*.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

81. [S. 303.] In the case of any moveable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct; and such property shall vest accordingly.

Loc Am —[Rangoon] In O 21 the following shall be inserted as R 81-A —

81-A Whenever guns or other arms in respect of which licences have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public-auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act

Sale of Immoveable Property.

82. [S. 304.] Sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

83. [S. 305.] (1) Where an order for the sale of immoveable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof,

Notes.

O. 21, R. 80—Court can cancel a previous endorsement as well under this rule. 12 I.C. 913=4 Bur. L.T. 138. The rule is only permissive and not obligatory. 111 I.C. 225=1928 M.W.N. 442=1928 M. 571.

O. 21, R. 81.—A mortgagee of moveables cannot follow the moveable property into the hands of the auction-purchaser. 1925 C. 164. On this rule, see also 92 I.C. 370=1925 R. 303.

O. 21, R. 82—Sale of immoveable property by a Court of Small Causes confers no title on purchaser. 17 W.R. 309. See also 7 M. 592; 8 M. 8. Court of Small Causes must proceed under S. 39 in all cases where execution is sought against the immoveable property of judgment-debtor. 7 M. 592; see also 8 M. 8.

O. 21, R. 83.—Sub-rule (3) is new and follows the ruling in 6 M.L.J. 187. See also 33 C. 335. Provisions of this rule are in-

or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale:

Provided that all moneys payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set-off such money under the provisions of Rule 72, into Court:

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

84. [S. 306.] (1) On every sale of immoveable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold.

Notes.

applicable to a decree for sale in a mortgage suit. 55 I.C. 816=5 L.L.J. 67. Extension of time for redemption to enable mortgagor to raise amount by private sale is prohibited by the Code and no appeal lies from a refusal order. 46 M.L.J. 71=1924 M. 234. There should be a reasonable probability of the debt being discharged within a reasonably short period. 21 W.R. 146. In 15 W.R. 322 six months' time was given. Sanction must be given by the Court which passed the order for sale. The sanction of any other Court is of no use. 23 B. 287. Where a property is purchased on the basis of Court's certificate granted before an attachment by another decree-holder, purchaser gets a good title. No formal confirmation is necessary. Order to pay the money to the creditor amounts to confirmation. 21 I.C. 210. But see 40 L. W. 720=1934 M. 727=67 M.L.J. 741. See also 19 B. 539. Guardian of a minor also cannot alienate property of the minor without the sanction of Court. To have such a transfer set aside, guardian must return the consideration. 36 C.L.J. 326=49 C. 911. Where decree was against two divided brothers, and the elder alone obtained permission to sell by private sale, he could not sell the younger's share as well. The younger on payment of half the purchase-money could get back his half-share from the purchaser. 11 L.W. 213=52 I.C. 956. Grant of qualified permission to judgment-debtor—Subsequent cancellation—Rights of prospective purchaser 151 I.C. 528=1934 Pesh. 76. Where there are several decree-holders and attachments, the Court should, while granting permission under R. 83, order the judgment-debtor to deposit entire sale proceeds in Court 1935 L. 481.

APPEAL.—Order under O. 21, R. 83 is not appealable. 109 I.C. 524.

O. 21, R. 84. SCOPE.—The rule does not prevent judgment-creditor from proceeding against other properties belonging to his debtor. 8 C. 291. The conditions of this rule are indispensable, and there is no sale where they are not followed. 5 A. 316. See also 16 C. 33 and 14 M. 227.

CONSTRUCTION OF SECTION.—Cl. 2, R. 84 must be construed in such a way as to be consistent with R. 72, Cl. (2) and with the proviso to R. 85 of the same order. 159 I.C. 228=42 L.W. 564=1935 M. 893. Where the second part of R. 84 is put into operation, the first part ceases to apply, and hence the use of the word "immediately" in the first part cannot be relied upon in order to ascertain the precise meaning of the second part. The second part must be interpreted according to the plain meaning of the words contained in it alone. There is nothing in those words precluding the Court from passing an order with retrospective effect. Hence where an auction-purchaser delays in applying under this second part, he should not be allowed the privilege which it empowers the Court to extend. But where the auction-purchaser applied to the Court immediately upon the very same day as the auction and the subsequent delay of four days was not due to the action of the auction-purchaser, but to the proceedings of the Court *Held*, that the Court could dispense with the deposit under R. 84 (2). 157 I.C. 748=1935 Pesh. 123.

DEPOSIT.—The deposit is to be made only after the bid is accepted and the person bidding declared to be the purchaser. No deposit can be required from intending bidders. 9 M.I.A. 328; 118 I.C. 901. An offer may be retracted at any time before it is

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase-money under rule 72, the Court may dispense with the requirements of this rule.

Loc. Am —[Oudh.] O. 21, R. 84 (2).—The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets.

Time for payment in full of purchase-money.

85. [S. 307.] The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from

the sale of the property:

Provided that in calculating the amount to be so paid into the Court, the

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[Madras] O. XXI, r 85—*Substitute the following for the existing rule.*—

The full amount of purchase money payable and the amount required for the general stamp for the certificate under r. 94 shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property:

Provided that in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under r. 72

1082=1934 Pesh 25. Where Judge refuses to accept the bid because he has got a higher bid it is open to him to order a re-sale and original bidder is not entitled to notice in that re-sale. 58 C. 788. If the deposit is not made under this rule, the sale is not null and void. It is a mere irregularity 67 I.C. 427, 144 I.C. 314=10 O.W.N. 440=1933 O. 345. See also 150 I.C. 733=1934 P. 329. But see 9 I.C. 66=15 C.W.N. 350. The officer conducting sale cannot extend time for payment of deposit and failure to deposit immediately annuls sale 30 I.C. 230=2 O.L.J. 216. But see 67 I.C. 427, 140 I.C. 98=1932 P. 342. Decree-holder can withdraw the deposit only after confirmation of sale and is entitled to interest 25 I.C. 859. Deposit compulsory unless dispensed with by Court. 116 I.C. 212=1929 L. 492.

BID UNDER MISAPPREHENSION—RESTORATION OF DEPOSIT—POWER OF COURT—Where a person bids at an execution sale for a certain property under a misapprehension that he is bidding for another property and deposits 25 per cent of the price, it is open to Court on his application to pass an order, before the sale is sanctioned by it, that the sale should not be enforced and to direct the restoration of the deposit. 1935 A.W.R. 29=1935 A.L.J. 249=1935 A. 204.

RE-SALE.—Any one who is interested in having the property re-sold can move Court for the purpose. He need not necessarily be the decree-holder. 138 I.C. 103=1932 A.L.J. 501. The word "forthwith" indicates that no fresh proclamation is necessary 12 M. 454. As to whether the sale can be adjourned, see 16 C. 33 (38); 12 M. 454=107 I.C. 274. When property is put up again forthwith and sold

M.L.J. 656. Where the highest bidder bids, to require the next higher bidder to deposit the money is illegal and open to revision. 42 M. 776=37 M.L.J. 274. In a re-sale the officer conducting the sale need not commence from the next highest bid below that made by the defaulter. 1 W.R. Mis 11. See 7 C. 337. Default of purchaser in payment of deposit—No certificate by officer holding sale in form prescribed—Right of decree-holder to recover deficiency. 141 I.C. 367=29 N.L.R. 52=1933 N. 123. According to O. 21, R. 72, as applicable to N.W.F. Province, no permission to bid is necessary. But this does not impliedly dispense with the requirement of this rule which requires 25 per cent. deposit. 165 I.C. 554 (Pesh.) The sale is not completed until such deposit is made; for, if such a deposit is not made, it is the duty of the officer conducting the sale to put the property up to auction again immediately. His action in doing so is not really a resale of the property but a continuation of the previous auction (*ibid.*).

APPEAL.—An order setting aside sale on default to deposit purchase-money is not appealable 58 I.C. 597.

O. 21, R. 85.—The words "into Court" have been added to remove the distinction which was drawn in 20 B. 745 between days on which the Court and those on which the Court's office, respectively, is closed or open. When the time for payment expires during the recess, the money may be paid on the day the Court re-opens 13 M.L.J. 271=116 I.C. 65=1929 N. 305. The sending of a postal money order by the purchaser does not satisfy the rule. He is bound to see that the money reaches the Court in time 22 B. 415,

"*Explanation*—When an amount is tendered on any day after 1 p.m. but paid into Court on the next working day between 11 a.m. and 1 p.m. the payment shall be deemed to have been made on the day on which the tender is made

86. [S. 308.] In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court

Procedure in default of payment. thinks fit, after defraying the expenses of the sale be

be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.

87. [S. 309.] Every re-sale of immoveable property, in default of payment of the purchase-money within the period allow-

Notification on re-sale. ed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescrib-

Page 846.

[Madras] O XXI, r. 87.—*Substitute* the following for the existing rule:—

Every re sale of immovable property, in default of the payment of the amounts mentioned in r. 85 within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

(G. O Ms No. 2922, Home, dated 28th October, 1936)

diction to extend the time when default is made in depositing the balance of the purchase-money within 15 days as required by R. 85 Court ought to order re-sale of the property and the only discretion is as regards the forfeiture of the deposit of 25 per cent. 57 A. 658=153 I C 910=1935 A. 243=1935 A. W R 28=1935 A L.J. 167. Extension of time can be granted with consent of parties. 100 I C 800=1927 L. 337. See also 122 I.C. 561 Yet when no objection was made when it was extended and the sale confirmed and money drawn out, the sale cannot be set aside on account of want of consent. 43 M.L.J. 477=69 I C. 1001=1923 M. 48. See also 35 C.W. N. 877. The property is liable to be re-sold when the decree-holder purchaser does not deposit the balance after deducting the decree amount. 51 I.C. 316. Amount of bid less or equal to amount sought to be set-off—Procedure. 1930 M.W.N. 568. Joint purchasers—Balance money paid by one ensures for the benefit of the other as well 51 C. 992=1926 C. 719, 1925 C. 164=81 I C. 1029. Tender in Court of balance on 15th day—Payment into Treasury on next day—Tender amounted to payment. 148 I C. 348=1934 A. L.J. 71=1934 A. 817. In Collector's sales, the non-payment of three-fourths of the sale price within the time limited by R. 85, is a mere irregularity and does not automatically involve the holding of a sale afresh. 20 M. L.J. 80.

O. 21, R. 85.—Judgment-debtor not entitled to have sale set aside under this rule, when no prejudice was caused to him, and failure of deposit was due to mistake of Court 144 I.C. 699=1933 R. 104. The deposit alone can be forfeited and not the right which the decree-holder has under the decree 7 W.R. 110. The words "if the Court thinks fit" are inserted to remove the hardship caused in certain circumstances, vide 28 M. 535, 95 I.C. 46=1926 A. 509.

15 Even apart from this rule Court can order re-sale on failure to fulfil conditions subject to which decree-holder was permitted to bid. 1 P. 235=69 I.C. 872. Purchaser paying 25 per cent. of purchase-money and not paying balance in time—Judgment-debtor paying off amount of decree and 5 per cent. under R. 89—Forfeiture of 25 per cent. deposit—Not proper—Purchaser has no right to 5 per cent. under R. 89. 151 I.C. 310=11 O.W.N. 1132=1934 O 429. In execution of his money decree, A purchased the property, and deposited the amount of the purchase price minus the amount of the decree into Court. Prior to the sale, B another decree-holder had also applied for execution, and a second sale was held and B purchased the property. The Court thereupon passed an order confirming the sale in favour of A cancelling that in favour of B and directing A to pay the entire purchase price in cash. On default by A, the Court further ordered that B was entitled to recover the amount by execution. Held, that the order was erroneous. As between two rival decree-holders against the same judgment-debtors, the Court had no authority to order that one decree-holder should pay another. The correct order should be to annul the sale and direct the re-sale of the property with a view to enable all persons entitled to rateable distribution to share in the proceeds. 142 I C. 577=1933 A L.J. 336=1933 A 337.

O. 21, R. 87.—See 12 M. 454. There is no illegality in not mentioning time and place of re-sale in the sale proclamation, if no deficiency results. 87 I.C. 1=1925 M. 631

O. 21, R. 88: SCOPE.—The ordinary law of pre-emption is applicable to sales in execution of decrees, and hence this rule which affords a remedy. 13 A. 224 (228). See also 27 A. 670 (677). The object of the rule is to enable a co-sharer to keep out strangers. 26

But if co-sharer to have preference the bid of the co-sharer.

able property, and two or more persons, of whom one is a co-sharer respectively bid the same sum for such property or for any lot, the bid shall be deemed to be

59. [310-A.] (1) Where immoveable property has been sold in execution

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I.C. 95=12 A.L.J. 1148 A pre-emption suit will not lie against such a bidder. (*Ibid*) The requirements of the rule are satisfied if the co-sharer asserts his right of pre-emption when bidding for the same amount. 36 I.C. 654=3 O.L.J. 405.

WHO ARE CO-SHARERS.—Members of a joint Hindu family, other than that member who is recorded in the Collector's register as sharer in the *mehal* are co-sharers. 7 A. 184. A Hindu widow holding by inheritance her deceased husband's share in a village is also a co-sharer. 1 A. 452 But possession by her for life of a share in a village, in lieu of maintenance, does not make her a co-sharer 6 A. 17 See also 7 A. 860.

BID THE SUM.—There must be a distinct bid by the co-sharer in the ordinary manner of offering bids. 3 A. 827. See also 2 A. 850.

ILLUSTRATIVE CASES.—The conditions of pre-emption under Mahomedan Law do not apply to claims under this rule. 6 N.W.P. 289 If claimant has fulfilled the conditions of sale and his rights are clear, Court executing the decree is bound to give effect to the right. 6 N.W.P. 272, 7 N.W.P. 97. See also 1 A. 272 and 3 A. 112, 1 A. 277; 6 N.W.P. 289 A person claiming to be a co-sharer cannot object to confirmation of sale in favour of the person recorded as auction-purchaser. 5 A. 42 Under Oudh Civil Rules, R. 211, sale officer has no right to decide as to claims and objections. 145 I.C. 281=10 O.W.N. 816=1933 O. 401.

APPEAL.—No appeal lies against an order passed under this rule. 3 A. 674, 5 A. 42 Also from an order refusing to restore to file an application under this rule, which has been dismissed for default. 29 A. 596

O. 21, R. 89. SCOPE.—See 58 I.A. 50=35 C.W.N. 81=60 M.L.J. 423 (P.C.) Proceedings under this rule are execution proceedings. O. 9 does not apply. 28 Bom.L.R. 668 50 B. 457=96 I.C. 411=1926 B. 377. Provisions of R. 89, are to be strictly complied with 106 I.C. 568. See also 42 M.L.J. 71. Object of the rule is to prevent sales for inadequate prices. 40 B. 557=18 Bom.L.R. 571. Right conferred by this rule is not an absolute right which can be enforced by suit against any particular person. 18 C. 481. Rule must be strictly construed. One judgment-debtor is not entitled to take advantage of any deposit made by his co-judgment-debtor, independently made. 42 M.L.J. 71=65 I.C. 983. Also 39 M. 429=28 M.L.J. 262 But see 22 I.C. 53. Rule applies to cases where attachment was made prior to the date on which this rule became law. 18 M. 477; 22 C. 767 (F.B.); to the sale of a tenure in execution of a decree for its own arrears, 23 C. 393; to sales in enforcement

of decrees on an award by arbitrators in a partition suit 27 C.W.N. 466=1923 C. 582; to sales in mortgage decrees and to sales on the Original Side of Calcutta High Court, 46 C. 69=24 C.W.N. 1032. As to High Courts generally, see 59 I.C. 432=24 C.W.N. 536 See also 41 M.L.J. 465=68 I.C. 916, 25 M. 244 (F.B.), 25 B. 104; 28 A. 778; 25 C. 703 (F.B.); 56 C. 477=1929 C. 574. Costs of suit—Mortgage suit on the Original Side, High Court—Application for setting aside sale—Item of costs whether need be paid approximately. 56 C. 477=1929 C. 574. Rule not applicable to sales under Public Demands Recovery Act. 18 C.L.J. 628=18 C.W.N. 766, nor to execution proceedings taken by a Collector, 25 A. 167. But see 31 B. 207, 13 M.L.J. 221. "Court" means a Civil Court and not of the sale officer when sale proceedings take place. 100 I.C. 726 (1). The word "property" means tangible property sold whether or not persons other than the judgment-debtor have any interest, and it does not mean the right, title and interest of the judgment-debtor alone 54 M.L.J. 455=51 M. 246=1928 M. 399, 159 I.C. 1044 (2)=1936 O.W.N. 48=1936 O. 128. The interest of a mortgagee in a usufructuary mortgage is immoveable property within the meaning of O. 21, R. 89. (27 M.L.J. 239, Diss from.) 122 I.C. 409=1930 A. 110. A house, apart from the ground on which it stands (which belongs to an outsider) is immoveable property. 15 R.D. 155=12 L.R. 38 (Rev.). Payment under protest or subject to conditions—Not recognised under the rule—Court cannot order decree-holder to furnish security before receiving payment. 1930 M.W.N. 524=1930 M. 921, 35 C.W.N. 1056

WHO CAN APPLY.—The expression "by virtue of a title acquired before purchase" does not qualify "any person owning such property". So a purchaser from the judgment debtor after sale can apply under this rule. 24 M.L.J. 205=18 I.C. 579; 40 B. 557=37 I.C. 211; 44 M. 554=40 M.L.J. 497 (F.B.); 54 I.C. 753; 22 I.C. 193=38 M.L.J. 775; 52 I.C. 344; 4 P.L.J. 340=51 I.C. 873; 148 I.C. 1082=1934 Pesh. 25. See *contra* 1922 L. 302; 42 A. 7=52 I.C. 331; 26 C.W.N. 149=49 C. 454, 34 A. 186=13 I.C. 134, 9 I.C. 745=14 O.C. 33; 98 I.C. 739=1927 M. 151; 24 L.W. 759; 48 A. 188=93 I.C. 24=1926 A. 204 (F.B.). A lessee can apply under O. 21, R. 89, though property is sold subject to lease. 51 M. 770=54 M.L.J. 445=1928 M. 1191. A transferee under an unregistered document by the judgment-debtor after sale is not prevented from applying under this rule 42 M. 503=49 I.C. 806. But see 22 I.C. 193=38 M. 775. The judgment-debtor can apply even though the deposit money was raised by sale of his

Application to set aside sale on deposit.

of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale

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equity of redemption to his mortgagees. 86 I.C. 732=1925 O. 349 (2). Also a judgment-debtor who has effected a private sale of his property during the pendency of the attachment proceedings. 25 B. 531. A transferee after attachment can apply. 26 C.L.J. 127=36 I.C. 510. *Quære*—If a transferee before attachment is entitled to make a deposit. 34 L.W. 399=1931 M. 753. Also a mortgagee after attachment. 100 I.C. 82=1927 M. 445=52 M.L.J. 157. A mortgagor has an interest and he can apply. 33 A. 481=10 I.C. 863. A prior mortgagee who was not a party to the suit, and when the sale was subject to a mortgage not stating amount or priority, can apply. 28 O.C. 221=1925 O. 429. A mortgagee who has purchased the equity of redemption in one portion can apply. 2 P. 715=74 I.C. 102. Also a mortgagee. 21 M. 416. Also a prior mortgagee. 53 I.C. 958=27 M.L.T. 130, 27 I.C. 831=13 A.L.J. 271, 12 I.C. 783=178 P.W.R. 1911. But see 33 A. 481=10 I.C. 863. A usufructuary mortgagee depositing is not a volunteer. 20 A.L.J. 42=1923 A. 127, also 25 O.C. 78=1922 O. 146. A *benamidar* can apply. 29 C. 1 at 6. A permanent under-tenure-holder under the E. B. and Assam Tenancy Amendment Act has an interest in the property to set aside sale in a rent decree. 52 I.C. 237=23 C.W.N. 597. Lessee can apply. 27 L.W. 307=54 M.L.J. 445. A purchaser of a portion of an occupancy holding can apply whether his interest is valid against the landlord or not. 8 C.W.N. 232. See also 8 C.W.N. 55, 31 C.W.N. 1050=1927 C. 817=55 C. 108. A *dar-mokar-ardar* can apply. 32 C. 107. Also an *under-riyat*. 11 C.W.N. 742. A member of a *joint Hindu family* can apply if the share of another member is sold. 1928 M.W.N. 101 (1). 51 M. 246=109 I.C. 297=54 M.L.J. 455. Also a decree-holder who is also a purchaser on the ground that the decree has been adjusted, without the concurrence of the judgment-debtor. 104 I.C. 753. A man is not debarred from defending his action under R. 89 because he desisted from his action under O. 21, R. 58. 25 L.W. 106=99 I.C. 893=1927 M. 327. The expression "owning such property by virtue of title acquired before such sale" applies as well to long-standing title as one recently derived from judgment-debtor. (*Ibid*)

WHO CANNOT APPLY—A person who purchases property before it is attached, and whose claim is rejected, and who files a suit under R. 63 cannot apply. 7 C.W.N. 243, 28 A. 84, 30 C. 214. See also 30 B. 575; 30 M. 507, 17 M.L.J. 129; 34 L.W. 399. The person applying should have an existing interest on the date of the application. 17 C.W.N. 1207=22 I.C. 192=15 Cr.L.J. 48=41 C. 305. A person whose title is not affected by the sale cannot apply. 15 C.L.J. 83=10 I.C. 880=16 C.W.N. 904. Nor a Receiver

under S. 20 of the Provincial Insolvency Act. 93 I.C. 271=1926 M. 357=50 M.L.J. 239. Nor a decree-holder who attaches before sale. 28 I.C. 948=13 A.L.J. 401. Nor an attaching creditor. 6 C.W.N. 57. See also 51 C. 495; 55 B. 239. Nor a person in whose favour there is an agreement to sell. 17 L.W. 680=1923 M. 659. Though application is by judgment-debtor tender of amount cannot be made by a person who acquires an interest in the property after the auction sale. 1936 O.W.N. 344=161 I.C. 424. Nor by a person who is neither an attorney, general or special, nor a Vakil or Mukhtar, for the owner of the immovable property sold. (*Ibid*). A second mortgagee when the sale is on decree for the prior one, cannot apply under this rule. 31 I.C. 37=9 S.L.R. 86. A mortgagee of non-transferable occupancy holding cannot apply. 29 I.C. 916; also 22 C.L.J. 108=20 C.W.N. 40. A mortgagee after sale cannot apply. 39 M.L.J. 84=55 J.C. 856 (F.B.). It was held that a person whose interest was not sold and cannot have passed under the sale could not apply, and a *puisne* mortgagee could not apply. 25 M. 244. See also 26 M. 332. A person expecting to get title and possession in a pending litigation cannot apply. 39 A. 700=41 I.C. 889. A part purchaser before sale cannot apply on the ground that the decree amount has been paid by himself and other purchasers of the rest of the property. 52 I.C. 641. Nor a person who has obtained a decree for specific performance of a contract of sale, when he has not executed his decree. 161 I.C. 26=1936 P. 119. Right to apply under—Under-riyat without right of occupancy—Sale of holding for arrears of rent—Sub-tenant of under-riyat—Right to have sale set aside. 39 C.W.N. 652.

FORM OF APPLICATION.—It need not be in writing. 63 I.C. 140; 13 I.C. 404=9 A.L.J. 12; 14 M.L.T. 534=22 I.C. 291. But mere deposit does not amount to an application. 66 I.C. 44=1922 M. 83; also 9 I.C. 33; 43 B. 735=53 I.C. 135, 32 I.C. 45. Lodgment schedule does not amount to an application. 95 I.C. 128 (1)=1926 M. 620, at least an oral application is necessary. 32 I.C. 783=3 L.W. 174; 86 I.C. 498 (1)=1925 M. 909. In a written application no specific prayer to set aside sale is necessary. 4 P.L.T. 295=58 I.C. 629. 34 P.L.R. 233=141 I.C. 421=1933 L. 210, 133 I.C. 407=1931 A. 756. As to defective applications, see 1925 N. 17. When a prior application to pay decree amount after attachment is dismissed, it does not operate as *res judicata* to an application under this rule. 44 M.L.J. 325=1923 M. 487 (2). An application to set aside sale is not invalid because of the absence of prayer to that effect. 106 I.C. 333. See also 57 C. 676, 58 C. 510. (Application by mortgagee to set aside mortgage sale under decree of High Court on the original side). Agreement between decree-holder purchasers and judg-

set aside on his depositing in Court,—

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ment-debtor on date of sale—Part payment of decree amount—Time fixed for payment of balance—Joint application to Court praying that on payment by fixed date sale to be set aside and in default sale be confirmed—Effect—Time, if of essence of contract—Non-payment on fixed date—Order confirming sale *Held*, (1) that though the parties agreed to substitute an agreed procedure for the procedure prescribed by law, it was nevertheless in essence, though not in form, one falling under O 21, and that the application filed by the parties on the date of sale might be treated as an application under R. 89, and the order confirming the sale was therefore appealable under O. 43, R. 1 (j); even if there be no appeal, High Court could interfere in revision if the order were shown to be wrong, as a question of jurisdiction was involved, (2) that the contract between the parties clearly showed that time was of the essence of the contract, and that on the expiry of time, fixed the sale automatically became confirmed, no order of the Court being necessary for the purpose and there was nothing left which could be set aside after that date 16 P. 202=17 Pat L T. 940=1937 P. 113 (F.B.)

PARTIES TO THE APPLICATION.—Purchaser and decree-holder are necessary parties to an application under rule 15 A. 407. But see 4 P.L.T. 491=2 P. 800, also 1923 C. 394. Auction-purchaser and decree-holder who are already on record need not be specifically mentioned and impleaded. 27 A.L.J. 769=119 I.C. 103=1929 A. 593; 1930 N. 5, 1930 A. 167 In an application to set aside a sale under R. 92 read with R. 89 which is otherwise in order and in time, the omission to implead the auction-purchaser till after the expiry of 30 days allowed for the application is not fatal to it (37 B. 387, Foll.) 32 M. 861=1929 M. 763=57 M.L.J. 310.

FORUM—Though sale was in execution by a Revenue Court, application under this rule must be made in Civil Court. 44 B. 50=54 I.C. 670.

DEPOSIT "FOR PAYMENT TO THE DECREE-HOLDER."—The words mean that the decree-holder is the person solely entitled to the money paid into Court 30 C. 262 But see *contra*, 1933 N. 347. If the decree-holder be the purchaser he is entitled to the 5 per cent. on the purchase-money. 26 C. 449 (F.B.), 22 M. 286, 10 M.L.J. 228; 1933 A.L.J. 78=145 I.C. 872=1933 A. 292=55 A. 203. If the decree is joint in favour of two, but one alone gets permission and is purchaser, he alone is entitled to the profits 6 P. 386=103 I.C. 724 (2)=1927 P. 288 A mere payment of the sale proceeds into Court does not satisfy the requirements of the rule. 23 B. 723, 8 C.W.N. 355; 7 Bom.L.R. 263. As to what amounts to a valid deposit, see 1 P.L.J. 459=35 I.C. 779, 35 C.W.N. 1056. Sale of properties in several lots—Judgment-debtor tendering purchase-money of some properties alone with five per cent compensation—

No valid deposit. 9 P. 310=1930 P. 318. See also 55 A. 123=1932 A.L.J. 1107=1933 A. 155. The deposit must be in Civil Court and not in the treasury. 40 A. 425=45 I.C. 773. But see 131 I.C. 596=1931 A. 303. A deposit by a stranger other than a vakil or attorney is not valid. 12 I.C. 404=9 A.L.J. 12 A deposit under R. 89 is a voluntary deposit and the person making the deposit cannot maintain a suit to have the sale set aside and for refund of the money deposited. 7 P. 30. But see 57 E. 601=35 Bom.L.R. 462=1933 B. 239. Execution sale—Subsequent private sale by judgment-debtor to purchasers in execution of items purchased by them—Purchasers willing to allow judgment-debtor to use moneys deposited by them as his—Amount sufficient to cover decree debt and poundage. *Held*, that the moneys deposited by them are in the custody of the Court till final orders are passed by the Court with respect to the sale, they cannot operate upon it to enable the judgment-debtor to use the same for the purpose of setting aside the sale under R. 89 The rule cannot be said to be complied with and the sale cannot therefore be set aside. 45 L.W. 88=1937 M. 270=(1937) 1 M.L.J. 264. Deposit by auction-purchaser under sale, before confirmation, cannot be taken advantages of by any person to support his application under this rule. 31 I.C. 913 "Amount specified in the sale proclamation," meaning of. See 96 I.C. 77=1926 M. 765=50 M.L.J. 580 The term cannot be taken to include the amount due to the same decree-holder by the same judgment-debtor under another decree in respect of which the decree-holder is allowed to claim rateable distribution subsequently A proclamation of sale is the only document to which publicity is intended to be given under the rules. 156 I.C. 965=37 P.L.R. 298=1935 L. 423 Amount mentioned in sale proclamation less than decretal amount—Judgment-debtor cannot take advantage of such mistake 1934 L. 790. Deposit under—Sum paid is smaller than that mentioned in sale proclamation—Validity. 31 Bom.L.R. 433=117 I.C. 527=1929 B. 215 'Any amount' means what actually was received by the decree-holder and does not include sale proceeds. 25 Bom.L.R. 446=73 I.C. 454. No cash payment is necessary—Agreement to set-off decretal amounts to payment. 14 I.C. 326=1912 M.W.N. 756, also 24 M.L.J. 205=18 I.C. 579 It is open to the decree-holder to waive the whole of the decree amount or to accept a lesser amount or to receive anything which is an adequate equivalent of the amount owing to him. 42 L.W. 692=1935 M. 1050 Where, therefore, the decree-holder agrees to accept from the judgment-debtor a mortgage in satisfaction of the amount due to him under the decree, the judgment-debtor applying to set aside the sale need not deposit any portion of the decree amount at all; it is enough if he deposits only the five per cent. under R. 89 (1) (a). (*Ibid*). It is not for the auction-

(a) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

(b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his

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purchaser to insist that there must be an actual receipt of cash or deposit of the entire amount. He receives his five per cent. and has no grievance, and he cannot be heard to say that it is not open to the decree-holder to waive the decree-amount or accept any adequate equivalent. (*Ibid.*) Money paid to decree-holder privately is equivalent to deposit 1933 N. 349. See also 1934 N. 21=150 I.C. 611; 39 C.W.N. 829=61 C.L.J. 313. Payments may have been made to decree-holder before sale. 39 C.W.N. 829=61 C.L.J. 313. A mere compromise or admission of decree-holder would not be sufficient. 55 A. 697=1933 A.L.J. 1004=1933 A. 510. Payment by cheque insufficient. 27 I.C. 656=8 Bur.L.T. 80. Where a short amount was paid, having been misled by an officer of Court, on payment of balance sale should be set aside 22 I.C. 842; see also 18 C. 481; 33 C.W.N. 1170. But see 13 P. 641. Where a sum less than the sum due is deposited owing to a *bona fide* mistake in calculating the amount, see 26 C. 449 (F.B.), also 21 A.L.J. 162=1923 A. 315=6 R. 490=113 I.C. 810 (2). Bengal Patni Regulation, S. 14-A (b)—Relative scope—Deposit to set aside sale—Interest—Calculation of 61 C. L.J. 39. An order setting aside sale and entering satisfaction when the amount was deposited, is valid and not *ultra vires*, merely because the creditor did not include interest in the execution petition. 41 C.L.J. 391=1925 C. 948. But see 13 P. 641=151 I.C. 618=1934 P. 336. The extent of deposit is the amount of decree in execution of which the sale was made, and not those of other decree-holders claiming rateable distribution. 17 I.C. 920=23 M.L.J. 585; also 37 B. 387=15 Bom.L.R. 244, 14 L. 55=34 P. L.R. 273=143 I.C. 768=1933 L. 226. Money once paid to set aside sale cannot be recovered from decree-holder after sale on the ground that judgment-debtor had no saleable interest in the property. 45 B. 1094=23 Bom. L.R. 455. See also 13 I.C. 144=16 C.L.J. 156. But (irrespective of the applicability of R. 89) a third party purchaser before attachment, if he subsequently succeeds in his suit for declaration of his right to the property is entitled to refund of the deposit from the decree-holder auction-purchaser, S. 72, Contract Act. 34 L.W. 399=1931 M. 753. When the mortgagor pays the amount, it has the effect of redeeming the properties. 60 I.C. 560=7 O.L.J. 620. The acceptance by a landlord of a deposit from a transferee means a recognition of the transferee as tenant. 36 I.C. 701. Deposit must not be made subject to any condition or under protest. 58 M. 972=42 L.W. 307=158 I.C.

207=1935 M. 842=69 M.L.J. 349 (F.B.). Where a conditional deposit was made, but the condition was withdrawn before an application to draw the money was filed, it was held that the deposit was a valid one 2 P. 534=72 I.C. 907. Two deposits by both the judgment-debtor and a mortgagee after sale, each depositing a portion of sale amount and two applications by them, can be treated as one proceeding and the sale be set aside. 49 A. 839=25 A.L.J. 576=102 I.C. 471=1927 A. 561. Sale set aside—Purchaser is entitled to interest and costs besides the 5 per cent. deposited under R. 89. 57 C. 676. A judgment-debtor who wishes to take advantage of R. 89 must strictly comply with the same, by paying all amounts as directed by the rule. Hence a deposit of merely 5 per cent. without the sum mentioned in Cl. (b) for payment to the decree-holder is not sufficient even though the decree in execution of which the sale has been held has been set aside. 39 M. 429, Foll. (Case-law reviewed.) 56 M. 808=1933 M. 598=65 M.L.J. 253.

O. 21, R. 89 (1) (b).—An amount which has been deposited in Court cannot be said to have been received within the meaning of this section. Received cannot mean "virtually or constructively received". 1933 M. 265=36 L.W. 967=141 I.C. 167. See also 1932 A.L.J. 1107=55 A. 123=143 I.C. 127=1933 A. 155. But see 55 A. 200=145 I.C. 872=1933 A.L.J. 78=1933 A. 292.

O. 21, R. 89 (2).—When an application under R. 90 is dismissed for default, the applicant is not precluded from applying under this rule. 43 I.C. 340=20 O.C. 339; 106 I.C. 568; 116 I.C. 490. Where an application under R. 90 is made before the sale is concluded, its existence is no bar to an application under this rule. 1926 A. 754. An applicant under this rule cannot impugn the sale on grounds set out in R. 90. 28 C. 78. When a judgment-debtor is allowed to apply under this rule, the Court cannot entertain objections to the sale. 21 A.L.J. 340=1923 A. 503. See also 47 A. 850=1925 A. 778.

Where an application is made under R. 89, the Court is bound to pass an order setting aside the sale, and it ought not, after the deposit has been made, to entertain an application under R. 90. 58 M. 972=42 L.W. 307=1935 M. 842=69 M.L.J. 349 (F.B.). Where therefore two applications are made, one by the judgment-debtor's mortgagee under R. 89, making the necessary deposit, and another by the judgment-debtor under R. 90, and both are allowed by the Court on the same day and the sale is set aside, the decree-holder is entitled to payment out of the decree amount deposited by the mortgagee, and he cannot be

immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Loc. Ams.—[Allahabad and Oudh.] R. 89 (1).—For the words “any person . . . such sale” in sub-rule (1), substitute “the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property”.

[Calcutta.] O. 21, R. 89 (1).

In sub-rule (1), R. 89, O. 21, *cancel* the words “either owning such property, or holding an interest therein by virtue of a title acquired before such sale” and *substitute* the words “whose interest is affected by such sale, (provided that such interest has not been voluntarily acquired by him after such sale)”

[Lahore.] In sub-rule (1) of this rule for the words “any person . . . acquired before such sale”, *substitute* the words “any person claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person”.

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refused payment on the ground that the sale was set aside under R. 90 or that the deposit was made by the mortgagee under R. 89, under protest. (*Ibid*)

LIMITATION—See 87 I.C. 722=1925 O 411. See also 28 Bom.L.R. 510=95 I.C. 549 (1)=1926 B. 335. Deposit is condition precedent to an application. It is the deposit which must be within time. 33 I.C. 996=3 L.W. 271. But see also 66 I.C. 44=1922 M. 83, 48 M.L.J. 405, 87 I.C. 722. Whole amount must be deposited within 30 days. 1925 N. 30. Where the circumstances of the case show that the applicant is ready to deposit the sum required, the Court can entertain the application, always provided that the applicant has an interest by virtue of title. But the application and the deposit have both to be made within 30 days. 161 I.C. 26=1936 P. 119. As to what is to be taken as the date of sale for purpose of limitation, see 29 C. 626. See also 1926 B. 335; 9 Luck. 393=147 I.C. 1077=11 O.W.N. 18=1934 O. 25. Application for setting aside sale—Deposit of sale price and five per cent—Sufficiency—One anna in the rupee to cover costs if need be deposited in time. 118 I.C. 805. Time begins to run from the day when the purchaser was declared and was ordered to deposit 25 per cent. 30 A. 65=10 A.L.J. 475. Time runs from the date of deposit under R. 84 (*Ibid*). It matters not if the sale is even confirmed if the deposit is in time. 27 I.C. 656=8 Bur. L.T. 80. The Court has no power to extend time. 36 I.C. 809, 1926 L. 639; 1928 R. 286; 1933 R. 8. If it can do so with the consent of parties, see 36 I.C. 809. Even with the consent of parties time cannot be extended. 39 I.C. 664=2 P.L.J. 164. But see 157 I.C. 803=1935 O.W.N. 975. Delay not due to any act of the person depositing but to the officer of the Court is to be excused. 10 I.C. 51=13 C.L.J. 467; 52 I.C. 161=17 A.L.J. 991; 15 C.L.J. 83=10 I.C. 889=16 C.W.N. 904; 9 N.L.J. 57=96 I.C. 376 (1)=1926 N. 331; 36 P.L.R. 101=1934 L. 875. Also due to the delay of the treasury. 37 A. 591=13 A.L.J. 793. The application too, not merely the

deposit, must be within time. 66 I.C. 44=1922 M. 83; 161 I.C. 26=1936 Pesh. 119. Also 48 M.L.J. 405=1925 M. 639; 87 I.C. 722=1925 O. 411. But see 33 I.C. 996.

APPEAL—No appeal lies against an order setting aside a sale. 27 A. 263. But see 31 B. 207, 6 C.W.N. 57, 30 M. 507; 5 C.L.J. 204. But against an order refusing to set aside, an appeal lies. 12 I.C. 169=12 M.L.T. 380. See also 36 I.C. 809. Appeal against order dismissing application under this rule—Failure to implead auction-purchaser—Appeal whether liable to be dismissed. 9 P. 310=1930 P. 318. See also 142 I.C. 623=34 P.L.R. 8=1933 L. 324. No appeal lies on an order refusing stay, when the sale itself was not confirmed. 3 R. 132=1925 R. 217. No second appeal lies under this rule. 44 B. 472=56 I.C. 597. See also 38 C. 339=15 C.W.N. 844, 17 I.C. 884=8 N.L.R. 177, 36 I.C. 769, 33 C.W.N. 1170. Order refusing to pay to decree-holder amount deposited under this rule is not one under S. 47 and is not appealable. 58 M. 972 (F.B.). (noted *supra*.)

REVIEW—Whether restoration of an application under this rule to set aside order of dismissal for default, is possible, is doubtful. But a review petition lies. 22 M.L.J. 148=12 I.C. 351.

REVISION—Revision lies when the lower Court improperly refuses to set aside sale. 21 A.L.J. 162=1923 A. 315. But see 40 A. 425=16 A.L.J. 433. See also 118 I.C. 805, 152 I.C. 259=15 Pat.L.T. 511=1934 P. 540.

O. 21, R. 89 (Lahore H.C. Amendment). **RIGHT TO APPLY UNDER—INTEREST AT TIME OF APPLICATION—SUFFICIENCY**—Under R. 89, as amended by the Lahore High Court in 1932, it is not necessary that the applicant desiring to have a sale set aside, should either own the property or hold an interest therein prior to the sale. It is sufficient if he claims an interest in such property at the time of making the application under the rule. 1935 L. 51. A person who has obtained a mortgage of the property after attachment can come forward under R. 89, as amended by the Lahore High Court, and by making the necessary payments save the property and prevent its sale from taking place. 1936 L. 561.

[Madras.] Applying the following for sub-rule (1) :—

(1) Where immovable property has been sold in execution of a decree, the judgment-debtor, or any person deriving title from the judgment-debtor, or any person holding an interest in the property may apply to have the sale set aside on his depositing in Court—

(a) for payment to the purchaser, a sum equal to 5 per cent. of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of that proclamation of sale, have been received by the decree-holder:

Provided that where the immovable property sold is liable to discharge a portion of the decree debt the payment under clause (b) of this sub-rule need not exceed such amount as under the decree the owner of the property sold is liable to pay."

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part II, pp. 1394-1396.)

[Nagpur.] Rule 89.—In sub-rule (1) of R. 89, for the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" substitute the words "any person claiming any interest in the property sold at the time of the sale or at the time of the petition, or acting for, or in the interest of, such person".

[N.-W.F.P.] In sub-rule (1) for the words "either owning . . . before such sale," substitute "either claiming any interest in such property at the time of sale or at the time of application, or acting for or in the interest of such person."

90. [S. 311.] (1) Where any immoveable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

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O. 21, R. 89 (Nagpur).—Provisions of the nature of R. 89 (2) must be construed with reference to the usual rules that the singular includes the plural, the male the female, and in all cases where the law allows devolution, the assignee or other person on whom the rights in question have devolved has to be substituted, as far as may be, for the original owner of the interest, subject of course to any express or implied prohibition to the contrary. Although this rule finds no place in the General Clauses Act, yet it is a principle of general application nevertheless. The difficulty usually lies in determining when the law permits of devolution, and not in applying this principle once that is ascertained 1937 N. 161. Sale by judgment-debtor after application by him under O. 21, R. 90—Purchaser depositing amount under O. 21, R. 89 and applying for sale being set aside—Maintainability—Procedure. (*Ibid.*).

O. 21, R. 90: Scope of Rule.—The scope of R. 90 and 91 is entirely different. The words "material irregularity" in R. 90 governed as they are by the words "in publishing or conducting it" refer only to an irregularity in the procedure to be followed before a property is put up to sale and R. 91 comes into operation in those cases where in spite of the prescribed procedure having been regularly followed, property has been sold in which the judgment-debtor had no saleable interest 12 P. 665=14 P.L.T. 388=1933 P. 435 (S.B.). Objections relating to the failure to deposit 25 per cent of the purchase money in the first instance and the balance of the purchase money later and the acceptance of an improper bid, come within the purview of R. 90 38 P.L.R. 839=163 I.C.

765=1936 L. 969. R. 90 does not refer only to an irregularity or fraud in publishing or conducting the auction-sale. The decree-holder is also responsible for any irregularity or fraud occurring in the sale proclamation which is itself prepared from the sale statement for which the decree-holder himself is responsible. 20 N.L.J. 111=1937 N. 140. Proceedings under this rule also come within the scope of S. 47. 34 I.C. 829=30 M.L.J. 611; but are not proceedings in execution. 62 I.C. 608=6 P.L.J. 253. But see 87 I.C. 413=1925 M. 1142. Order 9 does not apply, but an application dismissed for default can be restored under S. 151. 1931 A.L.J. 622=1931 A. 594. See also 53 C. 679=1926 C. 773. The addition of words "or fraud" takes the case out of S. 47 and brings it under this rule 4 L. 243. A sale can be partially set aside under this rule. 44 C.L.J. 167=98 I.C. 206=1926 C. 1219. Where, in an application to set aside sale on the ground of fraud and substantial injury, these allegations are found against, it is the duty of the Court to confirm the sale. 58 I.A. 50=1931 P.C. 33=60 M.L.J. 423 (P.C.). Before a sale can be set aside on the ground of irregularity, a connection must be established between the irregularity and the loss to the judgment-debtor on account of the sale of the property at a low price. 158 I.C. 167=1935 L. 390. Decree directing possession of land by removal of materials of a house standing on it—House attached by decree-holder for costs and house was not detached and house was sold *Held*, house was immoveable property under R. 90. 124 I.C. 48; 15 R.D. 155. Before setting aside a sale on the ground of irregularity under R. 90, Court must give decree-holder an opportunity to show that no sub-

Provided that no sale shall be set aside on the ground of irregularity or

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stantial injury had resulted, and when Court decides the application and orders the sale to be set aside in the absence of evidence which the parties wish to adduce, the order cannot stand. 152 I.C. 259=15 P.L.T. 511=1934 P. 540. Where a Court directs an enquiry as to the value of the property to be sold in execution, it cannot ignore the result of such an enquiry and take any imaginary figure or state the value of the property in the sale proclamation at any figure it thinks proper. It would be an irregularity. 37 Bom. L.R. 489=159 I.C. 358=1935 B. 331 Sale of holding under rent decree—Purchase by judgment-debtor—Application to set aside by mortgagee of part of holding—No finding of fraud or irregularity—Powers of Court to set aside sale under S 173, B. T. Act. 154 I.C. 721=16 P.L.T. 216=1935 P. 210. Application under this rule is not maintainable after application and deposit made under O. 21, R. 89 69 M.L.J. 349=58 M. 972=42 L.W. 307=158 I.C. 207=1935 M. 842 (F.B.). Proceedings under this rule—Compromise—Payment of money under, whether proper tender. 157 I.C. 31

MEANING OF TERMS—DECREE HOLDER—

This expression is not limited to the decree-holder at whose instance the property was first attached. 10 M. 57. The "interest" contemplated is interest at the time of sale and not at the time of application. 87 I.C. 94. "Interest" means interest in the property sold. The general creditors expecting a higher dividend have not such an interest as is contemplated by the rule 39 I.C. 932=10 S.L.R. 189 But *see contra* 103 I.C. 499=1927 M. 783=53 M.L.J. 229, 1928 M.W.N. 216

APPLICABILITY—The subsequent setting aside of an *ex parte* decree, after sale in pursuance of the decree, does not affect the title of the purchaser 38 C. 622=15 C.W.N. 875 Rule does not apply when a sale of one decree sold in execution of another is sought to be set aside. 64 I.C. 388 The rule applies when the ground of setting aside sale is fraud 1 L.W. 1033=26 I.C. 369 *Also* 66 I.C. 220. Fraud after publication of sale proclamation is covered by this rule. 48 I.C. 560=3 P.L.J. 645. Question of jurisdiction cannot be raised in an application under this rule. 3 A. L. 140. Nor that decree was partly satisfied, which can be raised only by a separate application under S. 47. 152 I.C. 1014=1934 P. 664. *See also* 18 A. 141 (144). Where after dismissing the applications under R. 90, made by some of the judgment-debtors, the Court passes an order setting aside the sale on an application by another judgment-debtor under the same rule, the order will take effect only so far as the share and interest of that judgment-debtor are concerned, and the sale will stand confirmed so far as the share and interest of the other judgment-debtors are concerned. 41 C.W.N. 224. When sale is held in different lots, and irregularity and loss is proved only as regards the sale of some lots, the sale of the other lots must be confirmed. 59 M. 438=43

L.W. 32=1936 M. 121 When setting aside the sale, the Court has power to order interest on the purchase-money as well to be paid to the purchaser. 48 I.A. 24=40 M.L.J. 141=25 C.W.N. 366 (P.C.). An objection that the property attached and sold is not by law saleable, cannot be entertained under this rule *See* 7 A. 641, 7 A. 365; 21 B. 463; 6 M. 237, 20 C. 8 (P.C.); 7 C. 23. 24 M. 311 (315). *See also* 6 C.W.N. 42, 6 C.W.N. 48 (57); 30 C. 152; 8 C. 932; 25 M. 244 (F.B.); 6 C.W.N. 5; 1 P.L.T. 742=57 I.C. 261. An objection that a minor was not properly represented does not come under this rule. 9 I.C. 252=9 M.L.T. 260. But *see contra* 64 I.C. 25=35 C.L.J. 9. *Also* 29 I.C. 211 The rule applies to Receivers appointed by Court. 6 Bom. L.R. 1140. When Receiver applies to have the sale set aside it is not open to judgment-debtor to file an independent application for the same purpose. 37 C.W.N. 146 An application to set aside a sale held by a Collector cannot be entertained under this rule 11 A. 94 (F.B.). This rule will not apply if the sale itself is a nullity. 35 I.C. 404. A sale held even on the face of an injunction to stop it, is a nullity 88 I.C. 532=1925 O. 424. Where judgment debtor did not until after the sale had been completed put forth the plea that he was an agriculturist, *held*, that the plea could not be allowed to be raised. 32 Bom. L.R. 436. Where the date fixed for sale was a holiday and the sale was held the next day the sale is not a nullity. 37 C.W.N. 146

INVALID SALES—*See* 10 C. 410; 7 A. 676, 12 A. 96; 16 A. 5; 11 A. 333; 21 A. 311; 10 A. 506. Where decree-holder himself is the auction-purchaser, it is open to judgment-debtor to assail the validity of the sale on grounds apart from those specified in R. 90, *e.g.*, that the sale of ancestral property which ought under the G. O. to have been conducted by the Collector, having been conducted by the Amin of Civil Court, was without jurisdiction. 143 I.C. 122=1932 A. L.J. 1118=1933 A. 192 Sale conducted at a time and place other than that notified, is not a sale at all. 7 A. 676. So also is sale held before the expiration of the 30 days required by R. 68, and without the consent of the judgment-debtor. 11 A. 333; 21 C. 66=20 I.A. 176 (P.C.); 1933 L. 186=145 I.C. 125. But *see* 68 I.C. 363=2 P. 207. Effect of sale held without the property being attached. 5 A. 86; 21 A. 311; 10 A. 506 *See also* 32 C. 296 at 314; 68 I.C. 843=1923 N. 18; 18 C. 188, 34 C. 787, 1 R. 533=1924 R. 124; 21 I.C. 46; 36 I.C. 292. Where a person is not aware of the sale proclamation and false representations are made to him by the bailiff as to the nature and interest put to sale and he purchases the property relying on those representations, the sale must be set aside. 164 I.C. 202=1936 R. 327 A summary rejection of an application under this rule without an investigation is improper and will not be sustained. 85 I.C. 779=1925 N. 289. An omission by the officer conducting an execution sale to record the

fraud' unless upon the facts proved the Court is satisfied that the applicant has

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bid of a bidder is an irregularity, but when there is nothing to show that the judgment-debtor suffered substantial injury on account of such omission and there is not even any allegation that intending purchasers were dishonestly sent away by the decree-holder or the sale officer or any one else, the sale will not be set aside. 11 O.W.N. 1618=153 I.C. 853=1935 O. 154.

NOTICE.—When no notice is given under R. 150 of the Civil Rules of Practice (M.), the sale is void. 16 M.L.J. 9. Also when no notice is given under O 21, R 22 91 I.C. 711=1926 C. 539, 146 I.C. 681=1933 Pesh 71, but not mere irregularity in the service of notice. 13 P. 467=149 I.C. 828=15 P.L.T. 273=1934 P 274; nor error in giving wrong address in the notice, specially when it is the same address as in the plaint, for the decree-holder has not acted *mala fide*. (*Ibid.*) The provisions of O 5, R. 19, are imperative and when there is no declaration that the service is due service, the service cannot be held to have been duly effected at all. 156 I.C. 699=42 L.W. 39=1935 M 438 Application for setting aside—Receiver not in possession—Whether entitled to notice. 7 R. 425=1929 R. 311. The Code does not lay down that the parties who would be affected by an order setting aside a sale under R. 90, should be formally impleaded as parties to the application made for the purpose. It is sufficient if notice is issued to them before the sale is set aside. 62 C. 286=157 I.C. 637=39 C.W.N. 186=1935 C. 502

LIMITATION.—When an application to set aside a sale in execution is time barred, the Court has no jurisdiction to set aside the sale (1926 L. 379, Rel. ou.) 1935 L. 972. The application must be made within 30 days of the date of sale. The period might be extended under S. 18 of the Limitation Act on the ground of fraud. 14 C. 679; see also 1926 C. 229; 30 C. at 153, but not under S. 4 of the Limitation Act. 92 I.C. 839. Whether benefit of S 6 Limitation Act is available to application under this rule, 1935 P. 450. See 29 C. 626, as to what day is to be taken as the "date of sale". Time runs not from the date of sale but from the date of knowledge of fraud. 60 I.C. 801=48 C. 119. But see 48 I.C. 970. Also 60 I.C. 529 (P.) It is sufficient if the application is in time. It does not matter if the particulars of the irregularities are filed more than 30 days after sale. 48 A. 286=24 A.L.J. 286=1926 A. 305. Where a void sale is sought to be set aside, then the application would not be under R. 90, but will be deemed to be an application made in execution governed by S. 47, to which Art. 181, Limitation Act, would be applicable. 151 I.C. 244=1934 A.L.J. 859=1934 A. 314. Where the real purchaser was included as a party after 30 days, while the application was within time against the ostensible purchaser, the application is within time, if the applicant did not know of the existence of a real purchaser at the time of the appli-

cation. 76 I.C. 507=1923 A. 462. As to whether an application by a *bona fide* purchaser on the ground of fraud is barred, see 27 C.W.N. 587=1923 C. 538. When a purchaser can apply, see 38 M.L.J. 228=55 I.C. 333; 47 A. 479=1925 A. 459. Also 18 N.L.R. 98=1922 N. 113; 5 Pat.L.T. 41=74 I.C. 760 (2); 107 I.C. 494. But see 47 C.L.J. 62, *contra*. Dismissal of prior application under this rule is not a bar to an application under O 34, R. 5 before confirmation of sale. 38 C.W.N. 924=152 I.C. 1059=1934 C. 822

FORM OF APPLICATION.—A formal array of parties is not an absolute necessity in an application under this rule. 25 I.C. 907=17 O.C. 306. See also 7 Pat.L.T. 532=1926 P. H.C.C. 83=94 I.C. 31=1926 P. 266. It is not the duty of the judgment-debtor to name in his application all the auction-purchasers. 49 A. 788=25 A.L.J. 524=102 I.C. 126=1927 A. 513. Separate applications by different judgment-debtors can be consolidated and heard together and the whole sale set aside 14 C.L.J. 346=16 C.W.N. 704. The Court cannot set aside a sale upon other grounds not pleaded by the applicant 21 A. 140. See also 53 I.C. 794. Absence of application bars defence of invalidity of sale in a suit by non transferable occupancy tenant 28 C.W.N. 821=1925 C. 81

PARTIES TO THE APPLICATION.—The decree-holder is a necessary party to an application under this rule. 15 A. 407. A beneficial owner is not a necessary party. 29 A. 682. The purchaser is a necessary party. 1891 A.W.N. 121. Also 50 I.C. 5, 8 L.R. 199 (Rev.); but see *contra* in 39 C. 687=16 C.W.N. 570. See also 62 I.C. 61=2 Pat.L.T. 386. Auction-purchaser is not a necessary party. 107 I.C. 494=1928 L. 413. An application to set aside the sale was made under R. 90 but that was refused and sale was confirmed. An appeal was preferred against this order but the auction-purchaser was not made a respondent. Afterwards he was sought to be impleaded as a respondent but the time fixed for filing the appeal had expired. *Held*, that as the auction-purchaser was a necessary party and was not impleaded within time, the appeal should be dismissed. 163 I.C. 698=1936 I. 478.

WHO CAN APPLY.—(1) The *decree-holder*, (2) any person entitled to share in a *rateable distribution* of assets, and (3) any person whose interests are affected by the sale. Under S 146 any person claiming under any of the persons aforesaid can also apply. 3 A. 554 (559) (F.B.). See also 1927 M. 67. Authorised *wakil* of the judgment-debtor can apply. 1926 L. 514. As to whether an attaching creditor can apply, see 84 I.C. 119=1924 C. 386. See also 51 M.L.J. 661. An attaching decree-holder can apply. 47 A. 479; 133 I.C. 426=1931 A.L.J. 880. Other *co-sharer landlords* can apply under this rule, when a defaulting tenure is sold. 50 I.C. 329=23 C.W.N. 619. A *co-sharer landlord* who claims pre-emption under the Bengal Tenancy Act, in respect of property sold in execu-

sustained substantial injury by reason of such irregularity or fraud.

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tion of a money decree. 151 I.C. 1088=59 C. L.J. 417=1934 C. 795. The words "whose interests are affected" are wide enough to include pecuniary interests. *Mortgagee* entitled to claim surplus proceeds of a rent sale in satisfaction of his debt can apply under this rule. 126 I.C. 295=1930 P. 451. See also 154 I.C. 721=16 Pat.L.T. 216=1935 P. 210. *Mortgagee* of item (2) can apply to set aside sale of item (1) on the ground that owing to fraud and collusion item (1) had been sold for a low price with the result that item (2) had been ordered to be put up for sale. 1933 A.L.J. 3=1933 A. 54=55 A. 121. See also 154 I.C. 721=16 Pat.L.T. 216. When a *minor* was not represented by a guardian *ad litem* in execution proceedings, his mother can apply to have the sale set aside as *natural guardian*. 40 C. 635=40 I.A. 140=25 M.L.J. 140 (P.C.) Whether the *auction-purchaser* himself may apply, see 105 I.C. 465=1927 R. 301=5 R. 516, Overruled by 6 R. 621=114 I. C. 538 (1) *contra*. See also 1928 C. 828=49 C.L.J. 207, 132 I.C. 525=1931 L. 630; 3 Pat.L.J. 516; 1929 R. 33; 134 I.C. 373=1931 S. 107. *Auction-purchaser* can apply. 20 N.L.J. 111=1937 N. 140. An *auction-purchaser* is not competent to apply to set aside the sale under R. 90, on the ground that an encumbrance existing on the property was not disclosed in the proclamation of sale and that he was unaware of it. 60 B. 750=38 Bom.L.R. 589=1936 B. 311. Also a person who has purchased the property at a prior execution sale, may apply, such prior sale not having been confirmed. 8 C. 367, 12 P. 665=14 Pat.L.T. 388=1933 P. 435 (S.B.). Even a defaulting *auction-purchaser*. 37 C.W.N. 766=146 I.C. 879=1933 C. 815. A *purchaser* from the judgment-debtor prior to attachment. 15 C. 488 (F.B.). Person purchasing property *after* attachment but before sale. 146 I.C. 339=37 C.W.N. 912=1933 C. 788. Also a person who obtains an order for attachment before judgment, and subsequently obtains a decree in his suit prior to an execution sale of the property of the judgment debtor at the instance of another decree-holder. 40 C.W.N. 1338=63 C.L.J. 560, 37 L.W. 581=1933 M. 455=64 M.L.J. 605; 146 I.C. 918=1933 P. 445, 152 I.C. 219=38 C.W.N. 182=1934 C. 477. Application to set aside sale by one of several judgment-debtors—Fraudulent suppression of processes and sale for undervalue proved—Setting aside sale enures to the benefit of other judgment-debtors also. 32 C.W.N. 519. A person claiming to be a co-share in undivided immoveable property. 5 A. 42. The *judgment-debtor* who sold the property prior to execution sale can apply where the properties are sold as his. 22 L.W. 872=92 I.C. 597 (1)=1926 M. 217. Judgment-debtor not appearing though served to settle terms of proclamation of sale—Still he is not estopped from applying to set aside sale. 1930 N. 191. But see 130 I.C. 265=1931 P. 63; 131 I.C. 721=1931 R. 179; 1925 C. 552=79 I.C. 369, 21 I. C. 780. A judgment-debtor who owns only a

share in one of the several lots of property sold in execution is a "person whose interests are affected by the sale". If the other lots are wrongly sold for a lower amount, the burden on the applicant's share would to that extent be increased. Hence he can challenge the sale of the whole property including lots with which he is not concerned. 58 B. 564=36 Bom.L.R. 681=1931 P. 348. See also 145 I.C. 884=1933 A.L.J. 3=1933 A. 54. The following persons were also held entitled to apply.—A *mortgagee* who holds a mortgage on the property sold. 15 C. 346. A person claiming to be the *beneficial owner* of property which has been sold as the property of the ostensible owner. 20 C. 418. See also 19 M. 167. A person claiming to be a purchaser of a tenure prior to attachment. 22 C. 802. The *real owner* of property that has been sold in execution of a decree against the benamidar. 6 M.L.J. 24. A *transferee* of a portion of non-transferable occupancy holding can apply to set aside a rent sale by the entire body of landlords. 23 I.C. 839=19 C.W.N. 326. An *interim Receiver* appointed under S. 20, Provincial Insolvency Act, can apply under O. 21, R. 90, C.P. Code. 1928 M.W.N. 216. See also 1935 M.W.N. 258=41 L.W. 309 (Official Receiver in Insolvency). Judgment-debtor who was adjudged insolvent before sale. 145 I.C. 855=1933 M. 694=65 M.L.J. 359. Adjudged insolvent after sale. 146 I.C. 521=1933 M. 851=65 M.L.J. 719 (F.B.). But not when Receiver applies. 37 C.W.N. 146=144 I.C. 779=1933 C. 486. See also 58 B. 564=36 Bom.L.R. 681. Decree against Hindu father and sons—Insolvency of father—Sale in execution of shares of sons—Application by Official Receiver to set aside sale—Held, that the Official Receiver was competent to make the application, because he was "a person whose interests are affected by the sale", under R. 90, as the sale of the sons' shares affected the interests of the general body of creditors whom the Receiver represented; and that notice of the settlement of the sale proclamation ought to have been given to the Receiver under R. 66, and the omission to do so was a material irregularity. 157 I.C. 251=41 L.W. 309=1935 M. 459. A mortgagee purchaser of an entire non-transferable holding can apply this rule to set aside a sale in execution of a subsequent rent decree. 31 I.C. 359=22 C.W.N. 143. See also 86 I.C. 612=1925 C. 925; 6 P.L.T. 295=1925 P. 461. A *Hindu receiver* can apply. 4 P.L.J. 360=1919 P. 303=51 I.C. 359. See also 1926 M. 959. As the entire ancestral property including the interest of the sons can be sold in execution of a decree obtained against a Hindu father, the interest of the sons is affected by the sale and they are competent to apply to set aside the sale. 14 P. 436=16 P.L.T. 680=1935 P. 205. Irregularity in the conduct of sale—Person bidding is not estopped from challenging the irregularity. 118 I.C. 901=1929 L. 673. *Quære*.—If a person claiming occupancy right can have the sale set aside. 35

Loc. Ams—[Allahabad] Substitute the following for the original proviso in O. 21 R. 90—

Provided that—

(a) no sale.....or fraud,
(b) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up."

[Calcutta] O. 21, R. 90 (1) (a). Add the following words to R. 90 (1). O. 21—"or on the ground of failure to issue notice to him as required by R. 22 of this Order".

(b) cancel the proviso to R. 90 (1) and substitute the following—

"Provided—(i) that no sale shall be set aside on the ground of such irregularity, fraud or failure unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure,

(ii) that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied upon."

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C.W.N. 51=1931 C. 425; 132 I.C. 111=1931 P. 217

WHO CANNOT APPLY—A stranger cannot apply. 1927 C. 82=97 I.C. 757 (2). A *judgment-debtor duly served* cannot apply under this rule. 1925 C. 552. But see also 1930 N. 191; 130 I.C. 265; 1931 R. 179; 21 I.C. 780. Nor a person claiming by *title paramount* to that of judgment-debtor. 1 Bur L. J. 234=70 I.C. 900. Nor an *adjudged insolvent* whose property has vested in the Receiver. 35 I.C. 530. Nor a person obtaining an *attachment before judgment*. 16 C.L.J. 566=17 C.W.N. 80. Also 42 C.L.J. 37=1925 C. 1103. *A fortiori* a person obtaining an attachment before judgment of properties other than those sold. 27 M.L.J. 302=1914 M.W.N. 871. A person who has filed a declaratory suit regarding the property ordered to be sold cannot apply under this rule, while his suit is pending. 38 A. 358=34 I.C. 272. A person not a party to a mortgage suit cannot apply. 20 I.C. 16. A decree-holder for money against the mortgagor cannot set aside a mortgage sale. 1925 S. 101. Objection to a purchase without leave of Court cannot be raised by strangers to the suit. 17 I.C. 126. Judgment-debtors or *sham alienees* from them who knew but kept quiet at the time of sale, that the property was not attached or that the property was not within the Court's jurisdiction, are estopped from objecting to the sale. 24 M.L.J. 70=18 I.C. 498. Non-appearance of judgment-debtors after notice at the time of fixing of terms of sale proclamation will bar them from raising objections later on. 22 I.C. 780. Where judgment-debtor has knowledge of irregularities and stands by without raising any objection at the time, he will not be permitted to take advantage of them in an application under this rule. 32 I.C. 990. Where purchaser is the decree-holder himself, he will be deemed to have notice of the charges to which the property is subject. 57 I.C. 1004=48 C. 93. Where a judgment-debtor having knowledge of irregularities gave an undertaking not to question the sale later, he

will be bound by his undertaking. 47 I.C. 831, 9 I.C. 698=13 C.L.J. 192. The rights of purchaser cannot be affected by any compromise between judgment-debtor and decree-holder. 88 I.C. 534 (2)=1925 O. 693. Direction to sell subject to mortgage—Sale proclamation not mentioning the charge—Mortgagee bidding with notice of decree-holder's application—Mortgagee if estopped 118 I.C. 901=1929 L. 673. Material irregularity—Sale in execution of later decree of property attached in execution of prior decree—Court allowing decree-holder to set off sale price—Propriety—If sale liable to be set aside at the instance of prior attaching decree holder, 17 P.L.T. 847.

MATERIAL IRREGULARITY—The word "irregularity" is wide enough to include an illegality; 11 A. 342; and connotes want of conformity to some recognized rule of procedure. 5 M.L.J. 70. Irregularities appearing during the course of investigation as well as those alleged in the application are to be taken into consideration. 103 I.C. 532=1927 N. 319. Sale in contravention of terms of decree is a material irregularity. 33 I.C. 692=(1916) 1 M.W.N. 256. Villages to be sold in one lot, but proclamation showing each village separately as for sale. 56 M. 356=144 I.C. 414=37 L.W. 188=1933 M. 225=64 M.L.J. 439. Where on account of defective plan, bidders are misled, 148 I.C. 135=35 P.L.R. 309=1934 L. 413. Omission to mention rent payable in respect of one of the lots in the sale proclamation. 147 I.C. 629=1934 P. 186. The fact of a sale being held before the period of 30 days has elapsed as required by O. 21, R. 68 although a material irregularity does not make the sale a nullity without proof of substantial injury thereby to the judgment-debtor (21 C. 66, Foll.) 1935 L. 962. Sale proclamation giving two valuations. 152 I.C. 259=15 P.L.T. 511=1934 P. 540. Gross under-valuation of the properties in the sale proclamation is a material irregularity. 157 I.C. 251=41 L.W. 309=1935 M. 459. Want of notice under O. 21, R. 22, does not make the sale void, but only voidable. 159 I.C. 299=60 C.L.J. 584=

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39 C.W.N. 510=1935 C 356. Non-compliance with provisions of O. 21, R. 84. 144 I.C. 314=10 O.W.N. 440=1933 O. 345. Irregularity in service of notice of attachment. 37 C.W.N. 1164. Non-compliance with provisions of O. 21, R. 66. 145 I.C. 915=1933 P. 640. The fact that no notice was issued under R. 66, though a material irregularity does not of itself vitiate the sale. (1927 L. 84, Foll.) 1935 L. 962. Omission in adjournment of sale to specify hour. See 1935 A. 182=4 A.W.R. 1465. But see 1935 L. 992. In order that there may be an illegality proved there must be shown some breach of a definite rule of law. 30 L.W. 995=117 I.C. 705=1929 M. 275. There is no basis for making a distinction between a material irregularity and an illegality in the conduct of a sale. In one sense whatever is irregular is also illegal. 5 M.L.J. 70. As to irregularities in conducting the sale, see 7 A. 641. Sale will be set aside if there is (a) collusion between judgment-debtors and decree-holders, (b) when the value of property is grossly inadequate, and (c) when price fetched is very low. 6 Pat.L.T. 295=1925 P. 461. When it has been agreed to between the parties that a sale of certain properties in execution of a decree shall be free of encumbrances, it is a material irregularity that a statement to the contrary in the sale proclamation should be allowed to stand without any correction either in the proclamation or verbally made at the sale and the sale should be set aside under R. 90. 157 I.C. 982=1935 M.W.N. 496=1935 M. 607. The holding of an execution sale fixed for a particular date in the following date because it could not be held earlier, when the sales are held in due order, is not illegal and void. It is not even a material irregularity. 17 Pat.L.T. 712, 167 I.C. 63=1937 P. 104. Where the auctioneer conducting an execution sale, arbitrarily closes the auction either before or as soon as it is 4 o'clock although a bidder is willing to purchase the property for a much larger sum than the price realized, and although the bid for the larger sum even if made after 4 o'clock is made immediately after the bid for which the property is knocked down, it amounts to a material irregularity in conducting the sale. 1936 L. 555. Where according to the sale proclamation the sale was to commence at 10 o'clock and the officer who was to conduct the sale reaches the spot at 12 o'clock with the result that the intending bidders depart after waiting, the sale cannot be said to have been properly and regularly conducted. When the intending bidders depart, it follows that there was no proper competition in bidding and the property would naturally be sold at an inadequate price. 38 P.L.R. 515.

WHAT ARE IRREGULARITIES.—On proof of irregularities sale must be set aside, though the property would be worth less than the decree amount, and the decree-holder had since allowed the decree to be barred by limitation. 15 I.C. 728=16 C.W.N. 1022,

overlooking the rules laid down for the preparation of sale proclamation. 133 I.C. 529=1931 A.L.J. 849. An omission in a sale proclamation must be very material one. 53 I.C. 143. The question of valuation can be raised in an application under this rule, though it has been decided at the time of settlement of proclamation. 105 I.C. 689 (2)=6 P. 588. Where the sale proclamation mentions only annual net income but not an adequate price, there is material irregularity. 21 I.C. 592. See also 27 A.L.J. 1228=1929 A. 948. So also an understatement of the value of the property in the sale proclamation, calculated to mislead bidders. 20 A. 412 (P.C.); 23 M. 568, 1935 M.W.N. 258=41 L.W. 309; 56 C.L.J. 570=1933 C. 339. See also 52 I.C. 23, 14 C.L.J. 346=11 I.C. 438=16 C.W.N. 704; 38 M. 387=25 M.L.J. 198, 33 I.C. 946; 16 I.C. 974=16 C.L.J. 98; 11 I.C. 295=15 C.W.N. 965, 44 I.C. 412; 33 C.W.N. 848=1929 C. 818; 1929 L. 441; 159 I.C. 358=37 Bom.L.R. 489=1935 B. 331. So also a misstatement of value knowingly made. 52 I.C. 23. See also 42 I.C. 394; 105 I.C. 153. So also omission of land revenue in sale proclamation. 40 M.L.J. 403=28 C.W.N. 593=75 I.C. 546=1923 P.C. 93 (P.C.). Omission to state the amount of revenue assessed in the sale proclamation. 9 C. 656 (P.C.). But see also 7 C. 723, 23 M. 628. Omission to state the hour of sale. 24 C. 295; 49 A. 402=25 A.L.J. 302=1927 A. 241; 1935 L. 992. But agreement by judgment-debtor to forego proclamation or notice amounts to waiver of irregularity. 55 A. 519=1933 A.L.J. 1273=143 I.C. 673=1933 A. 546; 1935 P. 483. See also 1937 L. 113. Where the Court omitted to fix a reserve price and the property was sold for a lesser amount than the decree amount, held, that the sale must be set aside. 32 Bom.L.R. 436. Also publication of the proclamation at a distance of half a mile from the property. 6 C.W.N. 44. Also delay in deposit under R. 84. 9 I.C. 66=15 C.W.N. 350, 14 M. 228, 9 A. 511; 16 C. 33; 28 A. 238. Want of notice under R. 66 is an irregularity. 4 L. 243=1923 L. 592, also 18 I.C. 715; 99 I.C. 515, 118 I.C. 49. Insufficient notice of sale, resulting in a low price is an irregularity. 144 P.L.R. 1914=25 I.C. 51, also omission to issue fresh proclamation on adjournment of sale. 100 I.C. 787=2 Luck. 490. Also omission to affix the sale proclamation to some conspicuous place on the property attached. 7 C. 466, 1929 A. 948. Omission to affix the sale notice in the Collector's office as required by R. 67. 8 C. 935. See also 46 M. 736=45 M.L.J. 263. Omission to have the drum beaten as required by R. 54. 10 B. 504, also 67 I.C. 752, 1933 A.L.J. 73=1933 A. 747=55 A. 182. Omission to state the place of sale. 9 M. 511, 5 Bur.L.J. 183=100 I.C. 74=1927 R. 84. But see 41 M.L.J. 465=68 I.C. 916. Adjournment of sale—Omission to specify day and hour—Material irregularity. 124 I.C. 721=1930 A. 542. Also when the proclamation is made on the spot only five days before the date fixed for sale. 7 C. at 40. But see 4 A. 300, also 48 I.C. 611.

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Also the holding of the sale on a date other than that notified in the proclamation. 150 P.L.R. 1915=30 I.C. 524, also 65 I.C. 746=35 C.L.J. 140. Altering date of sale without notice. 27 A.L.J. 1228=1929 A. 948. Material irregularity—Decree-holder with leave to bid—Bid of—Refusal to accept, is material irregularity in conduct of sale. 1929 O. 26. The absence of attachment prior to the sale of immovable property in execution of a decree is a material irregularity. 21 A. 311. See also 10 A. 506; 5 A. 86, 58 B. 564=36 Bom.L.R. 681=1934 B. 348. But see 9 C. 918=13 C.L.J. 243. Raising of attachment due to judgment-debtor's insolvency—Subsequent annulment of adjudication—Sale without fresh attachment. *Held*, that the omission to re-attach the property did not invalidate the sale, and that it amounted to no more than a mere irregularity. 165 I.C. 86=38 Bom.L.R. 719=1936 B. 315. Grounds for setting aside sale—Want of service of notice under O. 21, R. 22. 51 C.L.J. 197=1930 C. 348 (2). Omission to state whether the sale is subject to mortgages is a proper ground for setting aside the sale. 50 I.C. 384=21 Bom.L.R. 281. Where the sale is held at a different place from that advertised. 39 M.L.J. 188=44 M. 35, 152 I.C. 1017=1934 P. 659=11 P.L.T. 743. But see 1933 Pesh. 57. Sale held before the expiry of the 30 days. 20 I.A. 176; 1933 L. 186. Also the absence of specification of incumbrances and the statement of a very low value. 6 C.W.N. 386. See also 6 C.W.N. 56; 18 N.L.R. 98=65 I.C. 875, 16 N.L.J. 111, 1935 L. 962. Also a mistake in the dimensions of the property. 96 I.C. 196=1926 L. 587. Mistake in the boundaries. 1933 L. 1031. Selling half house when sale proclamation is for whole, is material irregularity. 1930 L. 15. A sale, free of mortgages but advertised subject to mortgage is a material irregularity. 9 I.C. 383. Sale can be set aside where the legal representatives of a decreed judgment-debtor was not brought on record. 23 C.W.N. 608=29 C.L.J. 411. See also 18 C.W.N. 1266=20 C.L.J. 341, 18 C.L.J. 628=18 C.W.N. 766; 23 I.C. 251=26 M.L.J. 267, 6 Pat.L.T. 67=1925 P. 384. Where a minor son of a deceased judgment-debtor was not brought on record, it is a material irregularity. 19 I.C. 120. Where the execution application in which the sale was held was barred by limitation. 105 I.C. 545=1927 O. 488. Where the deposit of 25 per cent. of the purchase-money is not made by auction-purchaser at the time of sale but three days after it, and it is accepted by the Court it is a mere irregularity and cannot vitiate the sale. 1937 L. 113. Suppression of processes in connection with sale. 108 I.C. 33=47 C.L.J. 351=32 C.W.N. 519. Mortgage suit—Sale held under Chap. XXVII of the Calcutta High Court Rules—Subsequent disclosure of prior subsisting attachment—Purchaser whether can give up title and take back deposit. 33 C.W.N. 177=118 I.C. 887 (2)=1929 C. 207. Where the sale is held in

separate lots the Court may set aside the sale in respect of some only of the lots, but that can be done only when the irregularity and the injury to the objector can be allotted to one part only of the sale. Where on the other hand the irregularity extends to the whole property and to all the lots it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale price obtained cannot be shown to be inadequate in view of the advertised sale value. 12 P. 181=144 I.C. 62=14 Pat.L.T. 493=1933 P. 223.

WHAT ARE NOT IRREGULARITIES.—Conducting a sale from day to day and fixing a date for bringing the sale to an end does not necessarily amount to material irregularity. 37 L.W. 188=1933 M. 226=56 M. 356=144 I. C. 414=64 M.L.J. 439. There is no irregularity in the conduct of sale in case the officer conducting the sale sells the property twice over. 2 A. 111. Where the date for sale is not mentioned, see 40 C.L.J. 311=84 I.C. 700=1925 C. 201. The use at a sale, of language by an intending bidder in disparagement of the property, is a "material irregularity". 5 C. 308; 7 C. 346, but such remarks made by standers or by-purchasers other than the decree-holder do not constitute such an irregularity. 17 C. 152. See also 23 M. 227 (P.C.). As to the purchase of property by the decree-holder without the permission of the Court, see 11 C. 732. As to omission to give notice to the judgment-debtor under O. 21, R. 22, see 3 A. 426, 6 M. 237, 15 I.C. 506=40 C. 45; also 37 I.C. 387=20 M.L.T. 479, 17 I.C. 126. Effect of a guardian of a minor judgment-debtor not having been appointed. see 89 I.C. 765. Appointment of an officer as guardian *ad litem* of minor son of deceased and omission to bring on record another minor son. 1933 M. 179=145 I.C. 394. Sale cannot be set aside at the instance of the judgment-debtor on the ground that the Official Receiver was not impleaded in the mortgage suit. 130 I.C. 485=1931 A. 159. A sale is not invalid if the attachment has been under a wrong section. 18 A. 469. Judgment-debtor who did not object at the time either to the procedure of the attachment or to the order for sale or the procedure after the order for sale cannot impugn them afterwards. 1931 P. 63. See also 58 B. 564=36 Bom.L.R. 681=1934 B. 348. The sale on a closed holiday is not always an irregularity. 3 A. 333. Nor when on account of holiday, sale was held on the next day. 144 I.C. 779=37 C.W.N. 146=1933 C. 486. No conclusion of sale before time advertised in the proclamation. 58 B. 564=36 Bom.L.R. 681=1934 B. 348. Nor where officer conducting the sale did not wait for bidders on intimation by a person that he was going to fetch bidders. 17 N.L.J. 91=1934 N. 250. When a Court sells property without having jurisdiction to sell it, this does not amount to an irregularity in publishing or conducting the sale. 18 A. 144. Omission to state value of property is not material irregularity. 1927 M. 1009 (1). Though there was an under-valuation yet if the price

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fetched was adequate, the sale cannot be set aside on the ground of under-valuation. 57 I.C. 892; 16 I.C. 394, *see* 10 I.C. 475=15 C.W.N. 577. Where in a sale proclamation a certain property was included in a wrong lot by mistake, it is not such an irregularity as to entitle the sale to be set aside. 32 I.C. 990. Where an entire holding is sold, the giving of wrong numbers of lots is not a sufficient irregularity. 41 I.C. 282=2 P.L.J. 623. A compromise, in which all persons affected by the sale, are not parties, and which is not recorded by the Court, does not result in setting the sale aside. 85 I.C. 529 (2)=1925 C 779. Failure by prior mortgagee-decree-holder to implead third party purchaser in execution of a decree (obtained by a puisne mortgagee) and subject to the prior mortgage is no irregularity or fraud in conducting the sale. 1933 M.W.N. 77. Purchaser of one of mortgaged properties made defendant—Preliminary decree not specifying order of sale—No objection by purchaser to preliminary or final decree—No irregularity in selling them in any order. 150 I.C. 733=1934 P. 329. Failure to follow the order entered in the list by the sale officer is not such an irregularity. 1931 A.L.J. 62=1931 A. 159; 55 A. 519=1933 A.L.J. 1273. The sale of property consisting of numerous plots of land situated in various villages in one lot does not by itself constitute a gross irregularity. 107 I.C. 295; 37 L.W. 188=1933 M. 225.

GROUND FOR SETTING ASIDE SALE—WHAT ARE NOT—Waiver of irregularities, *see* 91 I.C. 407=1926 C. 577. Mere suspicious circumstances about sale and low price in the absence of fraud. 20 L.W. 736=1925 M. 202. *See also* 154 I.C. 721=16 Pat.L.T. 216. An objection that the attachment and sale was time-barred. 2 P.L.J. 157=38 I.C. 876. Dissuading bids. 102 P.L.R. 1911=9 I.C. 816. Where the price fetched is below that fixed by consent in sale proclamation. 1 P. 214=1922 P. 550; *also* 21 L.W. 521=1925 M. 729. Also where the property is sold for a price which subsequently appears to be too low. 8 B. 424. Irregularity without loss is not. 4 P. 696. Fraud of decree-holder in bringing to sale property, after satisfaction of decree, is not. 10 I.C. 625. Irregularities in proclamation of sale not objected to, cannot be grounds for setting aside sale. 49 A. 788. Also gross under-valuation if not objected to by judgment-debtor after due notice. 37 C.W.N. 1054. *See also* 147 I.C. 629=1934 P. 186. But *see* 143 I.C. 284=56 C.L.J. 570=1933 C. 339. Where it was due to fraud of decree-holder. Failure to implead purchaser *pendente lite* is no fraud or irregularity in conducting sale. 146 I.C. 528=38 L.W. 728=1933 M. 838. As to want of notice under O. 21, R. 22, *see* 60 C.L.J. 584=39 C.W.N. 510.

FRAUD—Fraud is different from irregularity. As to what amounts to fraud, *see* 85 I.C. 622=1925 P. 521; *also* 1926 C. 229. Fraud antecedent to sale proceedings—Evidence of. *See* 93 I.C. 870=1926 C. 829. A

person alleging fraud must prove that the existence of his right to set aside the sale was concealed by fraud. 87 I.C. 555. Low price does not raise a presumption of fraud. 89 I.C. 107=1926 O. 45. Purchase by decree-holder's vakil's clerk without informing the decree-holder amounts to fraud. 2 O.W.N. 297=1925 O. 381. Auction-purchaser must be a party to the fraud, and the fraud must come to the judgment-debtor's knowledge subsequent to the confirmation of the sale. 20 M. 10, 8 C.W.N. 230, 5 C.L.J. 323, 23 M. 227 (P.C.), 24 C. 546. *See also* L. at 150. It is not necessary that purchaser should be a party to the fraud. 4 Pat.L.T. 306=72 I.C. 625. *Also* 18 I.C. 715, 99 I.C. 946=44 C.L.J. 565; 108 I.C. 899. Mere want of diligence is not fraud. Facts must be stated. 2 P.L.T. 401=6 P.L.J. 319. Mis-statement of value in a sale proclamation does not necessarily amount to fraud; but in particular circumstances may justify the inference of fraud. 2 Pat.L.T. 501=2 P. 65. *See also* 56 C.L.J. 570=1933 C. 339. Where decree-holder colludes with strangers in purchasing the property for much less than the decretal sum, it amounts to fraud. 15 I.C. 888=16 O.C. 86.

INJURY.—The word "injury" means loss which is wrongful. When a man loses what he had been in the habit of wrongfully gaining it is not substantial injury. 7 C.W.N. 439. Substantial injury is essentially necessary. 83 I.C. 1028=1924 A. 698. *See also* 20 C. 599; 7 C. 730, 12 M. 19; 18 A. 37; 7 C. 466; 20 M. 159, 24 C. at 295; 30 C. at 9, 104 I.C. 196=1927 C. 873; 7 Pat.L.T. 468=93 I.C. 935=1926 P. 202; 96 I.C. 196=1926 L. 587. Party must prove such an irregularity as resulted in substantial injury. 25 I.C. 18; 45 I.C. 212; 5 L.L.J. 30=1923 L. 213, 37 I.C. 964=1917 M.W.N. 89; 33 I.C. 692=(1916) 1 M.W.N. 256; 32 I.C. 990; 70 I.C. 900=1 Bur. L.J. 234. *See also* 39 C. 26=38 I.A. 200=16 C.W.N. 1 (P.C.). A denial of opportunity to purchase the property put up for sale by auction constitutes a "substantial injury" within the meaning of R. 90. 1933 A.L.J. 92=1933 A. 161. Unless otherwise prescribed, a sale under the Code is a public sale to be held at a public place and after notice to the public. Where a sale in which the bid of the decree-holder was the highest was not concluded and subsequently the Court accepted a private offer by another person and concluded the sale in the absence of the decree-holder, held, that there was material irregularity resulting in substantial injury and that the sale should be set aside. 1933 A.L.J. 92=1933 A. 161; 36 P.L.R. 183. Although the price realised is grossly inadequate, the Court must be "satisfied upon the facts proved" that it was caused by material irregularity in publishing or conducting the sale. *See* 20 M. 159; 30 C. at 9, 18 A. 37, 18 A. 141. But *see also* 31 C. 815 (818). *See also* 24 L.W. 406=97 I.C. 574=1926 M. 959 and 6 C.W.N. 836. An adjournment of sale by bailiff without Court's sanction and the absence of a fresh proclamation is not a

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sufficient ground in the absence of substantial injury. 20 I.C. 192=6 Bur L.T. 65. Absence of publication of sale is not a sufficient ground without proof of loss. 5 Pat.L.W. 15=46 I.C. 84. Mere omission of publication in the Gazette is not ground to set aside sale in the absence of proof of substantial injury. 53 I.C. 794. Where only a part of the property advertised was sold without a fresh proclamation, proof of substantial loss is necessary to set aside the sale. 11 L.W. 477. Mere omission to state value is not a serious irregularity. Proof of substantial loss in addition is necessary. 4 Lah L.J. 441=1922 L. 35. The circumstance that the decree-holders offered to return the properties to judgment-debtor at the price for which they brought, the offer not being accepted may be taken into consideration in judging whether judgment-debtor has suffered injury by the sale. 32 C.W.N. 309=1928 C. 328.

PROOF OF INJURY—Injury can be proved not necessarily by direct evidence but by circumstantial evidence also. 144 I.C. 414=56 M. 356=64 M.L.J. 439. Gross under-valuation must deter intending purchasers from bidding at the sale and offering reasonable value. When such under-valuation is proved and the properties are actually sold for a very low price, it must be held that substantial injury has occurred and the sale should be set aside. 157 I.C. 251=41 L.W. 309=1935 M. 459. From the failure at complying with even the elements of the prescribed procedure an irresistible presumption of substantial injury would arise sufficient to justify the cancellation of the sale, even without any affirmative proof of substantial injury, e.g., where the notice required under O. 21, R. 22, has not been served, no proclamation of sale issued at all, sale was held within 30 days of the order, less property was put up for sale than was contained in the application and the sole bidder was the decree-holder. 144 I.C. 14=1933 Pesh 41.

SUIT TO SET ASIDE SALE—A suit does not lie to have an execution sale set aside on the ground of any fraud in the conduct and proclamation of sale. The remedy is under O. 21 only. 159 I.C. 299=60 C.L.J. 584=39 C.W.N. 510=1935 C. 356. When an application under this rule is dismissed, no suit under R. 92 will lie. 5 R. 606=105 I.C. 706, 1929 N. 130. When a person seeks to set aside a sale by reason of a title adverse to that of the judgment-debtor at the date of attachment the proper remedy is a regular suit. 16 M. 476. A sale after proclamation notifying a decree giving prior charge, can be set aside only by a regular suit, if the decree giving prior charge was set aside subsequent to sale. 1925 M. 325. The rule does not apply when the fraud alleged is that a minor defendant was represented as major. A regular suit three years after his majority is the only remedy. 38 M. 1076=28 M.L.J. 525. When fraud is alleged, this rule applies before confirmation of sale. After confirmation a suit is the only remedy.

51 I.C. 447. *See also* 1926 O. 45. But *see* 44 M. 351=40 M.L.J. 55. *See also* 70 I.C. 675=1922 P. 422. **Applicability—Fraudulent sale**—Suit to set aside—Maintainability. 113 I.C. 873=1928 M. 1138. In a suit to set aside sale, fraud need not be specifically alleged; an inference or suggestion is sufficient. 63 I.C. 425=19 A.L.J. 530. A member of a family not bound by a decree against some other members can file a separate suit to set aside the sale of the family properties and need not apply under this rule. 2 P. 386. *Also* 6 Pat L.T. 742=85 I.C. 1014. A suit lies in a Civil Court to declare that a sale held by a Collector is valid, and that an order passed by him under this rule setting aside the sale is inoperative. 25 A. 355. Question relating to execution—When can be raised in independent suit—Execution proceedings as the proper stage. 33 C.W.N. 165.

DISMISSAL FOR DEFAULT—O. 9, R. 9, applies to an order of dismissal for default of an application under this rule. 59 I.C. 575=23 O.C. 349. *See also* 26 A.L.J. 382. But *see* 83 I.C. 749. *See also* 45 C.L.J. 60, 1931 A.L.J. 622=1931 A. 594.

APPEAL—An order dismissing an application under R. 90 for default is appealable under O. 43, R. 1 (f). The fact that a distinct order confirming the sale was not passed is no ground for refusing to entertain the appeal. 56 C. 969=33 C.W.N. 392=1929 C. 407 (2); 1931 P. 97. An appeal lies from an order refusing to set aside a dismissal for default of an application under this rule. 33 I.C. 581=20 C.W.N. 1203; 131 I.C. 533=1931 P. 97; 27 N.L.R. 339. *See also* 38 C. 622=15 C.W.N. 875. When appeal lies from an order under this rule. 40 C. 635=40 I.A. 140=25 M.L.J. 140 (P.C.). But *see* 16 I.C. 690=22 C.L.J. 266; 4 Pat.L.T. 735=74 I.C. 594. *See also* 46 C.L.J. 172=104 I.C. 825=1927 C. 833. If property is purchased by a third person and an application is made by judgment-debtor against decree-holder to set aside the sale on the ground of irregularity or fraud in conducting the sale, the application would still be treated as one under S. 47, if purchaser is not formally made a party to such an application. 150 I.C. 611=1934 N. 21. An appeal lies from an order of dismissal on the ground that the application was time-barred. There is no second appeal even when the purchaser is the decree-holder and the applicant is the judgment-debtor. 6 L. 250=1925 L. 624; 152 I.C. 776=1934 P. 627. But want of notice of sale proclamation and under-valuation are objections under S. 47 and therefore a second appeal lies. 87 I.C. 413=1925 M. 1142. Mere defect in notice and publication does not give room for second appeal. 145 I.C. 731=1933 A. 654. *See also* 60 C.L.J. 584=39 C.W.N. 510. Objections based on the ground of non-compliance with R. 66, such as defects in mentioning the value of the property, the encumbrances on the property and the description of the property proclaimed for sale, must be raised before the sale is held; when they have not been so raised or even mentioned in the lower Court,

[Lahore and N.-W.F.P.] Add the following proviso:—

"Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted."

[Madras.] Substitute the following for the existing rule.—

"90. Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a ratable distribution of assets or whose interests are affected by the sale, may apply to the Court to set the sale aside on the ground of a material irregularity or fraud in publishing or conducting it

Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realised by the sale whichever is less, or to deposit such amount in Court

Provided also that the security furnished or the deposit made as aforesaid shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud." (Vide *Fort St. George Gazette*, 20th October, 1936, Pt. II, pp. 1394-1396.)

[Nagpur] Rule 90—After the proviso to sub-rule (1) of R. 90, insert the following further proviso—

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been but was not put forward by the applicant before the commencement of the sale"

[Oudh.] Add the following as proviso to R. 90, O. 21—

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not, put forward by the applicant before the commencement of the sale"

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they cannot be considered as grounds for setting aside the sale in appeal. 19 N.L.J. 282

SECOND APPEAL.—No second appeal lies in view of the provisions of S 104 (2), from an order passed in appeal dismissing the application of the judgment-debtor under R. 90, even where the purchaser is the decree-holder himself 165 I.C. 654=1936 A.L.J. 959=1936 A. 763=17 Pat.L.T. 712; 1935 L. 962; 1935 R. 521; 163 I.C. 765=38 P.L.R. 839=1936 L. 969; 18 C. 422 (F.B.), 21 C. 799; 27 C. 414. See also 11 M. 319; 40 A. 122=43 I.C. 522; 15 I.C. 679=16 C.W.N. 1015, 9 I.C. 135, 2 P. 916=4 Pat.L.T. 721; 56 I.C. 646=1 Pat.L.T. 267; 39 I.C. 374=11 Bur.L.T. 26; 62 I.C. 986; 94 I.C. 521=1925 L. 624; 87 I.C. 555, 30 C.W.N. 586=96 I.C. 669=1926 C. 790; 1926 C. 229, 117 I.C. 727=1929 M. 624; 1930 N. 58

REVISION.—Where application under this rule is rejected wrongly on the ground that the applicant had no *locus standi* to apply, that amounts to a failure to exercise a jurisdiction vested in the Court by law, and the High Court will interfere in revision under S 115 40 C.W.N. 1338=63 C.L.J. 560.

O. 21, R. 90, proviso—Construction—Substantial injury due to under-valuation—Proof of 1935 M.W.N. 258=41 L.W. 309.

REVISION.—See 9 M. 145, 130 I.C. 265=1931 P. 63. Revision by High Court is not generally possible because revision of a dismissal order will be confirmation, and as such, that will be open to appeal under R. 92. 41 C.L.J. 286=1925 C. 510. But see 48 A. 286 Confirmation of a sale in execution of a decree before decision of application under this section is a material irregularity which adversely affects the judgment-debtor and High Court can interfere in revision 1933 A. 137=145 I.C. 732. Section 144 prescribes

a separate and independent remedy and when the application under R. 90 is dismissed and sale confirmed the aggrieved party can apply under S. 144. 133 I.C. 622=1931 A. 655.

O. 21, R. 90 (Allahabad), Prov. (b).—Object of.—No objection by debtor at the time of settlement of proclamation—Estoppel 55 A. 519=1933 A.L.J. 1273=1933 A. 546.

O. 21, R. 90, Proviso (Oudh).—Where a judgment-debtor did not, before the commencement of the sale, raise any objection to the sale proclamation in that it did not specify the estimated value of the property sought to be sold in execution, it is not open to him to raise this plea, after the sale had been completed, in an application by him under R. 90 154 I.C. 1103=1935 O.W.N. 435=1935 Oudh 336.

O. 21, R. 90 (as amended in C.P.).—Sale by Collector—Sale proclamation—Omission of details in—Omission to publish in Collector's office and Tahsil—If ground for setting aside sale. 19 N.L.J. 312 The amendment made in the Central Provinces to R. 90, govern all the proceedings in Collector's cases in those Provinces. The Collector under the rules contained in the Revenue Book Circular is merely undertaking the execution of the decrees of the Civil Courts as the agent of the Civil Courts and has to observe the provisions of O. 21 including R. 90. 19 N.L.J. 282 See also 19 N.L.J. 318

O. 21, R. 90 (as amended in Patna).—The amended rule applies only to applications made after date of coming into force of the rule and not to applications which have been already admitted. The rule, therefore, forbids a Court to admit an application but cannot have the effect of setting aside the previous admission of an application 1937 P. 260.

[Rangoon] 1140 40. Substitute the following proviso—

Provided that an application to set aside a sale shall be admitted unless—

(a) it discloses a ground which could not have been put forward by the applicant before the sale was conducted, and

(b) the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to the amount realized by the sale whichever is less; and in case the application is unsuccessful the costs of the opposite parties shall be a first charge on the amount so deposited

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

Application by purchaser to set aside sale on ground of judgment debtor having no saleable interest.

91. [S. 313.] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

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O. 21, R. 91.—This rule is the only exception to the doctrine of *caveat emptor*. 6 L. 283=1925 L. 467. The rule applies to the purchaser and its scope is limited to the case of a person whose property is purported to be sold, and who had no saleable interest therein. 20 C. 8 (P.C.); 27 A. 537, 9 C. 626; 3 A. 527. See 1 A. 568 (F.B.), 9 C. 217. R. 91 is for the protection of persons who innocently and ignorantly purchase valueless property and cannot be invoked by a person who has abused process of the Court for a fraudulent purpose. 145 I.C. 929=1933 P. 684. Auction-purchaser is not entitled to have the sale set aside on the ground of any misapprehension or mistake on his part when he is not misled by anything done or said by the officer conducting the sale. An *unilateral* mistake cannot avoid a contract or Court sale. 1932 A.L.J. 392=1932 A. 403; much less a suit against decree-holder lies for refund of purchase-money to the auction-purchaser when the latter was aware of the possession by a third person of the property put to sale and failed to make inquiry thereunto before sale, and allowed it to be confirmed. 20 N.L.J. 111=1937 N. 140. There is no implied warranty of title either by the decree-holder or the Court in execution sales and the statutory right recognized by R. 93 is confined to the case where the sale of the property is set aside under R. 92. 134 I.C. 269=1931 N. 116. Where decree-holder purchased and after entering satisfaction discovered defect in judgment-debtor's title, the only remedy of the purchaser was to set aside the sale under this rule within limitation time under Art. 166, Limitation Act. He cannot take further execution of his decree. 104 I.C. 614=1927 M. 835=53 M.L.J. 255; 15 P. 308=16 Pat L.T. 908=1936 P. 97 (F.B.). See also 41 L.W. 422=1935 M. 340. Nor can he invoke S. 47 for realizing the auction purchase money in execution of the original decree. 157 I.C. 343=1935 A.L.J. 474=1935 All. 910. The rights conferred by the rule are not exhaustive. The dispossessed purchaser can sue for recovery of his money. 4 L. 354=1924 L. 115. But see 61 I.C. 805=13 Bur.L.T. 152; 1925 L. 199. To set aside a sale under this rule the real owner is not a necessary party.

The proper course is to proceed against him by suit. 24 I.C. 44=1 L.W. 412. A suit for recovery of purchase money does not lie. 1925 L. 199. Knowledge of want of title in judgment-debtor will bar an application by purchaser under this rule. 23 I.C. 383=7 Bur.L.T. 18. When a decree has been transferred to Collector for execution a purchaser at a sale held by him can apply. 9 A. 43. Concealment of encumbrances by decree-holder is no ground for setting aside the sale. 74 I.C. 134. Setting aside sale by decree-holder, grounds for. 7 Pat.L.T. 25=1925 P. 702. A decree-holder is not entitled to set aside sale on the ground of any adjustment between the parties after sale. 88 I.C. 537=1925 P. 702.

SALEABLE INTEREST.—It is complete absence of any amount of saleable interest alone, not smallness of interest that this rule contemplates. 21 I.C. 774=19 C.W.N. 1291. Also 46 I.C. 614=3 P.L.J. 516, 24 I.C. 64=18 C.W.N. 947, 10 C. 368. Property not belonging to judgment-debtor—Attachment and sale—Void or valid—Limitation to set aside sale. 52 M.L.J. 148. Where a whole piece of land is sold, Court is precluded from severing a parcel of land on the ground that judgment-debtor has a saleable interest in one lot. 15 I.C. 109=23 M.L.J. 108. Fraud or neglect of duty on the part of decree-holder entitles auction-purchaser to a suit for refund of purchase-money. 134 I.C. 269=1931 N. 116. (Erroneous description of judgment-debtor's interest in the property). 16 P. 196=18 Pat. L.T. 32. (Auction-purchaser unable to obtain possession of the property purchased by him, owing to the fraud and collusion of the decree holder and the judgment-debtor). The fact that the purchaser does not implead the judgment-debtor as a party defendant to the suit cannot defeat his suit. The judgment-debtor and the decree-holder, who have acted fraudulently and in collusion with each other are jointly and severally liable for damages, and a decree can therefore be passed for the entire damages against the decree-holder alone who has been impleaded. (*Ibid.*) Auction-purchaser losing part of property under decree obtained by third party—Right to sue decree-holder for refund of purchase-money. 1937 O.W.N. 83. A property was sold by auction-sale in execution of a decree.

Loc. Am.—[Bombay.] The following rule shall be added as R. 91-A:—

"91-A. Where the execution of a decree has been transferred to the Collector, and the sale has been conducted by the Collector or by an officer subordinate to the Collector, an application under Rr. 89, 90 or 91, and in the case of an application under R. 89, the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the Local Government under S. 70 of the Code, shall be deemed to have been made to or in the Court within the meaning of Rr. 89, 90 and 91."

92. [Ss. 312 and 314.] (1) Where no application is made under rule 98,

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and the sale was confirmed. The property was in possession of a third person having a good title thereto. The auction-purchaser was already aware of the possession of the property by such person. The decree-holder had filed with the sale statement *parcha* containing the entry of title of such person to the property. The purchaser being unable to get possession of the property from such a person, sued the decree-holder for the refund of the purchase-money on the ground that the judgment-debtor had no saleable interest in the property. *Held*, that the sale having been confirmed, the suit was barred under R 92 (3), and no suit could be brought on the ground that the judgment-debtor had no saleable interest in the property sold. *Held also*, that the auction-purchaser being already aware of the possession of third party could not claim refund. 20 N L J 111=1937 Nag. 140. Where the same property has been sold twice over, purchaser can sue for refund of purchase-money from the creditors to whom it was paid. 40 A 411=44 I.C. 697. But see *contra* in 28 C.W.N. 20=1924 C. 172. Also 68 I.C. 126=25 C.W.N. 756. When purchaser was the executor of the judgment-debtor in his personal capacity, he will not be debarred from applying to set aside the sale. 28 I.C. 898=19 C.W.N. 152. See also 2 P. 829. There is no provision in the Code empowering Court to hold a second sale on the ground that decree-holder having applied to set-off the purchase-money against the decree, eventually realised that he had to pay out of his own pocket money for rateable distribution to the other decree-holders, a contingency not expected by him when he applied for permission. 133 I.C. 737=33 Bom.L.R. 503=1931 B. 252.

O. 21, Rr 91 and 92. Application under R. 91 should be made before Court confirms sale under R. 92. 156 I.C. 389=1935 A.L.J. 940=1935 A. 889. There is no provision in O. 21, which entitles auction-purchaser to reopen the question of the sale being set aside or not, ignoring the order confirming the sale, unless the latter order is reviewed or set aside on appeal. (*Ibid.*) He cannot bring a suit to challenge the same or apply under R. 91, except in the case of fraud or misrepresentation, in which case it may be open to him to apply for review or such relief by a separate suit (*Ibid.*)

O. 21, R 92—"Court," meaning of. 38 C.W.N. 924=152 I.C. 1059=1934 C. 822. Issue of certificate cures irregularities. 97 I.C. 757 (2); 1927 C. 82. This rule does not apply where the property concerned was not sold at

all, but was wrongly taken by the auction-purchaser. 6 P.L.T. 473=1925 P. 376. Does not apply to confirmation of irregular sale 1929 A. 671. Settlement between decree-holder and judgment-debtor before confirmation. No order of confirmation can be passed 100 I.C. 565. This rule does not oust the inherent power of the Court to cancel a sale of its own motion. 46 M. 583=44 M.L.J. 680. As to applicability to proceedings under the Madras Estates Land Act, see 22 L.W. 794. An order under this rule decides a question of title to the land in dispute between the parties. 16 C.L.J. 542=17 C.W.N. 84. Court has inherent power to stay confirmation of sale 1930 L. 793 (2).

CONFIRMING SALE.—Once a sale has taken place the Court has no jurisdiction to refuse to confirm it unless the specified objections are taken and sustained. 161 I.C. 752=1936 Lah. 191. Even after the execution sale, judgment-debtor still retains his interest in the properties till the sale is confirmed. So an attachment of those properties, after the sale in another execution proceeding but before the sale was confirmed, is effective to confer rights on the attaching creditor when that auction sale is set aside under R. 89, as against a subsequent transferee from the judgment-debtor. 131 I.C. 14=34 L.W. 531=1931 M. 511. Court has no power to stay the confirmation of sale on the basis of a payment or adjustment of the decree which has not been recorded or certified under O. 21, R. 2. 9 R. 104=132 I.C. 713=1931 R. 148. Confirmation of sale—Right of purchaser—Issue of certificate by Debt Conciliation Board after sale—If ground for refusal of confirmation. 19 N L J. 296. Where no application is made under R. 89, 90 or 92 to set aside a valid sale, the Court is bound to confirm the sale and cannot refuse to do so on the ground that there was no subsisting decree at the time of the confirmation, because the reversal of the decree is not mentioned in the rule as one of the grounds for refusing to confirm the sale. [60 M L J 423 (P.C.), Rel on] 56 M. 808=1933 M. 598=65 M.L.J. 253. Sale when becomes absolute—Order of confirmation—If necessary to be passed—Expiry of 30 days from sale—If automatically confirms sale. (1937) 1 M.L.J. 569. Absence of formal order of confirmation where in substance and effect Court did confirm the sale is immaterial 104 I.C. 384=1927 C. 881. It is the actual sale which Court confirms and not any transactions which by inadvertence, fraud or collusion may have been described in any reference to the sale made in a document subsequent thereto. 27 B. 341. A confirmation in

Sale when to become absolute or be set aside

become absolute.

rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within

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entirety cannot be made when the sale has been set aside as regards one of the judgment-debtors. 61 I.C. 571. If satisfaction is reported before confirmation, a sale cannot be confirmed. 18 N.L.R. 134=1922 N. 248. Auction-purchaser has no absolute right for confirmation if there is any irregularity, though it may not be his. 38 M. 387=25 M.L.J. 198. When a wrong property has been attached and sold, the confirmation in respect of properties not attached is invalid. 41 C. 590=41 I.A. 38=26 M.L.J. 89 (P.C.). Court may refuse confirmation when the decree debt was paid to the decree-holder after sale. 27 I.C. 601. Destruction of property after sale by act of God is no ground for refusing to confirm sale. 88 I.C. 693, 1926 N. 17. Sale can be set aside as regards a portion of the properties sold. 24 I.C. 64=18 C.W.N. 947. Declaratory suit under O. 21, R. 93 by third party—Application by auction-purchaser for not paying balance of deposit—Not sustainable. 134 I.C. 496=1931 L. 244.

SHALL BECOME ABSOLUTE.—See 7 M. 512; 17 C. 719; 21 B. 434. Also 12 M.L.T. 311=17 I.C. 242. Certificate cures irregularities. 1927 C. 82. See also 97 I.C. 757. A sale is final on confirmation. Its finality, in the absence of confirmation, may also be inferred by conduct of the executing Court. 81 P.R. 1915=31 I.C. 254. Order dismissing application to set aside sale merely on default of appearance of parties cannot be regarded as confirmation of sale. 53 C. 679=96 I.C. 705=1926 C. 773. See also 29 O.C. 86=1925 O. 622. But order confirming sale should automatically be passed. 13 L. 761=142 I.C. 686=1933 L. 99. An order against a pre-emptor in confirmation, as he did not appear before Collector, in a sale held by him, is final. 45 A. 203=21 A.L.J. 53 (F.B.). The legal effect of a sale depends on the decree-holder's status at the commencement of proceedings and not at the time of sale. 45 C. 294=21 C.W.N. 847. The title of purchaser dates only from confirmation and not from sale. 9 I.C. 25=8 A.L.J. 32. But where delay in confirmation is due to quarrel between rival bidders, interest should be paid up to confirmation on the sale amount. 22 I.C. 946=19 C.L.J. 358. Absence of decree-holder on the day fixed for confirmation of execution sale—Duty of Court to confirm sale—Dismissal for default—Inherent power to restore. 120 I.C. 405. In construing the meaning of words "when the sale becomes absolute" in Art. 180, Limitation Act, regard must be had not only to the provisions of R. 92 (1) but also to the other material sections and orders of the Code including those which relate to appeals from orders made under R. 92 (1). Where, there-

fore, there is an appeal from an order of Judge disallowing the application to set aside the sale, the sale will not become absolute within the meaning of Art. 180 until the disposal of the appeal, even though the Subordinate Judge may have confirmed the sale, as he was bound to do when he decided to disallow the abovementioned application. (1932 C. 75, Reversed, 56 C. 608, Overruled, 56 C.L.J. 520=1933 C. 311, Appr.; 43 M. 185, Ref.) 61 C. 945=61 I.A. 248=38 C.W.N. 901=67 M.L.J. 79 (P.C.) [Reversing 56 C.L.J. 574].

Sub-R (2).—The provisions of this rule are mandatory. The deposit should be made within 30 days from the date of sale. 33 I.C. 998=3 L.W. 271. Proceedings under sub-R (2) are not final and a third party is not bound by it. 24 I.C. 44=1 L.W. 412. The proviso to cl. (2) of R. 92 only lays down that a sale should not be ordered to be set aside unless notice is given to the persons affected thereby. It is not necessary that they should be made parties to the application and arrayed in the categories of plaintiffs and defendants. 62 Cal. 286=39 C.W.N. 186=1935 C. 502. Sale in execution of a decree cannot be set aside merely on the ground that after the date of the sale in fact more than thirty days after the date of the sale but before its confirmation the judgment-debtor was declared to be a member of an agricultural tribe whose land cannot be sold. (1931 P.C. 33 and 1933 L. 99, Rel. on.) 161 I.C. 752=1936 L. 191.

PROVISO—NOTICE.—The only three classes of persons affected by a petition under R. 89 are the judgment-debtor, the creditor executing the decree and the purchaser who has advanced cash. The other decree-holders who have applied for rateable distribution of the sale proceeds have no such direct or proximate interest as to make them affected thereby, and therefore not entitled to notice under R. 92. 132 I.C. 141=1931 M. 465=61 M.L.J. 909. Where the judgment-debtor is dead, notice must issue to his representative. 7 B. 424. See *contra* 98 I.C. 69=1927 O. 23. Formal notice is not necessary if there is actual notice otherwise. 1925 C. 157; 1928 C. 267=107 I.C. 476. Notice itself need not be served within 30 days. 37 B. 387=19 I.C. 475; 68 I.C. 238=1922 O. 129; 69 I.C. 745=1922 A. 282, 107 I.C. 494. Service of notice under this rule on all persons affected by the sale is not compulsory. 67 I.C. 286, 37 C.W.N. 84=144 I.C. 814=1933 C. 464. But any order passed behind the back of persons who had obtained orders for rateable distribution will not bind them as they are affected by the application to set aside the sale. 35 M.L.J. 604=48 I.C. 38. But see 132 I.C. 141=

thirty days from the date of sale, the Court shall make an order setting aside the sale:

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1931 M. 465=61 M.L.J. 909. Notice to purchaser before setting aside sale is necessary. 10 I.C. 148=15 C.W.N. 685, 104 I.C. 148=1927 L. 681. Otherwise the order is one without jurisdiction. 32 I.C. 891. See also 111 I.C. 895=1929 L. 778 (1). Auction-purchaser is not a necessary party in the sense that in the application he should be described as one of the parties. 104 I.C. 148=1927 L. 681.

LIMITATION.—The thirty days under sub-rule (2) is to be computed from the date of deposit under R. 84. 50 I.C. 914. An execution sale of immovable property is not complete until the officer conducting the sale has accepted the final bid. Consequently, the period of 30 days prescribed by R. 92 does not begin to run against a person applying to set aside the sale if, for any reason, the final bid remains for a time unaccepted by the officer conducting the sale. 118 I.C. 900. **Suit setting aside sale**—Starting point of limitation—Date when sale becomes absolute as the material point of time—Period during which application was pending—Whether can be excluded. 56 C. 608 [See 61 I.A. 248, disapproving the above case.]

ILLUSTRATIVE CASES.—As to the effect on a sale by the death of the judgment-debtor after the sale is held and before it is confirmed, see 3 A. 765 (F.B.), 9 A. 411, 10 A. 83, 29 B. 435. See also 98 I.C. 69. An order dismissing an application under R. 90 is not equivalent to confirmation of the sale under R. 92; under R. 92, Court has to pass an order confirming the sale after dismissal of the application under R. 90. 152 I.C. 1059=38 C.W.N. 924=1934 C. 822. Where objection to confirmation is raised before Collector who held the sale he must refer it to a Civil Court. If he confirms the sale, a suit will lie to declare the sale void. 44 B. 551=22 Bom. L.R. 759. Where there is no sale within the meaning of the Code, as to whether suit lies, see 16 C. 794 (798). The rejection of an application under this rule is no bar to a regular suit for the same purpose. 11 M. 269; 5 Lah. L.J. 9=1923 L. 224; 104 P.L.R. 1916=36 I.C. 212. See also 151 I.C. 150=1934 L. 400. But see 3 Bom. L.R. 463; 1930 A. 550. Suit to set aside sale on the ground of fraud, after it is confirmed, does not lie. 89 I.C. 107. (But see next case.) A suit will lie when the purchaser has been misled by any fraud or misrepresentation. 20 C. 8 (P.C.), 29 C. 370. See 47 A. 217=84 I.C. 1031. See also 37 C.W.N. 706=143 I.C. 575=1933 C. 454. A judgment-debtor cannot file such a suit. 26 B. 40. Nor a suit for damages. 17 N.L.J. 227. The plaintiff in such a suit must be stamped as if it were a suit for the recovery of the property. 9 C.L.R. 231. As to whether the rule applies to proceedings in execution of certificates under Bengal Act I of 1895, see 33 C. 451, 34 C. 787. **Sale in execution**—Confirmation—Sale subsequently set aside by consent of both parties

—Application for execution—Objection by judgment-holder—Sustainability. 38 L.W. 337=1933 M. 753.

APPEAL AND REVISION.—No appeal lies against an order refusing to confirm sale. 98 I.C. 866=1927 L. 71 (2), 1929 L. 438. See also 131 I.C. 533=1931 P. 97, 27 N.L.R. 339. No appeal against an order of confirmation. 98 I.C. 69=1927 O. 23. Where an appellate Court reverses an order of execution Court confirming a sale no appeal lies against the appellate order. 115 I.C. 636. But the matter may be taken up under the revisional jurisdiction. 1933 A. 137; 13 L. 761. An order setting aside sale is appealable by the purchaser. 40 A. 425=45 I.C. 773; 104 I.C. 148=1927 L. 681; but not by a party to the suit under S. 47. 33 I.C. 235=3 L.W. 105. A judgment-debtor who was declared insolvent during the sale proceedings has no *locus standi* to appeal from an order confirming the sale. 162 I.C. 299=38 P.L.R. 108=1936 L. 368. The auction-purchaser may not be a party in the execution proceedings until the confirmation of the sale but on the date of the confirmation he acquires a title in the property purchased by him and if it is sought in appeal to obtain an order to his detriment by having the sale set aside, he must be made a party to the appeal before such an order can be obtained. Failure to make him a respondent would entail dismissal of appeal. 1935 L. 802, 167 I.C. 166 (Lah.). The amendment of pleadings or of the memorandum of appeal at a late stage, when valuable rights have already accrued to the auction-purchaser, would result in very serious hardship to him and should not, therefore, be allowed. 167 I.C. 166. On 11th August, 1927, the judgment-debtor submitted an application under R. 92 to have the sale set aside and the 26th October, 1927, was fixed for hearing it. Meanwhile on 1st September, 1927, the judgment-debtor and the decree-holder informed the Court that they had come to a settlement and the Court, without issuing notices to the auction-purchaser or passing any order about the sale which was awaiting confirmation ordered the execution proceedings to be sent to the record room treating the decree as satisfied. On 28th October an application was made for confirmation of the sale but the same was rejected. An appeal against the order was dismissed. *Held*, in further appeal that the order dated 28th October, 1928, was one under R. 92 and was appealable under O. 43, R. 1 (j). *Held, further*, that the order dated 1st September, 1927, had no effect on the auction-purchaser's right and the fact that it was not appealed against did not preclude the later appeal. 149 I.C. 445=35 P.L.R. 375=1934 L. 508. Where a party did not apply to have the order refusing to stay sale revised, nor applied to have the sale set aside, the appellate Court cannot stay proceedings relating to confirmation. 3 R. 132=89 I.C. 300. See also 29 C. 584. No second appeal lies from an order setting aside a sale.

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made,

Loc. Amis—[Allahabad and Oudh.] In O. 21, R. 92 (1) after the words "the Court shall make" add "subject to the provisions of R. 58 (2)."

[Madras.] Rule 92 (2).—Insert the following between the words "from the date of sale" and "the Court shall make an order,"

and in case where the amount deposited has been diminished owing to any cause not within the control of the depositor such deficiency has been made good within such time as may be fixed by the Court.

[Nagpur.] Rule 92—In sub-rule (1) of R. 92. after the word "make" insert the words "subject to the provisions of R. 58 (2)."

93. [S. 315, Cls. (1) and (3).] Where a sale of immovable property is

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22 C. 802; 28 C. 4; 41 I.C. 753. also 4 L. 243=1923 L. 592; 72 I.C. 788=1923 L. 287; 25 O.C. 78=1922 O. 146; 90 I.C. 228 (1)=42 C.L.J. 176; 2 O.W.N. 376=1925 O. 622, 101 I.C. 520=28 P. 130, 1926 C. 400; 145 I.C. 732=1933 A. 137; 29 N.L.R. 92=142 I.C. 162=1933 N. 72, 1936 P. 119. Nor against an appellate order upholding an order rejecting an application to set aside sale under R. 92. 160 I.C. 468=1936 O.W.N. 137=1936 O. 172. An order setting aside sale *suo motu* falls under S. 151 and not under this rule. The order is not appealable but revisable. 18 S. L.R. 130=1915 S. 253 See also 1930 A. 843. A revision lies on an order setting aside sale on the ground that the decree was amended after sale 85 I.C. 660=1925 C. 157. Where executing Court in disregard of the imperative rule of procedure laid down in R. 92, declines to confirm the sale, the order is liable to be set aside on revision by the High Court. 13 L. 761=142 I.C. 686=34 P.L.R. 70=1933 L. 99.

Sub-R. (3).—1926 L. 165. R. 92 (3) bars a suit for setting aside an order by which a sale is set aside under sub-rule (2) or an order confirming a sale under sub-rule (1) irrespective of the question whether an application for setting the sale aside has been made or not. The sub-rule however has no application to a case where what is prayed for in the suit is not the setting aside of the order confirming the sale but certain declarations and injunction as regards the taking of possession. 35 C.W.N. 877. Unsuccessful applicant under R. 90, even if neither party to suit or to execution proceedings, is debarred from bringing suit. Even if suit by unsuccessful applicant under R. 90 is held unentertainable, Court must consider, if there is such prayer, whether he alone is entitled to surplus sale-proceeds—Practice. 119 I.C. 431=1929 L. 618 Applicability and scope—Maintainability 119 I.C. 852=1929 A. 673. No suit lies to set aside order under this rule on the ground that judgment-debtor had no saleable interest. It is immaterial that the judgment-debtor did not apply at all under R. 91, or applied and failed. 157 I.C. 33=1935 A.L.J. 261=1935 A. 470. But where a decree in execution of which the sale took place is itself found to be invalid, or where it

is found that the sale officer had no authority to sell the property, the remedy of a separate suit would not be barred. (*Ibid.*)

O. 21, R. 93 SCOPE OF RULE.—A right to claim refund in restitution is recognized against the decree-holder in R. 93. In principle there is no difference in this liability of the decree-holder whether the sale is set aside under R. 92 or under S. 47. 1936 L. 497 The rule clearly implies that the purchase-money may be paid to the decree-holder before the date of the confirmation of sale. 12 C. 255; 8 M. 101; 1 A. 568 (F.B.); 6 W.R. 147; also 28 O.C. 136=1925 O. 404; 3 P. 947=88 I.C. 219. Under the old Code a suit will lie for the refund of purchase-money when the judgment debtor had no saleable interest in the property. Under the present Code, the only remedy is under this rule. See 42 I.C. 453; also 65 I.C. 230, 37 I.C. 763, 1920 M.W.N. 736=60 I.C. 66. But see 1926 C. 297; 53 C. 758=96 I.C. 64=1926 C. 971. Compare 41 I.C. 924; 36 A. 529=26 I.C. 59 with 43 A. 60=58 I.C. 105. See also 27 C.W.N. 183=50 C. 115; 23 M.L.J. 487=17 I.C. 437; 64 I.C. 628, 46 I.C. 783=22 C.W.N. 760; 39 M. 803=29 M.L.J. 467. To such a suit Art. 120 of the Limitation Act will apply 35 A. 419=19 I.C. 986. See also 30 C.W.N. 79=91 I.C. 768=1926 C. 297. Where the Court-sale is not vitiated by fraud, the only extent to which the purchaser can claim relief is that indicated by this rule. 17 M. 231. As to whether the purchaser is entitled to a refund only when he is unable to obtain possession or is dispossessed, see 8 M. 99; also 46 I.C. 103=16 A.L.J. 511; 52 I.C. 818=15 N.L.R. 140. But see 22 O.C. 42=51 I.C. 95; 41 I.C. 200; 53 A. 496=132 I.C. 417=1931 A. 377 (Sale rendered invalid in part—Proportionate refund of purchase-money). See also 50 M. 639, 50 M.L.J. 232; 51 I.C. 595. The money is returnable only on the sale being set aside. 39 A. 114=37 I.C. 9. There is no implied warranty of title in Court-sales. 46 I.C. 783=22 C.W.N. 760; 49 I.C. 359=1918 M.W.N. 655; 29 I.C. 392=2 L.W. 517, 42 I.C. 440; 39 I.C. 763=2 P.L.J. 361; 52 I.C. 174=12 Bur. L.T. 211. See also 1932 A. L.J. 1007. The auction-purchaser is only entitled to a refund when the sale is set aside under R. 92. There is no warranty of title as regards Court-sales and therefore the purchaser cannot, when he loses the property

Return of purchase money in certain cases. set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

94. [S. 316.] Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the Certificate to purchaser.

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under a decree passed in favour of a third party, claim refund of the purchase-money. 1932 A.L.J. 1007=54 A. 948 A suit for refund of the amount deposited by the plaintiff in Court as auction-purchaser of certain properties against the defendants who as attaching creditors of the judgment-debtors had taken the surplus of the decretal amount which remained to the credit of the judgment-debtors, on the ground that the judgment-debtors had no title is not maintainable when in fact there is not warranty of title in respect of a Court-sale. 1935 A.L.J. 261=1935 A.W.R. 162=157 I.C. 33=1935 A. 470. As to setting aside mortgage sale, see 58 C. 510=133 I.C. 587=1931 C. 688 Court-sale of two properties in single lot—Title of judgment-debtor to one item subsequently found against—Application by purchaser for the proportionate refund of price paid does not lie. 50 M.L.J. 232. See also 58 A. 496=132 I.C. 417=1931 A. 377

PARTIES—Judgment-debtor is a necessary party to an application under this rule. 6 M. 197. See also 7 B. 424 When sale is set aside it is doubtful whether judgment-debtor or decree-holder has to pay the poundage which a third party purchaser had to pay. 33 I.C. 235=3 L.W. 105. But see 39 M. 803=29 M.L.J. 467. Sale set aside because of material irregularity in publishing it—Decree-holder after keeping price money with him for nine months refunding it to purchaser—Decree-holder must pay interest to purchaser for that whole period. 30 Punj L.R. 439=116 I.C. 715=1929 L. 617. No more than 6 per cent. interest should be allowed on the money to be returned. 45 I.C. 109=40 M. 1009. An order for refund can be executed as if it were a decree. 47 I.C. 630=23 M.L. T. 355.

SUIT—Purchaser of immovable property in an auction held by the Court in execution of a decree is entitled to maintain a suit for recovery of the price paid by him if he is deprived of the property subsequent to the confirmation of the sale in his favour on the ground that judgment-debtor had no saleable interest in it. In every case where the property of a third person in which judgment-debtor had no saleable interest, has been sold at the instance of the decree-holder, both the parties, i.e., the auction-purchaser and the decree-holder must at least be deemed to be labouring under a mistake on an essential fact and therefore the suit would lie to recover the purchase price on the auction-purchaser being deprived of the property by the rightful owner as for recovery of money had and received on total failure of consi-

deration. The right to maintain such action has been given to the purchaser on equitable grounds, he must therefore bring his case within the rules of equity and his right to recover would be subject to any equitable defence that the decree-holder might be able to advance on the ground of laches, knowledge of true state of affairs, fraud, etc., on the part of the purchaser. Object of R. 93 stated 13 L. 618=138 I.C. 47=1932 L. 401 (F.B.). After purchase-money has been returned by order of Court, a separate suit lies for interest on the purchase-money and the expenses of sale. 5 A. 364. Judgment-debtor is a necessary party to the suit. 10 C.W.N. 274. If purchaser was misled by carelessness of Court in permitting a mistake in sale proclamation, he can either sue for refund of proportionate part of purchase-money or can set aside the sale. 9 Bur L.T. 169=33 I.C. 1003 Purchaser can sue the judgment-debtor in cases of fraud. 46 B. 833=1922 B. 205. If sale is not set aside, purchaser who finds that judgment-debtor had no title to a portion of the property cannot sue to recover a proportionate part of the purchase-money. 51 I.C. 595=52 P.R. 1919. But see 79 P.L.R. 1913=18 I.C. 795; 50 M.L.J. 232, 50 M. 639; 53 A. 496. Where an execution sale turns out to be futile by a finding in another suit, in which the decree and the sale in execution are declared void, the auction-purchaser has a right of action to get his purchase-money back under the general law, though not under the Code. But his remedy is not an application under R. 93 but a regular suit. 159 I.C. 625=42 L.W. 866=69 M.L.J. 750 (F.B.). See also 1930 O. 148 (F.B.).

LIMITATION—See 16 M. 361; 11 A. 372. See also 30 C.W.N. 79=91 I.C. 768=1926 C. 297; 35 A. 419=19 I.C. 986.

APPEAL—No appeal lies from an order refusing a refund. 12 A. 397; 14 A. 201. But see 16 C. 535.

REVISION—See 9 M. 437 and 17 M. 228.

O. 21, R. 94: SCOPE OF SECTION—See 4 M. 172. The grant of certificate is ministerial, not judicial. 4 P. 760=90 I.C. 501. The rule imperatively requires the Court to grant a certificate and does not impose on the purchaser the duty of making an application, as a condition precedent. 4 M. 172. Also 1 P.L.J. 446=38 I.C. 576 It is the purchaser's duty to bring in a proper stamp for sale certificate. Judge after issuing sale certificate becomes *functus officio* and cannot order deficiency of stamp to be supplied later on. 32 Bom.L.R. 1084=1930 B. 392 (F.B.). A sale certificate is not a title-deed. It is merely evidence of title. 24 C.W.N. 1011=47 C. 1108. Under the Code a sale certificate

time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

Loc. Ams.—[Nagpur.] Rule 94.—In R. 94 add a comma after the word "sold" and insert the words "the amount of the purchase money" between the word "sold" and the word "and".

[Rangoon.] In O. 21, the following shall be inserted as Rr. 94-A and 94-B.—

"94-A. A copy of every sale certificate issued under R. 94 shall be sent forthwith to the Sub-Registrar within whose sub-district the land sold or any part thereof is situate.

94-B. In execution of a decree any interest in land is sold, the names and addresses of the purchaser or purchasers and the interest thereby acquired shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under R. 92 (1) "

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should bear the date of confirmation of sale. 1936 M. 733.

TO WHOM CERTIFICATE IS GRANTED.—The certificate is to be issued in the name of the actual purchaser. 54 I C 726=24 C.W.N. 27. If the purchaser is dead, the certificate may be granted to his legal representative. 24 B. 120, 11 C.W.N. 158. There is nothing whatever in R. 94, to prevent an assignee from the auction-purchaser applying for the sale certificate, nor to prevent the Court granting it to him. 161 I C. 740=38 Bom.L.R. 104=1936 B. 137. Where in a mortgage suit an interim Receiver was appointed and the properties were sold in execution, sale made absolute and certificate granted to the purchaser, it is the purchaser and not the Receiver who is entitled subsequently to sue for possession of the property. 9 R. 565. The purchaser so long as he is not in possession of the property will be open to objections as to his title to the property. 45 B 1186=23 Bom.L.R. 514. The purchaser gets only the rights of the vendor. 21 C.W.N. 854=41 I.C. 511. Also 29 I.C. 17; 12 I.C. 831=4 Bur.L.T. 135. See also 32 P.L.R. 759. The vendee even in the absence of a deed has a good title. 41 I.C. 850=22 C.W.N. 522. A certificate of sale issued in respect of property not attached is invalid. It cannot be treated as a misdescription of the property. The proper procedure is to commence execution proceedings over again. 41 C 590=41 I.A. 38=26 M.L.J. 89 (P.C.). If certain items in the joint family property of a coparcener are sold and if subsequently at a partition other items are allotted to the coparcener, the purchaser cannot ask for a substitution of the properties. 37 M.L.J. 620=54 I.C. 515. An application for a sale certificate need not be in writing, and, if in writing, need not be stamped. 13 B 670. Undisclosed principal of auction-purchaser—Right to sale certificate. 105 I.C. 880 (1).

SALE CERTIFICATE—CONTENTS AND EFFECT OF.—See 21 W.R. 93; 18 B. 175; 27 B. 339, 28 B. 162. See also 27 M. 142 (P.C.) The certificate completes the title of the purchaser. 12 I C 360=7 N.L.R. 134. Sale passes what is contained in the proclamation and what is attached. Certificate is not conclusive as to what is sold by its recital. 4 P. 760=99 I.C. 501; 7 Pat.L.T. 280=1925 P 615. Entries in sale certificates are not binding on strangers. 20 I.C. 753. Parties to sale cannot question title of the purchaser. 50 I.C. 157=21 O.C.

400. When the certificate recites that the right of redemption is sold, the right to redeem of any other coparcener of the defendant is also barred. 41 B 357=19 Bom.L.R. 75.

CONSTRUCTION OF.—Mere inaccuracy of language or misdescription will not vitiate a sale certificate. 7 W.R. 245, 15 W.R. 490. In certificates, boundaries prevail over areas, mentioned therein. 22 I C. 26=18 C.L.J. 541. But area as detailed by survey and paimash numbers prevail over a sweeping general boundary. 11 M.L.T. 15. A purchaser is not bound by a wrong description regarding situation of land. 52 I C 739. Also 11 I.C. 395=13 C.L.J. 660. Extraneous evidence might be received to identify the property comprised in the sale certificate. 25 W.R. 401. Sale certificate—Identity of property in doubt—Prior mortgage bond can be referred to. 33 C.W.N. 1211. Evidence to counteract terms of a certificate is inadmissible. 22 I.C. 280=19 C.L.J. 182. Evidence cannot be adduced to prove that more than what the certificate actually gives was purchased. 26 W.R. 104.

AMENDMENT OF.—A certificate granted by Court can be amended on an application for review under S. 114. 26 C. 530. Amendment cannot be made *ex parte*. 23 W.R. 301. See also 23 I.C. 811=19 C.L.J. 209, 20 I.C. 588. An amendment showing a larger purchase is without jurisdiction. 18 I.C. 725. Notice to judgment-debtor is necessary. When an amendment is asked for, without notice, it is an irregularity. 16 L.W. 760=1925 M. 63.

CANCELLATION OF CERTIFICATE.—When certificate issued on a rent sale is cancelled, the decree for rent remains unaffected. 35 I.C. 339=20 C.W.N. 819. The auction-purchaser derives his title from the Court's act. Where the Court's act is induced by mistake it may be set aside. 38 M. 387=26 M.L.J. 198. The onus of proving fraud is on the judgment-debtor when the certificate is sought to be cancelled. 34 I.C. 911.

REGISTRATION.—A sale certificate requires registration. 4 B. 155; 3 M. 37. See 7 M. 248; 7 M. 418; 11 B. 588.

GRANT OF FRESH CERTIFICATE.—See 9 B. 526.

DATE OF CERTIFICATE.—5 A. 84. When the mortgage decree-holder is the purchaser the title relates back to the date of the mortgage. 9 I.C. 840. A certificate issued during the pendency of a maintenance suit begun after

95. [S. 318.] Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the pur-

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sale is not affected by *lis pendens* and is complete. 1915 M.W.N. 15=28 M.L.J. 666.

LIMITATION.—The provisions of the Limitation Act relating to applications do not extend to applications to obtain a sale certificate. 4 M. 172 See also 6 B. 586

APPEAL.—No appeal lies against an order refusing to amend a certificate. 23 A. 476 Also against an order granting an amendment. 26 C. 529. An application for delivery of possession by an auction-purchaser under R. 95, has to be made within three years of the date of confirmation of the sale and not from any later date such as the date of the issue of the sale certificate 54 C.L.J. 241=134 I.C. 1188.

O. 21, R. 95. SCOPE.—A purchaser of Nankar rights need not apply for possession 36 I.C. 768=3 O.L.J. 436 In execution, delivery must be either under this or the next rule. 55 I.C. 946. Any person claiming under the "purchaser" can also apply See S. 146 See 28 M. 89; also 38 I.C. 338 A decree-holder entitled to possession cannot forcibly remove judgment-debtor from possession 5 Bom.L.R. 977. An order for delivery of possession is not a mere general order to be worked in subsequent execution proceedings 43 I.C. 155=7 L.W. 16. Delivery of possession need not be taken through Court—If auction-purchaser is let into possession by judgment-debtor amicably, application to Court under this rule is unnecessary. 34 C.W.N. 1059=1930 C. 586 R. 95 has no application to a case in which the property sold in execution is claimed by a person in his own right and independently of the judgment-debtor 1936 M.W.N. 1369=44 L.W. 698=71 M.L.J. 725 Where purchase was under a mortgage decree passed against executors in their representative capacity, application cannot be made for possession under this rule against the beneficiaries. The beneficiaries do not claim under executors, and they are not "judgment-debtors" or some persons on their behalf under R. 95 or any person bound by a decree under R. 35. 1937 C. 301 Auction-purchasers who are decree-holders do not cease to be parties to a suit, and even if they ask relief as auction-purchasers they are still decree-holders coming under the provisions of S. 47 Therefore an application under Rr 95 and 97 by decree-holder auction-purchaser is an application in execution of a decree and the removal of obstruction to the decree-holder auction-purchaser is in execution of the decree even though the decree be only for sale. 30 S.L.R. 290=161 I.C. 524=1936 S. 11. Property in Karachi Court's jurisdiction sold in execution by Bombay High Court—Decree-holder auction-purchaser obstructed from obtaining

possession—Decree sent for execution to Karachi Court—Power of Karachi Court to remove obstruction (*ibid*)

"POSSESSION"—Means such possession as the nature of the property is capable of. 5 O.W.N. 372=1927 O. 251 (F.B.). Under the law there are two modes of delivery of possession of a property both when there is a decree for possession and when the auction-purchaser is to be given possession These two modes do not depend upon the discretion of the Court but depend upon the nature of the property of which possession is to be given. If the property is in occupation of the judgment-debtor or of some person on his behalf, etc., the possession is to be given under one mode, namely, by removing the judgment-debtor and putting the auction-purchaser or decree-holder in possession of it; *vide* O. 21, Rr. 35 and 95. On the other hand, if the delivery of possession is of a property which is not in occupation of the judgment-debtor, but it is in occupation of a tenant or other person entitled to occupy the same, delivery of possession is to be given by proclaiming the possession of the decree-holder or auction-purchaser; *vide* O. 21, R. 36 or R. 96. 148 I.C. 905=15 P.L.T. 615=1934 P. 119. House purchased by auction-purchaser locked—Power of Court to direct breaking open lock. (*Ibid*) Even though a writ under R. 95 does not particularly mention delivery of huts or removal of huts, still the auction-purchaser is entitled to get the property after the removal of the huts 57 C.L.J. 41=144 I.C. 817=1933 C. 469 See also 100 I.C. 301=1927 R. 82. Delivery of possession—Demolition of structure on land covered by decree—Not necessary 152 I.C. 433=38 C.W.N. 1051=1934 C. 751 When actual possession is applied for under this rule, it may be granted or refused, but the Court has no jurisdiction to order symbolical delivery under R. 96 in such a case. 156 I.C. 551=1935 R. 159. As to effect of delivery of vacant site under this rule, when objected to by tenants, see 1936 M. 733 Where there was no opposition by the judgment-debtors and the obstruction was only by a third person to a limited extent, the portion as to which there was no obstruction by the third person and no opposition by the judgment-debtor should be delivered 58 M. 893=42 L.W. 375=1935 M. 803=69 M.L.J. 821 (F.B.). As to different effects as to limitation and adverse possession created by formal and actual delivery, see 27 C.W.N. 24=1923 C. 138 Also 23 I.C. 811=19 C.L.J. 209; 43 A. 520=19 A.L.J. 469; 39 A. 460=15 A.L.J. 361, 24 Bom.L.R. 232=46 B. 710; 43 B. 559=21 Bom.L.R. 357. But see 43 I.C. 268=34 M.L.J. 97 (P.C.), which decides that symbolical possession will interrupt title by adverse possession. As

chaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

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between the purchaser and judgment-debtor, the property vests in the purchaser. 34 C. 199. Where possession is delivered under R. 95 there is no necessity for making a proclamation which is only prescribed in cases where delivery of immovable property in possession of a tenant is made by symbolical possession under R. 96. So where the possession was given by beat of drum and the process-server's report showed that possession was given without crops. *Held*, that only symbolical possession was given. 150 I.C. 1028=1934 N. 172. As to right of purchaser to cut crops on land delivered under this rule, see 1936 C. 157. A purchase of right, title and interest of a co-sharer, passes title to what was in exclusive possession of the co-sharer. 38 I.C. 338. When an application under R. 97 is dismissed, it does not bar a fresh application under this rule. 16 I.C. 432=1913 M.W.N. 179. See also 25 L.W. 108. Bailiff purporting to give possession of wrong property is without effect 1929 P. 391. The purchaser of an usufructuary mortgage debt, whether or not he be also the decree-holder, cannot get anything more from the executing Court than his sale certificate. He cannot apply for delivery of possession under R. 95, the mode of delivery contemplated in such a case being that prescribed by R. 79 (3). 138 I.C. 819=1932 M. 283. Mortgage with possession—Decree for sale—Suit by purchaser for possession—Right of mortgagor's heir to resist. 122 I.C. 475.

AFTER GRANT OF SALE CERTIFICATE it is not incumbent on Court to put a purchaser into possession until he has obtained a sale certificate. 5 B. 206. The right of a purchaser to apply for possession accrues when certificate has been granted, that is to say, when it has been issued to him. 17 B 228

LIMITATION.—An order under this rule on an application by decree-holder auction-purchaser is an order under S. 47 and is governed by Art. 182 of the Limitation Act. 103 I.C. 335=1927 N 294. See also 54 C.L.J. 241=134 I.C. 1188.

SUIT.—It is not necessary in every case where an application for delivery under R. 95 is made that a complete inquiry is necessary. Where the questions raised are questions for decision in a regular suit, and not in summary proceedings, the proper course is to leave the aggrieved party to his remedy by way of a regular suit 156 I.C. 551=1935 R. 159. Auction-purchaser may sue for possession without proceeding under this rule and R. 96 9 C 602; 14 C 644; 10 M. 55; also 89 I.C. 134. A suit brought by decree-holder auction-purchaser for recovery of possession of the property purchased in execution of his decree is not barred by the provisions of S. 47, the question relating to

the delivery of the property purchased by him, not being a question relating to the execution, discharge or satisfaction of the decree 140 I.C. 683=1932 N. 140. A suit will lie when an attempt by auction-purchaser to obtain possession in execution proceeding has proved unsuccessful. 12 C 169. Also when possession given under the rule has been infructuous. 10 C. 402. He can also file a suit when his application under this rule is rejected as being beyond time. 29 A 463; 19 A. 499, 7 C 418; 4 A. 184, 8 M. L.J. 193, 18 A. 36. But see 90 I.C. 952=1925 M. 1198. If possession may be obtained by purchaser of joint interest except in the case of purchaser of interest of an undivided coparcener, see 102 I.C. 311=1927 S 199. When a person other than judgment-debtor resists purchaser from getting possession, he cannot again apply under this rule. He can only apply under R. 97 or file a suit 26 A. 365. But see 13 M. 504 and also 24 I.C. 512. When once possession is given, decree cannot be re-executed on plaintiff being dispossessed. 6 W.R. 108. Judgment-debtor's possession after delivery of possession to purchaser is trespass. 3 Pat L.T. 335=66 I. C 817. Subsequent ouster gives rise to a fresh cause of action. 5 B. 387; and a fresh start for computation of limitation 43 A. 520=19 A.L.J. 469. Delivery of symbolical possession when actual possession should have been delivered puts an end to adverse possession 1930 L. 823. But see 35 C.W.N. 12. Several mortgage suits—Execution sales—Priority. As between competing auction-purchasers the principles governing priority are the same as those which regulate the claims of priority among the mortgagees 32 Bom.L.R. 431=1930 B. 221. The puisne mortgagee's right, when he is not a party to the first mortgagee's suit, is limited to a right of redemption or sale of the mortgaged properties subject to the lien of the first mortgagee or auction-purchaser on a decree by the latter and he cannot in execution of his decree under R. 95 compel the first mortgagee to part with possession without redeeming the first mortgage 1934 Pat. 215.

APPEAL.—No appeal lies from an order allowing auction-purchaser's application. 29 A 207. See 18 A. 36, 6 C.L.J. 749; 40 A. 216=16 A.L.J. 150, 20 C.W.N. 829, 1 Pat.L.J. 232. An application under R. 95 or 97, will not be a proceeding relating to the execution, discharge, or satisfaction of the decree and the order passed thereon is not appealable. 11 Pat.L.T. 331=1930 P. 311 (F.B.). An appeal under S. 47 and no suit lies from an order rejecting an application under this rule. 90 I.C. 952=1925 M. 1198. On this, see 53 C. 781=95 I.C. 494=1926 C. 798 (F.).

O. 21, Rr. 95 and 96: SCOPE OF.—The summary procedure for obtaining possession under Rr. 95 and 96 does not bar a suit by a

96. [S. 319.] Where the property sold is in the occupancy of tenant or other person entitled to occupy the same and a certificate in respect thereof has been granted under rule

Delivery of property in occupancy of tenant.

94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

Resistance to delivery of possession to decree-holder or purchaser.

97. [Ss. 328 and 334.] (1) Where the holder of a decree for the posses-

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purchaser to obtain possession of the property. The two remedies are concurrent. Purchaser can at his option avail himself of the one or the other. For this purpose there is no distinction between a decree-holder purchaser and a third party purchaser. 10 P. 670 = 133 I C 337 = 1931 P. 241 (F.B.).

O. 21, R. 96—21 A. 269, 17 M.L.J. 598. This rule will not apply to property in the hands of a Receiver, and he can be sued only with leave of Court. 63 I.C. 685 = 14 S.L.R. 137. As to distinction between symbolical and paper delivery, see 44 I.C. 839. An order under this rule is a judicial order. 45 I.C. 608. And thereafter the warrant for delivery cannot be stopped. 103 I.C. 695 (1) = 1927 O. 304. Symbolical possession does not of itself effect a transfer of possession by a person not a party to the decree. 42 I.C. 449 = 3 P.L.W. 133. A formal possession under this rule does not affect strangers at all. 45 I.C. 606 = 20 O.C. 70. When such third person is in actual possession, he, not being dispossessed at all, is not bound or entitled to start proceedings under R. 100; when the purchaser who has got symbolical possession therefore removes crops grown on the land by the third person in actual possession, he is guilty of theft under S. 379, I. P. Code. The fact of symbolical possession to the purchaser is no answer to the charge. Nor can the act be said to have been done under a *bona fide* claim of right. 39 C.W.N. 1306. The remedy of purchaser of an undivided share is a suit for partition, when he is obstructed by one entitled to possession of the whole. 25 M.L.T. 153 = 49 I.C. 629. Formal delivery gives right to demand possession of share by metes and bounds—Right lost by inaction for 12 years. 129 I.C. 767. But see also 40 I.C. 605. Purchaser buying with knowledge of subsisting tenancy will be deemed to know of its duration as well. 100 I.C. 1014 (1) = 1927 R. 127 (2). There is no period of limitation under this rule for an application for delivery of possession after confirmation. 40 I.C. 605. But see also 129 I.C. 767.

O. 21, Rr 96 and 97. PRACTICE—O. 21, R. 58 does not contemplate the investigation of a claim by a tenant of the judgment-debtor to occupancy rights in the property advertised for sale and an order on that claim directing it to be notified and stating that the sale shall not prejudice the rights of the claimant is not conclusive under R. 63. When

the purchaser applies under R. 97 for delivery of the property sold to him in execution, the Court should investigate the merits of the claim and even if it finds the claim of the tenant to be *bona fide*, it should at least order symbolical delivery under R. 96. 41 L. W. 550 = 68 M.L.J. 518.

O. 21, R. 97: SCOPE OF RULE—R. 97 applies only where the decree-holder, having obtained a general order of the character specified in R. 96, meets with resistance from any particular person. Merely because an amicable delivery of the property is refused, the summary procedure under R. 97 cannot be resorted to. 36 C.W.N. 965. See also 35 C.W.N. 1132. Proceedings under this rule whether execution proceedings. See 1926 M. 412 = 92 I.C. 533 = 50 M.L.J. 200. It is only the decree-holder or auction-purchaser who can make an application under R. 97, regarding obstruction to possession. 132 I.C. 844 = 1931 L. 686. Where decree-holder's counsel was present when report of the bailiff complaining of the obstruction by the petitioner was placed before the Court, it is reasonable to hold that the further proceedings were taken at the instance of the decree-holder. 149 I.C. 1059 = 36 P.L.R. 89 = 1934 L. 193 (2). Oral application for action under this rule is sufficient. 1931 L. 13 = 130 I.C. 520. Person obstructing need not be physically present. 23 L.W. 157 = 92 I.C. 61 = 1926 M. 359. The executing Court has no jurisdiction to start upon an inquiry under R. 97 either *suo motu* or upon the application of a prospective objector in absence of a complaint by the decree-holder under R. 97 about resistance or obstruction of delivery of possession to him. [1931 L. 686, 60 C. 8 and 1924 A. 495 (F.B.), Foll.; 1925 R. 374, 1923 L. 145 and 1934 L. 193, Dist.] 31 N.L.R. 408 = 159 I.C. 584 = 1935 N. 212. A decree-holder is not bound to pursue his remedies under this rule. 8 B. 602, 10 M. 53. Application by decree-holder auction purchaser for possession—Obstruction by judgment-debtor—Application was one under R. 97 and not under R. 95. 32 Bom.L.R. 619. This rule is solely for the benefit of a purchaser at a sale in execution. 13 M. 506. But see 26 A. 365. Also 1926 M. 353. The enquiry into objections is not confined to cases where the order is for possession only but also where the order is for demolition as well. 4 Bur L. J. 178 = 1925 R. 374. See also 1932 A.L.J. 1036. When the decree is silent regarding the building, the executing Court cannot

Resistance or obstruction to possession of immovable property.

sion of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the

Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

Notes.

order its demolition. 5 Bur. L.J. 201=100 I. C. 301 (1)=1927 R. 82. See also 92 I.C. 667 (1)=1925 R. 374; 57 C.L.J. 41. O 9 of the Code does not apply to such proceedings under R. 93 or 100 as do not also fall within S. 47; and the Court has no inherent power to set aside, on sufficient cause being shown, either an order dismissing for default an application under R. 97 or 100, or an order allowing such an application *ex parte*. 30 L. W. 424=1929 M. 757=57 M.L.J. 381 (F.B.) The action of the Court in entertaining an application made by the obstructor for stay of proceedings on the ground that he was prosecuting a suit or appeal with respect to property in dispute, cannot be justified under S. 151. 119 I.C. 488=1929 L. 694. If the judgment-debtor and a third party both obstruct, the decree-holder purchaser has to complain against the judgment-debtor and, if he chooses, against the third party also under R. 97 and the complaint can then be disposed of. But if the judgment-debtor is quiescent, raises no objection and makes no opposition either before the Amin or before the Court, but a third party objects and on account of the third party's objection physical possession of the property cannot be given, it is the duty of the Court to note the fact and to order delivery of such possession as the matter may then be capable of so far as the judgment-debtor is concerned. 58 M. 893=42 L.W. 375=1935 M. 803=69 M.L.J. 821 (F.B.). Scope—Comparison with Rr. 58 to 63 of O. 21—Principles applicable to one whether applicable to proceeding under other set of rules. 53 B. 668=31 Bom.L.R. 765=1929 B. 379

DECREE FOR POSSESSION OF PROPERTY.—A decree for partition is a decree for possession of property. 16 M. 127. The rule applies to a decree for possession under S. 2 of the Specific Relief Act. 23 L.W. 157=92 I.C. 61=1926 M. 353. A sub tenant cannot resist. He is not in possession on his own account. 23 Bom.L.R. 1316=1922 B. 449 (2). Neither can a sub-lessee of a sub-tenant of the judgment-debtor. 23 Bom.L.R. 1251=46 B. 526. As to when symbolical delivery is effective, see 1925 M. 1140=49 M.L.J. 303. The first mortgagee of certain property was appointed a receiver and obtained possession in execution of her decree to which the second mortgagee was not a party. The second mortgagee brought a suit on his mortgage without impleading the prior mortgagee and the property was sold in execution of the decree in that suit. In an application by

the auction-purchaser for possession which was resisted by the earlier mortgagee, the first mortgagee was held to be a *bona fide* claimant and as he was in possession prior to the purchase by the auction-purchaser, he was entitled to be maintained in possession. 56 M. 846=1933 M. 583=65 M.L.J. 108 (F.B.).

FRESH APPLICATION.—When an application by an auction-purchaser not being the decree-holder is rendered infructuous on account of obstruction, he need not apply under this rule but can put in another application if within time fixed by Art 167 of the Limitation Act. 4 Pat.L.J. 94=49 I.C. 150 (F.B.) See also 1928 M.W.N. 236, 1933 A.L.J. 113=1933 A. 201=55 A. 235. See also 1933 N. 369=147 I. C. 582, 146 I.C. 11=35 Bom.L.R. 1033=1933 B. 457 (F.B.). When once a delivery has been complete, a second application is not maintainable. 43 M.L.J. 179=1923 M. 25. After resistance a fresh application for possession can be made under R. 95. 13 M. 504. But see 26 A. 365. Obstruction to decree-holder getting possession—Application taking objection not filed—Subsequent obstruction—Fresh application lies. 1928 M.W.N. 236. When once delivery is given, any subsequent act of resistance cannot be the subject of a complaint under this rule. 13 W.R. 418

LIMITATION.—There is no limitation for applying for delivery of possession after confirmation of sale. 40 I.C. 605. A minor is to apply within a month after coming of age. 11 B. 173. See 13 M. 504. As to effect of order upholding claim of sons of judgment-debtor in their own right, see 83 I.C. 923=1924 A. 495. An application under R. 97, for delivery of possession by an auction-purchaser may be treated as an application in an execution proceeding, but it cannot be treated, as an application for execution. S. 15 of the Limitation Act does not therefore apply to such an application. 62 C. 66=158 I.C. 191=1935 C. 333.

SUIT.—In execution of a decree for possession against lessee in favour of lessor, if the sub-lessee obstructs, the remedy is by suit. 60 I.C. 969=47 C. 907. When obstruction is by members of an undivided family to whom the property belonged but who were not parties to the suit, the remedy is by suit only. 14 I.C. 282. Where decree-holder was resisted in trying to obtain possession by the wife of the judgment-debtor who claimed in good faith to be in possession of the property on behalf of her minor son not bound by the decree obtained against the father, an order passed under R. 99 dismissing the

98. [Ss. 329, 330 and 334.] Where the Court is satisfied that the resis-

Resistance or obstruction
by judgment-debtor.

tance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

Loc. Ams.—[Allahabad] In O 21, R. 98 *alter* the words "or by some other person at his instigation" *add* "or on his behalf"; *after* "or any person acting at his instigation" *add* "or on his behalf", *after* "for a term which may extend to thirty days" *add* "and may order the person or persons whom it holds responsible for such resistance or obstructions to pay jointly or severally in addition to costs, reasonable compensation to the

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application of the decree-holder is not one falling within the scope of S. 47 and so not appealable. The remedy of decree-holder in such a case is that indicated in R. 103 58 C. 808=133 I.C. 335=35 C.W.N. 286=1931 C. 574. A suit by auction-purchaser for possession is maintainable even if the express words are absent in the decree. 57 I.C. 177. When an application under this rule is rejected, the applicant can file a regular suit, 8 B 481. When an application by mortgagee decree-holder under this rule is dismissed, the remedy is by suit and not an appeal against the order of dismissal 53 I.C. 923. A purchaser of immovable property sold for arrears of Abkari revenue is entitled to be put in possession by the Civil Court by removal of obstruction if any, 1. M.L.J. 594, 13 W.R. 467.

APPEAL.—Property subject to charge—Charge under surety bond—Independent suits to enforce mortgage and charge—Rival purchasers—Application by purchaser in surety proceeding against the other purchaser—Order of dismissal—*Held*, that the order against the surety was appealable, even though it was made by the Court not under S. 145, but under its general powers. 56 M. 909=145 I.C. 871=1933 M. 780=65 M.L.J. 407. Where the decree for restoration is resisted by a third person and the decree-holder applies under R. 97, the mere fact that the application is dismissed and is unappealable does not make the order of dismissal the less a refusal of restitution under S. 144 and as such it is appealable. 13 P. 108=15 P.L.T. 491=146 I.C. 1045=1934 P. 109. An order made under R. 97 between the decree-holder-auction-purchaser and another person who had been impleaded as a defendant in the suit is appealable, because the dispute comes under S. 47. 53 C. 781 (F.B.), Rel. on. 150 I.C. 313=38 C.W.N. 497=1934 C. 541.

O. 21, Rr. 97 and 98: SCOPE OF.—See 1932 A.L.J. 1036.

O. 21, Rr. 97, 98, 99 and 123. Scope—Order on investigation—Application allowed in part as unopposed and rejected in part as no evidence adduced—If one in default—Suit to set aside—Limitation. 39 C.W.N. 164=1935 C. 267.

O. 21, R. 98: SCOPE.—The rule applies only to obstruction by judgment-debtor or some

other person at his instigation. 31 I.C. 799. Where there was litigation going on between *Agraharamdars* and tenants regarding occupancy rights, and obstruction was caused by tenants against person claiming delivery against *Agraharamdars*, it cannot be said that the obstruction was not *bona fide* or was at the instigation of the judgment-debtors 1936 M. 733. Only to persons who have rights of their own and who are not bound by the decree for possession sought to be executed, does O. 21, R. 98 apply. The provisions of that and succeeding rules cannot help tenants of judgment-debtors who have no occupancy rights and who are, therefore, bound by a decree for possession against judgment-debtor 132 I.C. 301=1931 M. 534 (Case-law discussed). But *see also* 47 C. 907. A purchaser *pendente lite* comes within the definition of a judgment-debtor. 85 I.C. 1004=1925 C. 1243. Auction-purchaser is a representative of judgment-debtor and proceedings can be taken against him under S. 146 12 L.W. 350=59 I.C. 894. Provincial Small Cause Court can order ejectment where the obstruction is offered by the judgment-debtor. 45 M.L.J. 66=1924 M. 74. The words "at the instance of the applicant" have been inserted to give effect to the ruling in 26 M. 494. In case possession is ordered, it should be given in one of the ways prescribed by the Code. 8 W.R. 79. Acquiescence in the obstruction in a prior attempt for possession does not prevent another application to remove second obstruction. 66 I.C. 722=1921 M.W.N. 698. A Court has no jurisdiction to proceed with an enquiry which results in an order under R. 98 without giving notice to the objector. 106 I.C. 491 (1). Court can resist auction-purchaser's application on the ground of agreement between auction-purchaser and judgment-debtor—Order dismissing application is final subject to suit under O. 21, R. 103. 32 Bom L.R. 619.

APPEAL.—No appeal lies against an order made under this rule. 3 M. 81. See 21 B. 392; 13 M. 504, 14 C. 235. *See also* 51 B. 158=101 I.C. 40=1927 B. 184. But *see contra* 66 I.C. 722=1921 M.W.N. 698. When the purchaser is decree-holder, and the obstructor is the judgment-debtor, an order under this rule is appealable as a decree 4 P. 726=6 P.L.T. 351; but *see* 92 I.C. 544=1926 C. 985.

decree-holder for the delay and expense caused to him in obtaining possession. The order to pay costs and compensation [*vide* Court's Notification No. 6376/35 (a), dated the 12th November, 1926] made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

[Calcutta.] O. 21, R. 98. Insert the words "or on his behalf" after the words "at his instigation" occurring twice in R. 98, O. 21.

[Lahore.] O. 21, R. 98. After the words "at his instigation" where they occur first add the following words—

"or on his behalf"

Add the following proviso—

"Such detention shall be at the public expense and the person at whose instance the detention is ordered shall not be required to pay subsistence allowance"

[Nagpur.] Rule 98—In R. 98—

(a) after the word "instigation," in both places where it occurs, insert the words "or on his behalf"; and

(b) after the words "thirty days" insert the words—

"and may order the person or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally, in addition to costs, reasonable compensation to the decree-holder or the purchaser, as the case may be, for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree"

[N.-W.F.P.] After the words "at his instigation" wherever they occur, add the words "or on his behalf," and after the words "in the civil prison" add the words "at the end of the Crown".

[Oudh.] In R. 98, after the words "at his instigation," wherever they occur, insert the words "or on his behalf" and after the words "thirty days" at the end of the rule, add the words "and may order the person or persons whom it holds responsible for such resistance or objections to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

[Rangoon.] The following shall be substituted, namely—

"98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession the Court may also, at the instance of the applicant or of its own motion, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison at the cost of Government for a term which may extend to thirty days."

99. [S. 331.] Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application

Loc. Ams.—[Allahabad and Oudh.] R. 99. For the words in brackets "(other than the judgment-debtor" read the words in brackets, "(other than the persons mentioned in Rr. 95 and 98 hereof)"

[Calcutta.] O. 21, R. 99. Insert the words "to have a right" after the words "in good faith" in R. 99, O. 21.

[Madras.] Substitute the following for the existing rule—

Notes.

O. 21, R. 99.—The decision under this rule is final so far as possession is concerned subject to a suit under R. 103. 51 I.C. 787=51 P.W.R. 1919. See also 99 I.C. 219=2 Luck. 269=1926 O. 610

"POSSESSION" is not limited to actual physical possession but includes also constructive possession. 25 B. 478. Court should satisfy itself as to whether the person obstructing was in possession of the property in question on his own account. 27 B. 302. Investigation of claims under this rule is not limited to the fact of possession. Any question of title in connection with the right to possession may also be determined. 14 B. 627. See also 27 A. 453. Applicability of the doctrine of *lis*

pendens.

"ON THEIR OWN ACCOUNT"—Unmarried sisters under Hindu Law have a right of residence until they are married in the family dwelling-house and cannot be ousted. 43 M. 635=38 M.L.J. 433. The onus of proving a better title than the plaintiffs rests with the persons obstructing and they may prove their title as a defence. 22 B. 967, see also 10 C. 50; 26 M. 517, 14 B. 627; 18 B. 40.

LIMITATION.—Where an application for possession was dismissed for default, limitation for suit to establish right does not start from this date under Art. 11 of the Limitation Act. 39 I.C. 797=15 A.L.J. 420

APPEAL.—No appeal lies from an order under this rule. 9 Bom.L.R. 936=1926 O. 610.

"99 Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than those mentioned in R. 98) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application."

(Vide *Fort St. George Gazette*, dated 20th October, 1936, Part II, pp. 1394-1396.)

[Nagpur.] Rule 99.—In R. 99, for the word "judgment-debtor" where it occurs in brackets, substitute the words "persons mentioned in R. 95 or 98"

[N.-W.F.P.] For the words "(other than the judgment-debtor)", substitute the words "(other than the persons mentioned in R. 95 and 98)"

[Rangoon.] Substitute the following:—

99. Where the Court is not satisfied it shall make an order dismissing the application.

100. [Cf. Ss. 332 and 335.] (1) Where any person other than the judgment-debtor is dispossessed of immoveable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

Notes.

REVISION.—Revision lies. 9 Bom.L.R. 936
O 21, Rr 99 and 100—See 132 I.C. 844=1931 L. 686.

O. 21, R. 100. MEANING OF TERMS.—"Dispossessed", meaning of. 20 B. 353 (F.B.)
See also 30 C. 710 "Judgment-debtor" 17 A. 222 (F.B.). Includes his representatives 42 I.C. 526=2 P.L.J. 478.

SCOPE.—The rule cannot apply where S. 47 is applicable. 17 A. at 481. Nor where the execution has been transferred to the Collector. 37 B. 488=15 Bom.L.R. 389. As to applicability to proceedings under the Agra Tenancy Act, see 23 A.L.J. 23. See also 36 C.W.N. 790. A tenant who has been wrongfully dispossessed in execution of a decree obtained by his landlord against another person has a right to apply for restoration of possession to the Revenue Court under R. 100, and such a right is not barred on account of his alternative remedy by a suit under S. 108, Cl. (10) of the Oudh Rent Act. 155 I.C. 1082=1935 R.D. 346=1935 O.W.N. 698=1935 Oudh 462. No declaratory order can be made under this rule. 103 I.C. 231=1927 N. 300. Questions such as validity or collusiveness of the decree, *lis pendens*, whether opposite party derives title by *kabala* or compromise decree, are outside the scope of proceedings under R. 100. 1930 P. 416. The scope of enquiry under R. 100 is the same as that of an enquiry under R. 58. 36 C.W.N. 1034=56 C.L.J. 250, 157 I.C. 86=16 Pat.L.T. 220=1935 P. 230. The judgment-debtor has no right to apply under R. 100 I.R. 1932 L. 658. An unsuccessful applicant under R. 58 is not competent to apply under R. 100. His only remedy is by way of suit under R. 63. 35 C.W.N. 1034=56 C.L.J. 250, 148 I.C. 334, but see also 98 I.C. 541=1927 C. 339. It is only when a person has been dispossessed that he can apply under R. 100, when no possession has been given to the decree-holder or purchaser, there is no dispossession as contemplated by the rule. The Court, therefore, has no jurisdiction to determine the matter in the form of an anticipatory application or make an order under rule 101. 155 I.C. 93=1935 P. 253.

APPLICABILITY.—A representative of the judgment-debtor under S. 47 cannot apply

under this rule. 65 I.C. 476. The sons of a judgment-debtor are *prima facie* bound by the decree made against their father and cannot be regarded as persons other than the judgment-debtor within the meaning of R. 100. 155 I.C. 93=1935 P. 253. Joint possession is not a sufficient ground to maintain an application under this rule. 83 I.C. 599=1924 P. 1198. But see *contra* 58 C. 55=132 I.C. 631=1931 C. 385; 144 I.C. 147=1933 P. 132. Rule only applies where there is actual dispossession and a person whether holding under a judgment-debtor or any one else is not entitled to apply under this rule in a case where there has been only symbolical delivery of possession. 142 I.C. 152 (1)=1933 C. 144, 18 C.L.J. 138=18 C.W.N. 695, 68 I.C. 394=1923 N. 52. A usufructuary mortgagee in possession can apply under this rule. 70 I.C. 306=1 P. 159. The purchaser of a holding not transferable by custom cannot claim under this rule. 43 I.C. 969. See also 95 I.C. 146=1926 C. 956, 10 Pat.L.T. 242=117 I.C. 308=1929 P. 227. But see *contra* 53 C. 913=99 I.C. 718=1927 C. 156. See also 132 I.C. 301=1931 M. 534. Mortgagee objecting to attachment under R. 58 and failing—Omission to sue under R. 63—Subsequent application under R. 100 after delivery of possession to decree-holder purchaser—If barred 17 Pat.L.T. 812 (F.B.). Transferee of property from a person against whom an order under O. 21, R. 58 has been made can apply under this rule. 98 I.C. 541=1927 C. 339. See also 36 C.W.N. 1034=56 C.L.J. 250. In case of excessive execution proper remedy of judgment-debtor is to apply for restoration under S. 47 and not under this rule. 38 A. 339=34 I.C. 231. In a claim of an exonerated party enquiry should be confined to possession only and not extended to title. 40 M. 964=38 I.C. 297=32 M.L.J. 532. On this rule, see also 58 C. 55=132 I.C. 631=1931 C. 385. Rr. 100 and 101 are not confined to cases of exclusive possession alone, but are applicable to joint possession also. (*Ibid.*) See also 17 B. 718, Diss.; 18 C.W.N. 695, Ref. But see 83 I.C. 599=1924 P. 506, 1933 P. 132. See also 20 I.C. 253 and 1924 P. 506, Ref.). Where an application under O. 21, R. 100 has been dismissed for default, the party aggrieved has a direct remedy by way

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

101. [Ss. 332 and 335.] Where the Court is satisfied that the applicant *Bona fide* claimant to be restored to possession. was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

102. [S. 333.] Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immoveable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

Notes.

of regular suit under O. 21, R. 103 and the *ex parte* order cannot be set aside and the application restored under S. 151 (47 C.L.J. 87, Dist.; 31 C.W.N. 576 and 45 C.L.J. 557, Ref.) 152 I.C. 24=59 C.L.J. 218=1934 C. 653 *Alternative reliefs.* In a petition deliberately filed under R. 100, the alternative prayer for relief under S. 47 cannot be entertained. 145 I.C. 174=1933 M. 482 R. 101 is applicable to proceedings under the Madras Estates Land Act by reason of S. 192 of the Estates Land Act 157 I.C. 1066=1935 M.W.N. 633=41 L.W. 623=1935 M. 309=68 M.L.J. 324.

SUIT—A person can file a regular suit without proceeding under this rule. 10 M. 53. A person dispossessed in execution of a decree against another is not bound to institute proceedings under this 27 M. 262 *See also* 5 M.L.J. 252 When dispossessed under this rule a mortgagee decree-holder purchaser cannot claim compensation. 63 I.C. 126=25 C.W.N. 756. Equities in favour of purchaser could be considered in the suit and not under this rule. 24 L.W. 389=97 I.C. 605=1926 M. 1127

APPEAL—No appeal lies from an order under this rule. 41 I.C. 891=57 P.R. 1917. But where the question is between the parties to the suit or their representatives, an appeal lies. 41 M.L.J. 54=63 I.C. 730; 144 I.C. 472=38 L.W. 199=1933 M. 569, 60 C. 832=37 C.W.N. 671=1933 C. 680.

PRACTICE AND PROCEDURE—In a petition under R. 100 it is a serious irregularity to ask decree-holder to begin his case and examine his witnesses and then to examine the witnesses of the claimant. It justifies interference in revision. 1931 M. 534=132 I.C. 301. An order on an application under R. 100 without allowing any oral evidence to be led by the parties, on the ground that there was sufficient documentary evidence on record, is illegal and is liable to be set aside in revision. Court should dispose of the matter only after allowing the parties to produce whatever evidence they desire, oral or documentary. 1935 A. 457=1935 A.L.J. 419=158 I.C. 33=1935 A.W.R. 328. Subsequent events after application can be taken notice of by Court and relief granted on the basis of such events. 37 C.W.N. 339=60 C. 685=145 I.C. 663=1933 C. 534. Mortgage

suit—Third party impleaded—Omission to raise available plea—Plea whether cannot be raised in execution. 60 C. 832=37 C.W.N. 671=1933 C. 680.

LIMITATION.—*See* 58 C. 55=132 I.C. 631=1931 C. 385.

O. 21, R. 101—An order under this rule is conclusive until displaced by a suit. 27 I.C. 29=1914 M.W.N. 897 But it does not affect a party's right to possession upon redemption. 54 I.C. 276=17 N.L.R. 33 When the execution is transferred to Collector, the Court has no power to act under this rule. But when Collector's power is exhausted, the Court which made the decree should act 38 B. 673=26 I.C. 266. No question of title can be investigated under this rule. 22 I.C. 707=19 C.L.J. 13 R. 101 is applicable to proceedings under the Madras Estates Land Act by reason of S. 192 of Act. 68 M.L.J. 324.

ON HIS OWN ACCOUNT.—A claimant in possession on his own account though without title is entitled to succeed under this rule. 98 I.C. 541=1927 C. 339. A mortgagee in possession is in possession on his own account. 2 A. 94. A member of a joint Hindu family cannot say that he is in possession of any particular portion of the joint property on his own account. 17 B. at 721 Possession by enjoyment and receipt of rent is enough 15 W.R. 70 But *see* 33 C. 487; 14 Pat.L.T. 573=1933 P. 581

LIMITATION—An order dismissing a claim must be challenged within one year. 45 M.L.J. 690=47 M. 160. *See also* 58 C. 55=132 I.C. 631=1931 C. 385.

APPEAL—S. 104 of the Code read with O. 43 shows that no appeal lies against an order under R. 101. Such an order may however be made the subject of revision. 16 R.D. 160.

REVISION.—An order under this rule cannot be rectified in revision as a remedy lies under R. 103. 129 P.L.R. 1911=10 I.C. 183; But *see* 58 C. 55, *infra*; 34 C.W.N. 577. *See also* 16 R.D. 160. The power conferred upon any party by R. 103 to institute a suit does not restrict the High Court from using its revisional powers to correct the errors or illegalities of subordinate Courts in proceedings under R. 101. *See* 58 C. 55=132 I.C. 631=1931 C. 385

O. 21, R. 102.—*See* 42 I.C. 523=6 L.W. 568.

103. [S. 335, para. 2.] Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive.

Loc. Ams.—[Allahabad.] Add the following Rules to O. 21—

"104 When the certificate prescribed by S. 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the results of execution to be entered in its register of Civil Suits before the papers are transmitted to the record room

Notes.

1926 M. 963=51 M.L.J. 256. R. 102 does not in terms apply to an involuntary sale. 157 I.C. 86=16 Pat.L.T. 220=1935 P. 230. When a party raises the question of *lis pendens* before the Court and wants the Court to decide the matter not upon the plain language of R. 102, but upon the general doctrine of *lis pendens*, the Court has to find out whether the decree is collusive or not. And if the Court decides that the decree was collusive, it cannot be interfered with in revision as being without jurisdiction. 157 I.C. 86=16 Pat.L.T. 220=1935 P. 230

O. 21, R. 103.—The rule is intended to deprive the claimant of his remedy by way of an appeal or application for revision to a higher Court, and to declare that the adverse order shall be conclusive against the claimant, subject however to the result of any suit which he may file to establish his claim to the 'present possession of the property' which is the subject-matter of the order passed against him. The rule goes no further than that and the claimant is not required to file a suit for setting aside the adverse order passed against him, but to establish his right. 156 I.C. 702=1935 S. 129 This rule applies only where an order under Rr. 98, 99 or 101 has been passed. 69 I.C. 557=1923 L. 145. See also 132 I.C. 844=1931 L. 686. The orders referred to do not refer to those passed without investigation and not on the merits. 23 N.L.R. 94=97 I.C. 178=1926 N. 423 The rule is confined to suits for possession by purchaser under his purchase. It does not bar suits based on other causes of action. 30 C.W.N. 163=42 C.L.J. 578 But see 53 B. 668=31 Bom.L.R. 765=1929 B. 379. This rule applies where strangers are involved and S. 47 where the parties in the suit are involved. 41 M.L.J. 54=63 I.C. 730 See also 39 M.L.T. 281. The word "party" means party to the petition and to the execution. 43 M. 696=39 M.L.J. 456 See also 102 I.C. 446=8 Pat.L.T. 654 Right of suit—Plaintiff purchasing property during pendency of partition suit—Defendants subsequently purchasing same property from party to whom it is allotted by final decree—Dismissal of plaintiff's objection under R. 100 in execution proceedings by defendants. Held, in suit by plaintiff under R. 103, that his proper course was to proceed under S. 47, and the plaintiff had no *locus standi* to maintain an application under R. 100 and his suit under R. 103 was also not maintainable. 148 I.C. 731=1934 L. 457 Symbolical delivery does not amount to dis-

possession. 1 L.W. 31=24 I.C. 771. A transfer by vendee from the defendant is valid in the absence of an order preventing the vendee from disposing of the property pending the suit. 89 I.C. 990=1925 B. 413.

SUIT.—The scope of a suit under R. 103, is not the determination of merely the question of possession, but the establishment of the right or title by which the plaintiff claims present possession of the property. 36 Bom. L.R. 1074. In a suit under this rule the claimant is not confined to a mere declaration of his right it is open to him to seek consequential relief by way of possession. 156 I.C. 702=1935 Sind 129 A person who, claiming through the judgment-debtor, resists the decree holder purchaser in taking possession cannot be heard to say that the decree on which the suit under R. 103 is based was without jurisdiction. 64 C.L.J. 115=41 C.W.N. 396=1937 Cal. 88. A person whose application under R. 100 is dismissed has a statutory right of suit under R. 103, and it makes no difference that he did not prefer an objection under R. 58. 132 I.C. 201=1931 L. 598. In a suit under this rule the plaintiff's title alone and not the mode in which or the point of time at which the ouster took place is material. 161 C. 741=18 C.W.N. 473. Where a claim was not treated as a suit, but the question was treated as an interlocutory proceeding, an order will not operate as *res judicata* in any subsequent proceeding. 44 M.L.J. 443=72 I.C. 582=1923 M. 514. Where the decree-holder sells his own property by mistake, his only remedy is by suit. 15 L.W. 272=1922 M. 63. On this rule see also 132 I.C. 844=1931 L. 686

PARTIES.—R. 103 does not purport to lay down what may or may not be included in a suit filed for the purpose indicated therein, or what persons may be impleaded as parties to such a suit. 156 I.C. 702=1935 Sind 129; judgment-debtor is not a necessary party to a suit under this rule (*Ibid.*).

FORUM.—The suit can be instituted only in the Court within whose jurisdiction the property lies. 6 Bom.L.R. 301 The proof required in the suit is not that of actual present possession merely, but includes a right to present possession as well. 44 M. 227=39 M.L.J. 626.

MATTERS TO BE DETERMINED IN SUIT.—In a suit by the execution purchaser for partition and separate possession of the property purchased by him, the defendant resister is precluded from re-agitating the questions which he has put forward and which have been

105 Every attachment of moveable property under R. 43, of Negotiable Instruments under R. 51, and of immoveable property under R. 54, shall be made through a Civil Court Amin, or Bailiff, unless special reasons render it necessary that any other agency should be employed, in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

106 When the property which it is sought to bring to sale is immoveable property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decree-holder shall file with his application a certificate from the Sub-Registrar within whose sub-district such property is situated, showing that the Sub-Registrar has searched his Book Nos I and II and their indices for the past twelve years and stating the encumbrances, if any, which he has found on the property [See 1930 A. 188.]

Notes.

adjudicated upon in the obstruction proceedings. So far as the conclusiveness enacted in the final part of R. 103 is concerned, it makes no difference whether the questions are sought to be re-agitated by a person as plaintiff or as defendant. But it will be going too far if it were held that every issue sought to be raised must be taken to be precluded by R. 103. Issues which could not be raised in the obstruction proceedings such as one which attacks the validity of the decree in execution of which the proceedings arose, can be raised in the suit and are not precluded by R. 103. 45 L.W. 91=1937 Mad 366= (1937) 1 M.L.J. 122. See also 1937 C. 88.

PROPERTY ATTACHED AND SOLD JOINTLY OWNED BY JUDGMENT-DEBTOR AND HIS WIFE.—PURCHASER'S RIGHT TO POSSESSION.—The property attached was joint property of the judgment-debtor and his wife and only the judgment-debtor's interest therein was attached and sold in execution proceedings and the extent of that interest was not determined. *Held*, it was not possible to hand over any portion of the property to the decree-holder-purchaser as being the share of the judgment-debtor. The judgment-debtor's interest must first be divided off. 1935 R. 11=154 I.C. 1045.

APPEAL.—In a suit under R. 103, C.P. Code, against the Official Receiver representing the estate of an insolvent, a decree was passed in favour of the plaintiff. The official Receiver did not prefer an appeal. The appellant, who was one of the creditors of the insolvent, represented by the Official Receiver in the trial Court, presented an appeal against the decree in so far as it related to the Official Receiver and in application for leave to appeal against that decree on behalf of himself and the general body of creditors of the insolvent. *Held*, that appeal was not competent, nor was it a proper case for grant of leave. 57 M. 670=150 I.C. 538=39 L.W. 624=1934 M. 360=66 M.L.J. 532.

REVISION.—Order on application under R. 100.—Revision.—Competency.—Grounds for interference. 44 L.W. 703. If an appeal is wrongly entertained against an order under this rule the appellate Court acts without jurisdiction, and the case is clearly one for revision by High Court, which has power to interfere either under the appellate jurisdiction or revisional jurisdiction.

tion. Even if a second appeal is not competent, High Court will interfere in revision. 165 I.C. 986=17 Pat L.T. 815=1937 Pat. 136.

LIMITATION.—The suit must be filed within one year from the date of the order. Art. 11, Limitation Act, applies. See 9 M.L.J. 131; 44 A. 607, 10 B. 604; 26 B. 730; 1 L. 57, 34 C. 491; 27 M. 25; also 103 P.L.R. 1916=36 I.C. 211. Not only is a suit barred, but defence will also be barred after the prescribed time. 38 I.C. 216. But if an order for delivery was not enforced, the defence can be raised at any time to such a suit. 45 I.C. 24=23 M.L.T. 233. A mortgagee whose claim has been rejected can sue after the lapse of one year. 29 C. 25. Dismissal for default of an application under R. 101 is not an order on merits and so limitation for suit does not start from the date of the dismissal. 45 I.C. 102=14 N.L.R. 66. As to appeal, see 90 I.C. 952=1925 M. 1198.

PRACTICE AND PROCEDURE.—AMENDMENT OF PLAINT.—The suit to establish the right to possession contemplated by R. 103 is not one under S. 9 of the Specific Relief Act. Where suit is erroneously framed under the latter provision, the Court may in a proper case permit the party to amend the plaint so as to convert it into an ordinary suit for possession. 1932 A.L.J. 812=139 I.C. 366=1932 A. 703. The proviso to S. 42, Specific Relief Act, does not take away special right conferred by this rule. Plaintiff suing under this rule for declaration of his title need not ask for possession also. 151 I.C. 59=17 N.L.J. 24=1934 N. 169.

COURT-FEE.—O. 21, R. 103 enables a suit to be filed on a Court-fee of Rs 20 for possession, by a person who has been dispossessed in execution of a decree to which he is not a party, and whose application under R. 100 has been disallowed. Though the plaint does not purport to be filed under R. 103, when the plaint contains the necessary allegations the suit can be held to be one under the rule. It is the substance rather than the form of the suit which should be considered in determining the nature of the suit. 1935 A.M.L.J. 107.

O. 21, R. 105 (All).—The provision in R. 105, for recording the reasons for employing an agency other than an amin or a bailiff for making an attachment is not mandatory but directory. An order, therefore, for the appointment of a vakil to make an attachment is a good order and the attachment is

107 Where an application is made for the sale of land or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No 1887-1-238-10, dated 7th October, 1911, of the Local Government, and shall fix a date for determining the said question. On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence by affidavit or otherwise, as it may deem necessary, and may also call for a report from the Collector of the District as to whether such land or any portion thereof is ancestral land. After considering the evidence and the report, if any, the Court shall determine whether such land, or any, and what part of it, is ancestral land. The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

108 When the property which it is sought to bring to sale is revenue paying or revenue free land or any interest in such land, and the decree is not sent to the Collector for execution under S 68, the Court, before ordering a sale, shall also call upon the Collector in whose district such property is situate to report whether the property is subject to any (and, if so, to what) outstanding claims on the part of Government.

109. The reports of the Sub-Registrar and Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry. No fees are payable in respect of the report by the Collector.

110. The result of the enquiry under R. 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may in its discretion adjourn the inquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the enquiry. [See 1932 A 55.]

111. If after proclamation of the intended sale has been made any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

112 The costs of the proceedings under Rr 66, 106 and 108 shall be paid in the first instance by the decree-holder, but they shall be charged as part of the costs of the execution unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

113 Whenever any Civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a Military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such cantonment or station for his information and for record in the brigade or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

114. Whenever guns or other arms in respect of which licences have to be taken by purchaser under the Indian Arms Act (XI of 1878) are sold by public auction in execution of decrees by order of a Civil Court, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

115. When an application is made for the attachment of livestock or other movable property, the decree-holder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period or fifteen days, the amount of such costs for such further period as the Court may direct be not paid into Court, the Court, on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

116 Livestock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security, or in that of some land-holder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

Notes.

not illegal or without jurisdiction, notwithstanding the fact that the Court has omitted to record the reasons in the order appointing him. 154 I.C. 631=1935 A.L.J. 367=1935 A.W.R. 206=1935 A 490

O. 21, R. 107 (Oudh).—An appeal is allowed under R 112 against an order of a Civil Court proceeding under R. 107. No

right of second appeal is allowed under the Code 160 I.C. 42=1936 O.W.N. 114=1936 Oudh 167.

O. 21, R. 112 (Oudh).—An appeal is allowed under this rule against an order of a Civil Court proceeding under Rule. 107 (Oudh). No right of second appeal is allowed. 160 I.C. 42=1936 O.W.N. 114=1936 Oudh 167.

117. If the custody of livestock cannot be provided for in the manner described in the last preceding rule, the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871, and committed to the custody of the pound-keeper, who shall enter in a register—(a) the number and description of the animals; (b) the day and hour on and at which they were committed to his custody, (c) the name of the attaching officer or his subordinate by whom they were committed to his custody and shall give such attaching officer or subordinate a copy of the entry.

118. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues according to the scale prescribed under S. 12 of Act (I of 1871). And the sums so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sums shall be applied in the same manner as fines levied under S. 12 of the said Cattle Trespass Act.

119. The pound-keeper shall take charge of, feed and water animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be, from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule, not exceed the rates for the time being fixed under S. 5 of the same Act. In any case for special reasons to be recorded in writing the Court may require payment to be made for maintenance at higher rates than those prescribed.

120. The charges herein authorized for the maintenance of livestock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

121. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court, or of the attaching officer, or of the officer appointed to conduct the sale, the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in R. 118 [See 134 I.C. 836=1931 A.L.J. 865=1931 A. 567 (F.B.).]

122. For the safe custody of movable property other than livestock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical [See 134 I.C. 836=1931 A.L.J. 865=1931 A. 567 (F.B.).]

123. With the permission of the Court the attaching officer may place one or more persons in special charge of such property [See 134 I.C. 836=1931 A.L.J. 865=1931 A. 567 (F.B.).]

124. The fee for the services of each such persons shall be payable in the manner prescribed in R. 116. It shall not be less than four annas, and shall ordinarily not be more than six annas per diem. The Court may at its discretion allow a higher fee; but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

125. When the services of such person are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding judge: Provided that, where the amount does not exceed Rs. 5, it may be paid to the *sahib* by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with.

Notes.

O. 21, R. 122 (Allahabad).—Where a Commissioner appoints a *supurdar* and entrusts him with the custody of movable property and the action taken by the Commissioner meets with the approval of the Court, the responsibility for the safe custody of the property shifts on to the *supurdar*, notwithstanding the fact that the Commissioner did not obtain the previous permission of the Court to appoint him. 154 I.C. 711=1935 A.L.J. 824=1935 A. 737.

O. 21, R. 124 (Allahabad).—An order by the executing Court calling upon the decree-holder to pay a certain sum of money to a custodian or *supurdar* by way of fees paya-

ble under R. 124, as amended by the Allahabad High Court, is not without jurisdiction. It is the execution Court only which can settle the fee which is to be paid to the custodian under the rule, and it is only the decree-holder, as the person who has got the property attached, that can be called upon to pay the fee. 1937 A.W.R. 141=1937 A.L.J. 160.

O. 21, R. 125 (Allahabad): SCOPE.—There is no provision in R. 125 or in any other part of O. 21, authorising the executing Court to adjudicate on a dispute between the decree-holder and his *shahnas*. It has to be decided in a separate suit. 152 I.C. 932=1935 A.L.J. 78=1935 A. 102.

126. When in consequence of an order of attachment being withdrawn or of some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

127. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Re-payments

128. When any sum levied under R. 115 is remitted to the Treasury, it shall be accompanied by an order in triplicate (in the form given as Form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury Officials to the District or Municipal Board, as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass-book.

129. The cost of repairing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decree-holder to the attaching officer. In the event of the decree-holder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

130. Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment-debtor simultaneously the notice required by O. 21, Rr. 22, 66 and 107

Garnishee Orders

131. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court) or any movable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt or to deliver or account for such movable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of the execution

132. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution, and does not dispute his liability to pay such debt or deliver such moveable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice and on such order execution may issue as though such order were a decree against him

133. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit; and upon the determination of such issue shall pass such order upon the notice as shall be just.

134. Whenever in any proceedings under these rules it is alleged, or appears to the Court to be probable, that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or interest in, it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

135. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable

136. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realized although such order or the judgment may be set aside or reversed

137. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction. Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served

Notes.

O. 21, R. 131 (Allahabad).—Mortgage money left by the mortgagor with the mortgagee, out of the consideration for a possessory mortgage deed executed by him, for

payment to his creditor, is not a debt as contemplated in R. 131, and cannot be attached in execution of a decree against the mortgagor. 1934 A.L.J. 893=1934 A. 954

Explanation—Although the rates indicated above are regarded as reasonable the Courts should consider individual circumstances and the local conditions and permit deposit at reduced rates where the actual expenses are likely to fall short of the minima or maxima. If any specimen of special value in any of the above classes is seized a special rate may be fixed by the Court. If any animal not specified is attached, the Court may fix the cost as a special case.

3 Where the property attached consists of agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the proviso to R. 43, O. 21, he may, unless the Court has otherwise directed, leave it in the village or place where it has been attached—

(a) in the charge of the judgment-debtor or decree-holder or of some other person, provided that the judgment-debtor, decree-holder or other person enters into a bond in Form No. 15-A of Appendix E to this schedule with one or more sureties for the production of the property when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of fifteen days paid in advance.

4 If attached property (other than livestock) is not sold under the proviso to R. 43, of O. 21, or retained in the village or place where it is attached, it shall be brought to the Court-house at the decree-holder's expense and delivered to the proper officer of the Court. In the event of the decree-holder failing to make his own arrangement for the removal of the property with safety, or paying the cost thereof in advance to the attaching officer, then, unless such payment has previously been made into Court, the attachment shall at once be deemed to be withdrawn and the property shall be made over to the person in whose possession it was before attachment.

5. When livestock is attached it shall not, without the special order of the Court, be brought to the Court or its compound or vicinity, but shall be left at the village or place where it was attached in the manner and on the conditions set forth in R. 3 of this Order.

Provided that livestock shall not be left in the charge of any person under cl. (a) of the said rule unless he enters into a bond for the proper care and maintenance thereof as well as for its production when called for, and that it shall not be left in charge of an officer of the Court under cl. (b) of the said rule unless in addition to the requirements of the said clause provision be made for its care and maintenance.

6. When for any reason, the attaching officer shall find it impossible to obtain compliance with the requirements of the preceding rule so as to entitle him to leave the attached livestock in the village or place where it was attached and no order has been made by the Court for its removal to the Court, the attaching officer shall not proceed with the attachment and no attachment shall be deemed to have been effected.

7. Whenever it shall appear to the Court that livestock under attachment are not being properly tended or maintained, the Court shall make such orders as are necessary for their care and maintenance and may if necessary direct the attachment to cease and the livestock to be returned to the person in whose possession they were when attached. The Court may order the decree-holder to pay any expenses so incurred in providing for the care and maintenance of the livestock and may direct that any sum so paid, shall be refunded to the decree-holder by any other party to the proceedings.

8. If under a special order of the Court livestock is to be conveyed to the Court, the decree-holder shall make his own arrangement for such removal and if he fails to do so, the attachment shall be withdrawn and the property made over to the person in whose possession it was before attachment.

9 Nothing in these rules shall prevent the judgment-debtor or any person, claiming to be interested in attached livestock from making such arrangements for feeding, watering and tending the same as may not be inconsistent with its safe custody, or contrary to any order of the Court.

10 The Court may direct that any sums which have been legitimately expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the sale proceeds of the attached property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

11. In the event of the custodian of attached property failing, after due notice, to produce such property at the place named to the officer deputed for the purpose or to restore it to its owner if so ordered or failing in the case of livestock to maintain and take proper care thereof, he shall be liable to be proceeded against for the enforcement of his bond in the execution proceedings.

12. When property other than livestock is brought to the Court, it shall immediately be made over to the Nazir, who shall keep it on his sole responsibility in such place as may be approved by the Court. If the property cannot from its nature or bulk be conveniently

stored, or kept on the Court premises or in the personal custody of the Nazir, he may subject to the approval of the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical. If any premises are to be hired and persons are to be engaged for watching the property, the Court shall fix the charges for the premises and the remuneration to be allowed to the persons (not being officers of the Court) in whose custody the property is kept. All such costs shall be paid into Court by the decree-holder in advance for such period as the Court may from time to time direct.

13. When attached livestock is brought to Court under special order as aforesaid it shall be immediately made over to the Nazir, who shall be responsible for its due preservation and safe custody until he delivers it up under the orders of the Court.

14. If there be a pound maintained by Government or local authority in or near the place where the Court is held, the Nazir shall, subject to the approval of the Court, be at liberty to place in it such livestock as can be properly kept there, in which case the pound-keeper will be responsible for the property to the Nazir and shall receive from the Nazir the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

15. If there be no good pound available, or, if in the opinion of the Court, it be convenient to lodge the attached livestock in the pound, the Nazir may keep them in his own premises or he may entrust them to any person selected by himself and approved by the Court.

16. All costs for the keeping and maintenance of the livestock shall be paid into Court by the decree-holder in advance for not less than fifteen days at a time as often as the Court may from time to time direct. In the event of failure to pay the costs within the time fixed by the Court the attachment shall be withdrawn and the livestock shall be at the disposal of the person in whose possession it was at the time of attachment.

17. So much of any sum deposited or paid into Court under these rules as may not be extended shall be refunded to the depositor.

[Lahore and Patna.] Rule 104. For the purpose of all proceedings under this Order service on any party shall be deemed to be sufficient if effected at the address for service referred to in O. 8, R. 11, subject to the provisions of O. 7; R. 24, provided that this rule shall not apply to the notice prescribed by R. 22 of this Order.

[Oudh.] Added by Oudh Chief Court O. 21, Rr. 104-114

104. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a Revenue Court), or any movable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such movable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into the Court the debt due from or the property deliverable by him to such judgment-debtor or so much thereof as may be sufficient to satisfy the decree and the cost of execution.

105. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver such movable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

106. If the garnishee disputes his liability, the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and upon the determination of such issue shall pass such order upon the notice as shall be just.

107. Whenever in any proceedings under these rules it is alleged or appears to the Court to be probable, that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

108. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

109 Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realised although such order or the judgment may be set aside or reversed.

110 Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction.

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be sufficient appearance by the firm.

111 The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

112. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by sub-rule (1) shall be appealable as orders made in execution.

Illustration—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

113 All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under O 7 or O 8 shall apply to all proceedings taken under O 21 or S. 47.

114 The following form shall be used under the provisions of R. 104 of O 21—

Execution Case No

of 19 .

Decree-holder

versus

Judgment-debtor

To

WHEREAS it is alleged that a debt of Rs is due from you to, the judgment-debtor

Or that you are liable to deliver to the above-named judgment-debtor the property set forth in the schedule hereto attached, take notice that you are hereby required on or before the day of 19 , to pay into this Court the said sum of Rs to deliver, or account to the Nazir of this Court for the movable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this day of 19

Munsif
Subordinate Judge
At

ORDER XXII.

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES.

No abatement by party's death if right to sue survives. 1. [S. 361.] The death of a plaintiff or defendant shall not cause the suit to abate if the right to sue survives.

Notes.

O. 22. SCOPE—O. 22 is confined to question of the continuance of suit by virtue of devolution of the deceased's right to sue on other persons during pendency of the suit. But there may be cases in which suit can be continued by other persons who have an independent right to sue on same cause of action. 31 Punj.L.R. 973=1931 L. 79 (2)=12 L. 275=1931 L. 79. If, after an appeal is filed in a Court which has no jurisdiction to entertain it, a respondent dies and his L. Rs are not brought on record, no question of abatement arises. Question of abatement can only arise

when the appeal is pending in a Court having jurisdiction to entertain it 152 I.C. 939=1935 A 92=4 A.W.R. 1460 (Rev.) Non-compliance with procedure laid down in O 22, would not involve want of jurisdiction, but would be a mere irregularity so long as the decree is passed between living persons 133 I.C. 303=1931 A 746 Under O 22 an application is necessary to bring on record the L. R. of a deceased party and Court cannot proceed out of its own accord to ascertain who the heirs are and bring them on record; 151 I.C. 755=1934 A.I.J. 16=1934 A. 465. Rules of abatement laid down in O. 22 apply to

Notes.

appeals against orders on the execution side. 55 M. 1006=1932 M. 574=63 M.L.J. 827; 1935 A. 27=154 I.C. 920=4 A.W.R. 1025.

APPLICATION OF RULE—O 22 applies to jounder of L R of a person who is properly on record and dies pending the suit or appeal as the case may be but not to the case where a person is dead long before suit or appeal. 26 S.L.R. 362=1932 S. 220 *Quære*.—Whether on death of the manager of a Hindu joint family his sons should be brought on record in accordance with the provisions of O 22. 145 I.C. 164=35 Bom.L.R. 388=1933 B. 245. O. 22 cannot be applied to a case instituted or defended by a few persons on behalf of numerous persons not on record under O. 1, R. 8, or to suit instituted under S. 92 168 I.C. 113=17 Pat. L. T. 926=1937 P. 149 O. 22 has no application to *applications for leave to appeal to Privy Council* (4 I.C. 454, Ref.) 28 S.L.R. 150=148 I.C. 819=1934 S. 36 O. 22, under which substitution proceedings are taken is *not applicable to execution proceedings*. A decree-holder has an absolute right to execute the decree for the benefit of himself and other decree-holders and if any one of the other decree-holders dies, it is not strictly necessary that his heirs should be brought on the record. 4 A.W.R. 1025. Proceedings in appeal from any decree or order in proceedings in execution are not proceedings in execution and they are proceedings in appeal and R. 11 of O 22, makes the whole of O. 22, *applicable to appeals*. 150 I.C. 425=11 O.W.N. 917=1934 O. 337. See also 55 M. 1006=63 M.L.J. 827. The provisions of O. 22 about a batement of suits and appeals do not apply to *applications for revision*. 144 I.C. 883 (2)=1933 S. 200.

O. 22, R. 1: SCOPE OF RULE.—In order to work abatement of a suit or appeal it is not necessary for the Court to pass any order. 48 A. 334=93 I.C. 313=1926 A. 217 Rules 1 to 10 do not contemplate the representatives of judgment-debtor being placed on record after the appellate decree has been passed. 18 B. 224. The cause of action of the original and revived suit must be the same, and no fresh cause of action can be imported into the revised suit. 22 C. 92 (97) Substitution of L R. of a deceased plaintiff or defendant at one stage of a suit, as for instance, on an appeal from an interlocutory order in the suit, is effective for all future stages of the suit. 45 C. 94=33 M.L.J. 486=44 I.A. 218(P.C.); 1928 L. 784. A suit ordinarily abates only against the deceased defendant, unless there are circumstances which would cause an abatement as against one to operate as an abatement against all. 18 R. D. 553=15 L.R. 667 (Rev.); 155 I.C. 602=1935 A.L.J. 509=1935 A. 640; 164 I.C. 971=1936 L. 578 A suit for ejectment of several defendants who are collaterals of the deceased tenant by reason of the death of one defendant who is a remoter collateral than the surviving defendants, because the latter who are nearer than the deceased have precedence (*Ibid.*) Where in appeal in a suit brought in a representative

capacity one of the original plaintiffs dies, the surviving plaintiffs are competent to prosecute the appeal. 37 P.L.R. 85. So also in suits instituted with leave under O. 1, R. 8, C. P. Code. 39 C.W.N. 303=60 C.L.J. 556=1935 C. 413. The fact that an application by appellant for setting aside the fancied or imaginary abatement has been dismissed does not affect the competency of the appeal. (*Ibid.*) When in an appeal against a decree dismissing suit, one of the appellants and one of the respondents die pending appeal, and all heirs of the deceased appellant and respondent are already on record, the case is governed by R. 2 of O. 22, and not by Rr 3 and 4; no application for substitution is therefore necessary in such a case. Appeal cannot therefore abate by reason of the omission to apply for substitution. 15 P. 326=17 Pat. L. T. 584=1936 P. 548. Even if it be that there are other heirs of deceased appellant besides those on record there cannot be a total abatement of the appeal, when the shares or interests of several appellants are separate. The surviving appellants, if successful, will get a decree to the extent of their shares. (*Ibid.*)

RIGHT TO SUE—This is based upon facts which go to make up what is called "the cause of action" 22 C. 92. It includes a "right to appeal", and "a right to prosecute by law or to obtain relief by means of legal procedure". 26 B. 597 at 599 and 607, 33 I. C. 45=38 M. 1064, 9 Bur.L.T. 38=34 I.C. 249. See also 74 I.C. 14, 50 C. 650=74 I.C. 929=27 C.W.N. 621. The words "if the right to sue survives" mean, if the cause of action survives or continues. 26 B. at 599 See also 2 Luck. 464=4 O.W.N. 235=1927 O. 156; 104 I.C. 308=1927 N. 343.

BURDEN OF PROOF as to survival of right to sue is on the person desiring to prosecute the suit or appeal. 48 A. 630=24 A.L.J. 796=1926 A. 610.

ILLUSTRATIVE CASES.—When the cause of action against the deceased defendant is based on a *tort or breach of contract* of personal service, and the deceased has not left any personal assets, the right to sue does not survive. 8 M.L.J. 180. See also 9 Bur.L.T. 38=34 I.C. 249 (action for slander), 62 P.R. 1915=28 I.C. 455 (action for personal injuries) See also 48 A. 630 Death of one *joint tort-feasor* does not cause the suit to abate as against the other tortfeasors. 1930 L. 709=120 I.C. 9. Personal right does not abate after decree. 59 I.C. 939; 1929 L. 807=11 L. 1 Decree is properly capable of inheritance. (*Ibid.*) Actions which are not personal to the plaintiff survive after the death of minor plaintiff (as, suit by minor repudiating will of father). 27 I.C. 396=27 M.L.J. 674; 33 C. 1163 The right to an *office as mahant* is purely personal and comes to an end on the death of the person claiming it. 12 L. 1=125 I.C. 891=1930 L. 703 (2) Right to sue *in forma pauperis* is a personal right and does not survive to the heirs of the pauper. 64 I.C. 63; as also a *suit for damages* for breach of contract of marriage. 44 B. 446=55 I.C. 624. The cause of action in a

Notes.

suit by a father for the *custody of his minor children*, who are in the custody of the defendant does not survive against the widow of the deceased defendant. 25 B. 574. When a submission to *arbitration* has been made a rule of Court, and the right is one which is not personal the proceedings do not abate by reason of the death of a party. In such cases the procedure laid down in R. 5 should be followed. 13 M.L.J. 311. When a defendant in a suit for damages for *wrongful arrest and malicious prosecution* dies pending suit, the suit abates. 13 B. 677; 65 I.C. 66, 4 P.L.J. 676=52 I.C. 348; 38 I.C. 823=31 M.L.J. 772. See also 49 M. 208=92 I.C. 366=50 M.L.J. 34. Suit to enforce right to a *pala* or *worship* does not abate on the death of the *paladar* as the cause of action is not merely of a personal nature. 53 C. 132=30 C.W.N. 389=1926 C. 490; 34 I.C. 4 (suit by manager of *joint Hindu family*—No survival to other members). See also 145 I.C. 164=35 Bom.L.R. 388=1933 B. 245. Suit under S. 92, C. P. Code—Death of one of the plaintiffs obtaining sanction. Neither the suit nor an appeal therefrom abates. 47 M.L.J. 745=1925 M. 214, 48 C. 493=48 I.A. 12 (P.C.). See also 37 P.L.R. 85. If in a *defamation suit* plaintiff gets a decree, and the defendant appeals but dies before the hearing of the appeal, the appeal does not abate and his son can be placed on the record. 26 B. 597. See also 26 M. 499 and 9 A. 131 (F.B.); 31 C. 90; 34 I.C. 249=9 Bur. L.J. 38. As to second appeal, see 62 P.R. 1915=28 I.C. 455. As to suits by *Hindu reversioners* declaratory suit by one survives to next reversioners. See 38 M. 406=42 I.A. 125 (P.C.). [The following are not good law.—22 M.L.J. 375=15 I.C. 213; 16 I.C. 865=12 M.L.T. 664, 15 I.C. 461=23 M.L.J. 719, 27 M. 588. See now the Full Bench case, 41 M. 659=35 M.L.J. 57 (F.B.) See further 18 I.C. 329=65 P.R. 1913.] Suit by unmarried daughter as plaintiff—Right to sue survives to her married sisters. 38 A. 111=32 I.C. 104=14 A.L.J. 8. In *joint Hindu family*, surviving members represent the deceased member. 33 I.C. 123=14 A.L.J. 255. See also 145 I.C. 325=1933 P. 270. Hindu limited owner—Suit by—Death of plaintiff—Right of *reversioners* to continue suit. See 32 P.L.R. 712=1931 L. 675, 134 I.C. 771=1931 L. 293 (continuance of suit depends not on the qualifications of the person claiming to be the representative of the deceased, but on the nature of the suit). Malabar *Tarwad*—Suit by *Karnavan* and some other members complaining of mismanagement by *Anandravan*. On *Karnavan* dying and defendant becoming *Karnavan*—Other plaintiffs can continue suit. See 49 M.L.J. 691=1925 M. 894. Application for *letters of administration* by residuary legatee does not survive to his heirs. 31 I.C. 76=45 C. 862. The rule of joint ownership and survivorship as understood by the Benares School of Hindu Law does not apply to *Jat agriculturists*. They enjoy the family property as tenants in common and share of each is capable of separation and division. Where therefore one of

five *Jat* brothers, owning certain property, transfers it and the brothers institute a suit for its possession and during the pendency of the suit one of the brothers dies but his L.R. is not brought on record, the suit abates only as regards the share of the deceased brother and does not abate as a whole. 164 I.C. 971=1936 L. 578. Right to be appointed guardian of *reversioner*, if survives to his son. See 116 P.L.R. 1917=42 I.C. 410. In a suit for a declaration that defendant is not lawful wife of plaintiff, the cause of action does not survive. 52 I.C. 545=87 P.P. 1919. Where there is only an application for leave to sue *in forma pauperis* and the applicant dies before leave is granted, the right to sue as a pauper being a personal right cannot survive. 53 C. 1163. See also 64 I.C. 63. When an agent suing on behalf of an *undisclosed principal*, dies pending the suit, suit should after the death of the agent be continued, if at all, by the agent's representative, and not by the principal. 17 M.L.J. 116. Where pending a suit filed by a *partner* on behalf of a firm he dies, there is no question of abatement at all. 93 I.C. 144=1926 A. 351. As to principles governing survival of cause of action in *suits founded on torts* (as) for damages for malicious prosecution, see 49 M. 208=1926 M. 243=50 M.L.J. 34. *Representative suit* by some proprietors which could be brought by any of them does not abate on death of one proprietor. 120 I.C. 543=1930 L. 282. See also 37 P.L.R. 85. If the suit is a representative suit the death of some of the plaintiffs would not result in the abatement wholly or in part of the suit (1931 L. 167, Rel. on, 1930 L. 353 and 1931 P. 17, Dist., 1930 L. 515, Ref.) 146 I.C. 141=34 P.L.R. 1035=1933 L. 654.

PARTITION SUIT—DEATH OF MINOR PLAINTIFF—RIGHTS OF HEIRS TO CONTINUE—Where a *minor plaintiff* dies during the pendency of a *suit for partition* instituted on his behalf, his L.Rs. are not entitled to continue the suit, for the rule that the institution of a partition suit effects a severance of the joint status of the family is not applicable to a suit filed on behalf of a minor, as in such a suit it is for the Court to determine whether a decree for partition will be beneficial to the minor. 152 I.C. 715=36 Bom.L.R. 738. But see 65 M.L.J. 630 (F.B.) *infra*. The suit did not abate in such a case but the Court should proceed with the trial of the suit, and if it should come to the conclusion on the evidence that the suit as instituted was for the benefit of the minor, it should pass a decree, the benefit of which will go to the legal heirs of the deceased minor; hence the mother who instituted the suit on behalf of the minor could bring herself on record and ask for a decision on the issue whether the suit would be for the benefit of the minor. (41 M. 442, Diss., 1930 M. 486, Appr.) 146 I.C. 269=1933 M. 890=65 M.L.J. 630 (F.B.). But see 36 Bom.L.R. 738 *supra*.

TEMPLE COMMITTEE.—A Committee appointed by the Government under S. 7 of the Religious Endowments Act (XX of 1863) is

2. [S. 362.] Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the

Procedure where one of several plaintiffs or defendants dies and right to sue survives.

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ipso facto dissolved on the death of one of its members pending the suit and the suit can be continued by the surviving members of the Committee (39 C 304, Ref.) 61 C 80=149 I.C. 1215=38 C.W.N. 214=1934 C 328.

O. 22, R. 2: SCOPE OF.—See 14 I.C. 544=11 M.L.T. 409; 39 C.W.N. 303. (See also notes under O. 21, R. 1, *supra*) As to what is meant by *right to sue*, see under R. 1. A legal representative must continue the litigation on the cause of action sued upon and cannot set up her own individual right. 99 I.C. 160=1927 N. 162. The rule does not apply to proceedings in Mamlatdar's Courts. 17 B. 645; 6 W.R. 2, Ref., 27 B. 284; 30 M. 67, 10 C.W.N. 891. Appeal against decree for rent. One of the plaintiffs who is a respondent dies. Heirs not added—*Held*, appeal should be dismissed 10 C.W.N. 891. It cannot be said that the word “survive” in O. 22, R. 2 is used in the technical sense of accrual of rights by survivorship. The word is used in its ordinary sense of outliving. 11 I.C. 537=1929 S. 225. The rule is not confined in its application to cases in which the right to sue survives against the surviving defendants by reason of some circumstances antecedent to the suit. 4 C.L.J. 568; 11 C.W.N. 186. In a suit against a dead man, substitution of legal representatives is a nullity 25 Bom.L.R. 7=1924 B. 109, 51 I.C. 160. Suit instituted against dead man and other persons—Interest of dead man devolving on other defendants—Suit can be proceeded with. 30 Punj.L.R. 259=117 I.C. 899=1929 L. 440 (1). Scheme suit does not abate on death of original plaintiff 48 C. 493 (P.C.), 47 M.L.J. 745=85 I.C. 666. See also 47 M.L.J. 745. Appeal decreed in ignorance of appellant's death—Decree is nullity. 27 Bom. L.R. 91=1925 B. 290. If an appeal against several respondents abates against all, if their interests cannot be discriminated, 64 I.C. 49. See also 54 I.C. 396=30 C.L.J. 203 (co-sharers), 27 C. 417, 25 C.L.J. 469, *Foil*; 51 I.C. 409=29 C.L.J. 461 (co-shebaits); 47 I.C. 638=28 C.L.J. 201 (co-sharer landlords). See also 33 I.C. 1006=29 P.W.R. 1916; 94 I.C. 300=1925 L. 474; 91 I.C. 558 (L.). Appeal by one of several co-defendants—Other co-defendants impleaded as respondents—Death of sole appellant—Appeal abates—Right to sue does not survive to co-defendants who were made respondents in appeal. 53 A. 521=1931 A.L.J. 266=1931 A. 349. Brothers instituting joint suit—Death of one brother without impleading sons of deceased—Not legal 15 R.D. 27. See also 1934 P. 559. It would be otherwise if the liability of each of the defendants or respondents be separately ascertained 1 R. 618=1924 R. 127.

See also 152 I.C. 289=1934 P. 559. In case of several joint tort-feasors on death of one cause of action survives against others. 106 P.R. 1915=32 I.C. 18. Delay in bringing L. Rs. on record may be excused in a proper case. 74 I.C. 912=1924 P. 319. Where L. Rs. are already on record, no application is necessary. 66 I.C. 24=24 O.C. 374; 7 L. 399=27 Punj.L.R. 668. Application must be made in time by person ultimately found to be L. R.; another's application in time would not help the rightful party. 49 I.C. 34=15 N.L.R. 21. See also 11 P.L.R. 1921=59 I.C. 238. If, in a joint Hindu family, on death of manager, other members are substituted, there is no abatement. 51 P.L.R. 1913=18 I.C. 44. See also 14 I.C. 491=11 M.L.T. 240. If wrong L. Rs. be brought on record without notice to respondent he can object at time of hearing. 44 M.L.J. 60=69 I.C. 529=1923 M. 367. On this rule, see also 4 L. 72=1924 L. 45; 35 B. 393=11 I.C. 559=13 Bom. L.R. 517 (limitation). Legatee and executor co-plaintiffs—Death of executor—Suit does not abate if L. Rs. of the executor are not brought on record. 121 I.C. 177=1930 L. 138.

PRO FORMA DEFENDANT.—Omission to bring on record the L. R. of a deceased respondent who has been added in the suit only as a *pro forma* defendant and who is not a necessary party to the suit is not fatal to the hearing of the appeal and the appeal does not abate on that ground. 145 I.C. 713=34 P.L.R. 858=1933 L. 406. See also 1923 L. 647.

O. 22, Rr 2, 3 and 4. DIFFERENCE BETWEEN.—In all cases where the right to sue is fully represented by the surviving plaintiff or against the defendant already on record, R. 2 applies, when it would not be fully represented unless some person not already on record is added as a party, R. 3 or 4 applies. The application of R. 2 or Rr 3 and 4 does not depend upon the distinction between the right to sue surviving to a person in his own name or accruing after the death of the party pending the suit, but on whether the right to sue fully vests in the surviving plaintiffs or is fully available against the surviving defendants. 29 N.L.R. 12=1933 N. 95=142 I.C. 347. Co-widows hold the estate of their deceased husband jointly and are governed by the rule of survivorship. Both of them jointly represent the estate of their deceased husband, and if one of them dies the other continues to represent the estate alone. No substitution is necessary and the suit or appeal does not abate and R. 2 applies to such a case. 12 P. 778=14 P.L.T. 702=1933 P. 464. Suit for declaration—Several plaintiffs—Claim by each individually—Decree—Appeal by defendant—Death of one plaintiff—Whole appeal, does not abate. 1934 L. 621=36 P.L.R. 230.

instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants

3. [Ss. 363 and 365.] (1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

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O. 22, R. 3. CONSTRUCTION OF RULE.—See 5 Bur.L.T. 77=15 I.C. 366=6 L.B.R. 52

SCOPE OR RULE.—See 18 B. 224 under R. 1. See also 17 M. 209; 26 M. 224. R. 3, which deals with substitution after the death of a party, does not apply to a man who does not come in as a legal representative of a deceased party but as an assignee from him. 15 P. 82=17 Pat.L.T. 73=1936 P. 123. Where the right which a person claims does not accrue to him on the death of the plaintiff but on a lease obtained by him from her in her lifetime, it is obvious that he cannot come in as a man entitled to have his name substituted in consequence of the death of the original plaintiff. (*Ibid.*) All L.Rs must be brought on record as plaintiffs or appellants, or if any refuses to join, as defendants or respondents 20 I.C. 366=11 A.L.J. 719; 16 A. 211. See also 28 Punj. L.R. 3=100 I.C. 418=1927 L. 94. It is open to a Court, when application for substitution is made and the Court finds that all the heirs of a deceased person have not come forward to apply, to refuse to make an order for substitution upon the ground that there are other heirs who ought to have joined in the application. Where however some of the heirs make such an application disputing the right of the other persons to claim as heirs it cannot be said that the Court cannot make an order for substitution in their favour. 145 I.C. 170=37 C.W.N. 138=1933 C. 498. Death of one of several plaintiffs pending suit—Heirs not impleaded—Decree passed by appellate Court—Question of abatement raised in second appeal—Permissibility—Procedure. 30 Punj.L.R. 13=117 I.C. 665=1929 L. 119. If some do not choose to be brought on record there is no abatement. 1927 M. 1071. Scheme suit does not abate on death of original plaintiffs. 48 C. 493=22 L.W. 123=25 C.W.N. 794=62 I.C. 737=48 I.A. 12 (P.C.). See also 47 M.L.J. 745, nor a suit by creditors to set aside fraudulent transfers. 27 Punj L. R. 219=7 L. 12=1926 L. 167; nor do execution proceedings 2 Pat.L.T. 245=61 I.C. 4, 50 A. 621, 117 I.C. 165=1929 P. 200. Appeals in proceedings relating to execution of a decree are mere continuation of execution proceedings and Rr 3, 4 and 8 cannot apply 38 P.L.R. 281=1936 L. 519. An appeal arising out of an order passed in the course of proceedings in execution of a decree or order does not abate on the death of respondent if the appellant fails to apply to make the L.R. of the deceased respondent a party to the appeal within time prescribed by law. 9 P. 372=122 I.C. 148=1929 P. 565 (F.B.). Nor

do proceedings for ascertainment of mesne profits (*Ibid.*) See also 50 A. 321 1934 F. 200=117 I.C. 165. In a suit by two partners, death of one partner does not cause whole suit to abate. 60 I.C. 755=19 A.L.J. 266. See also 112 I.C. 455. Appeal by two co-share landlords against dismissal of their suit for rent abates on the death of one of them. 97 I.C. 569 (1)=7 Pat.L.J. 797=1927 P. 44. See also 67 I.C. 10=34 C.L.J. 405. Where some tenants-in-common file a suit against another tenant-in-common regarding trespass committed by him and pending appeal in District Court filed by the plaintiffs, one of them dies and his L.Rs. are not brought on record and the appeal is dismissed on merits, they can carry on, in their own behalf, the second appeal filed by them. 26 S.L.R. 362. Decree passed in appeal after death of a joint plaintiff without L.Rs. being brought on record is a nullity. 45 A. 286=21 A.L.J. 91=71 I.C. 321; 15 R.D. 29. On death of a *pro forma* plaintiff, it is not necessary to bring his L.Rs on record. 22 I.C. 929. So also in the case of *pro forma* defendant. 1923 L. 647, 145 I.C. 713=34 P. L.R. 858=1933 L. 406. So also in the case of *pro forma* respondent in appeal. 1923 L. 350; 45 A. 286=21 A.L.J. 91. See also 1925 L. 651. Regular application is necessary. The fact that the L.Rs. were brought on record in memo. of objection will not prevent appeal from abating. 52 I.C. 591=25 P.W.R. 1919, 162 I.C. 592=17 Pat.L.T. 129=1936 P. 266. See also 60 M.L.J. 267. But see 45 I.C. 949=34 M.L.J. 177. The rule only requires an application to be made by a person claiming to be the L.R. and it is not necessary that all the representatives should apply. 10 B. 220. See also 145 I.C. 693=1933 R. 234. In the case of mortgage suits the right to sue comes to an end with preliminary decree and the suit does not abate on the death of plaintiff after preliminary decree. 51 M. 701=55 M. L.J. 253 (F.B.); 2 Luck. 464=101 I.C. 174=1927 O. 156, 4 O.W.N. 1002; 1929 C. 430; 1935 L. 712, 17 L. 817=39 P.L.R. 168=1937 L. 164. But see 1930 A.L.J. 857, 1930 A. 762, 1930 A. L.J. 999, 1930 A.L.J. 825=1930 A. 779=52 A. 910; 1931 A.L.J. 715=134 I.C. 236=1931 A. 490 (F.B.) Suit does not abate if defendant dies after preliminary decree and pending an application for ascertainment of mesne profits. 129 I.C. 84=11 Pat.L.T. 796=1931 P. 57; 1936 C. 540. When a person sues for a debt and dies pending suit, his widow holding a succession certificate is alone entitled to be brought on record as his L.R. 26 M. 224. When a decree-holder dies pending execution petition his L.R. can be substituted

[S. 366, para. 1.] (2) Where within the time limited by law no application is made under sub-rule(1), the suit shall abate so far as the deceased plain-

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in his place 55 M 352=62 M.L.J. 1=1933 M 73 (F.B.) (50 M. 1, overruled.) Where the executor applying for probate dies during the pendency of such a proceeding his sons, who claim as legatees, or as representatives of the deceased legatee, can intervene and continue the proceeding. This is independent of the son's right to be impleaded as L R under O 22. 56 M 346=1933 M. 114=63 M.L.J. 899 Substitution of L R. at one stage of suit is effective in all subsequent stages 45 C. 94=33 M L J. 486=41 I A 218 (P.C.), 1928 L 784=112 I C. 704. Order for abatement of suit is a decree, and ought not to be made without notice to plaintiff (*Ibid.*) Order setting aside abatement and bringing L Rs. on record is a conditional and not an absolute order. 27 Punj.L.R 638=94 I.C 243=1926 L 422 See also 11 C.W N 698 Registrar refusing to register will—Two legatees suing for registration—One of them dying—Other is his L R. so far as right to continue suit is concerned 115 I.C 831 (1)=1929 M 524. Two independent appeals against single decree—L.Rs impleaded in one appeal—Abatement of other appeal. 60 M.L.J. 267. See also 52 I.C 597 (L R. brought on record in memo of objections) The test to determine whether or not failure to bring on record the heirs of one of several parties who has died has the effect of causing the entire appeal to abate or not is, can the appeal be decided, without bringing the L Rs. of the deceased party on to the record without bringing into existence two decrees contrary to each other. If the result of hearing and deciding the appeal would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other, the appeal would abate as a whole. 1935 P 4=158 I.C 56 On the death of the pauper plaintiff the right to sue will survive as in all other cases, but the personal right to sue as a pauper will not survive, and the L R will have to continue the suit either as a pauper on a fresh application that he is a pauper or on payment of Court-fees. 146 I C 235=1933 N. 334. See also 1936 P. 591. Where one of the *petitioning creditors* having once been impleaded as a party to an insolvency proceeding dies pending an appeal it is necessary to implead his representatives. It cannot be said that he is merely a *pro forma* defendant. The inclusion of his name and that of his representatives in the appeal is, therefore, essential 145 I C. 474=34 P L R. 827=1933 L 642 (2). In a *suit for malicious prosecution* the plaintiff's right, which is a mere right to sue for damages for a personal injury, changes its character once it is merged in a decree. It then becomes a matter of record which is a right of higher nature. The rights and liabilities arising under a decree awarding damages for malicious prosecution therefore continue when the plaintiff dies during the pendency of an appeal against the decree, so far as the appeal is concerned, but

as regards the cross-objections they abate. 30 N.L.R. 186=1934 N 119 Where a *suit for accounts* ended in a decree and some of the defendants appealed and one of them died pending the appeal but his L Rs were not brought on record within time. *Held*, that the appeal abated and that O 41, R. 4 did not apply. 15 L 667=1934 L 206. The L.R or a deceased decree-holder who dies during the pendency of an *execution petition* filed by him can be substituted in his place in the execution petition and be allowed to continue it 57 B. 616=35 Bom.L.R. 769=1933 B 358 Where one of three appellants, who are *members of a joint Hindu family*, dies, but the right to sue does not survive in the remaining members, although the members of the joint family are already on the record and represent in a sense the interest of the deceased member of the same family, yet it is necessary to bring them on the record in the capacity of representatives of the deceased. And if they are not so brought on record, the appeal abates as a whole. 1933 P 702. A body of *reversioners* had obtained a declaration during a widow's lifetime that certain alienations were not binding on them. After her death some of them brought a suit for possession of their share and the remaining reversioners were made defendants. One of the plaintiffs died and his L.R. was not brought on record in time. *Held*, that the suit did not abate as a whole as the remaining plaintiff's shares were ascertainable and also because any of the previous plaintiffs could have brought a suit in respect of his share only. (1928 L 572, Ref.) 1933 L. 938. Where in a *suit brought in a representative capacity*, one of the plaintiffs dies during the pendency of the appeal by defendants and no steps are taken to bring his L R on the record, the appeal does not abate *in toto* 152 I C. 817=1935 A.L.J 139=1935 A. 106 Where one of plaintiff-respondents dies during the pendency of appeal and the *right to sue does not survive* the defendant-appellants cannot possibly apply under R. 3, for bringing on the record the L Rs of the deceased inasmuch as no such representatives in the eye of the law exist and the omission to do what could not legally be done cannot be fatal to the appeal. (*Ibid.*) When trial Court decree declared that plaintiff and defendants were entitled to certain areas out of the joint holding and one of the respondents died pending appeal and his L.R was not brought on record within limitation period. *Held*, that as the decree affected all the respondents, the appeal abated *in toto* and not merely against the deceased respondent. 157 I.C 994=1935 Pesh. 126. Contract to sell land in favour of two persons—Shares not specified—Decree dismissing suit by vendees for specific performance—Appeal by both—Death of one—Heirs not impleaded. *Held*, that the right to enforce the contract vested, on the death of one of the appellants, under S. 45 of the

tiff is concerned, and, on the application of the defendant, the Court may award

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Contract Act, in his L.Rs along with the other and not in the latter alone, it was therefore impossible to give any relief to the surviving appellant in the absence of the heirs of the deceased appellants on the record. The appeal therefore abated not only as regards the deceased appellant, but *in toto* 15 L. 355=37 P.L.R. 400=1935 L. 478.

LEGAL REPRESENTATIVE.—These words must, where there are more than one L.R. be read in the plural 20 A. 341 See also 23 C. 636, 18 N.L.R. 21=1923 N. 101; 32 C.W.N. 1020 Admission of person as L.R. Effect of. 70 I.C. 209=1923 N. 209. Omission to bring L.R. of sole appellant (deceased) is not mere irregularity curable under S. 99. 9 I.C. 977. Death of the sole plaintiff in a mortgage suit and the omission to bring his heirs on the record within the period of limitation results in an abatement of the suit. The abatement is automatic and does not require any formal order by the Court. 129 I.C. 545=1931 A. 154=53 A. 374=1931 A.L.J. 153 Propriety of order setting aside abatement of suit. See 47 B. 92=1922 B. 449. What is sufficient cause for *setting aside order of abatement*, see 1 L. L.J. 26. The rule relates to the case of plaintiff dying before judgment. It has no application to a case where a plaintiff dies after decree, and his representative wishes to appeal. 3 M. 237. See also 9 C.W.N. 171; 9 C.W.N. 361, 10 A. 223 (F.B.), 8 M. 300, 23 M. 125. In a case in which an action would abate upon the death of plaintiff before judgment, the action could not abate if final decree had been obtained before his death 9 A. 134 (F.B.). See also 27 B. 579. The question of abatement must be considered with reference to the subject-matter of the suit; where the suit relates to a sum of money the suit need not abate in its entirety merely because all the heirs of one of the plaintiffs have not been brought upon the record. 1932 A.L.J. 1029=16 R.D. 583. Death of one of several defendants (appellants) causes the appeal to abate only so far as the deceased appellant is concerned and not the whole 10 I.C. 27. See also 50 A. 792=1928 A. 345 (F.B.); 1930 A. 211 (2)=125 I.C. 591; 61 C. 879=38 C.W.N. 743=1934 C. 703. But if the nature of the appeal is such that it cannot be decided in the absence of the deceased defendant the whole appeal abates. 32 C.W.N. 229=107 I. C. 726; 56 C. 622=33 C.W.N. 359=1929 C. 519. Where there are several appellants, any single one of whom is competent to maintain and prosecute the appeal, the death of one of them does not cause an abatement on failure to implead his L.Rs. The right to sue in such case survives to the other appellants alone. 1935 L. 879. Decree obtained against wrong L.Rs. cannot be enforced as against the proper L.Rs. 139 I.C. 465=63 M.L.J. 319. But see 29 N.L.R. 89=1933 N. 73 (1926 M. 487, Dist.) An objection that a person is not the L.R. of the deceased plaintiff must be taken at the earliest opportunity. When once the

name of a person is entered on the record under this rule, the Court is bound to proceed with the suit. 26 M. 224. See also 70 I.C. 209=1923 N. 209. An *ex parte* order under this rule does not preclude the defendant from urging at the hearing that the suit has abated 11 C.W.N. 698. See also 94 I.C. 243. It would be open to a defendant or respondent to apply to bring on record the L.R. 90 I. C. 72. A person who allows his benamidar to sue in his own name and not in a representative character cannot come in on the death as his L.R. 1930 M. 221=58 M.L.J. 57.

ESTOPPEL against original party also binds L.R. 19 I.C. 258 L.R. of deceased plaintiff is confined to pleadings and the case of the deceased plaintiff. 1930 M. 593=127 I. C. 127.

APPEAL—An appeal lies against an order passed under this rule. 17 M. 209. But see also 1 L. 493=2 L.L.J. 738; 49 M. 450=50 M.L.J. 485=1926 M. 586 (F.B.). An order dismissing a suit as abated, is a decree 26 M. 224. See also 17 M.L.J. Recent Cases 69 and 10 B. 220. An order stating that certain persons cannot be substituted in the place of a deceased plaintiff is not appealable. 140 I. C. 529=1932 A.L.J. 308=1932 A. 466. Joint decree in pre-emption suit—Appeal—Death of one vendee pending—L.R. not brought on record—No abatement. Mere fact that one of the vendees had dropped out, would not prevent the other vendees from prosecuting their appeal, because they were interested in the property transferred and were entitled to press their appeal as against the plaintiff on a ground common to all the vendees and that the appeal did not abate as a whole 146 I.C. 511 (2)=1933 A.L.J. 1049=1933 A. 733.

REVISION—An order passed by a District Judge dismissing an appeal from the order of a Munsiff that the name of a representative already brought on the record be struck out, is liable to revision under S. 115. 26 M. 224.

LIMITATION.—See Limitation Act, Art. 176. 3 I.C. 438, 5 Bur.L.T. 77=15 I.C. 366, 13 I.C. 313=22 M.L.J. 169. (If one L.R. be brought on record in time, there is no bar of time, if others are brought in subsequently.) 52 I.C. 614; 71 I.C. 176=1923 N. 166. Under R. 3, the suit abates so far as the deceased plaintiff is concerned when there is no application within 90 days under Art. 176 for the substitution of his L.R. and if within the 90 days an application in that behalf has been made then the Court under O. 1, R. 10 can afterwards permit other persons who are also L.R. to be joined as co-plaintiffs in the suit in spite of the fact that their application is presented more than 90 days after the death of the original plaintiff. 145 I.C. 693=1933 R. 234. The procedure laid down in Rr. 3, 4 and 11 for substitution of L.R. of appellant or respondent is not exhaustive. Such application can be made at any time within the period prescribed by Art. 181, Limitation Act. 9 P. 372=122 I.C. 148=1929 P. 565 (F.B.).

to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

4. [S. 368.] (1) Where one of two or more defendants dies and the right

Notes.

DISCRETION OF COURT.—See 43 M.L.J. 147=45 M. 703

O. 22, Rr. 3 and 4.—O. 22, R. 12 excludes Rr. 3 and 4 from execution proceeding, and does not prohibit the substitution of the name of the L.R. of the deceased decree-holder in execution on the latter's death. An execution proceeding does not abate on the death of the decree-holder and there is no bar to the execution continuing at the instance of his representative. A fresh application for execution is not necessary. 13 P. 777=155 I.C. 969=1935 P. 117. The provisions of Rr. 3 and 4 have no applicability to a case where the plaintiff dies after securing a preliminary decree and before the passing of the final decree in a mortgage suit. 17 L. 817=1937 L. 164=1935 L. 712. A final decree passed in a mortgage suit against a defendant who has died after the passing of the preliminary decree and without substitution of his heirs is not a valid decree 39 C. W.N. 1284.

O. 22, Rr. 3 and 10. DIFFERENCE BETWEEN.—There is a difference between R. 3 and R. 10. In case there is a death of a party to a suit, the Court, on a proper application, is bound to substitute the L.R. of the deceased party under R. 3, while R. 10 refers to cases of assignment, creation or devolution of an interest during the pendency of a suit other than on death, etc. In this case the Courts have a discretion to give leave for the suit to be continued by or against the person to or upon whom such interest has come or devolved. 15 P. 82=17 Pat.L.T. 73=1936 P. 123.

O. 22, R. 4. SCOPE OF RULE.—See 1930 M. 930. The rule is applicable to insolvency proceedings. 7 A. 734. But see 10 A. 264 (F.B.) It is sufficient compliance with R. 4, if one L. R. alone is brought on the record on the death of a defendant. It is not necessary that all his L. Rs. should be impleaded. An abatement under the rule as against a particular defendant cannot operate as an abatement of the whole suit as against all the defendants 37 Bom.L.R. 288=1935 B. 287. So also where the appellant has impleaded all the persons known to him and *bona fide* omitted one subsequently brought on record. 7 L. 438=28 Punj.L.R. 287=1927 L. 6. See also 7 Pat.L.T. 746=94 I.C. 209=1926 P. 376; 4 P. 320=89 I.C. 280=1925 P. 551, 1935 L. 712 (1933 L. 356, Dist., 1927 L. 6 and 1933 L. 380, Rel. on.) 59 M. 660=43 L.W. 500=1936 M. 336. Hence where on the death of a defendant his two sons are brought on record as his L. Rs. but one of them dies and this is not known to the plaintiff who continues the suit and the subsequent proceedings *bona fide* with the two sons on record and the other son contests all proceedings, the

subsequent proceedings taken are not null and void (*Ibid.*) On this rule, see also 36 C.W.N. 1007=56 C.L.J. 365. Words 'right to sue' in the rule means 'right to appeal' in case where a party dies after decree but pending appeal 1934 A.L.J. 933=1934 A. 1029. Decree in favour of Hindu son that decree against father not binding on his share—Appeal by defendant—Death of plaintiff—Effect—Abatement (*Ibid.*) Where the death of one of the respondents to an appeal does not make the representation of the interests involved incomplete, the appeal does not abate and can proceed; but where such death renders the representation incomplete, the appeal as a whole abates. In an appeal against a decree for partition, when one of the co-sharer-respondents dies and his heirs are not impleaded in time, the appeal abates as a whole because no decree for partition can be made in absence of even a single co-sharer. 16 Pat.L.T. 308=154 I.C. 856. Where, on the death of one of several respondents, the appellant withdraws his appeal as against him instead of bringing his L. Rs. on record, the whole appeal will abate and become incompetent if it will result in two inconsistent decrees being made 1936 A. M.L.J. 19. Death of defendant—Omission to implead all L. Rs.—Effect—Subsequent order allowing withdrawal of the suit with liberty—Legality. 43 C.W.N. 1019.

APPLICABILITY.—Suit for accounts.—Death of defendant after preliminary decree and before final decree—Suit if abates. 87 I.C. 818=1926 C. 308. As to mortgage suit, see 89 I.C. 236=1926 S. 20. But see *infra* 51 M. 701 (F.B.). A suit does not abate on account of the death of a defendant after a preliminary decree is passed. The word "suit" means only such proceedings as are antecedent to the passing of a preliminary decree or otherwise. 2 Luck. 464=101 I.C. 174=1927 O. 156; 1929 N. 206; 1929 C. 648, 11 R. 446=1933 R. 318. See also 132 I.C. 31=1931 A. 235. Where mortgagors obtain a preliminary decree for redemption, and some of them die and the rest are their representatives in interest by right of survivorship, R. 10 and not this rule applies and there is no period of limitation for the right to apply for the substitution of the representatives of the deceased (*Ibid.*) See also 29 Bom.L.R. 244=101 I.C. 129=1927 B. 156. But see *contra* 49 A. 310=100 I.C. 288=25 A.L.J. 175=1927 A. 272. A final decree in a mortgage suit is a "decree" within the meaning of S. 2 (2), C. P. Code, and as such, is subject to the general rule that a decree made against a dead defendant, i.e., a defendant dead at the date it was made, is a nullity. The L. R. can properly raise the question of validity of the decree so made in an independent suit, and cannot be prejudiced by the fact that their interests were technically represented in the execution by an adminis-

Procedure in case of death of one of several defendants or of sole defendant.

to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

Notes.

trator appointed *pendente lite* It is not necessary that they should take steps in the mortgage suit itself. 63 C. 472 *Wrong representative brought on record*—No fraud or collusion—Decision binds real representative as well 1930 M. 930=60 M.L.J. 97; 29 N.L.R. 89=1933 N 73; 1933 L. 380=141 I.C. 580=34 P.L.R. 511. When the defendant mentioned in an application to sue *in forma pauperis* dies, the applicant is not affected by the provisions of this rule. 7 B. 373 The rule does not apply to cases in which an assignment or creation of an interest pending the appeal *plus* the death of the assignor, arises. Such cases fall under R. 10 9 B 151 This rule and not R. 9 applies to the bringing on record of the L. Rs. of a deceased defendant, in a suit for *dissolution of a partnership*. 16 B. 27. As to applicability of rule to *partition suit* after the passing of preliminary decree, see 1933 C. 696=60 C 940 See also 11 O.W.N. 1487 Death of one of the defendants in a partition suit after preliminary decree and before final decree does not cause abatement. But this is not applicable to *appeal* from preliminary decree. In such an appeal in which the preliminary decree is put in jeopardy it is necessary that all the parties interested should be joined; and if a respondent who was one of the alienees impleaded in the suit dies during the pendency of the appeal and if his L. Rs. are not impleaded as parties within the time limited, the appeal must necessarily abate. 30 S.L.R. 428, 11 O.W.N. 1487=1935 O 36, 1935 O.W.N. 401=1935 O. 329 So also where one of the co-sharer respondents dies and his L. Rs. are not brought on record, the whole appeal abates. 154 I.C. 856=16 Pat. L.T. 308=1935 P. 241 When some of several respondents die and their L. Rs. are not added, the appeal abates only so far as they are concerned, and must proceed against the others. 26 B. 203 See also 22 B. 718; 94 I.C. 30, 48 A. 251=91 I.C. 859=1926 A. 234; 4 P. 53=1925 P. 480, 102 I.C. 304=1927 L. 783; 100 I.C. 839=28 Punj. L.R. 148, 1925 N 299; 85 I.C. 563=1925 A. 623, 4 P. 187=1925 P. 434, 6 L. 233=86 I.C. 1; 49 B. 118=85 I.C. 197, 1928 L. 572=10 L. 7 (F.B.); 1928 M. 1148; 50 A. 599=1928 A. 172. So also where a mortgagee sues for recovery of mortgage money, and one of the mortgagors dies pending suit, and no L. Rs. of the deceased mortgagor are brought on record within limitation, the whole suit does not abate. 132 I.C. 31=1931 A.L.J. 902=1931 A. 235, 1933 L. 1001 (Case of appeal by mortgagee and a puisne mortgagee dying.) But in cases where the cause of action is one and indivisible like *pre-emption suit* and *representative suit*, the appeal will fail *in toto* 90 I.C. 324=23 A.L.J. 935; 89 I.C. 378, 23 A.L.J. 938; 48

A. 81=1926 A. 128; 94 I.C. 253 (1); 92 I.C. 35=26 Punj. L.R. 797 1928 L. 869; 51 A. 267=56 I.A. 80=56 M.L.J. 304, 1929 N 358, 1930 L. 33, 27 N.L.R. 220=1931 N 184, 35 P.L.R. 513=1934 L. 429. Suit against three members of a *joint Hindu family*—Death of one of them (respondent) pending appeal—L. R. not brought on record—Whole appeal abates. 7 P. 285=108 I.C. 552. See also 1933 P. 646. But where the *manager of the family* died after the disposal of the appeal but before the second appeal was filed but the succeeding manager and the other adult coparcener were impleaded as party respondents, *held*, that the omission to implead the L.Rs. of the deceased manager was not fatal to the second appeal 1932 M.W.N. 491 [51 B. 450, (P.C.), Ref.]; 1935 R.D. 5. On death of the defendant who is sued as an executor, the estate of the testator devolves on the residuary legatee, and if he is not brought on the record of the appeal within the period of the limitation provided for by law, the appeal abates 62 C. 998 Suit for possession of land and demolition of buildings thereon—Decree—Appeal by all defendants—Death of one of them—Representative not added—Plaintiff's suit dismissed *in toto* *Held*, there was nothing improper in it. 1935 A.L.J. 501=1935 A. 640 Suit for declaration of plaintiff's *ownership and injunction* restraining defendants—Death of one defendant—L.R. not brought on record—Suit abates *in toto* 118 I.C. 437=1929 L. 256 But see *contra*, 150 I.C. 148=3 A.W.R. 615=1934 A. 716, which is a suit for possession and injunction against trespassers Where the rights of the defendants as a body were in question, *held*, the entire suit abates on account of the death of one. 28 Punj. L.R. 52=99 I.C. 970=1927 L. 87; 1925 A. 141=22 A.L.J. 1033; 89 I.C. 162. See also 8 L.L.J. 134=94 I.C. 563=1926 L. 332; 94 I.C. 300=1926 L. 474 (joint decree), 9 P. 693; 168 I.C. 983=1935 P. 430. *Representative suit* under O. 1, R. 8—Death of respondents other than representatives—Failure to bring L.Rs. on record—Appeal does not abate. 120 I.C. 794=1930 L. 18; 132 I.C. 657=1931 L. 610; 145 I.C. 432=34 P.L.R. 844=1933 L. 682. In a suit for declaration of title where one of the defendants dies and his L.Rs. are not brought on record, the suit abates against the deceased defendant and not against all. 1930 A. 369=129 I.C. 371. The ordinary test to see whether the suit abated against other defendants was that if the continuation of the suit would result in conflicting decrees, then the suit must abate against the other defendants as well, but if there would be no such contradiction, then it would not abate against all. 1936 N. 292 See also 1935 O.W.N. 297, 1936 P. 191. In a suit filed against a Hindu joint family business formed by brothers none of them was impleaded as the manager

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

Notes.

of the joint family. The eldest member died but his son was not brought on record. *Held* that suit abated against him only and not against other defendants. 1936 N. 292. Where in a suit on a hand-note, the trial Court having either intentionally or through oversight omitted to grant interest *pendente lite*, the plaintiff appeals from the suit praying for grant of interest *pendente lite* and during the pendency of the appeal one of the respondent dies and the appellant fails to bring his L. R. on record within the prescribed period, the appeal abates as a whole, because if the appeal is allowed there would be two inconsistent decrees on the basis of the same hand-note. 161 I.C. 862=1936 P. 191. An appeal as a whole does not abate on the death of a *pro forma* respondent. 1925 L. 651 (2)=92 I.C. 261. *See also* 60 C.L.J. 225. Where in a suit on a mortgage for sale certain defendants are impleaded as being in possession and occupation of the mortgaged properties and not because they are interested in the equity of redemption such defendants are only proper but not necessary parties to the suit. If, therefore, one of such defendants dies pending an appeal from the decree in the suit, and heirs are not brought on record, the appeal would abate only as against that particular defendant and not as a whole. 16 Pat. L.T. 893=1935 P. 383. Where the question in dispute in the suit does not affect the deceased defendant the suit does not abate. 91 I.C. 32=1926 L. 189; 1927 L. 418. The question of the abatement of the whole suit depends on whether the deceased was such a necessary party that his absence should result in the dismissal of the whole suit. 91 I.C. 991=1926 M. 379; 1930 L. 353; 1933 L. 129=143 I.C. 364. Whether abatement is *in toto* or in part—*Tes*. *See* 13 L. 70=137 I.C. 820=1932 L. 281; 1933 S. 384, 16 L. 747=37 P.L.R. 850=1935 L. 853 [1928 L. 572 (F.B.) and 1930 L. 126, Appl.] The question whether an appeal can or cannot proceed in the absence of the L.Rs. of one of the respondents who has died, must depend upon the nature of each case and it is impossible to lay down a general rule applicable to such cases. Each case must depend upon its own circumstances (*Ibid.*) Where pending an appeal against a joint decree in favour of three co-sharers, one of the respondents died, *held*, the appeal cannot proceed in the absence of the L.Rs. of the deceased. 53 C. 752; 43 C.L.J. 401=1926 C. 893. *See also* 100 I.C. 482=1927 A. 331; 137 I.C. 319=1932 M. 212; 135 I.C. 245=1932 A.L.J. 219=1935 O.W.N. 297. So also where one of several respondents to an appeal, who are joint tenants of a holding, dies pending the appeal. 1935 R.D. 5=16 L.R. 173 (Rev.). Suit under S. 106, B. T. Act—Appeal by one co-sharer landlord—Death of respondent-co-sharer—Abatement *in toto*. 146 I.C. 831 (2)=37 C.W.N. 756=58 C.L.J. 29=1933 C. 787 But where each of the plaintiffs has an ascertained share distinct from the

others, the mere fact that the L.Rs. of one of them have not been brought on record is not prejudicial to the prosecution of the appeal. 27 N.L.R. 220=134 I.C. 679=1931 N. 184; 146 I.C. 945. *See also* 146 I.C. 154=1933 L. 556. There were two separate attachments of a bungalow by two decree-holders. On objection to the attachments being dismissed, a suit was filed under O. 21, R. 63, which was also dismissed. The objector preferred an appeal impleading both the decree-holders as respondents. When the appeal came up for hearing, it was reported that one of the decree-holders had died more than three months previously and an order was passed that the appeal had abated against him. *Held*, that the appeal did not abate *in toto* and that it could proceed against the surviving respondent. 38 P.L.R. 269. L.Rs. already on record—Application still necessary. 90 I.C. 41=1926 L. 37; 3 P. 853=1925 P. 123, 150 I.C. 915=1934 N. 165. But *see* 1926 L. 607=7 L. 399; 1930 M. 579=126 I.C. 486; 51 M. 347=54 M.L.J. 675; 15 P.L.T. 380=1934 P. 427; 144 I.C. 618=1933 L. 710, 144 I.C. 607=34 P.L.R. 778=1933 L. 765. When a suit is instituted against a dead man, Court cannot substitute the representative as defendants. 17 M.L.J. 551; 9 L. 526; 1928 M.W.N. 240; 143 I.C. 596=37 L.W. 489=1933 M. 454. The general rule is that, as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased. 19 M. 347; 1930 A. 348=1930 A.L.J. 836=123 I.C. 376. Where an appeal is filed against a dead person no question of abatement arises, Court may in such cases excuse time and permit L. Rs. to be impleaded. 33 P.L.R. 116=1932 L. 305=138 I.C. 277. Decree passed in favour of two persons—Only one applying for execution and getting order—Judgment-debtor appealing—Other decree-holder dead before filing appeal—Judgment-debtor applying for substitution of L. Rs. after prescribed time—Appeal is not barred against representatives. 118 I.C. 901=1929 L. 673. Proceedings as regards taking additional evidence, under the direction of the appellate Court pending in lower Court—One of the respondents dying—Application for substitution of names can be entertained by the appellate Court and not by the lower Court. 115 I.C. 610=1929 A. 319. Respondent's L. R. wishing to bring himself on record ought to apply by petition under O. 22, R. 4, but he need not apply for setting aside abatement. 139 I.C. 574 (1)=36 L.W. 169=1932 M. 527. Decree against dead person is void as also the execution sale in pursuance thereof. L. R. of deceased can be granted restitution by Court by virtue of its inherent power. 11 P.L.T. 361. Where a respondent dies before the decree of appellate Court and his L. R. is not brought on record, if the appeal is of such a nature that it can proceed without bringing

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

Loc. Am.—[Madras] O 22, R. 4 (3) The words "except as hereinafter provided" were added at the end.

O 22, R. 4 (4). *Inserted as sub-rule (4) —*

(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity to substitute the legal representative of any such defendant who has been declared *ex parte* or who has failed to file his written statement or who having filed it, has failed to appear and contest at the hearing, and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant, and shall have the same force and effect as if it has been pronounced before death took place.

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the L.R. on record and the appellate Court passed the decree after hearing the merits, the decree is not invalid for that reason, and it can be executed if it is not barred under Art. 182 (1930 M 719, 39 M. 386 and 1925 P. 480, Foll.) 145 I.C. 765=1933 M. 218. Delay in making application to implead L Rs.—When condoned. 32 P.L.R. 822=1932 L. 148. Application to implead L Rs.—When extension of time granted. 15 R.D. 476=12 L.R. 237 (Rev.).

MISCELLANEOUS—An application under O. 22, R. 5 praying for decision as to who the L.R. is, may be treated as one under R. 4, to bring on record any particular person as L.R. 38 L.W. 792=1933 M. 920=65 M.L.J. 798. Cause of action for breach of trust survives against L.R. of deceased trustee. 40 L.W. 122=1934 M. 448=67 M.L.J. 222. Where one of the tort-feasors dies during the course of the suit and his L.Rs. are not brought upon the record within time, the suit can proceed without them, as the death of one tort-feasor cannot affect the case against another. 36 P.L.R. 182=1934 L. 941. *Plaintiffs* formerly a firm—Subsequent dissolution—Suit in individual capacity by all partners but not in name of firm—Death of one pending appeal—L.R. not added in time. *Held* that O 30, R. 4 did not apply and suit abated as a whole. 148 I.C. 333=1935 P. 121. So also where *defendants* constituted a firm but sued on individually 14 L. 543=1933 L. 356. Where several L.Rs. of a deceased party have been brought on the record, if one of them dies and the estate continues to be represented by the remaining L.Rs. the omission to implead the heir of the deceased L.R. does not cause abatement of the case. In such a case there is no lack of representation, because, the remaining representatives can as well represent the estate as the original group did. 1934 M. 730 (2)=67 M.L.J. 681. If the petitioning creditor dies, no valid order of adjudication can be made. But where a person, who is not directly participating in the insolvency proceedings, dies pending an appeal, the first step for the insolvent-appellant to take is to bring his own appeal into order by getting the L.R. of deceased petitioning creditor impleaded before urging that the order of adjudication itself is a nullity. 145 I.C. 474=34 P.L.R. 827=1933 L. 642 (2).

O. 22, R. 4 (3).—No order declaring abatement necessary. The suit abates

automatically. 7 L. 75=94 I.C. 422=14 L. 234, 48 A. 334=24 A.L.J. 369=93 I.C. 315=1926 A. 217 (F.B.), overruling 44 A. 459 and upholding 42 A. 540; 112 I.C. 5=1928 L. 746, 152 I.C. 227=35 P.L.R. 457=1934 L. 442, 1937 N. 88. An application filed to set aside such abatement within 60 days from the date of abatement of suit is proper and not premature, even though it is made before the order of the Court that the suit had abated. 1937 N. 88. Where only some of the L.Rs. of the deceased persons are brought on record within the time the suit does not abate though other L.Rs. are left out. 1928 M. 1199=117 I.C. 138. Meaning of L.R.—Only one of several representatives added *Held* appeal abated. 14 L. 543=142 I.C. 649=34 P.L.R. 11=1933 L. 356. But see 144 I.C. 607=34 P.L.R. 778=1933 L. 765, 14 L.R. 469 (Rev.)=17 R.D. 616 (Case of proceedings under U. P. Land Revenue Act III of 1901). Where an applicant under S. 21-A of the Punjab Alienation of Land Act omits to implead the L.Rs. of one of the necessary parties thereto who is dead, the application abates under O. 22, R. 4 (3), C.P. Code. 1935 L. 443. So also in suit under S. 44, Agra Tenancy Act 1936 R.D. 473.

LIMITATION—See Art. 175 10 A. 264 (F.B.) and 16 B. 27, 87 I.C. 632=1925 L. 599 (1). Under O 22, R. 9 (3) which specifically applies the provisions of S. 5 of the Limitation Act to the application to set aside abatements, the Court has power to extend the time to the applicant to bring the L.Rs. on records. 1935 L. 443.

APPEAL—An order declaring that the suit had abated because the L.R. of the deceased defendant had not been brought on the record in time is a decree and appealable as such though no formal decree dismissing the suit had been drawn up 10 P. 471=133 I.C. 767=1931 P. 353 (42 M. 52 and 30 M.L.J. 486, Foll.) An appeal against a finding that a suit had abated is maintainable but such an appeal is one against the decree in the suit and it should be accompanied by a copy of the decree. 26 S.L.R. 81. But see 34 P.L.R. 221=1933 L. 152. An order setting aside an abatement in the course of trial and allowing substitution of the heirs of a deceased party, cannot be questioned in appeal from the decree in the suit whether such an order is passed before or simultaneously with the decree. 14 L. 361=141 I.C. 337=34 P.L.R. 221=1933 L. 152.

REVISION—See 26 M. 224, 21 L.W. 21=1925 M. 456, 101 I.C. 84=1927 O. 221.

O. 22, R. 4 (4) (Madras)—O. 22, R. 4 (4)

5. [S. 367.] Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

Determination of question
as to legal representative

Loc. Am.—[Madras.] Add the following as a proviso to R. 5 of O. 22—

Provided that an appellate Court before determining it, may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question

6. Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronoun-

No abatement by reason
of death after hearing.

Notes.

is applicable to appeals also as provided by R. 11. The power which the rule gives to the Court to grant exemption is of course only discretionary and probably it rarely will be exercised in the case of a single respondent. But where there are several respondents whose interests are common, and some contest and others do not enter appearance, it is fairly safe to assume that the defence of the decree has been left in the hands of some on behalf of all. Hence where on the death of one of the respondents, the appellants fail to get on record his L.R. the appellate Court has jurisdiction to exempt his being brought on record and the appellate decree has the same force and effect as if it had been passed before he died. 58 M. 752=1935 M. 236=68 M.L.J. 318.

O. 22, R. 5. SCOPE OF RULE.—The dispute need not be between persons claiming to represent the deceased plaintiff. 18 M. 496. See also 21 B. 162 (168). The rule applies even when there is but one claimant and the defendant denies his representative character. 17 M. 209 (210). Contest as to who is L.R. The dispute should be decided at or before, the final hearing on the merits. 27 B. 162; 21 L.W. 21=1925 M. 456. See also 150 I.C. 425=11 O.W.N. 917=1934 O. 337 (Case where the L.R. of deceased respondent was appellant himself). L.R.—Court's order after due notice to parties—Same whether can be reopened on the ground that there are other heirs. 111 I.C. 238. Intermeddler cannot be recognised as L.R. 21 L.W. 21=86 I.C. 178. See 42 M. 76=35 M.L.J. 732; 44 I.C. 987=1918 M.W.N. 198. When two persons claim to represent the judgment-debtor, both of them might be placed on the record with the consent of the decree-holder. 13 B. 22. See also 8 M. 300; 18 B. 224, 26 M. 224. The appointment of a L.R. of a deceased plaintiff under this rule is not a determination of an issue which is properly raised in the suit. 28 A. 109. As to delegation of powers of inquiry as to who is L.R., see 39 I.C. 893. Wrong L.R. brought on record—Proper L.Rs. rights. 43 M.L.J. 486=46 M. 190. Proper L.Rs. will be in a position to get the benefit of the decree and thus be in possession of assets. (*Ibid.*) Inquiry into right—Question of adoption. 16 I.C. 798, 9 I.C. 603=9 M.L.T. 403.

"COURT."—The word "Court" means the Court before whom the question arises, *viz.*, the trial Court if the question arises at the trial stage or the appellate Court if the question arises on appeal. 3 Pat.L.T. 380=65 I.C. 131. The effect of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is that the judgment and decree become a nullity. 53 I.C. 548. Death after hearing but before judgment does not affect the decree. 106 P. R. 1915=32 I.C. 18. See also 1933 A. 111=1932 A.L.J. 1069.

RIGHT OF SUIT.—Suit to establish title by L.R. 40 M. 177=30 M.L.J. 274.

APPEAL.—An order refusing to implead a person as a L.R. of a deceased plaintiff is an adjudication of his claim and hence appealable. 43 M. 812=39 M.L.J. 218. See also 10 P. 471=133 I.C. 767=1931 P. 353; 12 A. 200. But see *contra* 131 I.C. 294=1931 L. 235 [1926 M. 856, Ref., 128 P. R. 1916 (F.B.) Dist.; 1 L. 493, 1925 L. 218, Expl.], 91 I.C. 166=1926 L. 181, 38 I.C. 833=13 N.L.R. 32. See also 20 I.C. 898=16 O.C. 350; 20 I.C. 950=25 M.L.J. 279, 49 M. 450=50 M.L.J. 485=1926 M. 586 (F.B.).

RES JUDICATA.—Where in a proceeding under O. 22, R. 5 a certain person is (or is not) held to be the L.R. of a deceased party the same question can be re-agitated in separate suit and is not barred by the rule of *res judicata*. 1934 L. 465; 166 I.C. 393=1937 O. W.N. 17=1937 O. 220 (F.B.) (8 Luck. 477 Overr.).

O. 22, R. 6. SCOPE OF RULE.—The rule supersedes the ruling in A.W.N. (1904), p. 4 and follows the rulings in 19 B. 807. A decree passed after defendant's death without L.R. representing him afterwards, is a nullity. 17 C.L.J. 634, 17 I.A. 150=13 A. 53 (P.C.), 1930 S. 259. Death of a party to a legal action—Decision on the merits of the action after the death and before abatement—L.Rs. not brought on record on the date of the decision—The decision not valid. 1929 M. 802=57 M.L.J. 424=120 I.C. 374. The decree might be impeached in execution without resorting to separate suit. 20 I.C. 506=17 C.L.J. 634; 16 I.C. 58=16 C.L.J. 571; 2 L.L.J. 144, 38 M.L.J. 413=42 I.C. 530, 31 I.C. 198=38 M. 682; 40 A. 423=45 I.C. 21. Decree against a dead person is void *ab initio*—Execution proceedings also void. 11 I.C. 782=4 Bur.L.T. 164. An appel-

cing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

7. [S. 359.] (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

Suit not abated by marriage of female party.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

8. (1) The insolvency of a plaintiff in any suit which the assignee or receiver might maintain for the benefit of his creditors, shall not cause the suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

When plaintiff's insolvency bars suit

Notes.

Plaintiff died on the day fixed for the hearing of the appeal but before the hearing. *Held*, his L.R.s. were not bound by the decree and the appeal must be reheard. 55 I.C. 498. *See also*. 43 I.C. 161=14 N.L.R. 71. Death during argument—Judgment pronounced without L.R. is bad 48 I.C. 859; 106 P.R. 1915. Death of party before judgment—Withdrawal of suit 4 Pat.L.J. 240=50 I.C. 529 (F.B.). Where a defendant dies after the hearing of a case and arguments but before the pronouncement of the judgment and the plaintiff files an appeal, he can bring on record the L.R. of the deceased defendant without making an application to the Court for the purpose and the appeal does not abate on the ground that he has not so applied, if the appellant has substituted the name of L.R. in place of the deceased defendant. 144 I.C. 618=1933 L. 710. Death of party after hearing and before decree—Decree passed is not bad—No application for substitution of names necessary. 1932 A.L.J. 1069=1933 A. 111. *See* 32 I.C. 18. Where one of the appellants to His Majesty in Council died before the passing of the Privy Council decree, and no substitution was made, the Privy Council decree could not be held void by the Courts in India. 58 I.C. 212=1 P.L.T. 426 (1 Pat.L.T. 325=5 P.L.J. 314 Foll.) Failure to substitute would have rendered the decree void only in so far as it was in favour of the deceased appellant 1 P.L.T. 426. Where during the interval between the last date of hearing of the suit and the date on which the judgment is pronounced, the Court makes local inspection of the site in suit and makes a reference to it in its judgment, the hearing of the suit cannot be said to have concluded on that date of hearing within the meaning of O. 22, R. 6. 164 I.C. 971=1936 Lah. 578. Nor can the preliminary decree in a mortgage suit be regarded as the conclusion of the hearing, within the meaning of O. 22, R. 6=39 C.W.N. 1284. Where on an application to set

aside *ex parte* decree, a conditional order was passed that if R. 15 was deposited by a certain date the *ex parte* decree would be set aside, and otherwise it would stand, between the date of the order and the time fixed for deposit one of the plaintiffs died. L.R. was not added, and the Court recorded the final order setting aside the *ex parte* decree. *Held* that failure to implead L.R. did not affect the final order which was merely formal, and that the matter was covered by the principles underlying O. 22, R. 6. 62 C. 1057=39 C.W.N. 863=61 C.L.J. 319=1935 C. 506.

O. 22, R. 8. SCOPE AND APPLICATION OF RULE.—The rule applies only to a case where there is an actual bankruptcy or insolvency in which there is an assignee or Receiver appointed. It does not apply to a case where there has been a mere application. 27 C. 219, *See also* 31 Bom. L.R. 357=1929 B. 202. R. 8 applies to an insolvent plaintiff and is confined to suits when the events mentioned therein happen (97 I.C. 435, overruled.) 146 I.C. 521=1933 Mad. 851=65 M.L.J. 719 (F.B.). O. 22, R. 8, applies to the case of a suit or an appeal which has already been filed before insolvency occurs. It has no application where the insolvency occurred before the appeal was filed and indeed before the suit was brought. 151 I.C. 579=1934 A. 1011. Where plaintiff was adjudicated insolvent subsequent to suit—Notice to Official Receiver should be given. 12 L.W. 551=61 I.C. 300, 109 I.C. 589. Official Assignee must be given an opportunity to prosecute the suit 12 B. 257. For form of order, *see* 16 B. 404. But where the Receiver after due notice took no steps to bring himself on the record and a third person, claiming to be an assignee from the Official Receiver applied to be brought on the record in place of the original plaintiff and wanted to maintain the suit for his own benefit. *Held* that the Official Receiver not having chosen to continue the suit, the Court had no option but to dismiss the suit under R. 8, that the

- (2) Where the assignee or receiver neglects or refuses to continue the suit and to give such security within the time so ordered,

Procedure when assignee fails to continue suit or give security

ed, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

9. [S. 371.] (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

Notes.

Receiver who was no party to the suit had no interest in the suit which he could validly assign under R. 10, which applies only to those cases which were not specifically provided for by the prior rules. 157 I.C. 900 (Lah.) Where pending an appeal the appellant becomes insolvent the appeal can be continued only by the Receiver in insolvency. 18 I.C. 922. See also 1928 L. 596. No limitation for Official Assignee to apply for substitution 43 A. 621=19 A.L.J. 685 Where a plaintiff after instituting a suit in *forma pauperis* is adjudicated an insolvent the Receiver in insolvency can continue the suit in the same way as the insolvent. 47 I.C. 577=16 A.L.J. 440. As to what constitutes costs for which the Official Assignee is to give security, see 28 Bom L.R. 1074=97 I.C. 797=1926 B. 533 Suit instituted by insolvent after adjudication—Receiver cannot continue it. 23 I.C. 813 Held, that the guardian was not debarred by virtue of his being adjudicated insolvent from acting as guardian of the minor decree-holder. 1930 L. 205=125 I.C. 186. As execution proceedings do not abate on the decree-holder being adjudicated an insolvent, it follows that such proceedings should continue in his name. But so far as a judgment-debtor is concerned, it does not lie in his mouth to claim that the execution proceedings should be dropped merely because the decree-holder has been adjudicated insolvent and the Official Receiver does not care to continue them. (*Ibid.*) See also 55 A. 509=144 I.C. 391=1933 A. 388, 9 P. 372=122 I.C. 148=1929 P. 565 (F.B.) cited under O. 22, R. 12.

O. 22, R. 9: SCOPE OF RULE.—The rule does not apply to a case in which the defendant or respondent dies. 7 M. 195. See also 8 C. at 842. The rule applies only to orders passed under Rr. 4 and 8. 9 C. 163 A Court after declaring that the suit has abated under R. 4 does not become *functus officio*, but retains the right of setting aside the abatement if it is moved by an application under R. 9. 1935 Lah. 712 R. 9 is a disabling rule and should be construed strictly. 31 P.L.R. 973=1931 L. 79 (2). It is open to the Court in a proper case to treat an application under O. 22, R. 4 as an application under R. 9. 26 S.L.R. 81 No fresh cause of action can be imported into a revived suit. 22 C. 97. See 9 A. 229 under R. 10 The abatement of a suit under this rule has not the force of *res judicata*. 6 Bom L.R. 638 An abatement takes place automatically and does not require an order of the Court to be passed to that effect Where the

decree-holder died after the preliminary decree and the sons without applying within time to implead themselves applied for a final decree, held, that the Court could in spite of the abatement pass a final decree 1932 A.L.J. 883=1932 A. 698. The mere fact that the representative of a deceased person happens to be already a party on the record in his own right does not dispense with an application for setting aside the abatement and substitution. 29 I.C. 470. But see 51 M. 347. Application to implead L.Rs, giving no reason for delay, cannot be treated as one under this rule for setting aside the abatement 94 I.C. 300=1926 L. 474 But see 112 I.C. 5=1928 L. 746, Abatement of suit—Petition for substitution—Fact of abatement and date of death not mentioned—Validity of petition—Application for substitution cannot be treated as one for setting aside abatement. 57 C. 148=1930 C. 422 Abatement—Effect of. 39 I.C. 277=23 P.R. 1917, 38 M.L.J. 266=54 I.C. 565 If by some oversight the abatement of an appeal is set aside without notice to the respondents, their objections if any must be heard at the time of hearing the appeal. 1928 M. 1148=115 I.C. 150. Suit by alleged donor for cancellation of gift—Donor dying and suit abating under R. 9—Next suit by his legatee for possession against the alleged donees is not barred. 27 A.L.J. 492=1929 A. 306=110 I.C. 562 Death of defendant—Absence of application within time to bring the L.R. on record—Decree—Validity. 122 I.C. 562. Where a reversioner sued challenging an alienation and he having died the suit abated and subsequently another reversioner sued on the same cause of action held, that the later suit was not barred. 131 I.C. 98=1931 L. 79 (2) R, a benamidar for C, sued for possession of certain properties. He died pending suit The sons of R did not come on the record, and no L.Rs having been brought on the record the suit abated. An application filed by the sons of C, to implead R's sons on the record was dismissed ultimately by the High Court The sons of C then sued for possession as being the beneficial owners of the property, held, that the suit was barred by O. 22, R. 9, C.P. Code. 45 L.W. 171=1937 M. 101=(1937) 1 M.L.J. 33

SCOPE AND APPLICATION OF SUB-CL. (2).—R. 9 (2) is not controlled by cl. (3) and the "sufficient cause" mentioned in cl. (2) is not confined to the circumstances given in S. 5 of the Limitation Act. 42 A. 540=59 I.C. 903=18 A.L.J. 688; 36 A. 235; 51 I.C. 534; 21

(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignee or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) [S. 372-A.] The provisions of section 5 of the Indian Limitation Act, 1877,¹ shall apply to applications under sub-rule (2)

Leg. Ref.

¹See now Act IX of 1908, Ss. 4 & 5.

Notes.

L. W. 220=1925 M. 494. It contemplates that a formal order declaring that a suit or appeal has abated should be made before an application under the rule is made. (36 A. 235, Foll.; 42 A. 540, Not foll.). 44 A. 459=66 I.C. 554=1922 A. 209. But see 1930 A. 379 (2); 50 C.L.J. 543=1930 C. 267.

SUFFICIENT CAUSE TO EXCUSE DELAY.—Before an abatement is set aside, Court has to be satisfied that there was sufficient cause for not applying in time. 49 C. 62=1922 C. 335; 36 A. 235=12 A.L.J. 299; 1923 L. 470. As to what is sufficient cause, see also 50 I.C. 422=20 P.R. 1919, 90 I.C. 811=1926 C. 175, 97 I.C. 142 (1)=8 L.L.J. 331. Under this rule it must be shown that appellant was prevented by sufficient cause from going on with the suit within the time limited by law; if he so proves he is entitled, as a matter of right, to have the abatement set aside. 28 I.C. 803. Appellant must prove, to get extension of time for bringing the representative of the deceased respondents on record, that he was not aware of death in time. 3 P.R. 1916=32 I.C. 829; 15 I.C. 708=204 P.L.R. 1912. Ignorance of death, standing by itself, may be sufficient cause; but if it is accompanied by great delay and dilatoriness it would be otherwise. 49 C. 62=1922 C. 335, 4 L.L.J. 171=1922 L. 61, 1925 O. 306 (2), 24 I.C. 275; 1935 R.D. 5, 49 I.C. 531, 22 P.W.R. 1919, 46 P.W.R. 1918; 44 I.C. 9=24 P.L.R. 1918, 31 I.C. 697=12 P.W.R. 1916; 54 A. 280=1932 A.L.J. 18=1932 A. 459, (1925 P. 162 Ref.). See also 1933 Lah. 916; 1933 L. 356; 91 I.C. 560, 1926 L. 137=89 I.C. 162. Ignorance of death is not sufficient cause and cannot be considered to be an adequate ground to excuse the delay in applying or to extend the time under S. 5 of the Limitation Act. 155 I.C. 610=37 P.L.R. 400=1935 L. 478. If it is due to applicant's negligence. 1935 R.D. 5=16 L.R. 173 (Rev.). There may be circumstances in which ignorance might be excusable. It is for the appellant to make out such circumstances. 1935 O.W.N. 371. The number of parties to the case was very large and the appeal had remained pending for a long time. There was no negligence in making applications for substitution of L. Rs. Held, that in the peculiar circumstances of the case the delay in making the application should be condoned and the abatement set aside. 165 I.C. 521=38 P.L.R. 915=1936 L. 710. An application to bring on record the L. Rs. of a deceased respondent in an appeal was out of

time by 9 days. The reason for the delay was alleged to be that the appellant was a minor and his next friend was a pardanashin lady and that she did not come to know in time of the respondent's death which took place in a different district. Held, that sufficient cause was shown for the delay in making the application and that the abatement of the appeal should be set aside. 36 P.L.R. 156=1934 Lah. 998. The plaintiff died after the decision in the lower Court and an application for substitution of the plaintiff's heirs was not made until five months afterwards. The defendant-appellant applied for setting aside the abatement of the appeal. The facts were that the village of the plaintiff and the village of the defendant were only 15 miles apart and the parties were related by marriage. Held, dismissing the application, that there could be no excuse for people in the position of the defendant not knowing of the death of the plaintiff when they were living so closely together and that knowledge ought to and must have come to him within 90 days which was the prescribed time for filing an application for the substitution of names, and that the appeal had abated. 151 I.C. 147=1934 Lah. 934 (1). Minor party represented by pardanashin lady as next friend—Mistake due to negligence or ignorance of pleader—Delay—If excusable. 19 N.L.J. 273. Delay in applying to bring the L.R. on record caused by a slip on the part of the party's vakil should be excused if the party himself is not at fault. 41 M.L.J. 65=62 I.C. 795. Fraud of agent would be sufficient cause. 53 I.C. 585. *Bona fide* mistake of fact is sufficient cause, as well as *bona fide* mistake of law. 1923 L. 475; 55 I.C. 883=1 L. 481; 8 P.R. 1916=32 I.C. 829; 67 I.C. 306=2 Lah. L.J. 44; 54 M.L.J. 234=1928 M. 404=108 I.C. 288. Mere ignorance of law that an application is necessary or mere ignorance of the death of a respondent is not sufficient cause within the meaning of R. 9 (Case-law referred.) 14 L. 543=142 I.C. 649=1933 L. 356 (2). A suit for partition cannot be proceeded with in the absence of the alleged co-sharers. The failure to implead the L. Rs. of a deceased party will in such a case entail abatement. It is no excuse for the party seeking to set aside the abatement to say she was not aware of the law. 147 I.C. 1187=35 P.L.R. 95. The Court has wide powers to set aside an abatement and these powers should be used somewhat liberally unless there is clear proof of laches. Where the plaintiff has had difficulties in keeping in touch with all his adversaries it does not lie in their mouth to object if the Court should

10. [S. 372.] (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

Procedure in case of assignment before final order in suit

Notes.

condone delay 26 S.L.R. 81 Quarrel among L. Rs is no sufficient cause to excuse delay in applying to be brought on record as L. Rs. under R. 9, 31 I.C. 38. That succession certificate was obtained after the expiry of time fixed for addition of L. Rs. is sufficient reason to excuse delay. 73 I.C. 215=26 O.C. 244. Appellant's carelessness and the culpable means adopted by him to conceal it are sufficient to reject his application to set aside order of abatement. 30 I.C. 717=155 P.L.R. 1915.

DISCRETION OF COURT.—The discretion of the Court under this rule, if exercised in favour of the party in default, is open to scrutiny and interference by the appellate Court only if the discretion has been exercised in a perverse or an unjust manner and where this is not the case, the order once made cannot be declared to be illegal, merely because the application to bring the L.R. on the record was submitted beyond time. 1935 L. 712. In an appeal against a decree dismissing a suit for injunction against several defendants, the cause of action being precisely the same against all, if some of the defendants die, it is the duty of the Court to set aside the abatement under R. 9 (2) and (3); if that is not done, the second appellate Court will do so under O. 41, R. 23. 13 L.L.T. 22.

LIMITATION.—The period of limitation is that prescribed by Art. 177 of the Limitation Act. 2 P. 168; 84 I.C. 1001. See 5 C. 139, where the suit was revived after the expiry of 3 years. See also 8 C. 837; 30 C. 609; 8 C. 420; 51 I.C. 534. Petition to add L. Rs. presented after the prescribed period should be treated as one to set aside the abatement. 1928 L. 746=112 I.C. 5, 117 I.C. 884=1929 L. 129=10 L. 816. See also 1933 N. 85=29 N.L.R. 118.

PROCEDURE.—Where a suit has abated and an application is made not as an application to set aside the abatement but for substitution of a L.R. and the application is treated as one to set aside the abatement would have been within time, the application for substitution may be considered as an application under R. 9 (2), for setting aside the abatement. 1933 N. 85=29 N.L.R. 118; 14 L. 543=34 P.L.R. 11, see also 1928 L. 746=112 I.C. 5; 117 I.C. 884=1929 L. 129. Where an appeal abates by reason of the death of the respondent and the failure to bring his L. Rs. within time, but the Court in ignorance of the fact hears and allows the appeal and the L. Rs. of the deceased respondent file a petition for review of the appellate judgment and along with it an application under R. 4, for their substitution on record, the order granting the application for substitution is not tantamount to an order setting aside the

abatement, as the sole object of the L. Rs. in making that application was to have it declared that the appeal had abated and that the order accepting it was a nullity in the eye of the law. 152 I.C. 227=35 P.L.R. 457=1934 L. 442. If the L. R. is not brought on record in time, the appeal against him abates automatically and unless that abatement is set aside within sixty days or a period extended under S. 5 of the Limitation Act, the appeal is dead and it is not necessary that an order should have been passed declaring that the appeal has abated. 14 L. 543=142 I.C. 649=1933 L. 356 (2). Death of appellant—Impleading of widow and minor son—Subsequent death of widow—Failure to appoint fresh next friend—Effect—Procedure—Application of respondents for appointment of next friend 17 P.L.T. 86. Death of appellant—Court ordering substitution of minor heirs without application and appointing Court guardian—Competency—Appeal—If abates—Remedy of minor heirs 17 P.L.T. 129.

REVIEW.—An order setting aside abatement by a Division Bench cannot be reopened at a subsequent stage of the case by a different Bench even though the order was made *ex parte*. The proper remedy is by a review. 29 M.L.J. 574=30 I.C. 669.

APPEAL.—An order refusing to set aside an abatement in an appeal cannot be appealed against. 121 I.C. 564=33 C.W.N. 881=1929 C. 532 (2). An application to bring on the record the legal representatives of a deceased party after the expiry of the time fixed for this purpose must be deemed to be an application to set aside the abatement and an order refusing to set aside an abatement is appealable. 147 I.C. 699 (1)=1934 L. 315.

FRESH SUIT.—Where a suit abates or is dismissed under O. 22, no fresh suit can be brought on the same cause of action nor can the same rights be set up in defence in a subsequent suit. 144 I.C. 605=1933 L. 752.

O. 22, R. 10 SCOPE AND APPLICATION OF RULE.—A person who institutes a litigation may prosecute it to its conclusion notwithstanding a devolution of his interest in the property. The litigation will continue in his name for the benefit for his successor. 15 P. 607=17 P.L.T. 564=1936 P. 420. R. 10 makes it discretionary with the Court to allow an application for substitution in the circumstances of a particular case. Where lower Court struck off the name of one of the defendants on the ground that he was an insolvent and that his interests had vested in the trustee in bankruptcy in England, *held*, that the order was valid. Unless the law casts a duty on the plaintiff to bring the Receiver or trustee on the record it cannot be said that the insolvent must be represented in the suit. He has no right to remain on the record as a defen-

(2) The attachment of a decree pending an appeal therefrom shall be

Notes.

dant and he cannot insist that he must remain on the record through his trustee. 34 C.W.N. 53=1930 C. 388. Leave should not be unreasonably refused. 15 P. 607=17 P.L.T. 564=1936 P. 420. The discretion of the Court must be exercised judicially. When the application is made after long delay—there being interminable, unexplainable and unnecessary delay and dallying since the commencement of the suit for nearly 10 years—the Court will rightly exercise its discretion by refusing leave to the applicant. 164 I.C. 845=44 L.W. 263=1936 M. 714=71 M.L.J. 307. See also 1936 L. 652. Court would be justified in refusing such an application if fraud is alleged and proved against the person applying under the rule. 156 I.C. 152=42 L.W. 340=1935 M. 423. R. 10 applies only to cases which do not fall under the preceding rules of the same order. 45 M. 872=42 M.L.J. 301; 91 I.C. 166=1926 L. 181. See also 22 L.W. 860=49 M.L.J. 704. P. 10 has no application to a case where the devolution of interest is by death. 1933 S. 371. By consent of parties and the leave of the Court a suit may be amended to cover an increased claim. 9 A. 229. The rule does not apply to cases of assignment of interest which is the subject-matter of litigation between the date of decision of the first Court and the filing of appeal. 38 I.C. 511=20 O.C. 31, 1 P.L.J. 596=38 I.C. 237. The first four rules of O. 22 cannot apply to a case in which the death of the defendant occurs between the passing of preliminary and final decrees in a suit, as there is then no right to sue surviving. 64 I.C. 307=17 N.L.R. 81, 116 I.C. 657=1929 N. 152, 123 I.C. 473. The rules in this order deal with the devolution of interest by the operation of law and not by act of parties. 53 M.L.J. 142=102 I.C. 444=1927 M. 693, 27 A.L.J. 921=1929 A. 444. R. 10 empowers the Court to give leave to a person who has taken an assignment from a party to continue the suit. The “party” there obviously refers to a party already on the record. Where the L.R. of a deceased plaintiff, instead of coming forward and himself taking up the responsibility of the suit, transfers his interest to another man, it will be defeating the object of the law to permit that man to continue the suit. 15 P. 82=17 P.L.T. 73=1936 P. 123. So also in the case of assignee from Official Receiver. 157 I.C. 900. Where after the passing of a preliminary decree for dissolution and accounts of a partnership the plaintiff widow died and certain ultimate reversioners applied to be substituted. *Held*, that the Court could permit them to continue the case. 58 C.L.J. 240. A creditor of a decree-holder who has attached the decree pending an appeal against it is not entitled to be made a party respondent to the appeal under this rule. 20 A. 229. On this rule, see also 5 A. 212; 9 A. 238; 30 A. 38; 23 A. at 335; 5 C. 720; 30 C. 609, 10 A. 97. The words “other cases” mean cases other than those specifically mentioned in the

previous rules. 9 C.W.N. 171. As to effect of order, see 43 M. 37=37 M.L.J. 449. The position of the party substituted is exactly the same as that of the original person. 16 I.C. 567=17 C.W.N. 862. A deed of compromise filed during the pendency of a suit cannot be regarded as an “assignment”. 5 A. 209 (212). As to Court’s power to decide dispute as to assignment, see 94 I.C. 926=1925 L. 574. Death of plaintiff after decree but before appeal—Substitution of his widow on basis of evidence or case—Failure to file special affidavit—Effect. 51 C.L.J. 73=1930 C. 270. Where once application is allowed under this rule and substitution is made, the original party ceases to have any *locus standi* in matters relating to the suit. 1935 O.W.N. 842=156 I.C. 990=1935 Oudh 486. A deed of relinquishment does not amount to any assignment, creation or devolution of an interest within the meaning of R. 10 of O. 22. 160 I.C. 801=1936 O.W.N. 183=1936 Oudh 224. Where after the passing of a preliminary decree, but before the decree was made absolute the person against whom the decree was passed relinquished his interest or rights in favour of another and the relinquisher did not inform the Court or the decree-holder of the relinquishment. *Held*, that the decree was not nullity against the person in whose favour the relinquishment was made. 159 I.C. 725=1935 Pat. 488.

PENDENCY OF SUIT.—Whether the expression “the pendency of the suit” in R. 10 covers the period between the original and an amended decree, see 43 M.L.J. 559=69 I.C. 977=1923 M. 57. Rule applies to cases of devolution of interest pending suit and not to cases of persons acquiring interest after decree. 40 I.C. 846 1917 M.W.N. 306, 64 I.C. 307=17 N.L.R. 81; 43 M.L.J. 589=27 C.W.N. 29=49 I.A. 220=1 P. 581 (P.C.). See also 1926 C. 173, 149 I.C. 970=1934 A.L.J. 832=1934 A. 442. Nor to cases of persons who have acquired interest in the subject-matter prior to the institution of the suit. 25 A.L.J. 985=108 I.C. 699=1928 A. 120. A simple mortgagee subsequent to suit of the share of a party in a partition suit cannot be allowed to be added as plaintiff and continue the suit after the original plaintiff has withdrawn the suit under R. 10 or under the residuary provisions of S. 146. A person who applies to be made a plaintiff under R. 10 must show that the original plaintiff’s interest in the suit has devolved on or has been assigned to him absolutely and not merely that he has obtained a derivative interest in the subject-matter like a simple mortgagee. While on the one hand assignees of fractional interests, if absolute, would be entitled to be added as parties, assignees of derivative title, like lessees or mortgagees are not entitled to be so added. [6 L. 388 (P.C.) and 1 P. 581 (P.C.), *Rel. on*]. 38 L.W. 280. In the case of an application by the mortgagee of the rights of the plaintiff it was held, that the petitioner was a person on whom an “inter-

deemed to be an interest entitling the person who procured such attachment to

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est" as contemplated by R. 10 had devolved that he might be allowed to continue the appeal, and that on the dismissal of the appeal, he should pay the costs of the respondents. [1 P. 581 (P C.), Dist J. 56 M. 469 =143 I.C. 578=1933 M. 411=64 M.L.J. 489.

"INTEREST"—The interest must be the interest in the property, which is the subject-matter in the suit. 30 C. 961. 30 S.L.R. 170=165 I.C. 305 (2)=1936 Sind 166 Where, during the execution of a decree against the estate of a deceased person, a posthumous son is born to him, there is no devolution of interest on him in the subject-matter of the suit, and R 10 does not apply to an application made on his behalf that he should be brought on record in the execution proceedings pending before the Court. (*Ibid*) The "interest" contemplated is any interest which will be vitally affected by the suit. 43 I.C. 811. The 'interest' referred to in R. 10 is the interest of a person who was a party to the suit. It is the transfer by assignment, creation or devolution *pendente lite* of the interest of such a person to the applicant, which entitles the latter to make an application to continue the suit or appeal, as the case may be and not the creation of an independent right in him. A suit was filed by a presumptive reversioner challenging an alienation by the limited owner as not affecting his interest. The period of 12 years for such a suit elapsed before Act II of 1929 came into force. On death of the plaintiff reversioner, a sister of last male holder sought to continue the suit on the ground that she had been included under R. 10, in the line of heirs by Act II of 1929. *Held*, that there was no transmission by assignment, creation or devolution of the interest of a party to the litigation to her within the meaning of R. 10, and that she was not competent to apply for permission to continue the suit. 1936 Lah 652. Compromise of suit—Decree not passed—Application by purchaser to be added as a party may be allowed in the discretion of the Court. 27 C.W.N. 755=1924 C. 188. Proceedings after a preliminary decree for sale or redemption till the final decree is passed are proceedings in the suit, and the private purchaser of the property after such a decree acquires an interest which entitles him to be made a party to the suit. 37 A. 226=27 I.C. 771; 25 Bom L.R. 308=75 I.C. 743=1923 B. 303; 27 C.W.N. 710=75 I.C. 255=1924 C. 90, 51 I.C. 233=29 C.L.J. 362.

DEVOLUTION OF INTEREST.—These words do not mean devolution by death. 28 C. at 175. *See also* 27 I.C. 704=20 C.L.J. 107. The devolution spoken of in R. 10 is not confined to devolution in ways other than by death. 64 I.C. 307=17 N.L.R. 81. *See also* 92 I.C. 520=1926 M. 540. They include devolution of an interest by reason of an adjudication in insolvency and a vesting order thereunder. 25 M. at 413. *See* 30 B. 257. Where a trustee dies or retires, the estate devolves on

the new trustee who can be added under the rule. 92 I.C. 520=1926 M. 540. *See also* 1928 C. 651=114 I.C. 413. Trustee ceasing to hold office during suit—He can still continue the suit. 109 I.C. 789=1928 M. 607. O. 22, R. 10 is applicable to a case where a suit is brought by a deity through the mohunt and shebait and on his death an application is made for the substitution of another as the next shebait and L.R. 139 I.C. 123=36 C.W.N. 816=1932 C. 783. Decision is binding on the institution though successor did not come on record. 108 I.C. 401=1928 M. 246. *See also* 1930 M. 881. The insolvency of the defendant in a money suit does not affect the devolution of any interest on the Official Receiver. 29 I.C. 30=8 S.L.R. 325, 53 M.L.J. 142=102 I.C. 144=1927 M. 693. *See also* 1933 N. 6=28 N.L.R. 340. There is no devolution of interest where a company goes into liquidation. Only the powers of the directors are transferred to the liquidator 94 I.C. 380=1926 N. 303. Assumption of superintendence by the Court of Wards involves a devolution of interest within the meaning of R. 10 of O. 22. 1935 O.W.N. 842=156 I.C. 990=1935 O. 486. An application for substitution by an assignee decree-holder is within R. 10 even though the assignment was obtained not directly but only derivatively from a party to the suit. 26 I.C. 410=20 C.L.J. 107; 20 I.C. 685=18 C.W.N. 450. The words "has come or devolved" connote an interest *in praesenti*. It must be vested in the applicant on the date of the application to implead him a party to the suit and not merely contingent 1937 M. 200. Where a plaint is returned for presentation to the proper Court, any devolution of interest which took place while the proceedings were pending in the first Court must be taken to be a devolution in the course of the suit. 8 L.W. 21=48 I.C. 840=41 M. 510. An adoption is not the creation of an interest within R. 10. 43 I.C. 64=15 N.L.R. 24. *But see also* 32 I.C. 858=20 C.W.N. 552. Attaching creditor cannot be impleaded under O. 22, R. 10. 89 I.C. 446=1926 N. 67. (*See sub-cl. 2*) Gift by father to son—Suit for pre-emption—Right of donee to continue the suit. 25 O.C. 319=1922 O. 289. Where a person whose suit is dismissed in the trial Court assigns his interest to a third party during the period intervening between the passing of the decree and the institution of the appeal, the assignor has no subsisting interest which would entitle him to prefer an appeal. R. 10 has no application to such a case as the assignment does not take place during the pendency of the appeal but before the appeal is instituted. To such a case S. 146 is of no assistance and the appellate Court could not allow the assignee to be made an appellant at the time of hearing the appeal, as S. 146 would become applicable only if the appeal could have originally been filed by the assignor. 1935 L. 119. Similarly an application by an assignee for his substitution as a co-appellant in appeal is not maintainable where the assignment was

the benefit of sub-rule (1).

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made during the pendency of the suit in the trial Court and not during the pendency of the appeal. 160 I.C. 801=1936 O.W.N. 183=1936 O. 224. Assignment or devolution of interest in favour of person added, absence of—Effect. 57 C. 170=123 I.C. 250=1930 C. 113.

EXECUTION PROCEEDINGS—R. 10 does not apply to execution proceedings. 10 I.C. 405=175 P.L.R. 1911. See also 36 C.W.N. 93=138 I.C. 64=1932 C. 423; 30 C. 961; 74 I.C. 577=1923 L. 560. But see 39 C. 220=16 C.W.N. 109 (*contra*). The rule does not apply to assignments after decree. 10 A. 97. An assignee of a decree need not therefore apply under the rule for recognition of his assignment. The law applicable to such a case is O. 21, R. 16 39 C.W.N. 961. But see 71 M. L.J. 385. Whether rule authorizes the addition of a party to suit after decree. 42 C. 72=41 I.A. 251 (P.C.). The mere fact that a transferee from the judgment-debtor takes up the position of a representative of the judgment-debtor bound by the decree to the extent of the interest acquired by the transfer does not entitle the decree-holder to proceed against him in execution. 138 I.C. 64=36 C.W.N. 93=1932 C. 423.

PRACTICE AND PROCEDURE—A judicial order which may possibly affect or prejudice any party cannot be finally made unless the party affected has had an opportunity of being heard. It is based on the plainest principles of justice. An order for substitution may be made *ex parte* without notice and such an order made *ex parte* can be re-called upon objection of parties interested. 16 I.C. 567=17 C.W.N. 862. No order for substitution should be made upon an application which is not supported by affidavit or is not verified. (*Ibid*) A person may, under this rule, be added or substituted as a party either on his own application or on the application of one of the parties already on the record. 18 A. 285. Deliberate delay in applying for the addition of a party will be a ground for rejecting the application. 43 I.C. 811. See also 71 M. L. J. 307. Whether an Official Receiver's successor on the resignation of his office can continue the proceedings, without his name being brought on record. 40 I.C. 170=32 M.L.J. 520.

LIMITATION—Limitation for impleading assignees. 27 C.W.N. 710=75 I.C. 255=1924 C. 90. See also 32 C. 612; 30 C. 609; 22 A. 231; 8 C. 837. An appellant should not, after the appeal has abated for not bringing the L. Rs. on record, be allowed to bring the transferee of the defendant on the record when he was not impleaded as a defendant though the plaintiff came to know of the transfer during the pendency of the suit and was not given an opportunity of defending the suit. 149 I.C. 1103=1934 L. 190. See also 1935 L. 112=36 P.L.R. 199. Mortgage suit—Insolvency of—Mortgagor—Addition of receiver—Limitation. 1935 L. 316.

APPEAL—Order under R. 10 is appealable. 44 M. 919=41 M.L.J. 316 (F.B.). See also 144 I.C. 978=10 O.W.N. 179=1933 O. 207, 134 I.C. 307=35 C.W.N. 296=1931 C. 594. An assignee can appeal though the decree was passed *ex parte* against the assignor. 22 A. 380, 35 C.W.N. 296. But see 24 A. 532. An appeal lies under S. 12 of the Letters Patent. 24 M. 252. *Quære* Where an application for the substitution of the applicant as the L. R. of the appellant was dismissed and the main appeal itself by the plaintiff appellant was also dismissed at the same time, whether an appeal from the interlocutory order alone is competent without an appeal from the order dismissing the plaintiff's appeal. 139 I.C. 123 (2)=36 C.W.N. 816=1932 C. 783. Applicability—Appeal preferred by insolvent—Whether can be prosecuted after annulment of adjudication. 1929 B. 202=31 Bom. L.R. 354. *Prima facie* no second appeal lies from an appellate order on an application made under R. 10. 156 I.C. 152=42 L.W. 340=1935 M. 423.

REVISION—Dispute as to the factum of assignment—Court's power to decide—Whether revision lies. See 51 I.C. 233=29 C.L.J. 362. A wrong exercise of discretion cannot be set aside in revision. 89 I.C. 605=1925 N. 423.

RES JUDICATA—Order under this rule will operate as *res judicata*, in subsequent proceedings. 144 I.C. 978=8 Luck. 477=10 O.W.N. 179=1933 O. 207.

DISCRETION OF COURT—The applicant obtained a preliminary decree for partition in 1878. Subsequently however no steps were taken beyond the appointment of a Commissioner who died in or about 1896 having done nothing towards the execution of the Commission. In July, 1932, i.e., some 53 years after the preliminary decree, the plaintiff applied by notice of motion asking among other things that certain names of parties, defendants to the suit, now dead, be struck out and the name of K be substituted in their place and for the appointment of a Commissioner to partition certain properties. *Held*, that irrespective of whether the suit for partition had abated or not the Court had a discretion whether to allow the decree to be resuscitated or not. 60 C. 940=1933 C. 696. See also 34 C.W.N. 53.

MISCELLANEOUS—Public trust—Death of trustee—Subsequent trustees impleaded as parties—Defences open to. 45 M. 703=43 M. L.J. 147. Where an Official Assignee has become *functus officio* on account of the property of the insolvent having been vested in the trustees in consequence of which he withdraws from a suit for the cancellation of a transfer pending in a certain Court and the Court dismisses it under O. 9, R. 8 the trustees cannot apply to be made the legal representatives of the Official Assignee and ask for the restoration of the suit. 152 I.C. 380=1934 Pesh. 89. The estate of the deceased had originally vested in trustees who filed a suit. Subsequently the Official Receiver was

11. [S. 532.] In the application of this Order to appeals, so far as may be the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

Application of order to appeals.

Loc. Ams.—[Calcutta] In O. 22, after R. 11, add the following proviso to R 11—

"Provided always that where an appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under O 41, R. 14 (3), the appeal shall not be deemed to abate as against such party and the decree, made on appeal shall be binding on the estate or the interest of such party."

[Madras] In O 22, after R. 11, add the following as R 11-A:—

11-A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a quasi-judicial act within the meaning of S. 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a judge for disposal.

Application of order to 12. Nothing in rules 3 4 and 8 shall apply to proceedings. to proceedings in execution of a decree or order.

Loc. Am.—[Allahabad.] At the end of the rule add the words—

"or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit."

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appointed Receiver of the estate which then vested in him. He refused to be joined as a party to the suit filed by the trustees. *Held*, that there was no objection to the suit being continued by the trustees. Even though the Official Receiver declined to be added as a plaintiff, he would be bound. 1933 S. 232. A suit for recovery of money due to an estate instituted by a trespasser cannot be continued by the real owner. 38 I.C. 154=2 P.L.J. 199. The assignees of a right to recover mesne profits given by a decree in a suit ought to apply for continuance of the suit under O. 22, R. 10. 1 P.L.J. 427=37 I.C. 998. Liability of assignee of a party's right who continues to conduct suit or appeal to pay costs, *see* 63 M.L.J. 489.

O. 22, R. 11.—The principle recognised in R. 11 applies not only to suits but to revision proceedings as well. 21 I.C. 407=18 C.L.J. 141. A rule issued at the instance of a party who is dead at the time is a nullity. 21 I.C. 407=18 C.L.J. 141. [N.B.—*See also* under R. 10.] Death of respondent pending appeal unknown to Court—Appeal dismissed after hearing—Unsuccessful appellant is not entitled to re-hearing. 123 I.C. 607=1930 M. 719. Right of surviving appellants having a common ground of appeal to continue appeal without bringing on record L. Rs. of deceased appellant. *See* 15 R.D. 629=12 L.R. (Rev.) 273. Where a decree is for joint possession without specification of shares and there is no mention in it of any specific share to which a co-plaintiff who dies pending appeal is entitled and the appeal has admittedly abated against the deceased co-owner the appeal abates as a whole. (Caselaw referred.) 148 I.C. 889=1934 Pesh. 14. Two independent appeals against single decree—Joinder of L. Rs. in one appeal does not enure for the benefit of the other appeal as well—The other appeal abates—To such a case the

analogy of appeal and memo. of objections is not applicable. 130 I.C. 764=1931 M. 277=60 M.L.J. 267. 7 L.W. 614, Dist., 45 C. 94 (P.C.), Cons.] *See also* note under O 22, R. 4. After abatement of an appeal, the trial Court has no jurisdiction to go on with the proceedings taken in pursuance of an order of the appellate Court which was intended to operate only during the pendency of the appeal. 161 I.C. 212=1936 L. 618.

PROCEDURE.—Where a party is already impleaded both in the appeal and the memorandum of objections two separate applications are not necessary to bring his L. Rs. on the record. 1934 M. 448=67 M.L.J. 222.

O 22, R. 12.—The rule does not apply to execution proceedings. 87 I.C. 21=1925 O. 448. *See also* 30 C.W.N. 735=96 I.C. 378. Appeals in proceedings relating to execution of a decree are mere continuation of execution proceedings and there can be no doubt that R. 12, is applicable to such appeals and consequently Rr. 3, 4 and 8 cannot apply. An appeal arising out of an order passed in the course of proceedings in execution of a decree or order does not abate on the death of respondent if the appellant fails to apply to make the L. R. of the deceased respondent a party to the appeal within time prescribed by law. 9 P. 372=122 I.C. 148=1929 P. 565 (F.B.). But *see* 1933 A. 388, *infra*. R. 12, O. 22 does not exempt pending appeals even though they arise out of execution proceedings and R. 8 applies to them. (1923 L. 560 and 1929 P. 565, *Diss. from*; 51 M. 858, *Ref.*) 55 A. 509=144 I.C. 391=1933 A.L.J. 706=1933 A. 388. The words "proceedings in execution" in R. 12, mean proceedings provided for in Part II and O. 21 of the Code, that is, they are proceedings in the Court which passed the decree or in the Court to which the decree has been sent for execution. An appellate Court may have to consider the propriety of the orders passed

ORDER XXIII.

WITHDRAWAL AND ADJUSTMENT OF SUITS.

1. [S. 373.] (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants withdraw his suit or abandon part of his claim.

Withdrawal of suit or
abandonment of part or
claim

Notes.

by these Courts but the proceedings in the appellate Court cannot properly be described as proceedings in execution. They are separate proceedings, merely testing the validity of the order made by the executing Court. 38 P.L.R. 946=164 I.C. 605=1936 L. 1022. Further, Rr. 3, 4 and 8 apply in terms to suits while R. 11 makes these provisions applicable to all appeals. As no distinction is made in the Code between appeals from orders in execution and appeals generally, and as R. 11 is without qualification or exception, Rr. 3, 4 and 8 apply to appeals in execution matters (*Ibid*). Where pending an application for execution of a decree the decree-holder dies, it is open to his heir and L.R. to continue execution proceedings provided he applies to the Court and obtains an order under O. 21, R. 16. He need not be compelled to resort to a separate proceeding. 134 I.C. 720=33 Bom. L.R. 818=1931 B. 423. (50 M. 1, Foll.; 34 C.W.N. 437, Ref.) But see 1931 M.W.N. 1209=34 L.W. 366 (F.B.), 60 M.L.J. 628=131 I.C. 610=1931 M. 303. Appeal in execution proceedings—Death of appellant pending—L.R. can be brought on record by the ordinary procedure applicable to appeals. 51 M. 858=110 I.C. 662 (1)=1928 M. 772=55 M.L.J. 497. Decree capable of execution without final decree—Substitution of L.Rs. need not be within three months of party's death. 82 I.C. 604=1925 A. 66. Application for execution—No abatement—Substitution of names in pending execution proceeding is permissible. O. 21, R. 16 applies only to substitution along with execution and there is no other rule barring the substitution of names by an executing Court when an execution is pending. 50 A. 621=1928 A. 299.

O. 22, R. 12 (Allahabad) — Amendment, if retrospective. The amendment of R. 12 under which there would be no abatement once a preliminary decree has been passed, does not have a retrospective effect and cannot have the effect of automatically reviving all suits which had abated previous to the amendment. Where the abatement has taken place under the old law, the preliminary decree becomes non-existent, and without the abatement having been set aside on a proper application being made within time, no final decree can be prepared. 4 A.W.R. 1450=1935 A. 180.

O. 23, R. 1: APPLICABILITY OF RULE.—As regards applicability of R. 1, see 132 I.C. 224. This rule does not apply to suits before the Revenue authorities under Act X of 1859. 21 C. 428. See also 21 C. 514. It applies to rent suits in the N.W.P. 5 A. 406. Also to ejectment suits filed under the Agra Tenancy Act. L.R. 6 A. 65 (Rev.). But see 15 R.D. 177=12 L.R. 53. (Rev.). O. 23 applies to

S. 92, 1925 C. 187. As to application of principles of the rule in case of withdrawal of an application to Court for amendment of specification under S. 18, *Patent and Designs Act* (II of 1911), without leave is applicable, see 61 C. 450=152 I.C. 914=38 C.W.N. 720=1934 C. 735. As to whether such an order could be made in a suit for judicial separation, when an amicable settlement has been come to after suit, see 9 Beng. L.R. App. at 6. An application under R. 20 of Sch. II can be withdrawn under this rule. 31 C. 516. Second suit is barred even against a sub-tenant, when the latter had raised in the prior suit a plea of rights of a permanent character. 18 R.D. 338 (1)=15 L.R. 440 (Rev.). See also 18 R.D. 1=15 L.R. 1 (Rev.). But the recorded chief tenants are entitled to bring a suit against the recorded sub-tenant even though the previous suit brought by some of them against two persons alleged to be sub-tenants had been withdrawn without permission to bring a second suit. 18 R.D. 338 (2)=15 L.R. 488 (Rev.). Where proceedings under S. 86 of Agra Tenancy Act were withdrawn without liberty to file fresh suit, *held*, a fresh suit even under S. 121 of the Tenancy Act was barred. 18 R.D. 235=15 L.R. 263 (Rev.). An application which has been registered as a suit under any of the provisions of the Code can be allowed to be withdrawn with liberty to file a fresh suit. 5 M.H.C.R. 298. When a suit has been dismissed in the lower Court, the appellate Court cannot in appeal allow the plaintiff to withdraw his suit. 11 M. 322. Nor in second appeal 147 I.C. 441=1934 A.L.J. 821=1934 A. 214. But see 39 C.W.N. 586. Letters Patent appeal—Permission to plaintiff to withdraw with liberty to bring fresh suit—Not permissible. 1930 P. 410. Withdrawal of suit in appeal—Discretion of Court—Conditions justifying withdrawal. 114 I.C. 557=1929 M. 36. See also 41 C.L.J. 186=1925 C. 711; 1931 A.L.J. 232=132 I.C. 194. Amendment of plaint—Direction to value property and to pay deficit Court-fee—Non-compliance—Prayer for leave to withdraw suit with liberty refused—Subsequent dismissal for default—If bars fresh suit. 40 C.W.N. 1390=1935 C. 764. With respect to the application of R. 1, a suit for partition should be treated differently from other suits, and a subsequent suit for partition of the same property involved in the previous suit is not barred under R. 1, by the dismissal of the prior suit, even though no permission to institute a fresh suit was obtained when the prior suit was dismissed as withdrawn on the ground of compromise. The right to bring a suit for partition is a continuing right, and as soon as the defendant fails to carry out

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect, or

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the compromise the parties are relegated to their rights as they existed prior to the compromise 158 I.C. 1051=42 L.W. 843=1935 M. 909=69 M.L.J. 401. The Court trying the subsequent suit is not competent to inquire into the propriety or validity of the order granting permission to withdraw the suit. 159 I.C. 678=61 C.L.J. 209=1935 C. 739. Court of Wards assuming superintendence of plaintiffs' estate during pendency of suit—Order granting leave to Deputy Commissioner to continue suit—No appeal filed—Subsequent order allowing application by Deputy Commissioner for permission to withdraw suit—*Locus standi* of original plaintiff to file appeal. 1935 O.W.N. 842=156 I.C. 990=1935 Oudh 486.

"AT ANY TIME".—A Court cannot refuse to allow the plaintiff to abandon a portion of his claim on the ground that the petition was filed too late, for R. 1 gives a right to the plaintiff to do so at any time during the pendency of the suit 116 I.C. 823. The procedure of withdrawal laid down in R. 1 applies only to pending suits and before the decree has been made. (29 B. 13; 35 B. 261, Foll.) 47 I.C. 817=12 S.L.R. 14. Leave cannot be granted after judgment is pronounced. 24 W.R. 23; 18 M.L.T. 460=31 I.C. 312; 62 I.C. 25; 52 I.C. 870; 55 C. 1067=1929 C. 88=113 I.C. 847. Nor after the suit had abated under O. 22, R. 4. 40 C.W.N. 1019; 1935 A.L.J. 1286=1935 A. 853. Where after the grant of leave to appeal to the Privy Council the parties compromised the suit and applied to High Court to pass a decree in terms of the compromise. *Held*, that High Court had no power to do so as it would supersede the first decree. 57 B. 369=35 Bom.L.R. 413=1933 B. 244. Leave to withdraw with liberty to sue again cannot be given after an award is filed. 7 C.W.N. 181, 32 I.C. 347=2 O.L.J. 497. During the course of the suit, by a widow against her husband's brother, etc., for an account of her estate a compromise was alleged to have been entered into by way of family arrangement settling all matters in dispute between the parties to the suit and another *M* (the respondent), also a son of a deceased brother of the plaintiff's husband; *M* filed petitions first to be made a party to the suit and secondly for a decree in terms of the compromise. Some time hence the plaintiff applied to withdraw from suit and *M* opposed it contending that the dismissal of the suit consequent on the withdrawal of the plaintiff would affect the interest derived by him in the subject-matter of the suit as a result of the compromise. *Held*, that though the plaintiff desired to withdraw the suit and the defendants on record did not object to the withdrawal, the Court could still consider whether it should permit a withdrawal under the circumstances of the case. 57 M. 892=150 I.C. 582=1934 M. 337=66 M.L.J. 517. Withdrawal by one co-plaintiff without the consent of others is not permissible. 52 C. 139=1925 C. 637=38 L.W.

666=1933 M. 824=65 M.L.J. 693. (Doubts if sub-R. (4) governs sub-R. (1) of section, but holds that permission may be refused if the withdrawal would be prejudicial to non-consenting plaintiffs.) But see 14 L.R. 14 (Rev.)=17 R.D. 14. See 7 L.R. 135 (Rev.) (Withdrawal of by one appellant). A suit for account is said to be pending until the final order on taking the account is made. 30 C. 609. Where once there has been a preliminary decree ordering the taking of accounts if the plaintiff desires to withdraw his claim for rendition of accounts but the defendant desires the case to proceed, the proper course is to transfer the plaintiff as defendant and make the defendant plaintiff. 96 I.C. 67=24 A.L.J. 694=1926 A. 582. But defendant would not be entitled to continue the suit, in the absence of a preliminary decree passed in his favour and an award made or agreement or compromise entered into by which the defendant may have acquired the right 32 L.W. 280.

AS TO SCOPE OF SUB-R. (2). See 15 M.L.J. 452, 2 A.L.J. 59.

SCOPE OF SUB-R. (3).—10 M. 160; 8 C. 871; 9 B. 346, 1928 A. 689. Sub-rule (3) applies only to withdrawal of suits and not to those of applications. The withdrawal of an application for final decree does not bar a fresh application 1928 M. 1165=115 I.C. 825. Application by Receiver to be made a party to suit in ignorance of *ex parte* decree—Withdrawal of—Subsequent application to re-open case and to implead him as party is maintainable. 6 R. 494=1928 R. 273=113 I.C. 811.

ABANDONMENT OF PART OF CLAIM.—A suit can be withdrawn in part with liberty to sue again in respect of it. But the whole suit cannot be withdrawn with liberty to sue again in respect of part only. When only part of a suit is withdrawn, the remaining part must be proceeded with and if not, it must be dismissed as to it. 5 Bom.L.R. 223; 15 M.L.J. 462. Where plaintiff withdrew part of a claim without permission, his suit for the same is barred. 40 I.C. 408=29 C.L.J. 11. A plaintiff may withdraw his claim against some defendants only at any time before actual judgment. 18 M.L.T. 460=31 I.C. 312; 62 I.C. 25; 52 I.C. 870. "Formal defect" is not confined to those in pleadings. 34 C.W.N. 578. The phrase "other sufficient grounds" would not cover any ground wholly dissimilar to some formal defect. The words must be taken to mean *eiusdem generis* with the words in cl (2) (a). 79 I.C. 1033=1925 O. 291; 22 L.W. 535=1925 M. 1268; 21 L.W. 282=1925 M. 617; 94 I.C. 983=23 L.W. 525=1926 M. 863; 90 I.C. 217=1926 P. 128; 50 B. 192=28 Bom.L.R. 440=94 I.C. 777=1926 B. 315; 112 I.C. 312=1928 M. 1085, 1930 L. 175; 1929 A. 683=155 I.C. 210=1935 P. 251. But see *contra* 36 Bom.L.R. 1110. Where the property of the adoptive father of the minor was under the superintendence of the Court of Wards and after

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim.

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the death of the father the minor sued by his next friend and on objection being taken on the ground that the Court of Wards ought to have filed the suit applied for withdrawal of the suit. *Held*, that the Court could order the suit to be withdrawn with liberty to file a fresh suit. 145 I.C. 239=10 O.W.N. 314=1933 O. 273. Representative suit—Application by plaintiff to withdraw—Right of persons beneficially interested to continue litigation 55 A. 687=1934 A. 4. As to what are sufficient grounds for allowing plaintiff liberty, *see also* 13 M.I.A. 160; 9 A. 155; 11 A. 187, 1929 A. 136=50 A. 835=115 I.C. 124. Mistaken view of law no ground for withdrawal. 88 I.C. 512. Liberty would be granted if suit would fail for multifariousness, which is a defect of a formal nature 40 A. 7=42 I.C. 856, 37 A. 326=28 I.C. 857. 22 Bom.L.R. 1183=59 I.C. 210; 45 B. 206; 44 B. 598, 67 I.C. 530, 35 B. 261=10 I.C. 813; 70 I.C. 484=1922 C. 58. Where the Court held that the parties and cause of action have been improperly combined and the plaintiff thereupon elected to confine the suit to one of the causes of action and gives up the other defendants and the causes of action against them. *Held*, that the suit was non-existent so far as the parties and causes of action given up were concerned, that there was no question of any withdrawal, and that R. 1 did not apply to the case. 158 I.C. 909=42 L.W. 696=1935 M. 696. The dismissal on the ground of misjoinder cannot operate as *res judicata*, and there will be even less scope for the application of R. 1, if the Court is held to have dismissed the suit, for no question of abandonment will then arise (*Ibid*). A defect which goes to the root of plaintiff's claim is not a formal defect. 21 L.W. 282=1925 M. 617. Omission to obtain permission of Insolvency Court is a formal defect. 2 R. 643=1925 R. 105. Where it is apparent from the pleadings and the proceedings in the lower Court that the plaintiff has no clear conception of his rights, leave to withdraw with liberty to file a fresh suit will be granted. 17 I.C. 396=1912 M.W.N. 1003. Leave was granted when it was not possible for the plaintiff to adduce evidence within the time fixed by the Court. 16 W.R. 100. *See also* 15 B. 160. But failure to produce evidence in time is no ground for permitting withdrawal 7 L.L.J. 290=1925 L. 497. *See also* 22 L.W. 535=1925 M. 1268; 21 L.W. 282=1925 M. 617. *See also* 147 I.C. 776=1934 A.L.J. 450=1934 A. 137, 158 I.C. 280=1935 O.W.N. 1066=1935 O. 495. A plaintiff who has failed to conduct his suit with proper care and diligence, cannot be permitted to withdraw his suit, after his witnesses have failed to support his case. 158 I.C. 263=18 N.L.J. 149=1935 N. 185. Permission to withdraw with liberty to file fresh suit should not be given without proof and indication of formal defect. 34 C.W.N. 912; 117 I.C. 864=32 C.W.N. 1244; 131 I.C. 863=35 C.W.N.

112=1931 C. 336. Suit for declaration as to plaintiff's title to suit property—Evidence closed—Application for withdrawal alleging third party having taken possession decree would be infructuous—*Held* no formal defect existed and withdrawal should not be allowed. 1934 L. 735. Where defects referred to were that certain necessary parties were not impleaded and some properties were not included in the claim, *held*, that defects were not 'formal' to sustain an application under this rule. 57 C.L.J. 498. Plaintiff—Suing evidence and later applying for leave to withdraw—Refusal of permission is proper. 31 Bom.L.R. 613=119 I.C. 773=1929 B. 320.

SUBJECT-MATTER—Subject-matter is equivalent to phrase cause of action. 1930 L. 937. And does not refer to suit property. 151 I.C. 458=38 C.W.N. 133=1934 C. 433. This means clearly "the subject of legal action, consideration, complaint or defence, or the fact or facts constituting the whole or a part of a ground of action or defence." (*Ibid*). *See also* 21 M. at 37; 21 C. 265. *See also* 30 L.W. 562=1929 M. 798, 74 I.C. 56=1924 O. 180; 92 I.C. 358=1926 M. 490. Where a suit on a promissory note is withdrawn by the plaintiff without obtaining the permission of the Court to bring a fresh suit in respect of the same subject matter, a second suit by him on a fresh promissory note, the consideration for which is the same consideration which is embodied in the promissory note which formed the subject-matter of the former suit, is barred by R. 1, sub-CI (3) of the Code. The subject-matter of the two suits is the same, the only difference being that it is embodied in different promissory notes. 156 I.C. 17=1935 O.W.N. 661=1935 O. 434.

CAUSE OF ACTION DIFFERENT—O. 23, R. 1 (3) does not bar a suit on a different cause of action. 36 M. 325=23 M.L.J. 658, 1928 A. 689; 1934 L. 721=16 L. 27; 1933 L. 943=144 I.C. 864 (first suit by reversioners to declare alienation by widow invalid—Death of widow—Suit withdrawn without permission—Subsequent suit for possession maintainable) (*Ibid*). *See also* 9 B. 346 (different title) "Shall" in the rule is not mandatory and is merely directory. 2 O.W.N. 901=1925 O. 699. Withdrawal without leave—Subsequent suit on different ground not barred. 59 I.C. 84. The withdrawal of a suit in which a right of ownership is asserted does not preclude the plaintiff from suing again upon a claim based upon an easement. 2 A. L.J. 59. Where plaintiff withdraws suit without permission with consent of defendant in the hope of the matter being settled out of Court by arbitration but the arbitration proves abortive and he files a fresh suit on the same cause of action, simply because of the arbitration, the cause of action does not alter and the subsequent suit is barred. 156 I.C. 386=1935 C. 157 (2). The withdrawal of a suit instituted by partners who have not been registered as a firm under the Partner-

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

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ship Act is no bar to a fresh suit filed by them on the same cause of action after they get themselves registered as a firm. The later suit is technically a suit by a different plaintiff 164 I.C. 748=44 L.W. 247 (1)=1936 M. 697

EFFECT OF WITHDRAWAL.—The withdrawal of a suit bars only the plaintiff and his privies from bringing a fresh suit but not a person who has purchased the plaintiff's interest at a sale in execution under an attachment prior to the withdrawal. 39 I.C. 276=1917 P. 141. Order granting withdrawal with permission to institute fresh suit will not be binding on heirs of one of the original defendants who were not impleaded and against whom the suit had abated. 1935 A.L.J. 1286=1935 A. 853. Where the defendants have failed to prove that the withdrawal of previous suit, with reference to which the bar under R. 1 has been pleaded, was without permission to bring a fresh suit, the suit is not barred by reason of R. 1. 1935 C. 744. First suit withdrawn while second suit is pending—Second suit not barred unless the conditions of R. 1 are fulfilled. 1930 L. 599 (2), 110 I.C. 818 (2)=1928 L. 710. Where the Court allows some plaintiffs to withdraw with liberty to file a fresh suit without the consent of the others, the Court acts without jurisdiction and a fresh suit is barred. 1 P. 228. Withdrawal by unnecessary plaintiffs from a suit does not necessitate the dismissal of the suit. 60 I.C. 592; 1 P. 228.

NEXT FRIEND.—A next friend can withdraw a suit on behalf of a minor, and any withdrawal by him would have precisely the same effect as the withdrawal of a suit by a person of full age. 10 C. 357. Two plaintiffs—One of them a minor and the other acting as his next friend—The other plaintiff cannot withdraw the suit. 107 I.C. 431 (2)=1928 M. 496 (1). Suit by one on his behalf and on behalf of his minor brother—Withdrawal of major brother—Appointment of another as next friend to continue suit—*Held* proper 148 I.C. 1171=11 O.W.N. 557=1934 O. 257. But a withdrawal by him without the leave of the Court is voidable at the instance of the minor. 27 M. 377. As to the courses open to the minor when his next friend has fraudulently withdrawn a suit without leave to file a fresh suit, *see* 10 C. 357.

PRACTICE AND PROCEDURE.—Orders under—Need for exercise of judicial discretion 1931 A. 19. Where leave to withdraw is granted without express liberty to sue again a fresh suit on the same cause of action is barred. 58 I.C. 271=129 P.R. 1919; 40 M. L.J. 126=62 I.C. 833; 46 I.C. 913. Order permitting the withdrawal of suit without liberty to bring fresh suit is not warranted by law. The proper order is to dismiss the

application and proceed with the suit. 107 I.C. 469 (2)=1928 C. 273 (1); 1931 A.L.J. 966, 18 R.D. 415=15 L.R. 538 (Rev.)=10 O.W.N. 1102. The power of an appellate Court to allow withdrawal of suit proceeds from S. 107 (2), and it has the same powers as the trial Court. The proper procedure would be for an appellate Court to set aside the decree of the trial Court and then grant permission to withdraw. 39 C.W.N. 586. Where an application signed by the parties and filed in Court by the defendant is not an application under R. 3 but an application under R. 1 for the dismissal of the suit as having been settled out of Court, the Judge is not entitled to examine the plaintiff in regard to the terms of the settlement they being not relevant to the matter before him. His only course is to dismiss the suit. 150 I.C. 721=1934 R. 108.

FORM OF ORDER.—The suit cannot be dismissed with liberty to file a fresh suit 9 A. 690; 1931 M.W.N. 1008=1931 M. 830, and the fact that such an order has not been appealed against will not give it any effect 11 A. 187 (F.B.). An order cannot be passed directing the plaintiff to institute a new suit. 9 A. 191=13 I.A. 134 (P.C.). Dismissal of a suit "in the form in which it is brought" does not amount to permission to sue again. 5 A. 595. Application for permission to withdraw a suit with liberty to bring a fresh suit—Court giving permission to withdraw but not giving in terms liberty to bring a fresh suit, *held*, the order should be read along with petition and construed as granting permission to file a fresh suit 5 P. 23=93 I.C. 1001 (1)=1926 P. 259. *See* 1931 M.W.N. 1148=1932 M. 155 (1). *See also* 148 I.C. 879=15 L.R. 52 (Rev.)=18 R.D. 46=3 A.W.R. 66=1934 A. 292. Prohibition as to a second suit when the first suit is withdrawn without liberty to bring a fresh suit does not apply to ejectment suits by tenants against sub-tenants. Where, however, special rights of a permanent character have been claimed there is a permanent prohibition of ejectment. 15 R.D. 598=12 L.R. 344 (Rev.). *See also* 1935 C. 157. Order of the lower Court allowing the suit to be withdrawn with leave to file a fresh suit should be in such terms as to make it possible for High Court to be satisfied that there was *prima facie*, at any rate, proper ground for the Court's order. 1931 A. 19=132 I.C. 36. Court cannot pass an order returning the plaint 7 B. 487. Suit withdrawn to be regarded as never brought 41 C.L.J. 456=29 C.W.N. 755=52 C. 894 (F.B.).

NOTICE.—Notice should issue to the opposite party before passing any order under this rule. 6 A. 211.

COSTS.—When leave to withdraw the suit with liberty is granted, costs must follow the event. *See* 25 Bom L.R. 242=47 B. 559=72 I.C. 324; 40 A. 612=46 I.C. 71; 14 I.C. 97=9

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

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A L J. 358. See also 15 B 160, 1 M H.C.R. 247. But see 2 O.W.N. 901=1925 O. 699. Court can extend the time to pay costs when it is absolutely impossible for the party to pay such costs on or before the day so fixed. 29 M. 370. When a suit is withdrawn with liberty to sue again "on payment of costs, and a subsequent suit is filed without payment of costs," subsequent payment cures the irregularity. Court can refuse to proceed with the suit till the costs are paid. 31 C. 965 (968). 157 I.C. 287=31 N.L.R. 266=1935 Nag. 56 (where no date was fixed for payment of costs). On this point, see also 39 C.W.N. 330, 1935 N. 56; 5 P. 306=96 I.C. 942=1926 P. 409; 95 I.C. 875=1926 P. 472, 1929 A. 692; 55 B. 206=133 I.C. 256=33 Bom L.R. 278=1931 B. 257; 139 I.C. 167=1932 M.W.N. 1244=1932 M. 714. Where the order was that costs "must be paid within one month as a condition precedent to the fresh suit" and the plaintiff did not pay the costs within the time fixed, but paid the same only after the fresh suit was filed, held that the Court would have no jurisdiction to entertain the new suit unless the costs have been paid within the period fixed and payment at a subsequent stage would not confer jurisdiction, although there might be no express order for dismissal on default of the condition attached. 39 C.W.N. 330. Withdrawal of suit with permission on condition of costs being paid before second suit.—Costs paid after institution of second suit.—Second application to withdraw second suit with liberty allowed. Next day the plaintiff stated that he was unable to pay the costs and prayed that the suit be tried on its merits. Defendant did not object to the disposal on the merits. But first Court dismissed the suit on the ground that the costs had not been deposited in time. On appeal, case was remanded for trial on the merits. Held, that (i) the question whether the deposit was in time was one that depended on the construction of the first order and lower Court was justified in holding that it had been substantially complied with, (ii) the application of plaintiff to have the suit tried on merits can be treated as one for review and the order restoring the suit by consent of parties was perfectly valid. 1933 A.L.J. 1350=1933 A. 810. But see 151 I.C. 458 (2)=38 C.W.N. 133=1934 C. 433, where it was held that non-payment of costs within time ordered, had the effect of revoking the liberty granted for fresh suit.

POWER OF APPELLATE COURT.—Court of appeal has power to grant permission to withdraw a suit with liberty to file a fresh suit. 74 I.C. 894=1924 A. 260, 41 C.L.J. 186=1925 C. 711; 45 I.C. 913, 45 M.L.J. 212=46 M. 811=1924 M. 79; 40 M. 259; 37 I.C. 414=32 M. L.J. 477 (F.B.). Before doing so, it must set aside the decree of the first Court. 95 I.C. 424 (2)=1926 N. 444, 39 C.W.N. 586. Where, however, an appellate Court allows an appeal

setting aside the decree of the trial Court without expressly dismissing the suit, and then grants permission to withdraw the suit, the order so granting permission is irregular but not without jurisdiction or illegal. Nor would the findings recorded in the judgment permitting withdrawal operate as *res judicata* in a subsequent suit. 39 C.W.N. 586. On an appeal against an order of remand, the Court can, at the plaintiff's request, allow him to withdraw the suit with liberty to bring a fresh suit under O. 23, R. 1. 38 P.L.R. 319. Where an appellate Court calls for a finding on a new issue, and an application is made by the plaintiff under R. 1, the appellate Court has jurisdiction to pass orders on it. 156 I.C. 799=1935 Mad. 445. The Court must be very cautious in granting permission. 24 A.L.J. 721=96 I.C. 480=1926 A. 548. An appellant is not entitled to withdraw his suit in the appeal Court under R. 1 (1) as a matter of course. 61 I.C. 584=1923 O. 252. R. 1 does not allow a plaintiff who has appealed to get rid of the decree that has been made by the simple process of withdrawing the suit. 47 I.C. 817=12 S.L.R. 14. See also 11 M. 322; 41 C.L.J. 186. In proper cases High Court on appeal can take action under R. 1. 40 A. 7=42 I.C. 856=15 A.L.J. 809.

APPEAL.—An order made by an appellate Court giving permission to withdraw a suit with liberty to bring a fresh suit is not a decree, and is not appealable. 18 C. 322. 88 I.C. 1029 (1)=1926 O. 185 (1). No appeal lies against an order passed under R. 1 (1) dismissing a suit as withdrawn by the plaintiff. 1935 O.W.N. 842. 156 I.C. 990=1935 Oudh 486. Withdrawal of appeal does not amount to confirmation of lower Court's order. 50 A. 608=108 I.C. 564=1928 A. 679. If such an order is passed by a Court of first instance, and district Court on appeal sets aside the order and dismisses the suit, the order of District Court is a decree and is appealable. 27 C. 362. An order permitting the withdrawal of an appeal is not a decree. 15 B. 370 (373). No appeal lies against an order for costs, passed under R. 1. 105 I.C. 733=1927 N. 399.

REVISION.—An order granting leave to withdraw without considering or recording any grounds for allowing withdrawal is a wrong exercise of jurisdiction and a revision would lie. 20 A.L.J. 90=64 I.C. 948=1922 A. 185. See also 25 Bom L.R. 242=47 B. 559, 40 A. 612=16 A.L.J. 493, 14 I.C. 97=9 A.L.J. 358, 15 A. 169; 11 M. 322, 85 I.C. 548=1925 A. 272, 87 I.C. 175=1925 A. 466. Where there was proper exercise of jurisdiction by lower Court no revision lies. 19 A.L.J. 47=60 I.C. 899, 13 L. 537=136 I.C. 1=1932 L. 360. High Court has power to revise the order granting withdrawal of suit with liberty to bring a fresh one without any formal defect. 41 I.C. 934; 40 I.C. 77; 44 C. 454=39 I.C. 969=25 C.L.J. 455, 35 I.C. 843; 34 I.C.

(4) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to withdraw without the consent of the others.

2. [S. 374] In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

Limitation law not affected by first suit

3. [S. 375.] Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly, or in part by any lawful agreement or compromise, or where the defendant

Compromise of suit

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934, 10 I.C. 346; 27 M.L.J. 480=26 I.C. 57; 3 P.L.J. 460=46 I.C. 179 *See also* 7 L.L.J. 290=1925 L. 497; 3 Luck. 403=107 I.C. 887=1928 O. 482; 147 I.C. 776=1934 A.L.J. 450=1934 A. 137. Where a Court passes an order of withdrawal with liberty in a case which is not brought within the specific provisions of this rule it is without jurisdiction and will be set aside in revision. 155 I.C. 210=1935 P. 251. The failure of lower Court to see whether the necessary conditions are existing, entitles High Court to interfere in revision. (3 P.L.J. 651; 3 P.L.J. 460, Foll.; 34 C. 51, Dist.) 158 I.C. 986=1935 P. 438.

REVIEW.—An order permitting the withdrawal of an appeal can be reviewed 15 B. 370.

O. 23, R. 2—The effect of this rule is that limitation is to apply to the second suit as if it was the first. 29 B. 219. Limitation for fresh suit. 25 I.C. 188=12 A.L.J. 989. The fact that a suit is withdrawn does not entitle the plaintiff in a fresh suit to any deduction of time during which the former suit had been pending. 20 I.C. 205. *See also* 23 I.C. 458=163 P.L.R. 1914. Adjustment—Award—Supersession of—Subsequent reference through Court—Effect of *See* 24 Bom.L.R. 361=46 B. 854. Plaintiff obtained a decree and in execution certain property was put up for sale. Before the sale was confirmed decree-holder and judgment-debtor made a joint application to Court by which they asked that defendant having agreed to pay the whole of the decretal amount together with interest and costs before a certain date the confirmation of the Court sale should be held over. If defendants did not pay, the sale was to be confirmed without further delay. The order of Court set out the terms and provided that on that basis the *darkhast* was allowed to be withdrawn and also provided that if judgment-debtor failed to pay, confirmation of sale might be applied for. *Held*, that no fresh *darkhast* was necessary for the application for confirmation after the default of judgment-debtor. 57 B. 616=35 Bom.L.R. 769=1933 B. 358.

O. 23, R. 3. APPLICABILITY OF RULE—As to whether this rule is an exception to S. 89, *see* 16 P.L.T. 280=1935 P. 243. Non-compliance with provisions of this rule—Effect on decree—If makes decree other than one on compromise—Registration—Necessity 40 C.W.N. 1176. The rule applies to cases referred to arbitration. 1925 M. 50. The provisions of

R. 3 are imperative and the special procedure therein prescribed is not affected by the general procedure laid down in R. 1. The mere circumstance of a person not being actually on record is not a bar to his filing an application under R. 3. If there is a question common to the parties on record and a stranger as regards the subject-matter of the suit or any portion thereof, it should be tried once for all by allowing the stranger to be made a party. 57 M. 892=1934 M. 337=66 M.L.J. 517. *See also* 1935 L. 168. R. 3 is mandatory in its terms, and if the Court is satisfied that the parties executed the compromise, the terms of which were known to them and which is a perfectly valid and binding document, adjusting the suit or appeal, Court has no option but to order the compromise to be recorded and to pass a decree in accordance therewith. The rule does not provide for an enquiry into disputed facts collateral to the terms of the compromise. A party alleging fraud cannot be allowed to avoid the compromise admittedly executed by him with consent in proceedings started on application under R. 3. Such an enquiry is not within the purview of the rule. If the compromise is lawful, having regard to its terms, Court must give effect to it forthwith. 57 A. 426=1934 A.L.J. 1183=4 A.W.R. 1186=1935 A. 137=154 I.C. 746.

MEANING OF WORDS—“Adjustment,” meaning of. 45 M.L.J. 763=28 C.W.N. 930=1923 P.C. 178 (P.C.) “Award is no adjustment.” *See* 47 A. 637=23 A.L.J. 561 (F.B.) If in a pending suit the parties go to a private arbitrator without the consent of Court and the arbitrator makes an award there is nothing to prevent the Court from giving effect to the award as if it were an adjustment by common consent and it amounts to an adjustment under O. 23, R. 3. 31 N.L.R. (Supp.) 72=160 I.C. 202=1936 N. 8. The landlord filed a suit against the tenant for damages. The tenant also filed a cross suit maintaining that he was the owner himself. They arrived at an agreement that the suit by landlord should be decided according to the decision in the tenant's suit. The parties meant that the issue as to ownership of land should be decided on merits. Tenant's suit was dismissed. *Held*, that such agreements had nothing to do with adjustments of suits within the meaning of R. 3. (1914 M. 449 and 31 M. 1, Diss. from. 1925 A. 271 Foll.) 1935 R. 482. “Proved to the satisfaction of the Court,” meaning of: *see* 24 C. 908 (F.B.) The word “suit” in R. 3, is not

satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit.

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used in any narrow sense, it means and is applied to all the proceedings from the beginning of the plaint up to the time when an executable decree has been obtained. 14 P. 488=155 I.C. 976=16 Pat.L.T. 311=1935 P. 385. It includes the appellate stages and execution proceedings following the decree. 62 I.C. 608=6 P.L.J. 253 'Lawful' means lawful within the meaning of the Contract Act. The agreement should be legally though not specifically enforceable. 12 P. 359=145 I.C. 1=14 Pat.L.T. (Sup.) 1=1933 P. 306. A compromise affecting the rights of a person who is not a party to it cannot be considered to be lawful, and a decree passed thereon is liable to be set aside. 38 P.L.R. 283 Application to enforce award—Application to record compromise—Distinction—"Agreement"—Meaning of 16 Pat.L.T. 280=1935 P. 243. The words "In so far as it relates to the suit" are wider than the corresponding term in S. 375 of the old Code 146 I.C. 145=1933 A.L.J. 728=1933 A. 649 (F B)

LAWFUL AGREEMENT, ADJUSTMENT OR COMPROMISE—"Lawful" in R. 3 does not merely mean binding or enforceable. The rule refers to agreements which in their very terms and nature are not "unlawful", and may include agreements voidable at the option of one of the parties. A compromise is not otherwise than lawful under R. 3, merely because it is alleged that the appellant who is one of the parties to it had given an assurance to the respondent, other party, that no other defendant would file any cross-objection, and that contrary thereto he caused another respondent to file a cross-objection. That does not take the agreement out of the rule, when the agreement has been executed and registered freely and with full knowledge of its terms. Nor can the compromise be said to be not "verified," simply because one of the parties declines to give effect to it 57 A. 426=4 A.W.R. 1186=1934 A.L.J. 1183=1935 A. 137=154 I.C. 746. "To determine whether a compromise is lawful" it is necessary to consider the facts of the litigation, the terms of the compromise, and the circumstances under which it is entered into. "Where a compromise by a trustee involves a breach of trust, it is not lawful." 12 M.L.J. 360. See also 60 I.C. 22 An agreement which purports to deal with the rights of certain minors who are not parties to the suit is not a lawful agreement which can be recorded under R. 3. As it involves and implies injury to the property of minors it is unlawful within the meaning of S. 23 of the Contract Act, and consequently it is void 61 C.L.J. 88. Mere offer not enough to constitute adjust-

I.C. 540, 37 M. 408=22 M.L.J. 447. See also 1929 M. 416. A joint petition by both the parties to a suit requesting Court to adjourn the case for enabling the parties to arrive at the terms of a contemplated settlement is not by itself a compromise when nothing further was done by the parties in furtherance of their original intention. A decree based on the original petition itself as if it were a compromise is without jurisdiction. 34 C. W.N. 1068. Court granting adjournment on application stating that parties had agreed to abide by High Court's decision in other suit—Order, if amounts to record of compromise. 1929 M. 416=120 I.C. 742. See also 37 M. 408; 51 I.C. 540. An executory contract comes under term 'lawful agreement or compromise' and can form subject of compromise of suit 166 I.C. 946=1937 Pat. 39. Agreement to abide by the sums fixed by the other side may be good agreement. 25 I.C. 935=8 S.L.R. 91. An agreement by the parties to a suit to abide by the sum to be named by their pleaders is not a lawful adjustment 19 I.C. 450=6 S.L.R. 166 See also 1930 A. 162. Mortgage suit—Application for final decree for sale—Plea of extension of time for payment—Not an adjustment to which the rule is applicable. 6 R. 285=1928 R. 194. Executable decree for future maintenance can be passed on compromise. 12 P. 359=145 I.C. 1=14 Pat.L.T. (Sup.) 1=1933 P. 306 One of the partners cannot compromise suit instituted in the name of the Firm even though there may be no fraud or collusion in the same 144 I.C. 1=1933 L. 618.

SUBJECT-MATTER OF THE SUIT.—Whether a particular matter is the subject-matter of or relates to a suit is primarily a question of fact depending upon the circumstances of each case. Although a matter is not strictly the subject-matter of a suit, it may relate to or have reference to the suit if it forms part of the consideration. 1937 P. 232. In a suit by a plaintiff against defendants of whom one was a minor, a compromise was arrived at, whereby the plaintiff, in consideration of her giving up her right to an account of the whole property from the defendant who managed it, for which in fact she had sued, agreed in order to facilitate enjoyment, to take her share of the income from only some villages out of the whole property, and it was agreed between the parties that, in case no agreement could be arrived at on reference to the vakils, the parties had a right to obtain partition from the Court. Held, that the arrangement arrived at to 'facilitate management' being in consideration of the plaintiff's giving up her right to an account

Loc. Am.—[Rangoon.] To R. 3 of O. 23. the following proviso shall be added:

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EFFECT OF COMPROMISE AND DECREE.—Intention of parties to have a formal document drawn up will not affect settled compromise. 56 I.C. 26=11 L.W. 179. A compromise is a binding agreement between the parties and none the less so binding, because followed by a decree. 21 I.C. 538=18 C.L.J. 187; 53 M.L.J. 345; 32 C.W.N. 93=1927 P.C. 204 (P.C.) A consent order is only an order of the Court carrying out the agreement between the parties. 29 I.C. 156=19 C.W.N. 565. A consent order or decree is a mere creature of agreement and no greater sanctity can be placed upon the decree than upon the agreement itself. 1930 P. 234. The provisions of this rule, whenever they are applicable, must be given effect to even in cases which are governed by the Dekkhan Agriculturists' Relief Act. 24 Bom. L.R. 88=46 B 560 See also 57 I.C. 751. Effect of decree on rights of absent respondents 19 I.C. 915 A decree passed under R 3 in terms of a compromise arrived at between parties to suit becomes final and conclusive if not appealed against. 29 I.C. 156=19 C.W.N. 565; 21 I.C. 538=18 C.L.J. 187, 19 I.C. 915; 40 M. 177=30 M.L.J. 274; 31 I.C. 21. A defendant who is a party to the suit, but not a party to the compromise is bound by the decree if it is not appealed against. 24 I.C. 491, following 31 M. 474. Effect of decree on compromise, when there has been a misapprehension as to right. See 24 I.C. 491. A contract of a compromise which has passed into a decree is governed by the same principles as are applicable to the construction of contracts. 12 I.C. 334=35 M. 75=21 M.L.J. 709. Where a compromise decree is made by means of which the whole amount is to be discharged by payment in certain instalments on fixed rates, Court has no power to grant any extension of time for the payment of any of such instalments 146 I.C. 411=1933 P. 677 (2) The question whether time was of the essence of the contract embodied in consent decree would depend on the facts and circumstances of each case 1930 P. 234 Setting aside of compromise decree by third party—Procedure. 15 L. 626=151 I.C. 786=35 P.L.R. 199=1934 L. 393.

POWERS AND DUTY OF COURT.—Under R 1 Court has to deal with plaintiff alone, but under R 3 Court has to deal with plaintiff and defendant and has to find out if there is any agreement between them for compromise 37 I.C. 421 The terms of settlement must be examined with care and caution 16 I.C. 611 If the compromise is fraudulent, Court may refuse to pass a decree thereon 52 I.C. 105. Court must be satisfied that the agreement is lawful and it can pass a decree in accordance therewith only in so far as it relates to the suit 25 C.W.N. 806=34 C.L.J. 96 A Court making a decree by consent is performing a judicial and not a ministerial act. (*Ibid.*). Also 50 I.C. 363. Where no

injustice of any kind is established and it is established that a suit has been adjusted either wholly or in part by a lawful compromise, it is the duty of Court to record the agreement and pass a decree in accordance therewith. 57 I.A. 133=57 C. 1311=1930 P. C. 158=58 M.L.J. 551 (P.C.). Where a party has no further interest in the property in dispute his agreement to the compromise is not necessary; such a person has no *locus standi* whatever. 148 I.C. 171=1934 L. 34 (2). The Court must satisfy itself by the evidence taken that the agreement or compromise is a lawful one 23 M. 101. See also 17 A. at 532; 91 I.C. 790 (2)=24 A.L.J. 210=1926 A. 278. Beyond that, Court cannot examine the terms of the compromise. 91 I.C. 790=1926 A. 278. Court has no jurisdiction, except in the case of minors, etc., to investigate the fairness or unfairness of a compromise which has been accepted by both the parties. 43 L.W. 386=1936 M. 347=70 M.L.J. 471. Ordinarily when investigating the fact and lawfulness of a compromise under R 3 it is irrelevant to examine the strength or weakness of the suit itself. When a compromise is in dispute, the party repudiating it, on whatever ground it may be cannot reasonably ask that the entire suit be reopened. 12 P. 359=14 Pat L.T. (Sup) 1=1933 P. 306. Court is not bound to record compromise or adjustment not assented to by all the parties 86 I.C. 361=1925 L. 280. Compromise effected between parties to suit who are majors—Court need not consider whether such compromise will affect the interests of persons who are not parties to suit and who are not *sui juris*. 55 C. 210=104 I.C. 219=1927 C 870. Court has jurisdiction to pass a right as well as a wrong decree and if it decides wrongly, the wronged party can only take the course prescribed by the law for setting matters right. 51 I.C. 439 A consent decree wrongly passed owing to some legal or technical defect is not a nullity. (*Ibid.*) Where a compromise effected by the parties is conveyed to Court by pleaders on both sides, the parties cannot object on the ground that the pleaders had no such authority 60 I.C. 22=12 L.W. 562. Court has power to frame an additional issue to decide whether a lawful compromise has been effected between the parties 20 B. 304, 19 M. 419 See also 8 M. 482, 9 M. 103, 7 B. 304. Where a compromise is filed in Court but repudiated by some of the parties to it, Court must hold an enquiry under R 3. 1934 P. 582=152 I.C. 289. Unless the parties repudiating establish that they had no knowledge of the terms of the settlement, a decree must be passed on the compromise. 110 I.C. 524 (2)=1929 P. 102 But see 38 C.W.N. 648=151 I.C. 661=1934 C. 643. Agreement of compromise filed in Court—Petition of compromise signed by only some of the parties—Communications showing that all parties agreed to the same—Court whether can direct enquiry—Evidence Act, S. 23 1930

"Provided that before recording and passing a decree in accordance with an agreement, compromise or satisfaction in a suit instituted under the provisions of S. 92, Civil

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L. 293=11 L.L.J. 446 A consent decree cannot be challenged on the ground that it is erroneous in law, nor on the grounds on which a contract can be impeached (29 C. 854, Foll.) 35 M. 75=21 M.L.J. 709 Court can decide the fact of settlement out of Court and grant a decree in accordance therewith, if it is established. 36 I.C. 375=21 C.W.N. 366 Arrangement prior to decree to treat it as inexecutable will not be given effect to. 43 M. 725=39 M.L.J. 222 Power of Court to postpone passing of decree—Duty of Court to pass decree at some time 1930 P. 395=9 P. 314. After an *ex parte* decree had been passed, containing a direction for ascertainment of mesne profits, the parties compromised the matter and presented a petition to Court obviating the necessity for an enquiry. Court, however, did not pass a final decree in accordance with the same *Held*, that the decree-holder should not be deprived of the fruits of his action by the omission of the Court, and that he had the right to execute the compromise. 15 Pat. L. T. 457=1934 P. 380

LEGALITY OF COMPROMISE.—R. 3 does not always compel the Court to pass a decree in accordance with a compromise 4 P.L.J. 580=53 I.C. 833. Court must see that the compromise is a lawful agreement and will look into the merits when necessary to determine its *bona fides* (*Ibid*). The word "lawful" does not mean merely binding or enforceable. It refers to agreement which in their very terms or nature are not unlawful and may therefore include agreements which are voidable at the option of one of the parties because they have been brought about by undue influence, etc. Court is bound to pass a decree in the absence of any evidence that the compromise is unlawful. 50 A. 748=110 I.C. 573=26 A.L.J. 691=1928 A. 494. See also 1932 A. L.J. 509=1932 A. 478 Where the claim is beyond the jurisdiction of trial Court, it is not competent to pass a compromise decree. Its duty is to return the plaint under O. 7, R. 10-66 I.C. 837=16 L.W. 155. The compromise may be regarded as an abandonment of the claim so far as it was beyond the jurisdiction of the Court and the decree on the compromise may be valid (*Per Coutis-Trotter, J.*) (*Ibid*). Compromise is not unlawful merely because the parties do not get the shares to which they would be legally entitled. 55 I.C. 716 An agreement which carries a penal clause such as may be caused by S. 74 of the Contract Act is not "unlawful". 91 I.C. 790 (2)=24 A.L.J. 210=1926 A. 278. Nor an agreement to drop an appeal 18 R.D. 336 The Court in recording a consent decree is bound to consider whether the compromise is a lawful one 35 M. 75=21 M.L.J. 709; 26 M. L.J. 315=23 I.C. 72; 1922 M.W.N. 83=56 I.C. 837, 55 I.C. 716, 38 C.L.J. 272=1924 C. 159 No compromise can prevent the law of limitation from taking effect. 92 I.C. 732=1926 O. 311. All terms in a contract which are opposed to public policy are invalid and will

not be enforced by the Courts 26 M. at 33 Compromise partly legal and partly illegal—Legal portions, when they form the substantial portion of it, can be accepted and enforced. 109 I.C. 261=1928 P. 495 Compromise in fraud of some of the parties—Not allowed 1923 O. 252. A Court will not recognise any compromise of an action with the facts of which it is entirely unacquainted or if one of the terms of the compromise is a clear violation of a statutory rule 55 I.C. 504, 47 I.C. 817=12 S.L.R. 14, 50 I.C. 577=37 M.L.J. 65, 37 I.C. 764; 4 P.L.J. 580=53 I.C. 833. Section 6, cl (a) of T.P. Act renders certain transfers unlawful on grounds of public policy, and the Court cannot allow them to be effected by means of a consent decree 26 M. 31 So also an agreement by a mahant to transfer the properties of the *mutt* for no necessary purpose. 106 I.C. 645=9 Pat. L.T. 214 Suit relating to public trust—Compromise sacrificing the interest of the trust—If not lawful—Court bound to record such a compromise. 53 M. 398=1930 M. 629=58 M.L.J. 410 Any agreement or compromise as regards the genuineness or execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful 31 C. 357. The principles of compromise under Divorce Act are considered in 10 A. 559. See also 22 M. 214

MATTERS OUTSIDE SUIT.—The only compromise which Court is bound to enforce is that which adjusts the suit wholly or in part, not one which goes beyond the suit 13 C. 170 Where a term of the compromise is plainly outside the scope of the suit, Court may refuse to incorporate it. But where it is a consideration of the compromise and so intimately connected with it, Court has the power to include it in the decree, even though the consideration may be entirely outside the scope of the suit 132 I.C. 434=33 Bom.L.R. 463=1931 B. 295. [7 B. 304, 27 Bom.L.R. 943; 30 M. 478, 35 C. 837; 53 M.L.J. 345 (P.C.) Ref.] Also 139 I.C. 830=34 Bom.L.R. 849

SO FAR AS IT RELATES TO THE SUIT.—As to the meaning of these words, see 33 Bom.L.R. 1457. See also 146 I.C. 145=1933 A.L.J. 728=1933 A. 649 (F.B.) These words must be restricted to relief which Court could have given in the suit, and will not include reliefs which could only have been given in a suit based upon different cause of action. 18 M. 410 (414); 5 M.L.J. 145. See also 5 C.W.N. 485, 22 M. 214; 9 A. 229, 30 M. 478, 3 P.L.J. 43=43 I.C. 282. Where there is a compromise beyond the scope of a suit and the compromise has not been registered but the parties have acted on it, there is an equitable estoppel and the parties cannot resile from the compromise. 42 C. 801=42 I.A. 1=28 M.L.J. 548=28 I.C. 980 (P.C.) See also 1928 A. 534. Compromise—Decree passed in terms of—Provisions in compromise impliedly incorporated—Compromise whether requires registration 11 L.L.J. 127=118 I.C. 395=

Procedure Code, the Court shall direct notice returnable within a reasonable time to be given to the Government Advocate, Burma, or the officer with whose consent the suit was

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1929 L. 527. A compromise decree constitutes an estoppel, though it relates to matters outside the suit. 42 I.C. 223=33 M.L.J. 615. Where a compromise goes beyond the subject-matter of the suit, the proper procedure for the Court is to recite the compromise in the decree but to make part of the decree only so much of the compromise as relates to the subject-matter of the suit. 65 I.C. 47. [47 C 485 (P.C.), Ref.] See also 25 C.W.N. 990=48 C 1059, 38 C.L.J. 72, 59 I.C. 344=22 Bom.L.R. 1286; 51 I.C. 273=31 P.R. 1919, 29 O.C. 276=92 I.C. 722, 1928 R. 43, 104 I.C. 810=1928 N. 51; 107 I.C. 525=1928 N. 173. Where a compromise collateral to suit offered by one party in the course of the appeal was accepted by karpardaz of the other party, but the document of compromise was not recorded and a decree was merely drawn up and it was the only document brought into existence *Held*, that the provisions of O. 23 were not complied with and that the Court should not in pursuance of R. 3 make a decree. 62 I.A. 196=14 P. 545=1935 A.W.R. 980=39 C.W.N. 1185=37 Bom.L.R. 845=1935 P.C. 119 (P.C.). Where a petition includes matters not in suit, the Court should pass a decree with regard to matters in suit only and not to reject the petition entirely. 78 P.R. 1917=40 I.C. 675. See also 145 I.C. 441=14 Pat.L.T. 23=1933 P. 176. Where demolition of the wall not in suit was the consideration for the abandonment by the plaintiff of his right to have the wall in suit demolished, the compromise with regard to the wall not in suit should be deemed to relate to the suit within the meaning of R. 3. 1934 L. 623. An objection to the inclusion of a term in a compromise decree, on the ground that it goes beyond the subject-matter, ought to be taken by way of appeal and cannot be urged when execution is sought. 38 M. 959=26 M.L.J. 331=23 I.C. 581, 30 I.C. 263=2 L.W. 608; 53 I.C. 354=1919 M.W.N. 356; 1925 M. 1101=49 M.L.J. 490; 29 O.C. 276. Court should record the entire compromise filed by the parties and draw up a decree giving the parties the right to execute the decree in respect of the matters which properly fall within the scope of the rule. 3 P.L.J. 255 (F.B.), 52 I.C. 20=4 P.L.J. 667; 38 M. 959=26 M.L.J. 331. But even in cases where a part of the compromise does not, strictly speaking, relate to the suit and nevertheless the Court decides that it relates to the suit and incorporates it into the operative portion and passes a decree in terms of it, the decree is not a nullity and not one passed without jurisdiction, but would be binding upon the parties to the decree and its validity cannot be questioned in the execution department, nor can any title derived under it be attacked. 146 I.C. 145=1933 A.L.J. 728=1933 A. 649 (F.B.).

PARTIAL COMPROMISE.—Partial compromise to which some of the parties only agree is good as to them. 34 I.C. 518; 123 I.C. 693

=1930 S. 217; 12 P. 359=145 I.C. 1=14 Pat.L.T. (Sup.) 1=1933 P. 306. But see 38 L.W. 280. Others can object to it on showing good grounds. 85 I.C. 678=1926 C. 193. Partial compromise is not binding on persons not parties to the compromise. 45 I.C. 33.

ORAL COMPROMISE.—The mere fact of an oral compromise having been come to cannot supersede a mortgage unless the Court accepts it and passes a decree in accordance with it. 24 I.C. 93=12 A.L.J. 672. S. 92 Evidence Act, does not prevent oral evidence of the terms of the compromise being given. 29 I.C. 860.

COUNSEL'S AUTHORITY TO COMPROMISE.—Express authority is not needed for a counsel to enter into a compromise within the scope of the suit, and where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. 1 P. 480=67 I.C. 96, 4 P. 766=92 I.C. 179=1926 P. 73. See also 19 A.L.J. 63=60 I.C. 912, 60 I.C. 22=12 L.W. 562, 41 C.L.J. 213=29 C.W.N. 597. Compromise by counsel out of Court without consent of party is not valid. 52 C. 386=29 C.W.N. 566. The implied authority of agents extends only so long as the litigation proceeds in the ordinary way, but they cannot consent to a decree on compromise without special authority. 36 I.C. 375=21 C.W.N. 386. Pleader confessing judgment on party's behalf—Court passing consent decree thereon—Burden of proof as to authority of pleader. 1929 O. 211. Where there is misunderstanding between a party and that party's advocate, the advocate being under the impression that the party was expressly assenting to a compromise on certain terms while the party did not appreciate that she was consenting to a compromise in the same sense, it is open to the Court to refuse to give effect to the compromise. 13 Rang. 319=156 I.C. 665=1935 Rang. 150.

ARBITRATION.—Where the parties to a suit for partition compromise it by agreeing to refer the matter to arbitration, there is an end of the suit and the Court cannot supersede the decree and proceed with the suit, if arbitration fails. 33 A. 743=38 I.A. 181=21 M.L.J. 1151 (P.C.). See also 25 Bom.L.R. 452=1923 B. 401, 32 Bom.L.R. 389. Where, in a suit, a reference to arbitration is made by the parties without the intervention of Court and an award is made thereon, it can be recorded as an adjustment and a decree can be passed in terms of the award. 45 B. 245=22 Bom.L.R. 1043. See also 40 B. 386=18 Bom.L.R. 559, 38 B. 687=16 Bom.L.R. 653, 37 B. 639=19 I.C. 786; 49 C. 608=1922 C. 404; 97 I.C. 465=1926 M. 1211, 1927 M. 1126, 30 Bom.L.R. 1539; 107 I.C. 525, 51 M. 800=1928 M. 1025=55 M.L.J. 429 (F.B.). But see 55 C. 538=1927 C. 887; 8 O.W.N. 71; 38 C.W.N. 648=1934 C. 643, 60 C.L.J. 173=1935 C. 239 (*contra*). See however the

instituted, or the agreement, compromise or satisfaction proposed to be recorded. The

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recent case in 11 P. 237=138 I.C. 82=1932 P. 205 (51 M. 800, 51 B. 908, Foll.; 55 C. 538, Not foll.). A mere agreement to refer to arbitration is not an adjustment. 38 B. 687=16 Bom L.R. 653. When an award made on a reference to arbitration in a pending suit without the intervention of Court is disputed by a party the Court should inquire whether the award which is alleged to be an adjustment or compromise was justly, legally and properly arrived at. 37 B. 639=15 Bom L.R. 340. An informal reference to arbitration in a pending suit cannot be given effect to. 49 C. 608=69 I.C. 808=1922 C. 404. See also 25 C.W.N. 127=47 C. 6, 34 I.C. 220, 23 C.L.J. 482, 3 Lah. L.J. 162; 24 P.R. 1914=25 I.C. 710. Proceedings under R. 17, Sch. II, can be compromised and a decree passed thereon. 23 I.C. 591=69 P.L.R. 1914. Arbitration—Partial award—Decree on—Power of Court to pass. 45 M.L.J. 76=74 I.C. 609=1923 M. 576. A private reference to arbitration in a pending suit followed by a lawful award is a lawful agreement amounting to an adjustment. (26 B. 76; 24 C. 908; 24 M. 326, Foll.; 33 B. 69, Diss.) 23 M.L.J. 290=16 I.C. 478, 36 M. 353=21 M.L.J. 990; 49 I.C. 746; 46 I.C. 902, 25 O.C. 213=1922 O. 189, 5 Bur. L.T. 125=15 I.C. 959; 14 R. 766. See also 133 I.C. 29=1931 A.L.J. 393=1931 A. 557, 131 I.C. 443. But if the plaintiff wants a decree for certain reliefs granted to him under the award, which, according to the tenor of the award, are enforceable under the provisions of the Arbitration Act, and not by virtue of any decree which might be passed in the suit, the application of the plaintiff for the reference and award being recorded as an adjustment of the suit under R. 3 should be disallowed. 158 I.C. 60=1935 Sind 184. Where a literate person, having an award explained to him, signs it, he should be taken to agree to it, and the award becomes a compromise. 1929 L. 806. Where the parties have by agreement left the matter to the mediation of third party not during the judicial proceedings but during the arbitration proceedings there is no adjustment independent of the arbitration proceedings but has to be followed and ratified by an award. Where the award turns out to be invalid in view of concurrent judicial proceedings, the oath taking before the arbitrator would stand or fall with the subsequent award. 1934 L. 887=154 I.C. 7.

COMMISSIONER.—After a suit has been referred to a Commissioner to take accounts, a decree can be passed under this rule. 26 B. 76.

EXECUTION PROCEEDINGS.—R. 3 is inapplicable to execution proceedings. 44 I.C. 164, 1925 O. 136. But see 97 I.C. 768. Once a compromise decree has been passed with reference to the rights of the parties to a suit, their further remedy is by way of execution and not by a suit. 52 I.C. 188=151 P.R. 1919. Execution cannot be issued upon a razinamah unless the terms are embodied in

the decree of the Court. 2 M.H.C. 305, Executing Court cannot question the validity of the compromise decree. 138 I.C. 786=1932 M.W.N. 623=1932 M. 557.

GUARDIANSHIP PROCEEDINGS.—A guardian appointed by the Court cannot be removed by a compromise. 47 I.C. 817=12 S.L.R. 14. Compromise affecting minors. 20 M. 106. Compromise invalid as against minors is enforceable as against the other parties bound thereby. 1928 L. 792 (2)=112 I.C. 695. Record of compromise by guardian—Decree of Court necessary. 62 I.C. 688.

PROBATE PROCEEDINGS.—A compromise in a probate case is binding only upon the parties to it. 33 I.C. 273=23 C.L.J. 82; 20 C.W.N. 986=1 P.L.J. 377. A compromise in a probate case only makes the case non-contentious but does not take away the Court's duty to grant or refuse probate. 20 C.W.N. 986=1 P.L.J. 377.

TRUST PROPERTIES.—A *bona fide* compromise by the trustee of a public trust relating to trust properties is a lawful compromise. 60 I.C. 22=12 L.W. 562. But see also 12 M.L.J. 360.

PRELIMINARY DECREE.—Application for final decree under O. 34, R. 6—Plea of agreement exonerating personal liability entered into after final decree—If can be gone into. 69 M.L.J. 765 (F.B.). The payment of the mortgage money, due on a preliminary decree made out of Court, if certified by the decree-holder, can be treated as an adjustment of the suit under O. 23, R. 3, (2 P.L.J. 533, foll.). 158 I.C. 419=1935 O.W.N. 1087. See also 1935 O.W.N. 541=1935 O. 313; 1935 L. 168. If the preliminary decree is satisfied in part out of Court, the Court at the final taking of accounts will permit such payment towards the satisfaction of the decree. 40 I.C. 138=2 P.L.J. 533. See also 58 I.C. 299=2 P.L.T. 38, 43 I.C. 399. In a suit for taking partnership accounts if an appeal is preferred from the preliminary decree the jurisdiction of the Original Court to record a compromise under R. 3 is not ousted by reason of the appeal. 52 I.C. 899=13 S.L.R. 135. Until a decree for redemption is passed under O. 34, R. 7 the suit can be adjusted under this rule. 25 M. at 317 (F.B.).

PRACTICE AND PROCEDURE.—The general rule, that evidence should be recorded before a decision is made and not after, should also be followed in cases in which the Court records compromises arrived at between the parties. 29 S.L.R. 437=163 I.C. 240=1936 S. 59. The Court should first pass an order directing the compromise to be recorded and then pass a decree in accordance therewith. 24 I.C. 630=96 P.R. 1914; 33 I.C. 759=43 C. 85, 1928 R. 43. Absence of formal order recording the compromise is not fatal to the validity of the decree passed in pursuance thereof. 111 I.C. 619. If the compromise that is filed is a valid and lawful one, the Court is bound to pass a decree in terms thereof and cannot add a new party afterwards. 50 M.L.J. 59=92 I.C. 311=1926 M.

Government Advocate or such officer as aforesaid may thereupon appear before the Court and be heard in the matter of such agreement, compromise or satisfaction."

Notes.

341. A Court to whom a petition of compromise is presented should not delay passing order for recording the compromise. Under R. 3, the Court is to pass an order directing the compromise to be recorded and this should be done at once. 15 P. 456=163 I.C. 675=1936 P. 401. The passing of the decree may, if necessary, be postponed till the hearing of the suit if there is a question as to how the interests of other parties to the suit, who have not entered into the compromise, would be affected by it, but this is no reason to defer the actual recording of the agreement of compromise (*Ibid*).

RECORD OF COMPROMISE.—What is 29 I.C. 860. Order recording compromise.—If consent decree.—Appeal.—If barred by S. 96 (3). 1936 S. 59. Where the parties enter into a compromise and the suit is decreed in the terms of the compromise, the omission to record the compromise is not fatal to the validity of the decree. The omission to record the compromise does not affect the merits of the case or the jurisdiction of the Court, and the defect, therefore, is cured by S. 99. 155 I.C. 1067=1935 A.L.J. 962=1935 A. 738. See also 14 P. 356.

SIGNATURE.—A party who is present in Court at the time of compromise and who does not object to it is bound by it though he has not signed it especially if he gets some benefit under it. 242 P.L.R. 1914=25 I.C. 874.

REVENUE PROCEEDINGS.—Rule 3 applies to civil as well as revenue proceedings. 39 I.C. 545=21 O.C. 346.

APPEAL.—An appeal lies against the decree on compromise on the ground that it embodies matters not relating to the suit. 5 M.L.J. 145; 8 P. 528=10 P.L.T. 293=1929 P. 318. See also 36 C.W.N. 1013, 35 Bom.L.R. 127. An appeal lies from the order recording the compromise at the instance of a party who denies the truth of the compromise. 1925 M. 606=48 M.L.J. 249. But see 12 P. 359=145 I.C. 1=1933 P. 306, 57 B. 206=144 I.C. 448=35 Bom.L.R. 127=1933 B. 205. Order recording a compromise not open to second appeal. 119 I.C. 422=1929 L. 472, 60 C.L.J. 173. The question as to the validity of consent decree cannot be gone into in appeal against that decree. 9 I.C. 210=13 C.L.J. 16; 33 I.C. 769=43 C. 85, 78 P.R. 1917=40 I.C. 675. Order holding that no compromise is proved is not open to appeal. 73 I.C. 177=1924 L. 248. A decree dismissing the suit on the ground that a plea in bar of the suit on the basis of an alleged compromise is established cannot properly be said to be one made under R. 3. 46 I.C. 775. See also 62 I.C. 608. Order rejecting application for recording compromise is appealable. 1928 L. 39=104 I.C. 561, 1929 N. 275=119 I.C. 673. When the parties to the suit request the Court to adopt a certain procedure and to decree the suit in case a certain event happened, and make an endorsement to that

effect on the plaint, they cannot afterwards go behind it or appeal against the decree passed in pursuance of that agreement. 44 L.W. 351=1936 M. 856=71 M.L.J. 281. *Quære*.—Whether the agreement and endorsement of the plaint would amount to an adjustment of the suit under R. 3 (*Ibid*.) Where the Court after deciding the issues as to the validity of the award made by a private arbitrator remarks that "there is no adjustment of claim in suit out of Court as alleged", it amounts to an order refusing to record an adjustment under R. 3, and the order is appealable under O. 43, R. 1 (*m*). 31 N.L.R. (Supp.) 72=160 I.C. 202=1936 N. 8.

MISCELLANEOUS.—As to the power of a Court to grant relief against a forfeiture clause inserted in a compromise decree, see 31 B. 15 (F.B.). Even when only a money decree was prayed in the plaint there is nothing in the rule to prevent the Court from making the sum decreed a charge on immoveable property. 16 M.L.J. 354=30 M. 478. See also 17 M.L.J. 255, 116 I.C. 651. The decree is conclusive only so far as it relates to so much of the subject-matter of the suit as is dealt with by the compromise. 18 M. 410 (414), 30 M. 421. See 31 B. 15 (F.B.), 1928 R. 43. A compromise can be set aside in a regular suit on the ground of fraud. 5 C. 27. Even when the party may have been under a mistaken belief and may have failed to exercise due care and caution. 17 M.L.J. 82. Or by review of judgment. 10 C. 612. See also 15 B. 594. A suit will also lie to set aside a compromise decree upon grounds other than that of fraud, i.e. on the ground that the pleader engaged by the guardian of a minor compromised the suit against the express wishes of the guardian. 34 C. 83. Also on the ground that the Court sanctioned the compromise under a misapprehension of material facts. 6 C. 687. The rule cannot be extended by analogy to proceedings held under S. 83. T.P. Act 13 M. 316. A judgment by consent operates as a waiver of any defect or irregularities provided it does not go to the jurisdiction. 35 M. 75=21 M.L.J. 709. This rule does not override the provisions of O. 34, Rr. 3 and 4.—Payment out of Court between preliminary and final decrees.—Legality. 30 L.W. 551. See also 136 I.C. 732=33 P.L.R. 138. A compromise though not recorded as required by R. 3 can still be looked upon as an agreement between the parties and a party taking advantage of such an agreement and getting the suit of another party thrown out is estopped from pleading in a subsequent suit that he was not bound by that agreement. 152 I.C. 263=35 P.L.R. 150=1934 L. 218. A compromise cannot be recorded under this rule on the basis of a draft compromise petition filed in Court, when it is found that the suit was not really completely adjusted. 61 C. 910=59 C.L.J. 421=1934 C. 846. On passing an order recording a compromise under R. 3, Court is to pass a decree not for

Proceedings in execution of decrees not affected.

4. [S. 375-A.] Nothing in this Order shall apply to any proceedings in execution of a decree or order.

ORDER XXIV.

PAYMENT INTO COURT.

Deposit by defendant of amount in satisfaction of claim.

1. [S. 376.] The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.

2 [S. 377.] Notice of deposit.
paid to the plaintiff on his application.

The deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be

Interest on deposit not allowed to plaintiff after notice

3. [S. 378.] No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

Notes.

the specific performance of the original contract but for the specific performance of the new contract to have the suit disposed of in a particular manner. But the analogy should not be carried far. There is one difference while the Specific Relief Act gives the Court discretion to refuse specific performance of a contract, no such exception has been made in R. 3. The specific performance of an agreement to end the suit by a compromise decree is different from specific performance of agreed acts to be performed after such decree, which the Court may or may not be in a position to supervise or enforce. If after a compromise decree is passed, the consenting party disobeys the decree, the decree-holder has his remedy under O. 21, R. 32 and where the contract is not specifically enforceable the party may claim damages. 12 P. 359=14 P.L.T. (Supp.) 1=1933 P. 306. On this rule, *see also* 1933 P. 135. Where during the course of an objection to an execution sale the parties made a statement that the sale be set aside and the decree-holder be given possession of one square of land for twenty years but this could not be acted upon for certain reasons, *held*, that there was no adjustment of the decree so as to bar revival of the execution proceedings. 148 I.C. 446=1934 L. 679.

O. 23, R. 3 and O. 21, R. 2.—Relative scope—Powers of Court under. 69 M.L.J. 765 (F.B.).

O. 23, R. 4.—R. 4 is explicit in its terms and declares O. 23 to be inapplicable to proceedings in execution of a decree or order and an arrangement entered into after decree for payment of the sum decreed in instalments is not binding, and limitation for execution of the decree runs nevertheless. 72 I.C. 477=1924 L. 342, 12 A.L.J. 235=22 I.C. 961; 18 I.C. 81. *See also* 18 C. 515; 18 M. 240; 10 B. 62. This rule does not affect the rule of estoppel. 13 I.C. 81.

O. 24, R. 1.—The word "debt" in R. 1, applies to secured debt as well as to unsecured debt. The language of the rule is wide

enough to cover a suit to recover a debt secured by way of mortgage or charge. 10 Luck 350=11 O.W.N. 1550=1935 O. 93=153 I.C. 263. Payment into a Government treasury is equivalent to payment into Court. 7 M. 211. The deposit must be made unconditionally. 14 M. 49; 97 I.C. 479=1927 C. 72. Defendant's failure to deposit amount admitted—Running interest not stopped. 117 I.C. 687=1928 C. 874. Money sought to be attached before judgment paid by debtor into Court—Attachment is irregular—Such payment should be considered as deposit under R. 1. *See* 1927 R. 278. Rr. 1 to 3 do not apply to execution proceedings. 97 I.C. 479=1927 C. 72.

O. 24, R. 2.—Court has a discretion to refuse to allow money to be paid out, but that discretion is to be exercised reasonably. 26 C. 766 (769). What tender causes cessation of interest. 34 M.L.J. 439=45 I.C. 638. Where the amount for the recovery of which the suit has been instituted has been deposited in Court, Court has got a discretion as to the disposal of costs. 13 I.C. 200=(1911) 2 M.W.N. 568, 13 I.C. 188=1912 M.W.N. 38. Where defendant pays money into Court, Court should record a finding as to whether a demand was made or not, so as to determine by whom the costs should be paid. 13 I.C. 188=1912 M.W.N. 38. Where the amount deposited in Court in execution might have been immediately on deposit paid out of the decree-holder in part discharge of his claim, the judgment-debtors may be relieved from paying interest. 40 A. 125=16 A.L.J. 15. Where the deposit made is on the challenge of the plaintiffs and in the presence of the plaintiffs, a separate notice is not necessary and therefore the plaintiff cannot claim interest from the date such deposit is made to the date he gets the formal notice. 1935 M. 342 (2).

O. 24, R. 3.—In the case of ordinary money claims not based on mortgage, a tender before suit of the amount due must be followed by payment into Court in order to stop the running of interest. 55 M. 458=62 M.L.J.

4. [S. 379.] (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim

Procedure where plaintiff accepts deposit as satisfaction in part.

- (2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.

Procedure where he accepts it as satisfaction in full.

Illustrations

(a) A owes B Rs. 100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) B sues A under the circumstances mentioned in illustration (a). On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shown that the litigation was necessary.

(c) A owes B Rs. 100, and is willing to pay him that sum without suit. B claims Rs. 150 and sues A for that amount. On the plaint being filed, A pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. B accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

ORDER XXV.

SECURITY FOR COSTS.

1. [S. 380.] (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does possess any

When security for costs may be required from plaintiff.

Notes.

266. In the case of mortgages, the rule is different and a tender alone has the effect, under S. 84, T. P. Act, of stopping interest from the date of tender. (*Ibid.*) It is doubtful whether this rule applies to cases where the tender is made direct to the creditor. 3 C 468. A deposit by the defendant in a suit for arrears of maintenance, charged upon certain property, of the decretal amount after the passing of the preliminary decree, is a deposit during the pendency of the suit under R. 3, and interest therefore ceases to run from the date on which the deposit is made. 10 Luck 350=153 I.C. 263=11 O.W.N. 1550=1935 O 93. Where the defendant deposits the amount in Court but stipulates such conditions as will make it impossible for plaintiff to get payment and is thus himself responsible for non-payment to plaintiff, he cannot escape payment of interest from date of such deposit. And R. 3, has no application to such a case. 1936 L. 76.

O. 24, R. 4—In cases not being suits to recover a debt or damages, where money is paid into Court, the principle underlying this rule ought to regulate the discretion of Court

in directing the payment of costs. 21 B 502.

"DEBT OF DAMAGES"—What are. 21 B 502

O 25, R. 1. SCOPE OF RULE—The rule applies to cases where the plaintiff brought a suit for partition of property in which he was entitled to a share, the extent of the share alone being in dispute. 10 Ben L.R. at 25. The power given under this rule is discretionary. 21 C. at 836. See also 17 C 610. The discretion is unfettered and unqualified. 63 C 897=164 I.C. 560=40 C.W.N. 511. If a party to a suit or appeal desires to apply for security for costs, he must do so promptly. Otherwise the order made on such an application may have the effect of stalling the suit or appeal and should not be passed. 1930 C. 520. Poverty or insolvency of plaintiff is not by itself ground for ordering security for costs. 26 S.L.R. 21=140 I.C. 233=1932 S. 33. The rule should not be so applied as to drive away all poor plaintiffs. The Court should see whether at first sight the suit appears *bona fide* and whether the defence is such as is likely to succeed. 6 Bom L.R. 1072. Liability of person standing surety for secu-

sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) [S. 382.] Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) [S. 380.] On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

Loc. Ams—[Allahabad] In O. 25, R. 1, sub-rule (1) after the words "other than property in suit" add "or that the plaintiff is being financed by a person not a party to the suit"

[Madras.] The following shall be inserted as sub-rule (4) —

"(4) In all cases in which an element of champerty or maintenance is proved, the Court may, on the application of the defendant, demand security for the estimated amount of the defendant's costs, or such proportion thereof, as from time to time during the progress of the suit, the Court may think just."

Notes.

ity for costs. See 92 I.C. 546=1926 A. 657 Security for costs from plaintiff—"Residing out of British India"—Evidence 1930 B 220=32 Bom. L.R. 411 R 1 (3) cannot apply to a suit where there are more plaintiffs than one, and only one of them is a woman. A suit in which there is also a male plaintiff cannot properly be described as "a suit in which the plaintiff is a woman", within the meaning of the rule. 63 C 809

PRACTICE AND PROCEDURE.—A Court has power to demand security for costs where it finds that the plaintiff is not the real litigant but a puppet in the hands of others. 32 I.C. 786=18 C.W.N. 119, 20 I.C. 703=19 C.L.J. 59; 2 Bur. L.J. 78=1923 R. 244. If an insolvent sues as nominal plaintiff for the benefit of somebody else, which somebody is a female minor who is also a party to the suit, he must give security 27 B 100. Where the plaintiff has got a substantial interest in the suit, the order for security should not be made nor should it be made merely because the plaintiff is a poor man and cannot pay the costs if he loses. 18 C.W.N. 119=19 C.L.J. 59; 75 I.C. 309=1923 R. 244; 36 I.C. 320, 10 Bur. L.T. 105, 13 Bom. L.R. 955=36 B. 415. Save in exceptional cases security for costs ought not to be required from an infant female plaintiff, nor from her next friend. 23 B. 100. Security for costs of appeal, when to be demanded. 32 I.C. 786, 46 C. 156=22 C.W.N. 1018. See also 41 L.W. 135. Security for the defendant's costs cannot be ordered if there are grounds tending to prove that the defence is true. 18 I.C. 217. No order should be made before the written statement is filed. 18 I.C. 217. Suit by undischarged bankrupt for after-acquired property if security for costs can be demanded. 46 C. 126=22 C.W.N. 1018. As to how security given is to be realized, see S. 145; also 16 C. 323.

SUIT FOR PAYMENT OF MONEY.—A suit for dissolution of partnership on account and for the recovery of the stridhan property belonging to a female plaintiff is not a suit for payment of money within R 1 (3). 68 I.C. 607=1923 C 316 (2). So also a suit for administration of an estate consisting largely of immoveable property. 3 R. 211=1925 R. 300. Suit for declaration of title to moveables or their value if suit for money. See 14 I.C. 290=16 C.W.N. 763

PAUPER PLAINTIFF.—A woman allowed to bring a pauper suit cannot be required to furnish security for costs, as an order of security would mean a refusal of permission to sue as a pauper. 36 I.C. 320=10 Bur. L.T. 105, 13 Bom. L.R. 955=36 B. 415. See also 27 B 100, 1928 L. 960=113 I.C. 911. Mere poverty is no ground for requiring a plaintiff to give security for costs. 14 C 533. See also 4 B. 244; 3 M. 66 and 7 A. 542. There is no absolute rule that a pauper plaintiff cannot be asked to furnish security under R. 1 (3). Such order would not be improper where the allegation in the petition praying for security is that the plaintiff is a mere puppet in the hands of her husband and that as the husband does not wish to pay the Government stamp duty nor to be mulcted with costs in case he fails, he had put forward the plaintiff to sue in *forma pauperis* and the circumstances are sufficient to show that she is bringing the suit for her husband and not *bona fide* on her own behalf. 1935 M.W.N. 513=41 L.W. 135=1935 M. 230=155 I.C. 317=69 M.L.J. 38

"RESIDING."—The residence intended by this rule is residence under such circumstances as will afford a reasonable probability that the plaintiff will be forthcoming when the suit is decided. 3 B 227. See 14 B. 541. Temporary residence in British India for purposes of suit is not residence within the rule. 46 B 589=64 I.C. 703.

[Nagpur] R. 1 (1) —In rule 1 (1) insert the words "or that any plaintiff is being financed by a person not a party to the suit" between the words "other than the property in suit" and "the Court may"

[Oudh.] O. 25, R. 1, sub-rule (4) —Add the following as sub-clauses (4) and (5) —

(4) Where the plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person within a time to be fixed by the Court to give security for the payment of all costs likely to be incurred by any defendant. In case of his default, the Court may dismiss the suit so far as his right to, or interest in, the property in suit is concerned or may declare that he shall be debarred from claiming any right to, or interest in, the property in suit.

(5) If such person declines to be made a plaintiff, the Court may implead him as a defendant and may order him, within a time to be fixed by the Court, to give security for the payment of all costs likely to be incurred by other defendant. In case of his default, the Court may declare that he shall be debarred from claiming any right to, or interest in, the property in suit.

[Rangoon] The following shall be substituted for O. 25.—

(1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiff does, possess any sufficient immoveable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.

2. [S. 381, first three paras.] (1) In the event of such security not

Effect of failure to furnish security.

being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

Loc. Ams.—[Bombay.] O. 25, R. 2 (4). Add the following sub-rule—

The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule.

[Nagpur] New Rule 3 After R. 2, add the following new Rule —

"3. (1) Where any plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not

Notes.

APPEAL —An order passed on the Original Side of High Court requiring plaintiff to give security for costs is a judgment within the meaning of S 15 of the Letters Patent, and is appealable. 26 M. 502.

O. 25, R. 2.—Next friend of minor plain-

tiff unable to give security for costs—Suit should not be stopped. 13 Bom L.R. 480=35 B 329 The dismissal of suit under this rule is no bar to a fresh suit. 26 B. 637. Appeal. See 8 A. 108 (F.B.) The Court has power to enlarge time for furnishing security. 11 I.A. 7=10 C. 557, 17 I.A. 1=17 C. 512 (P.C.).

being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to, or interest in, the property in suit is concerned or declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(2) If such person declines to be made a plaintiff the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed, the Court may make an order declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of R. 2 shall apply, *mutatis mutandis*, to such application."

(Notifications Nos. 2563 and 2564, dated the 21st March, 1929)

plaintiff is deriving assistance from, or is being maintained by a person in consideration of a plaintiff is deriving assistance from, or is being maintained by a person in consideration of a promise to give to such person a share in the subject-matter or proceeds of the suit, or in consideration of having transferred his interest in the subject-matter of the suit, the Court may, either of its own motion or on the application of any defendant—

(a) award costs on a special scale to be decided by the Court, and approximating to the actual costs reasonably incurred by the defendant,

(b) at any stage of the suit, order the plaintiff, within a time fixed by it, to give security for the payment of the estimated amount of such costs or such proportion thereof as the Court may think just

Rule 3 (1) In the event of security demanded under R. 1 or R. 2 not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff is permitted to withdraw therefrom.

(2) Where a suit is dismissed under this Rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the order of dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The order of dismissal shall not be set aside unless notice of such application has been served on the defendant.

ORDER XXVI.

Commissions to examine witnesses

1. [S. 383,] Any Court may in any suit issue a commission for the exa-

Notes.

O. 26, R. 1. SCOPE OF RULE.—O. 26 amplifies and explains S. 75. 3 L. 209=1922 L. 47 Examination of witnesses on commission is in the discretion of the Court. 46 M. 574=44 M.L.J. 202 See also 32 C.W.N. 128. Court should not allow witness to be examined on commission without adequate reason, and the grounds on which a commission can issue are ordinarily those specified in R. 1, O. 26. 42 B. 136=43 I.C. 729. Especially so when he is a material witness or a plaintiff or defendant. 39 C.W.N. 595 As to the obligation of a Court to issue a commission, see 8 Beng.L.R. App. at 16. A commission to examine witnesses may issue when a case is referred to arbitration. 7 Bom.L.R. 560 See also 8 Beng.L.R. App. at 16, 18 W.R. 230; 15 C. 775. There is nothing in O. 26 which prevents a Court from accepting evidence on a debatable point between the parties where a Commissioner has been appointed to examine and report on the accounts. 53 A. 54=137 I. C. 334=1932 A. 128. There is nothing in law to authorize a commissioner to try the issue referred to him with the aid of assessors. 139 I.C. 804=1932 A.L.J. 117=1932 A. 264.

MEANING OF TERMS.—The word "may" means "is given authority to" 46 M. 574=44 M.L.J. 202

ILLUSTRATIVE CASES.—In the case of a witness not under the control of the party who resides beyond the limits fixed, commission should issue as a matter of right, unless the Court is satisfied that the party is merely abusing the Court's power. 46 M. 575=44 M.L.J. 202=1923 M. 321. Court ought to issue commissions for the examination of witness at the instance of a party if all the conditions requisite therefor are fulfilled, irrespective of whether that party will be ultimately benefited thereby. 12 I.C. 74=21 M.L.J. 889, 46 M. 574=44 M.L.J. 202 If a *pardanashin* lady can be examined in Court in her *palki*, no commission need be issued. 18 W.R. 230. See also 15 C. 775 But see *contra* 86 I.C. 513=1925 M. 905. Court has no power to insist that a *pardanashin* lady must attend and give evidence in Court. It is the right of a *pardanashin* lady to refuse to attend the Court and to say that if she is to be examined, her statement should be taken on commission. She cannot be compelled to attend the Court either as a party or as a witness and a Court acts wrongly in insisting on the personal attendance of a *pardanashin* lady in Court. The Court has no such power under O. 5, R. 3 or O. 10, R. 4 (56 C. 865, Diss.) 55 A. 666=1933 A.L.J. 1384=1933 A. 551. Where the allegation that a *pardanashin*

Cases in which Court may issue commission to examine witness.

mination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it

Notes.

lady examined on commission was being tutored by somebody behind the parda is established, the Court has the discretion to exclude the evidence. But there is no justification for Judge to insist on the attendance of the *pardanashin* lady in Court. (*Ibid*) A *pardanashin* woman cannot claim to be examined on commission as a witness at a place of her own choice. 48 C. 448. Where however on an application filed by the defendant *pardanashin* lady who was living beyond the jurisdiction of the Court, for her examination on commission at K (her place of residence), as she was ill, the Court insisting on her examination on commission at R (place of suit), rejected her application. *Held*, that the order was bad and could be set aside on revision 166 I C. 729=1937 P. 21. The mere fact that a woman lost her husband a few months ago does not justify the issue of a commission 14 B. 584. Issue of commission to Hindu lady recently widowed—Witnesses being old as a ground for examination on commission—Principles applicable—Erroneous order—Interference in revision See 1927 M W N. 218=1927 M 524. In the case of an old man of feeble health the Court can order an examination on commission at his own house 85 I C 619=1925 C. 1118. A commission should issue to examine the head of a *Muti* who is an ascetic, 28 M. 28; as to a religious preceptor, see 42 B 136. A commission will not issue for the examination of an infant of tender years. 23 B 626. A commission will not be issued for the examination of a plaintiff on his application except under very strong circumstances. 1 Ind. Jur N.S. 357; 57 I C 955=13 Bur.L.T. 33. But the case is different when the application is made by a defendant. 57 I C 955. See also 1935 P. 220 (as to principles governing the issue of commission for examination of plaintiff and defendant) In the case of a defendant outside jurisdiction the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a forum of his choice though he resides beyond the jurisdiction of such Court [*Ross v. Woodford*, (1894) 1 Ch. 38 and *New v Burns*, 64 L.J.Q.B. 104, Ref J. 35 C.L.J. 78=68 I C 9=1922 C. 42; 73 I.C. 923=1924 L. 475 See also 46 M.L.J. 131. Where the witness is the servant of the party applying, it is not reasonable to issue a commission. 20 W.R. 253. Where an application is filed to examine on commission a witness which is a company, the Court can direct the party to name the individual, as distinguished from a company, whose evidence is desired to be taken. The Court can also insist on the documents to be produced being specified. But such application cannot be refused on ground of lapse of time. 1934 A. 37 (2)=154 I C. 391.

PRACTICE AND PROCEDURE—Mere inconvenience or great distance from the Court to the plaintiff's place of residence is not a sufficient ground 57 I C 955=13 Bur.L.T. 33. Remand order for examining expert in hand writing—Discretion to issue commission 120 I C 335=1930 N. 27. Where commission is issued to examine a specific witness and a witness not named is examined, Court would ignore such evidence. 59 I C 539=47 C 583. When handwriting expert is to be examined on commission by written interrogatories, the Court acts without jurisdiction if it orders the defendants to file cross interrogatories. The defendant can insist on an opportunity to cross examine the witness orally. 150 I.C 788=1934 P. 60. There is nothing prohibiting the granting of copies of cross-interrogatories to the opposite party before a commission is issued for the examination of a witness and it is reasonable that each side should know the questions the other desires to put. 39 I C. 944=10 S. L R 210. Commissioner's report—Objection to, should be heard by the Court 14 L W 620=68 I C 469. Order as to issue of commission—Power of succeeding Judge to modify A Judge has the power to alter an order of his predecessor with regard to the issue of a commission. Such an order is not a final one and it relates more to the routine of the case than to the merits of the case. 1930 R. 315. Objections to Commissioner's report—If can be taken for first time in appeal 114 I.C. 232=1929 M. 492.

DELAY.—Long unexplained delay would be a ground to disallow an application for examining a witness on commission. 35 C W N 705. As a general rule, the plaintiff is within his rights if he refrains from giving his evidence, assuming it is otherwise possible for him to do so, before the settlement of issues and the production of all the documentary evidence. An order refusing to issue a commission for the examination of the plaintiffs on the ground of lapse of one year since the filing of the suit is not therefore just and reasonable. 1934 A. 37 (2)=154 I C 391. See also 67 M.L.J. 878.

WITNESS IN NATIVE STATE—There is no law by which witnesses in a Native State which have made arrangements for mutual service of processes with British India can be compelled to obey the processes, *i.e.*, punished if they fail to do so. If the witnesses so summoned fail to appear the only way to take their evidence is by commission. The rule as to 200 miles is not applicable in such a case. 142 I C. 201=1933 M. 366=63 M.L.J. 334.

APPEAL.—An order refusing to issue a commission to examine a witness whose personal attendance cannot be enforced is a judgment within the meaning of S 15 of the Letters

2. [S. 384.] An order for the issue of a commission for the examination of a witness may be made by the Court either of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

3. [S. 385.] A commission for the examination of a person who resides within the local limits of the jurisdiction of the Court issuing the same may be issued to any person whom the Court thinks fit to execute it.

Where witness resides within Court's jurisdiction
Persons for whose examination commission may issue.

4. [S. 386.] (1) Any Court may in any suit issue a commission for the examination of—

Notes.

Patent, and is appealable. 30 C 143. But see *contra* 35 M. 1, 3 R 293=1925 R 290; 152 I.C. 264=36 Bom L R 272=1934 B. 168

REVISION.—An order refusing a commission cannot be the subject of revision. 9 M. 256, 1927 S. 267 Interlocutory order appointing Commissioner is not open to revision. 74 I.C. 812. Court has jurisdiction to dispose of the application for examination of witnesses on commission. An order rejecting the application cannot be said to be without jurisdiction nor can the Judge be considered to have exercised it illegally or with material irregularity only because he took an erroneous view on a question arising in the case. An interlocutory order like the one in question cannot be said to amount to a "decision" of the case within the meaning of S. 115. 1934 A 37 (2) =154 I.C. 391

O. 26, R. 2.—Rule 2 does not say that the application for commission must be supported by the affidavit of the party or of the witness, but only says that the application of a party or of a witness is to be supported by affidavit or otherwise. 103 I.C. 141=1927 R 175. Court can issue a commission to a person directing him to hear a woman singer and her musical talents 139 I.C. 804=1932 A.L.J. 117=1932 A. 264.

O. 26, R. 3.—Where a defendant who has made a counter-claim applies to be examined on commission the mere advantage of observing the defendant's demeanour in the box is not a sufficient reason for refusing a commission. Failure to distinguish between applications of the plaintiff and of the defendant in such matter is an irregular exercise of jurisdiction in which High Court can interfere in revision. 57 M 705=150 I.C. 63 =1934 M 399=67 M.L.J. 95.

O. 26, R. 4: SCOPE OF RULE.—This rule is exhaustive and provides for all cases in which the legislature intends that a commission should issue. 28 M 28 The issue of a commission to examine a witness is matter of judicial discretion and will not be granted unless the application is made *bona fide* 19 I.C. 643; 103 I.C. 141=1927 R 175. The power of Court to issue commission is not more restricted under R. 4 than under R. 1 114 I.C. 843=1929 M. 192. Examination of a witness on commission as provided under R. 4, stands on a slightly different footing from the issuing of summons to a witness under O. 16, R. 1. In the former case the

matter is in the discretion of the Court, whereas in the latter case summonses are to be issued as a matter of course though the Court may not permit an adjournment of the case if the application is made too late. 51 A 341=113 I.C. 266=1929 A. 449 In cases under this rule a distinction has been observed between an application by a plaintiff asking for commission to examine himself and an application by a defendant asking for a commission to examine himself. 35 C.L.J. 78=1922 C 42. See also 3 P. 863=84 I.C. 993 =1925 P. 125. Where the defendant is his own sole witness and applied for a commission to have himself examined as he was living more than 200 miles away in a Native State, the application should be allowed. 73 I.C. 923=1924 L 475, 16 I.C. 750 "It is a very unusual thing to grant a second commission and it ought never to be allowed except upon substantial grounds". 7 Times Rep. 653 A *de bene esse* examination of a witness about to leave the jurisdiction of the Court must be taken by the Court unless the parties consent to the evidence being taken on commission. 5 B.L.R. 252 A commissioner for the examination of witness is entitled to note his observation as to the demeanour of the witnesses examined by him 48 I. C. 561=28 C.L.J. 306 Report of a commissioner appointed by an assistant Collector in a suit for profits under S. 164 of the Agra Tenancy Act cannot be admitted in evidence 39 A. 694=42 I.C. 720 Where what was required was a decision on the question as to whether what was asserted by one of the parties, namely, that certain structures standing on the land were recent and not old structures, was a true assertion or not and the Court issued a commission for local investigation, *held*, that the appropriate procedure was under O 39, R. 7 and not under R. 4 or 9 of O 26 37 C.W.N. 143=144 I.C. 870=1933 C 475 A Court of appeal should exercise great caution when invited to interfere with an order of trial Court made with jurisdiction in the exercise of its discretion as to granting a commission. 35 C.L.J. 78=1922 C. 42.

APPEAL.—A party asking for the issue of a commission to examine witnesses is not entitled as of right to such an order and an order refusing the issue of a commission to examine witnesses is not a "judgment" within Cl 15 of the Letters Patent, and no appeal lies from such an order [35 M 1 (F.B.), 1920 C. 894, 3 R 293; 3 R. 605, *Foll.*, 2 I.C.

(a) any person resident beyond the local limits of its jurisdiction;
 (b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and

(c) [any person in the service of the Crown] who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

5. [S. 387.] Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a

letter of request

Court to examine witness pursuant to commission.

6. [S. 388.] Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

7 [S. 389.] Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms

Return of commission with depositions of witnesses

of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

When depositions may be read in evidence.

8. [S. 390.] Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

Leg. Ref.

¹For words 'any civil or military officer of the Government' the words in brackets substituted by the Government of India have been (Adaptation of Indian Laws) Order, 1937.

Notes.

157, Expl.] 152 I.C. 264=36 Bom.L.R. 272=1934 E 168

O. 26, R. 5.—The costs of a commission to England should be taxed on the same scale and principle as would be adopted in England 15 B. 209 Proper procedure for examination of witnesses in England would appear to be the issue of a commission in accordance with the provisions of Statute 22 Vict., Ch. 20, as laid down in Para. I, Part E, Ch. 10 of the Rules and Orders of the Lahore High Court, Vol. I, 1930. Of course, the issue of a commission for examination of a witness in a distant country is bound to cause delay and a Court will be fully justified in satisfying itself that the evidence is really relevant and necessary for the purposes of the case before issuing process. But a party cannot obviously be deprived of the opportunity of producing his evidence merely on the ground that it may involve some delay. Such a procedure would be nothing short of denial of justice. 39 P.L.R. 345=1937 L. 73.

O. 26, R. 6—A party who has not joined in a commission is entitled to cross-examine the witnesses who are examined under it. 14 W.R.O.C. 17.

O. 26, R. 8.—The evidence taken on commission does not *ipso facto* become evidence in a case. It has to be offered by the party who has examined the witness on commission and it has to be accepted by the Court after hearing the opposite party and unless it is tendered by the party and accepted by the Court it is not to be considered as evidence in the case. 37 C.W.N. 1045. When a defendant examines a witness on commission and the commission is returned to the Court, the plaintiff in opening his case is entitled to treat the evidence as part of the record, without treating it as his own evidence. 26 C. 591. That the evidence was given in the absence of the other side is not enough to make the deposition of a witness taken on commission inadmissible 10 W.R. 236. A Court may refuse to hear read in evidence the deposition of a defendant taken on commission, where there is no evidence to prove that the defendant was unable to attend personally at the time of the trial. 22 W.R. 331. A party, who wishes to rely on evidence taken on commission, must either obtain the consent of the party against whom he offers it, to its being read as evidence in the suit, or

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is 1[any person in the service of the Crown] who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Commissions for local investigations.

9. [S. 392.] In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the Court may issue a commission to

Commissions to make local investigations

Leg. Ref.

¹For words 'a civil or military officer of the Government,' the words in brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937

Notes.

have it read as evidence in the suit after complying with one the conditions laid down in R. 8 (a) or persuade the Court in its discretion to dispense with the proof of any of the circumstances mentioned in R. 8 (a) and to authorize the evidence being read as evidence in the suit, notwithstanding the want of proof of the existence of such circumstances. Each of the alternatives involves a request to have the evidence read as evidence in the suit 122 I.C. 396=1930 S. 89. See also 63 C 914. Evidence taken on commission, until tendered and admitted as evidence in the suit, cannot be made use of by either party 30 C 999 (1003); 9 C.W.N. 794. On this point, see also 1926 S. 34; 44 C.L.J. 288=1927 C 43; 32 C.W.N. 128. Deposition of sick person admitted without objection—Appellate Court should not reject deposition 1929 C. 591. A Court has no power under O. 26, R. 8 to reject the report and evidence in a commission enquiry. 14 R.D. 548. The expression "beyond the jurisdiction of the Court" in O. 26, R. 8, C.P. Code, has reference to the question whether or not the witness is in reach of the compelling or disciplinary powers of the Court in his capacity of a witness or potential witness, and the matter would therefore fall within the purview of O. 16, R. 19, C.P. Code, under which no witness is to be ordered to attend in person unless he is resident within a certain distance from the Court. 63 C. 914

O. 26, R. 9: APPLICATION OF RULE.—The rule applies to proceedings under S. 158 of the Bengal Tenancy Act. 17 C 277. There is no error of law when a judge does not direct a local investigation of his own motion in a case where he is not moved to do so by the parties. B.L.R. (Sup.) Vol 358. It is within the discretion of the Court to order or refuse a local inquiry. 12 W.R. 76. The issue of commission is a matter in the discre-

tion of Court, and if the discretion is wrongly exercised, the question ought to be raised, before Court of first appeal. It cannot be agitated for first time in second appeal. 1933 P. 542. Application for local investigation by Court on the day set down for trial would not be granted 13 I.C. 194. The local investigation pre-supposes the existence on record of independent evidence which requires to be elucidated 16 M. 350. The rule does not authorize Court to delegate to a commissioner the trial of any material issue which it is bound to try 16 M. 350. Object of local investigation is to obtain evidence which from its peculiar nature can only be obtained on the spot 2 N.W.P. 196. A commission for local investigation cannot be issued after the evidence is closed and the case is ready for judgment 51 I.C. 399. Where a party to a local investigation goes on with the trial he cannot at the last moment ask for giving fresh evidence against report of such investigation 16 I.C. 39. Restitution—Commissioner appointed to ascertain mesne profits—Commissioner taking evidence as to possession and recording finding—Court acting on the same is illegal and *ultra vires*. 9 Pat.L.T. 258=109 I.C. 641 (1)=1928 P. 278. On this rule, see 37 C.W.N. 143=144 I.C. 870=1933 C. 475, cited under R. 4, *supra*

WHO CAN BE APPOINTED.—A Judge from whose decision an appeal is pending, is a most unsuitable person to make a local investigation. 17 W.R. 300. A Judge may make a local inspection in person at his discretion. Under the present Code, a Judge may issue a commission in any case where he deems it fit to do so irrespective of his own convenience 44 M. 640=40 M.L.J. 554. The District Judge can appoint a Munsiff to be Commissioner. 11 C.L.R. 533. For instance of improper appointments, see 6 W.R. 81.

OBJECTIONS TO REPORT.—Parties are entitled to object to the Commissioner's report and prove their objection by examining the Commissioner or other witness 42 I.C. 221=164 P.W.R. 1917, 38 I.C. 491; 19 C.L.J. 87=18 C.W.N. 697; 72 P.L.R. 1914=22 I.C. 526. It is within the discretion of a Judge to accept the report of a Commissioner. 47 I.C. 650=28

such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the 1[Provincial] Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

10. [S. 393] (1) The Commissioner, after such local inspection as he deems necessary and after reducing to writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.

Leg. Ref.

¹ For word 'local', the word 'Provincial' has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

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C.L.J. 203. A defendant who does not appear before a Commissioner cannot ordinarily object to his report. 60 I.C. 434. Court has a discretion to permit or refuse a party to examine the Commissioner. 47 I.C. 650=28 C.L.J. 203. Objections to the report of a Commissioner cannot be raised for the first time in second appeal. 27 I.C. 598=70 P.L.R. 1915.

SUPERSEDING COMMISSIONER.—A local Commissioner appointed by consent of parties cannot be superseded simply on the ground that he is incompetent to go into the accounts being ignorant of the language. 27 I.C. 598=70 P.L.R. 1915.

SECOND INQUIRY.—When an inquiry is being carried on, a second inquiry should not be ordered without setting aside the first. 23 W.R. 93; 120 I.C. 737=1930 M. 236. Where the result of a local investigation is unsatisfactory the Court is not bound to order another inquiry. It can decide the case on the evidence. 50 I.C. 301. When a Judge has ordered his successor should not interfere with the order but should carry it out. 1 W.R. 102. The appellate Court should not order local investigation where the parties refused to have one in the lower Court. 12 C. 45. Practice in Malabar of issuing successive commissions in cases under Malabar Compensation for Tenants' Improvement Act, for arriving at valuations is not regular. 55 M. 656=138 I.C. 114=1932 M. 482=62 M.L.J. 629.

O. 26, R. 10 [N.B. See also under R. 9]—A commission issued to an Amin to hold local investigation is not a process within the meaning of Cl (1) of S. 20 of the Court-Fees Act. 17 C. 281. When a Commissioner is appointed to prepare a map of a locality, statements of village officers made to him with regard to the right in suit are admissible in evidence. 24 B. 43. Commissioner for ascertainment of mesne profits may rely on local inspection but must record witnesses' evidence. 47 M. 800=1925 M. 145=48 M.L.J. 89; 92 I.C. 133=1925 M. 145. Evidence taken should only be with reference to points for the determination of which local inspection is required. 9 W.R. 83. See also 17 W.R. 282. A Commissioner should give to the

parties notice of the time when the local investigation is to be held. 12 M. 139, 17 W.R. 236. See R. 18. Commissioner's report is only evidence and not binding on the Court—If report is not satisfactory Court can order another commission. 7 Pat.L.T. 795=96 I.C. 327=1926 P. 462, 157 I.C. 530=1935 A.L.J. 427=1935 A. 422. A second commission should not be issued by the Court for the same purpose for which the first was issued, unless the Court is dissatisfied with the report of the first, in which case, the Court should not take into consideration the report of the first Commissioner. 54 M. 239=130 I.C. 470=1931 M. 73=60 M.L.J. 450. Decree based on incomplete report of Commissioner can be set aside. 104 I.C. 369=9 Lah.L.J. 339. Evidence of possession recorded by a Commissioner who is appointed in a suit for possession of land, not for the purpose of examining witnesses, but for the purpose of relaying the settlement boundaries and to ascertain and determine whether the suit land was within a particular patta, is not admissible in evidence in the suit to prove the possession of the land. 40 C.W.N. 582. The report submitted by a Commissioner after a local investigation is not admissible in evidence without the Commissioner's verification in Court. 1935 R.D. 319. Under R. 10, the Commissioner's report is evidence in the suit and shall form part of the record. A party to the suit is, therefore, entitled to have the report, for what it is worth, considered by the Court before it reaches its conclusion on any issue. 163 I.C. 36=1936 M.W.N. 935=1935 M. 918. The report of a Commissioner in a previous suit is not admissible in evidence in a subsequent suit, unless its accuracy be proved. 12 C.L.R. 50. The report cannot be rejected in case the Commissioner's remuneration has not been paid. 17 C. 281: and his report is evidence only on the point to which the commission refers. 14 W.R. 493; 24 W.R. 208. After receipt of the report, a day should be fixed for hearing objections, and notice given to the parties. 21 W.R. 2. The time fixed for the return of the commission can be extended. 9 B. 250. A pleader who is appointed Commissioner for the purpose of relaying a large number of *dags* of a very old *chitta* having no bearings on the Field Book but giving only the lengths of the different *dags*, will not be disentitled to any fee, merely because the work done by him is found to be inaccurate, in the absence of any finding that he has done his work carelessly.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Commissions to examine accounts

11. [S. 394] In any suit in which an examination or adjustment of accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

12. [S. 395] (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry,

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or negligently or that he was actuated by improper motives or that he was incompetent to do that kind of work 40 C.W.N 928

APPEAL.—No appeal will lie from an order directing a local investigation 7 WR 425. See also 12 WR. 76

O. 26, R 11 [N.B. See also under R 9].—This rule merely entitles the Court to appoint a Commissioner to examine accounts when it is necessary to examine the accounts, but it has first to be shown that it is necessary to examine them. When in a suit on a promissory note the defendant puts in no defence, it is impossible to say whether it is necessary to examine the accounts or not. 1937 N. 136 As regards the procedure to be adopted in taking accounts, see 7 C. 654. See also 6 C. 754; 14 C 147, 87 I C 764=1926 C 349; 91 I. C. 766=1925 S 265 Commissioner is to determine only the quantum and not the factum of a liability of an agent. 52 C. 766=1925 C. 1069 Court cannot delegate all its powers and functions in the matter of taking evidence and determining issues to a Commissioner 89 I C. 333. See also 89 I C 343=1925 P 576; 53 A. 190=58 I.A. 173=1931 P.C. 136=61 M.L.J 665 (P.C.). Where in a suit for dissolution and settlement of accounts of a partnership business, a dispute arises as to which of the parties is in possession of the account-books, the Court should not leave it to the Commissioner, who is appointed to examine accounts and to submit a scheme for the winding up, to decide that question, as it does not fall within his ordinary duties. It is the duty of the Court to record the evidence and to decide that question itself, and not to appoint a commissioner for that purpose 160 I C. 642=1936 L. 458. Decree based on incomplete report of Commissioner can be set aside 104 I.C. 369=9

L.L.J 339 The remuneration of a Commissioner appointed to examine accounts should, as a rule, be a definite amount, and not a monthly allowance 3 M. 259 No objection can be taken to the order of a Judge appointing a Commissioner for taking accounts from a guardian of property. 1929 P 626

MIXED QUESTIONS OF FACT AND LAW.—It is as a rule expedient to refer to a local Commissioner mixed questions of fact and law, e.g., whether a particular business was of a gambling nature. The distinction between contracts which are legitimate and genuine trading transactions of a speculative character and contracts which are simply gaming and wagering transactions is frequently a narrow one and difficult of determination even after the examination of the parties concerned, the course of the business and the nature of the contracts. It certainly is not a question which can safely be left to the decision of a local Commissioner. 58 I.A. 173=53 A. 190=1931 P C 136=61 M.L.J 665 (P.C.).

O 26, R. 12 [N.B. See also under R 9].—Although Commissioner's report should have very great weight attached to it, it is not absolutely binding. 6 M H C R 36 See also 6 M H C R (A.C.) 149 and 1 I.A. 346, 72 P L R 1914=22 I C 526. (Suit for dissolution of partnership.) Commissioner's report and the opinion he expressed on the evidence is merely a piece of evidence to be considered by Judge. It is the duty of Judge to consider every objection of fact or of law made by the parties to the report, to show the nature of the objection in his judgment and his grounds for allowing or dismissing it 27 S L R 194=1933 S. 327 As to what Commissioner's report should contain, see 3 B 161 When a Commissioner makes a report, Court of first instance and Court of appeal should

or also to report his own opinion on the point referred for his examination.

Proceedings and report to be evidence. Court may direct further inquiry.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

Commissions to make partitions.

13. [S. 396, para. 1.] Where a preliminary decree for partition has been passed, the Court may, in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

Commission to make partition of immoveable property.

14. [S. 396, paras. 2 & 3] (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

Procedure of Commissioner

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by

Notes.

consider it before accepting a decree in accordance with it 5 C.W.N. 692 Commission for examining accounts—Report—Party whether can adduce evidence to rebut—Duty of Court to give time to party to adduce evidence and then decide. 1929 L. 782=119 I.C. 490.

O. 26, R. 13.—The intention of the rule is that, upon the first hearing Court shall determine whether plaintiff is entitled to a partition, and shall ascertain who the several persons interested in the property are. 7 C. 318 See also 18 M.L.T. 145=2 L.W. 693. Proceedings taken under this rule are proceedings in suit itself, and not proceedings in execution of a decree. 22 C. at 432. Court has no power under this rule to order its Amin to cause a wall to be built separating portions of property of which partition has been decreed 19 A. 194 The word "person" has been used in the singular to meet the rulings in 29 A. 235 (F.B.), 6 Bom. L.R. 586 Powers of Commissioner appointed to make a partition—Difference between Commissioner and arbitrator 1927 P. 135=95 I.C. 321=7 Pat.L.T. 739.

APPEAL.—No appeal lies from an order appointing a Commissioner 16 M.L.J. 21.

O. 26, R. 14. SCOPE.—Application for partition by compromise is not application for execution 2 L.W. 693=30 I.C. 380. A casting of lots for the purpose of allotting shares to the parties is not opposed to R. 14 29 I.C. 245=2 L.W. 430 The most equitable way by which properties could be assigned to coparceners will be to draw lots after dividing the properties with reference to the number

of shares 29 I.C. 245=2 L.W. 430. Commissioner cannot prepare a number of schemes and ask the Court to accept one 6 Bom. L.R. 586 Commissioner, allotment by—Approved by order of Court—Effect 14 M.L.T. 157=20 I.C. 908. Objections are entertainable to the report of the Commissioner under R. 14. 25 I.C. 277 In dealing with the objections to the report of a Commissioner an appellate Court has the same power as the Original Court 56 I.C. 972=12 Bur.L.T. 228 A party cannot be heard in the appellate Court unless he had filed his objections in the original Court. 56 I.C. 972=12 Bur.L.T. 228.

APPEAL.—An application under this rule for the appointment of a Commissioner is not a matter coming within the scope of S. 47 and appeal lies from an order made on it. 17 M.L.J. 144. But no appeal lies against an order of Court confirming or varying a report of a Commissioner made in a partition suit under R. 14 (3) 91 I.C. 317=1926 O. 195.

PRACTICE AND PROCEDURE.—R. 14 entitles the parties to substantiate their objections to the report of the Commissioner, but in such cases as a rule of practice the Commissioner should first be examined with reference to the objections, if any, and if it appears from the statement of the Commissioner that there is ground for further enquiry into any matter which is raised in the objections, then the parties should be allowed to produce evidence or the Commissioner directed to amend the report accordingly. 157 I.C. 480 (2)=37 P.L.R. 252=1935 L. 501.

metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

Loc. Am.—[Patna.] O. 26, R. 14. *Substitute the following for sub-rules (2) and (3):—*

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if necessary) by metes and bounds. The Commissioner or Commissioners shall append to the report, or where there is more than one, to each report, a schedule showing the plots and areas allotted to each party and also unless otherwise directed by the Court, a map showing in different colours, the plots or portions of plots allotted to each party. In the event of a plot being sub-divided, the area of each sub-plot shall be given in the schedule and also measurements showing how the plot is to be divided. Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied and, when drawing up the final decree shall incorporate in the decree the schedule and the map, if any, mentioned in sub-rule (2) above, as confirmed or varied by the Court. The whole report or reports of the Commissioner or Commissioners shall not ordinarily be entered in the decree. When the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

General provisions.

15. [S. 397.] Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Notes.

O. 26, R. 15.—Court has got power to impose any terms that it chooses as condition precedent to granting prayer for local investigation. 104 I.C. 814=1927 C. 907.

SELECTION OF COMMISSIONERS—REMUNERATION — PRINCIPLES GOVERNING.—Thorough competence should be the sole criterion in the selection of commissioners and fees fixed should not be oppressive. Judge should not, in the exercise of his discretion, alter behind the backs of the parties, fees to which they had agreed. 1933 P. 681. As to the fee for execution of a civil Court commission, Court is to fix a sum commensurate with the difficulty and importance of the work done. If only nominal or worthless work has been done, manifestly there can be no payment at all. There is always the understanding that the commissioner possesses the knowledge and puts forth the exertion requisite to execute the commission efficiently and has in fact executed the same in workmanlike manner. The remuneration is not for labour expended or for days spent but for an efficient piece of work. If he fails in the respects mentioned and merely executes the commission nominally, he is not entitled to any fees, whether he is a pleader or professional surveyor. It is incumbent on Court scrupulously

to protect the person who has deposited money towards commissioner's fee and all the more since he is powerless to protect himself against the commissioner. And where a commissioner has already taken payments provisionally, he must refund them if it is subsequently found that they have not been earned by real work but that the commissioner has executed the commission only nominally. 150 I.C. 630=15 P.L.T. 320=1934 P. 316 (2). The Court should also take into account the return which the party has got for his money paid towards commissioner's fees. 63 C.L.J. 563=40 C.W.N. 1216. On the application of the petitioner, A was appointed commissioner for local investigation in a suit, he did not finish the work within the time fixed by the Court, and time was therefore extended to him on several occasions. Ultimately after taking further time, he died without submitting any report at all to the Court and the Court had to direct a fresh local investigation. A's widow having applied to the Court for payment to her of the balance of the fees due to A who had already drawn Rs 700 out of Court during his life time, out of the amount deposited by the petitioner prior to the issue of the commission under R. 15, the Court directed the petitioner to deposit into

Loc Am —[Madras.] *Re-number* the existing R. 15 in O. 26 as R. 15 (1) and *insert* the following as sub-rule (2) :—

(2) Before executing and returning any commission issued by foreign Courts under the provisions of S. 78, the Court or the Commissioner required to execute the commission may levy such fee as the High Court may from time to time prescribe in this behalf in addition to the fees prescribed for the issue of summons to witnesses and for expenses of such witnesses under R. 2 of O. 16.

16. [S. 398.] Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment—

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

Notes.

Court a sum of Rs. 2,050. The value of the property in suit was Rs. 7,800. *Held*, in revision, that the Court, in view of the facts, was not justified in making the order summarily, calling on the petitioner to deposit the amount, and that therefore the order must be set aside without prejudice to the rights of the widow to take such steps as were open to her under the law to recover any excess amount which might justly be due to her husband A, in respect of the work done by him. (*Ibid.*)

COMMISSIONER'S FEES.—Under R. 15, Court has to order the parties to make the deposits for the necessary remuneration of the Commissioners and as it has to be entered in the decree, it is necessary to determine the fee of the Commissioner before the final disposal of the case. 57 I.C. 291=1 P.L.T. 170. There must be some confidence reposed in the Commissioners, who are pleaders and officers of the Court, and their report. 47 I.C. 291=1 P.L.T. 171. It is not proper that the Commissioner should be left to realise his fees by execution. 9 I.C. 313=15 C.W.N. 221. *See also* 52 C. 269=1925 C. 57. The proper course is to call on the plaintiff to deposit the full amount in Court and refuse to draw up the decree before the sum is so deposited. 9 I.C. 313=15 C.W.N. 221. If the defendant also is liable to pay a share, the plaintiff ought to be made to deposit it in Court and such sum ought to be allowed to the plaintiff in the decree (*Ibid.*) The Court will not order the costs of a commission to examine a defendant who is a parda lady, to be paid by her. 5 C. 866, 10 C.W.N. 234. The Court has power to grant the examination of witness on commission, on condition of the applicant depositing the costs of the other party in attending the commission. 159 I.C. 179=1936 P. 33. But the money should not be paid directly to the party, but must be deposited in Court as security for such costs as may be payable to the opposite party in the matter of commission. 159 I.C. 179=1936 P. 33.

SUIT.—A Commissioner can sue for the recovery of his remuneration. 4 M. 399. But

cannot seek to recover it by way of execution. 10 M.L.J. 241. Where money is not deposited in Court, an order passed on the Commissioner's application directing payment to him is covered by S. 36 and is a decree under S. 47. 52 C. 269=1925 C. 57=84 I.C. 724.

EXECUTION.—Court has jurisdiction to pass an order demanding commission fee after the return of the commission and such order can be executed by the Commissioner. 147 I.C. 784 (2)=34 P.L.R. 1043=1934 L. 46. The order of a Court directing the parties to a partition suit to deposit the Amin's fees is not capable of execution. 21 I.C. 191. *See also* 9 I.C. 313=15 C.W.N. 221. District Judge has no power to disallow a portion of the remuneration claimed by a Commissioner for local investigation in connection with a suit pending in the Court of the Subordinate Judge. 44 I.C. 496=23 C.W.N. 295. On this rule *see also* 3 M. 259, 17 C. 281 and 15 B. 209.

O. 26, R. 16—R. 16 (a) has nothing to do with the question of title of the parties to shares other than those admitted in the pleadings or declared in the preliminary decree. 146 I.C. 353=1934 P. 32. Where a case is remanded to lower Court for taking accounts the latter Court has jurisdiction to appoint a Commissioner for such purpose. 14 A. 23, Dist.), 1934 P. 35. An Amin appointed to hold a local investigation has power to examine witnesses relative to the matter he has to inquire into. 1 B.L.R. (S.N.) 2. The Commissioner cannot deal with the case as if he is the judge or arbitrator. If the report does not show what the accounts are, it is waste paper. 6 C.L.J. 105. The delegation of power to Commissioner by Court cannot extend to the delegation to the Commissioner of the Court's duty of deciding questions which have been raised or which are sought to be raised as definite issues in the suit. 159 I.C. 23=42 L.W. 574=1935 M. 888. Where statements recorded on commission were not read over to the witness they are admissible in evidence and it is open to the Court to grant sanction for perjury in respect of such statements. 74 I.C. 445=1923 O. 119.

17. [S. 399.] (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

18. [S. 400.] (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

Loc. Ams.—[Allahabad and Oudh.] In O 26, R. 18, sub-rule (1) after the words "by their agents or pleaders," substitute a comma for the full stop and add the following words—"and shall direct the party applying for examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

[Rangoon] The following shall be substituted for O 26, R. 18, sub-rule (1).—
"When a commission is issued under this order, the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders, unless otherwise directed by the Court, within fifteen days"

The following shall be added as Rr 19 to 26 of O. 26 respectively.
(This was added before the amendments of Rr 19 to 22 by the Indian Legislature in 1932.)
Fees to Commissioners for Local Investigation and Commissioners for partition or to take accounts or for the examination of witnesses.

19. Civil Courts in issuing commissions will be guided by the provisions of R. 15, and subject to the provisions of R. 23 will exercise their own judgment in fixing a reasonable sum for the expenses of the commission

20. Under Government of India Resolution in the Home Department (Judicial No. 101101, dated the 21st July, 1875) Judicial Officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces.

21. It is to be understood that no part of the fees sent for the execution of a commission is to be accepted, either personally or on behalf of Government. The execution of a commission is an official duty which Judicial Officers are bound to perform when called upon, and is not work undertaken for a private body.

22. In all cases the unexpended balance, which remains after all charges have been deducted, should be returned to the Court issuing the commission.

23. The following fees are to be allowed to Commissioners of Partition or to take accounts or for the examination of witnesses namely.—

Commissioners' fees for every effective meeting shall not exceed three gold mohurs for the first two hours and one gold mohur for each succeeding hour.

Fees to Commissioners for administering on oath or solemn affirmation to a declarant of an affidavit

24. When under the orders of a Court in the town of Rangoon, or of a District Court, an oath or solemn affirmation is administered to a declarant of an affidavit at his request elsewhere than at the Court, a fee of Rs. 16 shall be paid by the said declarant: Provided that—

Notes.

O. 26, R. 17.—See 23 C 404. Examination of witness on commission—Death of party during examination—Commissioner proceeding with examination and returning commission—Legality—Examination to be taken out afresh and not continued. 115 I.C. 240

=10 P.L.T. 51=1929 P. 101.

O. 26, R. 18.—O. 26, R. 18 is mandatory and the Court cannot issue an *ex parte* commission 40 L.W. 358=151 I.C. 941=1934 M. 548 A party refusing to appear before an Amin is not at liberty afterwards to take any objection to his report. 6 W.R. 130.

(a) the administration of the oath or of solemn affirmation elsewhere than in Court shall be authorized by the Court by order in writing;

(b) if more than one affidavit is taken at the same time and place, the fee shall be Rs. 8 for each affidavit after the first,

(c) in no case shall the fees for taking any number of affidavits at the same time and place exceed Rs. 80;

(d) in pauper suits and appeals, when the affidavit of a pauper is taken, no fee shall be charged

25 Affidavits taken under R. 24 shall be taken out of Court hours. The fees shall be retained by the Commissioner for administering the oath or solemn affirmation.

26. No fee shall be charged for the administration of an oath under the order of any Court other than those specified in R. 24.

O. 26, R. 26—After R. 26 insert the following headings and rules, namely:—
"Commission issued at the instance of Foreign Tribunals."

27. (1) If a High Court is satisfied—

(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

(b) that the proceeding is of a civil nature; and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction, it may, subject to the provisions of R. 28, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in cls. (a), (b) and (c) of sub-rule (1)—

(a) by a certificate signed by the consular officer of the foreign country of the higher rank in India and transmitted to the High Court, through the Governor-General in Council; or

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the Governor-General in Council; or

(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding.

28. The High Court may issue a commission under R. 27—

(a) upon application by a party to the proceeding before the foreign Court; or

(b) upon an application by a law officer of the Local Government acting under instruction from the Local Government.

29 A commission under R. 27 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or where the High Court is established under the Indian High Court's Act, 1861, or the Government of India Act, 1915, and the witness resides within the local limits of its ordinary original civil jurisdiction, to any person whom the Court thinks fit to execute the commission.

30. The provisions of Rr. 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed, it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the Governor-General in Council, along with the letter of request for transmission to the foreign Court "

Commissions issued at the instance of Foreign Tribunals.

1[19. (1) If a High Court is satisfied—

(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction, it may, subject to the provisions of rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1)—

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the 2[Central Government] or

(b) by a letter of request issued by the foreign court and transmitted to the High Court through the 2[Central Government], or

Leg. Ref.

¹ This section was inserted by Act X of 1932.

² Substituted for 'Governor-General in Council' by Government of India) Adaptation Indian Laws) Order, 1937.

(c) by a letter of request issued by the foreign court and produced before the High Court by a party to the proceeding.]

20. 1[The High Court may issue a commission under rule 19—

(a) upon application by a party to the proceeding before the foreign court, or

(b) upon an application by a law officer of the 2[Provincial] Government acting under instructions from the 3[Provincial] Government]

21. 1[A commission under rule 19 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or 3[* * * * *] the witness resides within the local limits of 4[the ordinary original Civil Jurisdiction of the High Court] to any person whom the Court thinks fit to execute the commission.]

22. 1[The provisions of rules 6, 15, 16, 17 and 18 of this Order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned, together with the evidence taken under it, to the High Court, which shall forward it to the 5[Central Government] along with the letter of request for transmission to the foreign Court.

Loc Am —[Madras] After O. 26. read the following Order as O. 26-A.—

Order 26-A.

1 The Court may in any suit issue a commission to such person as it thinks fit to translate accounts and other documents which are not in the language of the Court

2 The report of the Commissioner shall be evidence in the suit and shall form part of the record

3. Before issuing any commission under this order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued "

ORDER XXVII.

SUITS BY OR AGAINST THE 6[CROWN] OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

1. In any suit by or against the 7[Crown] the plaint or written statement shall be signed by such person as the 6[Crown] may. Suit by or against 8[Crown.] by general or special order, appoint in this behalf, and shall be verified by any person whom the 6[Crown] may so appoint and who is acquainted with the facts of the case.

2 [S. 417.] Persons being *ex-officio* or otherwise authorized to act for the 6[Crown] in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the 6[Crown]. Persons authorized to act for 6[Crown].

Leg. Ref.

¹ This section was inserted by Act X of 1932

² Substituted for the word 'Local' by Government of India (Adaptation of Indian Laws) Order, 1937.

³ The words 'where the High Court is established under the Indian High Courts Act, 1861, or the Government of India Act 1915, and' have been omitted by *ibid*.

⁴ For words 'its ordinary original Civil Jurisdiction' the words in brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

⁵ Substituted for words 'Governor-General in Council' by Government of India (Adaptation of Indian Laws) Order, 1937.

⁶ For the word 'Government', the word

'Crown' has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

⁷ For the words 'Secretary of State for India in Council' the word 'Crown' has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

O 27, R 2.—In a Government appeal the vakalat was signed by the Personal Assistant to the Collector on behalf of the latter. It appeared from the Government notification that the Personal Assistant and the Collector had been authorised to sign vakalats in such suits. Held, that the vakalat was not in proper form but that it could be altered after the appeal has been disposed of. 105 I.C. 84 =1928 M. 96.

3. [S. 418.] In suits by or against the ¹[Crown] instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant it shall be sufficient to insert ¹[the appropriate name as provided in section 79, or, if the suit is against the Secretary of State, the words 'the Secretary of State'.]

4. [S. 419.] ²[The Crown pleader in any Court shall be the agent of the Agent for Government to Crown for the purpose of receiving processes against the Crown issued by such Court.]

5. [S. 420.] The Court, in fixing the day for the ¹[Crown] to answer to the plaint, shall allow a reasonable time for the necessary communication with the ³[Crown] through the proper channel, and for the issue of instructions to the ³[Crown] pleader to appear and answer on behalf of the ³[Crown] or the Government, and may extend the time at its discretion.

Loc. Am —[Madras] For O 27, R. 5, substitute the following rule—

5. The Court in fixing the day for Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government Pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion.

6. [S. 421.] The Court may also, in any case in which the ³[Crown] pleader is not accompanied by any person on the part of the ³[Crown] who may be able to answer any material questions relating to the suit direct the attendance of such a person.

7. [S. 423.] (1) Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the ³[Crown] before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

8. [S. 426.] (1) Where the ³[Crown] undertakes the defence of a suit against a public officer, the ³[Crown] pleader, upon being furnished with authority to appear and answer the plaint, shall apply to the Court, and upon such

Leg. Ref.

¹For the words 'Secretary of State for India in Council' first occurring, the word 'Crown' and for the same words, occurring again, the words "the appropriate name as provided in section 79, or if the suit is against the Secretary of State, the words 'the Secretary of State' have been substituted by the Government of India (Adaptation of Indian Laws) Orders, 1937.

²This rule has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, in place of the old rule which ran as follows:—

"The Government pleader in any Court, or such other person as the Local Government may for any Court appoint in this behalf,

shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court."

³For the words 'Secretary of State for India in Council', and for the word 'Government', the word 'Crown' has been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

application the Court shall cause a note of his authority to be entered in the register of civil suits.

[S. 427.] (2) Where no application under sub-rule (1) is made by the 1[Crown] pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties:

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

8-A. (New) 2[No such security as is mentioned in rules 5 and 6 of Order 41 shall be required from the Crown or, where the Crown has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.]

8-B (New) 2[In this Order "Crown" and "Crown pleader" mean respectively—

(a) in relation to any suit by or against the Secretary of State or the Central Government, or against a public officer in the service of that Government, the Central Government and such pleader as that Government may appoint whether generally or specially for the purposes of this Order;

(b) in relation to any suit by or against the Crown Representative, or against a public officer employed in connection with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representative and such pleader as he may appoint, whether generally or specially, for the purposes of this Order; and

(c) in relation to any suit by, or against a Provincial Government or against a public officer in the service of a Province, the Provincial Government and the Government pleader, or such other pleader as the Provincial Government may appoint, whether generally or specially, for the purposes of this Order.]

Loc Am.—[Allahabad.] Add the following as R. 9—

"9 In every case in which the Government pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of R. 8 (1), the defence of a suit against an officer of the Government, he shall in lieu of a vakalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the following form—

Title of the suit, etc.

I, A.B., Government Pleader, appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces, or as the case may be), Respondent (or etc.), in the suit; or, on behalf of the Government [which, under O. 27, R. 8 (1) of (Act V of 1908), has undertaken the defence of the suit] respondent (or etc.), in the suit."

ORDER XXVIII.

SUITS BY OR AGAINST MILITARY ³[OR NAVAL] MEN ⁴[OR AIRMEN].

1. [S. 465.] (1) Where any officer ⁴[soldier ³(sailor) or airmen] actually ⁵[serving under the 'crown] in ⁶[such] capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

(2) The authority shall be in writing and shall be signed by the officer ⁴[soldier ³(sailor) or airman] in the presence of (a) his Commanding Officer or the next subordinate officer, if the party is himself the Commanding Officer, or (b) where the officer, soldier ³(sailor) ⁴[or airman] is serving in military ³(naval) ⁴[or air force] staff employment, the head or other superior officer

Leg. Ref.

¹ Vide foot-note ² at p 934.

² This rule has been inserted newly by the Government of India (Adaptation of Indian Laws) Order, 1937

³ Inserted by Act XXXV of 1934.

⁴ Inserted by Act X of 1927.

⁵ For the words 'serving the Government'

the words 'serving under the Crown' have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

⁶ Substituted by Act XXXV of 1934.

Notes.

O. 28, R. 1.—The written authority must be filed in the suit. 6 Bom H.C. 20

of the office in which he is employed. Such Commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier 1[sailor] 2[or airman] by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

Explanation.—In this Order the expression "Commanding Officer" means the officer in actual command for the time being of any regiment, corps 1[ship detachment or depot to which the officer, soldier 1[sailor] 2[or airman] belongs.

2. [S. 466.] Any person authorized by an officer 2[soldier] 1[sailor] 2[or airman] to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, soldier 1[sailor] 2[or airman] could do, if present; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, 2[soldier] 1[sailor] 2[or airman].

3. [S. 467.] Processes served upon any person authorized by an officer soldier 1[sailor], 2[or airman] under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

ORDER XXIX.

SUITS BY OR AGAINST CORPORATIONS.

1. [S. 435.] In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the

Leg. Ref.

*Inserted by Act XXXV of 1934

*Inserted by Act X of 1927

Notes.

O. 29, R. 1: SCOPE OF RULE.—R. 1 comes into operation only after the proceedings have been validly started and cannot be utilized to authorize an unauthorized person to institute suits on behalf of the corporation 158 I.C. 346=1935 L. 345. Where the manager of a Bank is authorised by the Articles of Association to file a suit with the previous sanction of the executive board, a suit instituted by him without such sanction is instituted without proper authority and the fact that the act of the manager was ratified by a resolution of the Board of Directors after the expiry of the period of limitation, is of no avail. 37 P.L.R. 446. Rule is clearly permissive and not imperative in its terms and it lays down mere procedure. The rule, however, does not exclude the operation of rr 14 and 15 of O. 6. 38 Bom.L.R. 894=1936 B. 418 R. 1 requires that a suit against companies should be framed, so as to describe them by the proper names 43 C. 441=22 C.L.J. 241; 22 I.C. 674=20 C.L.J. 39. See also 49 C. 524; 25 Bom.L.R. 1081=1924 B 155, and that a pleading filed by a Corporation should be verified by a principal officer of the Company. But there is nothing to suggest that the heading of the plaint should contain any

further particulars showing the name and description or place of residence of the person who represents such Corporation. 26 S.L.R. 431=142 I.C. 361=1933 S. 102 Suit against unregistered body—All members must be impleaded. 47 A. 342=23 A.L.J. 37. The plain terms of O. 6, R. 14, do apply to a company, which is a party to an action, under that rule the pleading must be signed by the party, but where the party is a company and therefore unable to sign, having regard to the words "or for other good cause" the last part of the section applies in the case of a company. The company can, therefore, always authorise some person to sign on behalf of the company. If the company does not choose to do that, it can act under R. 1, i.e., it can rely on that order as in fact constituting an agent to sign without the necessity of giving an express authority. In that way O. 29 is read as merely permissive and not mandatory. 32 Bom.L.R. 1305. But see 32 P.L.R. 655 (O. 29, R. 1 is permissive and O. 6, R. 14 applies to the case of companies as well as private persons. A plant which satisfies the requirements of O. 6, R. 14 should be taken to have been properly signed. See also 134 I.C. 1170=1931 S. 178 Suit to recover possession of property by Secretary of Brahma Samaj—Need for permission of Court. 49 C.L.J. 357=1929 C. 445.

A STATE BANK IN A NATIVE STATE which is not a corporation as distinct from the

facts of the case.

Loc. Am.—[Madras.] Insert the following as R. 1-A of O. 29:—

"1-A. In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance."

2. [S. 436.] Subject to any statutory provision regulating service of

Service on corporation. process, where the suit is against a corporation, the summons may be served—

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at

Notes.

State or Maharaja cannot sue in a British Indian Court through its Secretary or manager 143 I.C. 348=34 P.L.R. 470=1933 L. 456.

"CORPORATION".—The term "corporation" is used with reference to S. 41, Companies Act. 12 C 41. The corporation contemplated by this rule is a corporation as known to English law, that is, a corporation created with the express consent of the Sovereign, or of such antiquity that the consent of the Sovereign may be presumed. 20 A. 167 A corporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other States 30 C. 103 The Cantonment Committee of Poona is a body corporate. 14 B 286.

RAILWAY COMPANY.—Suit against Railway Company in the name of agent, if proper See 90 I.C. 680=5 P. 128=1926 P. 40 Form of suit against Railway Company. 64 I.C. 125=2 P.L.T. 679, 52 C 783=29 C.W.N. 614=1925 C. 716.

WHO CAN SUE OR VERIFY PLEADINGS.—Permission to enable a principal officer of a corporation to verify a plaint or written statement is not necessary 22 C. 268. In a suit by corporation a plaint signed by principal officer who is also an *Am-Mukhtar* is good 22 I.C. 674=20 C.L.J. 39. See also 100 I. C. 450=1927 S. 263; 26 S.L.R. 431=1933 S. 102, 1927 C. 773, 1927 C 780=31 C.W.N. 1030 An attorney appointed by the company has no power to sign and verify a plaint on its behalf. 100 I.C. 450=1927 S. 263. Rule does not require a principal officer to verify from actual personal knowledge. He may do so on his information and belief. 9 C.W.N. 608 Secretary of a non-proprietary club cannot sue in his own name for goods supplied to a member. 14 M 362. See also 6 A. 284. Director of company.—Authority to sign pleadings. See 130 I.C. 843=1931 R. 54. See also Companies Act, S. 86

UNREGISTERED SOCIETY.—All members must be made parties. 103 I.C. 45 (1)=1927 A. 789.

PAUPER SUIT.—It is open to a company in liquidation to sue in *forma pauperis* through its liquidator 41 M. 624=34 M.L.J. 421.

PRACTICE AND PROCEDURE.—Plaintiff is bound to serve notices after amendment of plaint has been made and the suit properly constituted. 43 C. 441=22 C.L.J. 241. In the case of a suit by a corporation all that the law requires is that the plaint should be

verified by a principal officer and that he should be able to depose to the facts of the case. But it is not necessary for the plaintiff-corporation to state in the body of the plaint or by affidavit that the person verifying the plaint is a principal officer of the corporation able to depose to the facts of the case. There is nothing in the Code which requires this 38 Bom.L.R. 894=1936 B. 418. It is no doubt open to the defendant to object to the verification as insufficient and to show that the person who has verified the plaint is not a principal officer, or if he is such, that he is not able to depose to the facts of the case, either by cross-examination or otherwise. (*Ibid*) Where in a suit on behalf of a registered company the secretary verifies a plaint under authority obtained from the Articles of Association of the plaintiff company which empowers the Secretary to do all acts necessary for the conduct of suits and inasmuch as there is averment in the plaint to that effect. *Held*, that no affidavit was necessary to establish such authority for verification. (22 C. 268 and 22 C. 60, Foll., 1927 C. 758, Dist.) 1935 C. 770=40 C.W.N. 930 A suit on behalf of a company incorporated under the Companies Act is properly instituted, if the plaint is duly signed and verified by the secretary who has a letter from the chief officer of the company expressly authorizing him to conduct and defend suits on behalf of and against the company, when such officer is given by the Memorandum and Articles of Association extensive powers to manage and conduct the affairs and business of the company and also to appoint and employ for such purposes a secretary or secretaries with such powers and duties as he should think fit 39 P.L.R. 173.

O. 29, R. 2.—The service of summons on a junior assistant of a company which acted as agents of the primary company is not sufficient service on the principal company 108 I.C. 660=1928 S. 111. "The place where the corporation carries on business" in R. 2 (*b*) refers to the principal place of business of the corporation in British India. (*Ibid*) Where a corporation is sued as a defendant plaint should be accompanied by a separate application under O. 29, R. 2 or O. 30, R. 3 duly stamped stating where and in what manner and on whom the plaintiff wishes the summons to be served. 26 S.L.R. 431=142 I.C. 361=1933 S. 102.

the registered office, or if there is no registered office, then at the place where the corporation carries on business.

3. [S. 436, last para.] The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

Power to require personal attendance of officer of corporation.

ORDER XXX.

SUITS BY OR AGAINST FIRMS AND PERSONS CARRYING ON BUSINESS IN NAMES OTHER THAN THEIR OWN.

1. (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of

Suing of partners in name of firm.

Notes.

O. 30: GENERAL.—O. 30 does not only not deal with the question whether the subsequent disclosure of the names of the partners in the plaint is a case of misdescription or non-joinder, but on the contrary it gives legislative sanction to suit being filed and decided by or against firms without disclosing the names of partners, subject however to certain limitations. (1928 B. 191, Not Foll.) 1935 S. 225. The Code does not allow the firm to sue or to be sued. It only allows the individuals constituting the firm to sue or to be sued in the name of the firm. The privilege is given to persons, but the Code does not treat the firm as a *juristic person*. A suit by or against a firm is therefore really a suit by or against a group of individuals, and the name of the firm is the collective name of the individuals 158 I C 25=16 P.L.T. 649. The word "partner" in O. 30 applies to persons who are partners by contract and not by virtue of their personal law, and the word "firm" means a business carried on by persons who have contracted to do so and does not include a Hindu joint family business 1936 N. 292. If a suit is brought under O. 30 against a partnership firm, where a minor has been admitted to some kind of benefit, the minor can in no sense be regarded as a party to the suit. When all the owners of the firm happen to be minors there is no partnership as contemplated by the Partnership Act, and the procedure prescribed by O. 30 cannot apply, so as to make the minors liable under a decree passed in a suit in the firm name. 44 L.W. 310=1936 M. 707=71 M.L.J. 373. Although O. 30 permits of a suit being filed by or against a firm in the firm's name if such firm carries on business in British India and is silent with regard to a suit by or against a foreign firm carrying on business outside British India, it does not follow that a suit by or against a foreign firm is not instituted or not deemed to have been instituted, until and unless the partners of such firm are placed on the record or that until that is done limitation runs against the plaintiffs. 1935 S. 225.

O. 30, R. 1: SCOPE OF.—87 I.C. 992=1925 S. 298; 8 L. 1=1927 L. 115, 9 P. 717. The

position of a firm is materially different from that of a registered company when it sues or is sued. O. 30 makes it clear how far a firm, as distinguished from a registered company, can be represented by its individual partners. 55 A. 719=145 I C 812=1933 A.L.J. 1264=1933 A. 523. A Hindu joint family is not a firm in the name of which proceedings may be commenced under R. 1, that rule being confined to firms of merchants carrying on business in British India. 35 Bom.L.R. 569=1933 B. 304. O. 30 only applies to a firm or a contractual partnership and does not apply to a joint Hindu family business, and an undivided Hindu family carrying on business is not entitled to sue as a firm. 61 C. 975=152 I C. 991=38 C.W.N. 914=1934 C. 810. See also 1936 N. 292 under 'O. 30—General', *supra*. In the case of a firm of father and son who form a joint Hindu family, the father as manager can act on behalf of the family by signing and verifying a plaint. 1935 A.W.R. 32=1935 A.L.J. 260=1935 A. 280. Any company, partnership or association unregistered in violation of the Companies Act is an illegal body and its existence cannot be recognised by law and a suit is, therefore, not maintainable against it. The provisions of O. 30 evidently assume that the so-called "firm" is legally constituted and do not have any bearing on the question of the maintainability of a suit against an "illegal" association. 36 P.L.R. 149=1934 L. 882. The provisions of R. 1 are not applicable to foreign firms 36 Bom.L.R. 983=1934 B. 467. See also 1935 S. 225 (noted under 'O. 30—General', *supra*). Although the firm consisted of two partners at the time when the cause of action arose, a suit cannot be lodged in the name of the firm, where there is only one partner left, the other partner having severed his connexion before the institution of the suit. The defect in the form can however be easily removed by a slight amendment and the suit should not be thrown out on the technical ground. 1934 L. 157 (1). As to proper parties in a suit relating to a partnership transaction, see 132 I.C. 860=1932 S. 78. One person carrying on business in the name of a firm cannot sue in the name of the firm. 25 I.C. 131=12 A.L.J. 1020; 1930 B. 216=32 Bom.L.R. 212; 140 I.C.

the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were,

Notes.

519=34 Bom.L.R. 1112=1932 B. 516, 159 I.C. 138=1935 R. 240. He may be sued, but unless there are two or more persons in the firm the plaintiff cannot sue in the firm name. 38 Bom.L.R. 529. Suit by foreign firm represented by one of its partners—Not maintainable—Amendment so as to join other partners as plaintiffs can be ordered on payment of costs up-to-date of amendment to defendants. 30 Bom.L.R. 117=109 I.C. 99=1928 B. 191. Two or more persons carrying on business in the name of a firm in British India are liable to be sued in British India in the name of the firm and would be amenable to the jurisdiction of any competent Court in British India irrespective of whether they are British subjects or foreigners. 28 N.L.R. 118=140 I.C. 63=1932 N. 114. Suit against firm and partner personally—Procedure. 27 Bom.L.R. 998=1925 B. 494. A firm must consist of two or more persons and one partner can sign and verify the plaint in a suit by the firm. 25 I.C. 131=12 A.L.J. 1020. The mere recital of the firm's "*vilasam*" before the name of the agent of the firm who is the plaintiff, does not suffice to make the suit one by the firm. 17 M.L.J. 116. Where the plaint describes the plaintiff himself as the "firm X, situate in Y, etc., through B, proprietor of the said firm" and the plaint is signed by B, as the plaintiff cannot be deemed to be suing in the firm's name but in his own name, the mere fact of the firm's name being mentioned, in no way affects the matter. 161 I.C. 516=1936 P. 140. The correct way of bringing a suit under R. 1 is to bring it in the name of the firm as plaintiff, and no other name should be mentioned as plaintiff at the head of the plaint, but in the signature and verification of the plaint, the person signing and verifying should describe himself as one of the partners of the firm which brings the suit 157 I.C. 166=1935 R. 209. The firm's name is a mere expression and not a legal entity. 49 C. 524=1922 C. 408, 25 Bom.L.R. 1081=1924 B. 155. When a suit is brought against a firm "*by its managing partner*" it cannot be said to be against the managing partner personally 134 I.C. 397=1931 S. 121. Where a suit is in the name of a firm, the plaint may be signed by one of the partners in such capacity. 1932 N. 137. Where a corporation is sued as defendant, the plaint should be accompanied by a separate application under O. 29, R. 2 or O. 30, R. 3 duly stamped stating where, in what manner and on whom the plaintiff wishes the summons to be served 26 S.L.R. 431. Firm carrying on business in different places—Identity, determination of. 65 I.C. 98=1922 A. 367. Suit by one of several partners in his own name—Maintainability. 8 L. 1=100 I.C. 721=1927 L. 115. Under R. 1, it is competent for one partner alone to sue in the firm's name even though the other partners refuse to sue. Such a suit is a good

suit; to such a suit the other partners who refuse to join are not necessary parties. 40 C.W.N. 824=1936 C. 353. Suit by some of the members of the firm—Addition of others—Limitation. 28 I.C. 210=2 L.W. 239, 15 S. L.R. 152=65 I.C. 26. A suit against a firm is maintainable, even if one of the partners of the firm is dead on the date of the institution of the suit. 27 A.L.J. 73=112 I.C. 715. Firm—Insolvency of one firm—Effect of—Right of remaining partners to sue for money due to firm. I.L.R. (1937) N. 28. As to what amounts to misdescription of a firm's name, see 44 I.C. 283=155 P.L.R. 1917. Suit in firm name by *sole proprietor*, verifying the plaint himself as a partner—Objection to frame of suit—Amendment can be allowed on payment of costs. 35 C.W.N. 432=134 I.C. 1200=1931 C. 770. A suit contemplated by O. 30 may be brought by or against a firm in the firm's name even though the firm may have been dissolved before the date of the suit provided the cause of action arose before the dissolution. 67 I.C. 10=34 C.L.J. 405; 49 C. 394=69 I.C. 236=1922 C. 390. Service of summons on the manager of the firm is service on all partners of the firm. 12 I.C. 629; 49 C. 394=69 I.C. 236. See also 1926 S. 75. Firm including a minor partner—Reference of suit to arbitration—Sanction of Court is not necessary 68 I.C. 750=1923 L. 103; 5 L.L.J. 5=1923 L. 212. Where a suit is brought by one firm against another through their representatives they can agree to refer the dispute to arbitration. 5 I.L.J. 5=1923 L. 212. But see also 48 A. 239=24 A.L.J. 235=1926 A. 238. It is permissible in India as it is in England to sue only the solvent members of a firm when a decree is sought against it. 41 M. 923=35 M.L.J. 581. A bank being a limited company can be sued only in its own corporate personality and not in the name of its manager; the manager is not personally liable. 40 I.C. 549=1917 M.W.N. 359. Single man firm—Suit against firm—Death of person carrying on business during pendency—Decree passed after death—Nullity—Power of executing Court not to give effect to it. 34 C.W.N. 36=57 C. 931=1930 C. 327. Plaintiff while suing partnership firm can implead all members of firm as defendants 1930 P. 239=9 P. 717.

SUIT BY PARTNER—LOCUS STANDI, IF CAN BE QUESTIONED BY THIRD PARTY.—Partners can bring suit for the benefit of the firm, and although they may be prosecuting the litigation on their own responsibility, the benefit goes to the concern, and it is no business of third parties to question their *locus standi*. 155 I.C. 1006=1935 Pesh. 44.

PROCEDURE.—Partner refusing to join as plaintiff should be made defendant 92 I.C. 569=1925 L. 504. But see 40 C.W.N. 824 (noted *supra*). Where a party elects to go against a firm, the question whether a particular person is, or is not a partner of such firm, and is bound by the decree or the award

at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

Loc Am.—[Lahore and N.-W.F.P.] To R 1 of O 30 the following explanation shall be added—

"**Explanation.**—This rule applies to a joint Hindu family trading in partnership."

2. (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint:

Notes.

as the case may be is a question which can be dealt with either in execution proceedings or in a separate suit. 140 I.C. 761=1932 B 375=34 Bom.L.R. 737 Procedure to be adopted in suit against firm and partner personally. See 94 I.C. 969=1925 B 494=27 Bom.L.R. 998.

ARBITRATION—Authority of one of the partners to refer matters to arbitration. 140 I.C. 519=34 Bom.L.R. 1112=1932 B. 516.

PAYMENT OF DECREE AMOUNT TO ONE PARTNER in a suit filed in the name of a firm gives valid discharge 92 I.C. 387=1926 S. 167. But see 57 M. 692, *infra*. One of the joint decree-holders cannot, though they are partners, give a valid discharge by receiving decree amount out of Court without concurrence of the other decree-holders. Payment to one of them may under the general law relating to partnership be valid and binding on the firm but that circumstance is not enough to validate the payment made to one of them against the other joint decree-holders. 57 M. 692=148 I.C. 860=1934 M. 330=66 M.L.J. 656

SET-OFF.—Decree in favour of partners in individual capacity—Cross decree against firm, if can be set-off 29 Bom.L.R. 396=1927 B. 255.

EXECUTION.—O 21, R. 50 should be read subject to the provisions of O 30 It is not open to a partner, against whom execution is applied for of a decree obtained against the firm, to deny in the first instance that he is a partner and then if it be found against to plead in the alternative that none of the partners had any authority to enter into the transaction which gave rise to the liability 36 Bom.L.R. 617 A firm is dissolved by the death of one of the partners but a decree passed in its favour is nonetheless executable at the instance of the surviving partners. 33 P.L.R. 290 A decree obtained by a firm con-

sisting of one partner only cannot be executed by the son of the decree-holder without the production of a succession certificate 140 I.C. 519=34 Bom.L.R. 1112=1932 B 516.

O 30, Rr 1 and 4—R 1 is merely permissive. If it is followed, R. 4 applies but not otherwise. So where the defendants, though members of a firm, are sued individually, it is necessary, in the event of the death of one of them to implead his legal representatives 14 L. 543=34 P.L.R. 11=1933 L. 356 (2)

O. 30, R. 2—Under R. 2 once partners have been declared, they are to be regarded parties to the suit There is however nothing to prevent a party from making a further declaration the effect of which might afterwards fall to be considered by the court. But if it is made after the period of limitation it will have no effect and the Court would regard the suit as being one by the parties whose names were originally declared 60 C 1217=37 C.W.N. 1105 A firm is not a legal entity or a "person" capable of becoming, as a firm, a partner in another firm. But at the same time, once a declaration of partners has been made under R. 2, a suit for dissolution can proceed although the plaintiffs in the first instance had described themselves as a firm It is true that a firm is nothing but an association of individuals; but that is no obstacle or bar to a partnership suit instituted in the name of the firm, there is no reason why two or more individuals should not be allowed to have their shares separated in one lump if they so desire. 157 I.C. 1113=37 P.L.R. 663

O. 30, R. 2 (3).—R 2 is applicable only to plaintiffs—Whether R 2 (3) controls O. 21, R. 50, see 29 Bom.L.R. 921. Provisions not contradictory 48 C.L.J. 357=114 I.C. 156=1929 C. 11. Suit by firm—Plaint affirmed by Munim of firm—Application by partner to re-affirm plaint—Maintainability. 32 Bom.L.R. 56=1930 B. 150 (1).

Provided that all the proceedings shall nevertheless continue in the name of the firm.

Service.

3. Where persons are sued as partners in the name of their firm, the summons shall be served either—

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct; and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are within or without British India:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, summons shall be served upon every person within British India whom it is sought to make liable.

Notes.

O 30, R 3.—The provisions of R. 3, refer to a time anterior to the decree and are not applicable to an award which has been filed and which has become enforceable as a decree. The omission, therefore, to give notice of the filing of the award to the individual partners of a firm does not destroy the operative character of the filed award or make it inexecutable against a partner who has not been served with such notice. 62 C 833=61 C.L.J. 515. Although R. 3 provides that there must be individually the service of summons upon a person who was a partner of a dissolved partnership, it cannot be said that the decree cannot be both against the firm and the partner personally. The question is to be decided by the form of the plaint. If in the plaint the plaintiff sues not only the firm but also a partner personally, then there may be decree not only against the firm but against the partner individually in his personal capacity 30 S.L.R. 296=165 I.C. 907=1936 S. 206. O. 30 contemplates a suit against a firm as such, and even if the firm be dissolved before the institution of the suit, there may still be property of the firm against which execution may proceed, and merely because the partnership has been dissolved, the whole form and nature of the suit is not altered. Where the partner appears not only on behalf of the firm but also in his personal capacity and puts in a personal defence, the Court is entitled to pass a decree not only against the firm but also against him (*Ibid*). When a corporation is sued as a defendant, the plaint should be accompanied by a separate application under O 29, R 2 or O 30, R 3 duly stamped stating where, in what manner and on whom the plaintiff wishes the summons to be served 26 S.L.R. 431=142 I.C. 361=1933 S. 102. The rule has no application when the suit is against the partners of a firm individually 88 I.C. 439=1925 C. 1136. Summons to be served at the place of the business of the firm on manager or managing partner—Service effected by affixing summons at managing partner's residence by affixing—Not proper service. See 95 I.C.

149=1926 S. 208. Suit against firm—Service of process—Liability of partners not personally served. 27 Bom.L.R. 541=87 I.C. 1051. Suit against firm—Firm dissolved before institution of suit—Service of summons on one of the partners individually—Limitation. 105 I.C. 854=1928 S. 97=23 S.L.R. 54. Appearance under protest. 99 I.C. 495=50 B. 665. A person who has been served as a partner and entered appearance under protest is not entitled to file a written statement on his own behalf denying that he is a partner 54 C. 1057=31 C.W.N. 1004=1927 C. 758. See also 140 I.C. 40=1932 S. 199. Suit against firm—Service on agent of partners authorised to act not only on behalf of the firm but also on behalf of each partner individually must be deemed to be service on each partner. 108 I.C. 528=1928 L. 528. Whether enlarges scope of O 21, R 50 (2) 57 M.L.J. 344=52 M. 885 (F.B.).

"AS THE COURT MAY DIRECT"—Where service has in fact been made upon a partner of a firm, the service is not merely bad because the directions of the Court under R. 3 have not been first obtained 59 C. 496=138 I.C. 637=1932 C. 541.

O. 30, R 3 Proviso.—All that the proviso to R. 3 requires is that the summons shall be served upon every person whom it is sought to make liable which means every person "whom it is sought to make personally liable" It must be read along with and in the light of O. 21, R 50, and so far as the property of a dissolved firm is sought to be made liable, there is no need for serving each and every partner of that firm. Therefore, it is not open to a person to challenge the decree passed against his dissolved firm as a nullity on the ground that he was not personally served, or on the ground that the property of the firm was not liable for the decree. 161 I.C. 324=1936 S. 34.

O. 30, Rr. 3 and 8.—Suit against firm—Parties—Joinder of—Person not served but claiming to be interested in firm though denying to be partner—Right to intervene and defend suit on merits—Court's power to add without plaintiff's consent. 40 C.W.N. 677.

4. (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

- (a) to apply to be made a party to the suit, or
- (b) to enforce any claim against the survivor or survivors.

5. Where a summons is issued to a firm and is served in the manner provided by rule 3, every person upon whom it is served shall be informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters, and, in default of such notice, the person served shall be deemed to be served as a partner.

6. Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Notes.

O. 30, R. 4.—R. 4 applies only to a case where the suit is brought in the name of the firm. 48 I.C. 309=28 C.L.J. 268; 21 I.C. 509=17 C.L.J. 648. See also 91 I.C. 573=1926 S. 81; 20 S.L.R. 238. And only to such firms as are owned by two or more persons. But where a sole proprietor dies and the firm ceases to exist, it is necessary to bring on record the L. Rs. of the deceased sole proprietor under the provisions of O. 22, R. 3. 103 I.C. 142=1927 L. 556 (2) Applicability.—Suit by surviving partner to recover debt—L. Rs. of deceased partner whether necessary parties. Defect in title of the suit cannot affect the substance of the suit. 77 I.C. 476=1923 B 368, 44 I.C. 283=155 P.L.R. 1917. Defect of parties, Effect of. 48 I.C. 309=28 C.L.J. 268. In a suit by or against a firm trading in different names if one of the partners be dead, it is not necessary to join the representatives of the deceased as a party. O. 30, R. 4 contains a modification of S. 45 of the Contract Act. 21 I.C. 509=17 C.L.J. 648; 1930 A.L.J. 913=52 A. 964=1931 A. 65. A person who sues some of the partners in their individual capacity cannot change his front and sue for a relief against them as partners. 76 P.R. 1915=31 I.C. 209. The L.R. of a deceased partner is not a necessary party in suits by the surviving partner for recovery of the debts due to the firm, but they may apply to Court to be joined as parties. 7 Bur L.T. 261=24 I.C. 268. Suit against firm, liability of partners. 1926 S. 75. Where the suit was by the individual owners of a firm and a decree having been passed the defendants appealed and one of the plaintiffs-respondents died during the pendency of that appeal, but his L. Rs. were not impleaded in time, held, that the decree being a joint one the appeal abated *in toto*. Held, also, that R. 4 was

inapplicable since the suit was not in the firm name. 135. I.C. 245=1932 A.L.J. 219. Suit by two members of firm—Compromise decree—Death of one member subsequently—L.Rs. not impleaded—R. 4 makes them unnecessary as parties—No abatement. 48 C.L.J. 357. See also 148 I.C. 462.

LEGAL REPRESENTATIVE.—The whole scheme of O. 30 is against the theory that a suit against a firm is a suit against the L.Rs. of a deceased partner. R. 4 must not be carried any further than what it expressly states. If it is sought to fix liability on the private estate of the deceased partner, apart from his interest in the partnership assets, then his L.Rs. must be added. In such a case the L.Rs. of the deceased partner are served with the summons though not added as parties, leave cannot be obtained to issue execution against them under O. 21, R. 50 (2) of the Code. See 29 Bom L.R. 1296=105 I.C. 305=1927 B 581.

O. 30, R. 5.—The concluding words in R. 5 lay down a definite rule of law that service on a person without notice is equivalent to service as a partner. 19 C.L.J. 581=19 C.W.N. 1008. The provisions of O. 30 are applicable to suits only and do not apply to proceedings of an arbitrator under Arbitration Act 115 I.C. 536=1929 L. 228. Guardian *ad litem* in suit.—If continues as such for execution. 1930 N. 185=26 N.L.R. 173. Minors represented by father before arbitrator substantially fair—Minors whether can repudiate award—Manager whether can refer partition suit to arbitration. 30 L.W. 868=1930 M 38.

O. 30, R. 6.—Under R. 6, in a suit against a firm in the name of firm name, the appearance of one partner is appearance of the firm, i.e., of all partners of the firm. 62 C. 510=39 C.W.N. 606. It implies the right of any partner who has been sued against in the name of

7. Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.
- No appearance except by partners
8. Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.
- Appearance under protest.
9. This Order shall apply to suit between a firm and one or more of the partners therein and to suits between firms having one or more partners in common, but no execution shall
- Suits between co-partners.

Notes.

a firm to appear in the suit. If any partner considers that his rights will not be adequately represented by the other partner who has been impleaded, or that his interest is adverse to that of the other partner it is just and fair that he should be allowed to appear individually and resist the claim. 1930 A.L.J. 1212=52 A 951=1930 A. 701 (2). It entitles a plaintiff suing a firm to know who the persons are who constitute that firm and the information cannot be withheld. 78 P.R. 1918=47 I.C. 422. The word "individually" in R 6 is not synonymous with "in person" (*Ibid.*) No partner can be forced to appear in person, but, in his absence, after service of summons, he will be dealt with *ex parte*. (*Ibid.*) See also 108 I.C. 528=1928 L. 528. Suit against firm—Summons on a person as partner—Defence in partner's name but containing nothing individual—There is technical flaw which can be corrected by Court even at argument stage 1929 S. 192.

PRACTICE AND PROCEDURE.—Where some only of a large number of partners who have been sued under the name of the firm put in appearance, the fact will be duly recorded, and if appearance has not been put in by all the partners, the case will be one in which some only of the partners have appeared and others have not. The suit being one in which the entire firm is sued, the liability of each partner is not several but a collective liability, unless any particular partner is impleaded for some reason in his individual capacity, in which case he should figure as party wholly apart from his capacity as a partner. Each of the partners who has entered appearance as such has precisely the same rights as regards the conduct of the case as one of several defendants having a common defence. The name of the firm is only a compendious description of the partners in reference to the common interest which they possess in a certain concern. When the firm is arrayed as a defendant, all the partners should be deemed to be in the array of the defendants in their capacity as partners. 55 A. 719=1933 A.L.J. 1264=1933 A. 523.

O. 30, R. 7.—R. 7 must be read subject to R. 5 and it contemplates a case where service is on a manager. 19 C.L.J. 581=19 C.W.N. 1008.

O. 30, Rr. 7 and 8.—In a suit against a firm and its partners, there is nothing in law

to prevent the Court from arriving at a finding in the suit itself, that a particular person is a partner in the firm, although such person appears in protest and although his protest is not struck off 30 S.L.R. 296=1936 S. 206.

O. 30, R. 8.—Appearance under protest. 64 I.C. 688=23 Bom.L.R. 1249. Where plaintiff files a suit against the firm, the alleged members of which put in their appearance under protest, he has the option of applying to strike out their appearance under protest. If he does not do so but simply obtains a decree against the firm, the defendants are entitled to apply to Court for provision to be made for their costs of appearance in the event of the plaintiff not applying for leave to issue execution against them within a reasonable period or so applying but failing to prove they were partners. 138 I.C. 777=34 Bom.L.R. 640=1932 B. 269. A surety bond executed in a partnership suit enures for the benefit of all those who eventually get a decree 4 I.C. 436.

O. 30, R. 9.—The scope of R. 9 is not to lay down when and under what circumstances suits can be laid as between partners. It only lays down the possibility of such suits and the procedure to be followed therein. 45 I.C. 36=34 M.L.J. 408. Each of the parties to a partnership suit is really in turn plaintiff and defendant and in both capacities comes before the Court. 42 I.C. 436. No suit lies as between partners or between firms having common partners for recovery of moneys without asking for accounts 45 I.C. 36=34 M.L.J. 408. A suit lies by one firm against another firm notwithstanding that the firms have common partners 44 I.C. 428=34 M.L.J. 32. Where an individual happens to be a common partner in two houses of trade or firms, no action can be brought by one firm against the other upon any transaction between them while such individual is a common partner. 163 I.C. 579=38 Bom.L.R. 486 1936 B. 246. This rule, however, is subject to an exception in equity in certain cases where it might be possible to ascertain the rights and liabilities of a member of a firm when all the parties are before the Court; and provided all interested parties are before the Court either as plaintiffs or as defendants, the Court would adjust and determine their rights. (*Ibid.*) This equitable exception cannot be extended to a case which can-

be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

Suit against person carrying on business in name other than his own.

10. Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and so far as the nature of the case will permit, all rules under this Order shall apply.

ORDER XXXI.

SUITS BY OR AGAINST TRUSTEES, EXECUTORS AND ADMINISTRATORS.

1. [S. 437.] In all suits concerning property vested in a trustee, executor

Notes.

not be adequately dealt with merely by a declaration of a right to a credit in the partnership accounts. A suit for specific performance of an oral agreement for a lease entered into between a firm and one of its partners is a suit to which the equitable principle cannot be applied. Nor does R. 9 entitle the firm to institute such a suit on such an agreement. Such a suit is therefore not maintainable in law. (*Ibid.*) An action for balance of a settled account is not barred merely because there are other unsettled accounts between the partners. Where, therefore, a partner of a firm is doing business with the firm on his own behalf and has struck a balance in favour of the firm after settling his account, a suit by the firm for the balance is maintainable. 164 I.C. 832=38 P.L.R. 857=1936 L. 648. The provisions of R. 9 which provide that execution will not be taken without the leave of the Court and that the Court may order all accounts to be taken and give such directions as it considers just are sufficient to safeguard the interest of the defendant. (*Ibid.*)

O. 30, R. 10. SCOPE OF RULE.—R. 10 of O. 30 simply justifies the introduction of the assumed name instead of the real name of the defendant but does not absolve plaintiff from his liability to propose a proper guardian, if the defendant represented by such a name is really a minor. 57 M. 973=149 I.C. 233=1934 M. 386=66 M.L.J. 609 R. 10 is subject to the same restrictions as R. 1. The case of a single proprietor doing business in a name other than his own who has to be treated as a firm for the purpose of O. 30, is covered by R. 1, which requires that the firm should be carrying on business in British India. Consequently, if a person carries on business outside British India in a name other than his own, a suit against him in the name of the firm is not maintainable. 36 Bom. L.R. 983=1934 Bom. 467. See also 149 I.C. 978=1934 L. 147.

APPLICABILITY OF RULE.—A plaintiff is entitled to sue a defendant, in the name of the firm, in respect of a firm transaction under R. 10; his residence is of no importance to determine jurisdiction. 10 I.C. 895. Death of sole proprietor of firm—Suit in the name of firm when can be instituted. 89 I.C. 22=23 A.L.J. 961. One man cannot constitute a firm and a person trading as a firm under his

own or an assumed name may be sued in his trading name under R. 10 but he cannot sue in that name. 140 I.C. 519=34 Bom. L.R. 1112=1932 B. 516 (25 Bom. L.R. 7, Foll.) 158 I.C. 25=16 P.L.T. 649. When such a person dies leaving sons who are all minors, if the business is carried on by another adult person as guardian or agent in the old name of their father, the name becomes the name of the minors. They are not, however, partners, which relationship can be created only by contract. A *hundi* drawn in favour of the business name is really in favour of the minor sons; and if the *hundi* becomes payable when they are still minors, they can avail themselves of S. 6 of the Limitation Act, and bring a suit on it after the minority ceases. The mere fact that there was a manager who could have sued during their minority cannot make any difference. Nor will the fact of the *hundi* being in a name not their own disentitle them to the benefit of S. 6, Limitation Act. 158 I.C. 25=16 P.L.T. 649. See also 160 I.C. 893=1936 O.W.N. 221=1936 O. 245. Business conducted by guardian on behalf of minors in firm name. A decree obtained *ex parte* in a suit instituted against the firm in the firm name is not a decree against the minors and cannot be executed against them or their property, because, the minors are not parties to the decree. 44 L.W. 310=1936 M. 707=71 M.L.J. 373. Sole proprietor of firm, death of—Suit in name of the firm, when can be instituted. 1926 A. 161 (2). See also 149 I.C. 998=1934 L. 147. Suit under—Right of defendant to set up counter-claim—Counter-claim whether need be given separate title. 32 Bom. L.R. 212.

O. 31, R. 1. SCOPE AND APPLICATION OF RULE.—R. 1 is not applicable to a suit for a declaration of the plaintiff's right to worship in a temple and for an injunction restraining the defendant from interfering with his right. 63 I.C. 963=13 Bur. L.T. 183. See also 2 Pat. L.J. 306=39 I.C. 779.

TRUSTEE.—Under R. 1 a beneficiary is not a necessary party to a suit as he can be represented by his trustee. 18 I.C. 959=17 C.L.J. 233. Where the interest of the trustees is adverse to that of the beneficiaries, the beneficiaries must be added as parties. 13 M. 197. See also 12 M.L.J. 355.

BENEFICIARIES.—In suits between beneficiaries of property vested in trustees of executors and third persons, beneficiaries must be

Representation of beneficiaries in suits concerning property vested in trustees, etc.

the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

Joinder of trustees, executors and administrators

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties.

Husband of married executrix not to join.

against her.

or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to

2. [S. 438.] Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

3. [S. 439.] Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not, as such, be a party to a suit by or

ORDER XXXII.

SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND.

Minor to sue by next friend

1. [S. 440, para. 1.] Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

Notes.

represented by trustees or executors 50 I.C. 509=11 Bur L.J. 249. Where an administratrix creates a mortgage without sanction of Court, beneficiaries are necessary parties to the same 51 B. 16=98 I.C. 915=1927 B. 49

SREBAIT—*Shebait* of an idol can sue for possession of property belonging to the idol 18 I.C. 959=17 C.L.J. 233 In a suit against a temple all the trustees are necessary parties even though there is an agreement between them authorising one of them to represent the temple. 1922 M. 405=77 I.C. 942

EXECUTOR.—No one but an executor is competent to prosecute a suit as representative of the deceased 55 I.C. 504

ADMINISTRATION SUIT.—In an administration suit by a legatee the executor is the only necessary party. The other legatees need not be joined as parties defendants. It would suffice for a decree to be made and the other parties either brought on record or notice given to them if that would suffice at the time of the reference if their interests were likely to be affected 58 C. 77=132 I.C. 904.

ADMINISTRATOR.—One of co-administrators of an estate can sue to recover rent with consent of the other administrators who are impleaded as *pro forma* defendants. 53 I.C. 478 (1)

O 31, R 2—Where a suit is instituted against a trustee, all the trustees should be impleaded. If not, no decree can be made against any of the trustees O 1, R 9 which provides that no suit can fail for non-joinder of parties does not mean that only one trustee may be sued in contravention of O. 31, R 2, and a decree passed against the trustee singled out for the suit. 55 A. 687=1933 A.L.J. 1393.

O. 32, R. 1: APPLICATION OF RULE.—O. 32 has no application when the minor happens to be a ward under the Court of wards, and

a Civil Court in which such a minor is sued has no power to appoint a guardian *ad litem* for him or to remove a guardian who has been acting for him 15 Pat. 667=17 Pat L.T. 899 Order 32 does not directly apply to proceedings in execution 64 I.C. 25=35 C.L.J. 9 See also 104 I.C. 357. Therefore, in determining whether the minor is sufficiently represented in the execution proceedings, Court is at liberty to look at the substance of the transaction. 109 I.C. 521, 64 I.C. 25=35 C.L.J. 9; 1929 M. 275

SCOPE OF RULE.—This order lays down the form in which a minor should appear as a party and this form should be strictly followed. 5 C. 450 Where plaintiff is really a minor, case could not be proceeded with until a next friend comes on record. 3 R. 239=1925 R. 325 Suit by minor in *forma pauperis*—Next friend need not be a pauper 37 C.L.J. 394=1923 C. 656 Suit must be brought in name of minor and not in name of next friend as representing the estate of the minor. 11 C.L.R. 15; 14 C. 159 (F.B.) See also 13 M. 480, 19 M. 127 General rule is that, although a minor may appear by an attorney or pleader, he can only plead or conduct the suit by his guardian. 16 M. 344 Consent of a minor to institution of a suit by next friend is immaterial 3 M. 34 Suit filed against minor as major—*Ex parte* decree—Objection raised in execution—Restoration of suit—Guardian *ad litem* appointed and suit decreed—Suit taking effect from date of original filing. 1930 A.L.J. 938=1930 A. 644

EVIDENCE.—Question whether a person is a minor or not should be decided by positive evidence, and not by his appearance 1864 W. R. 304 A certificate of guardianship is not evidence of minority, nor a horoscope 17 C. 842.

Loc. Am—[Lahore and N-W F P] To O 32, R 1, the following paragraph shall be added—

"Such person may be ordered to pay any costs in the suit as if he were the plaintiff"

2. [S. 442.] (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file with costs to be paid by the pleader or other person by whom it was presented.

Where suit is instituted without next friend, plaint to be taken off the file

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

3. [S. 443.] (1) Where the defendant is a minor, the Court, on being

Notes.

Costs.—Court may direct costs to be paid by next friend personally in proper cases. See 1927 M 1023=106 I.C. 131

DEMAND OF SECURITY FOR COSTS—There is no provision in Code for calling upon next friend to provide security for costs though it is open to Court to make an order, after the hearing, for costs against a next friend and to call on him to provide security in the event of his retiring [O. 32, Rr. 4 (4) and 8 (1)]. Interest of the other parties to the suit are sufficiently protected by the power they have in a proper case of moving the Court either to stay the suit as not being for benefit of the infant, or if there is a just cause other than the poverty of the next friend, to have him removed. It is undesirable to call on the next friend to provide security for costs 1934 A. 458 (1).

ILLUSTRATIVE CASES—Where Court appointed a person other than a certificated guardian, the next friend of the minor, defective service of notice upon the guardian under R 4 (2) is only an irregularity and the minor is properly represented 13 I.C. 594. When plaintiff although a minor sues in her own name, and defendants take no objection till suit has been disposed of by appellate Court, they cannot raise any objection in second appeal, and after plaintiff has become a major. 19 M 127. Objection as to minority cannot be taken after remand, if the point was not urged in appellate Court. 13 C. 189. **Guardian ad litem**—Gross negligence—Effect 33 I.C. 481. Where minor files a plaint and before it is put up before the Court, attains majority, and applies to be allowed to proceed with it, the plaint must be deemed to have been properly presented on the day of application to proceed with the plaint. 46 I.C. 747=16 A.L.J. 737. Appeal by an infant not represented by a guardian *ad litem* is not entertainable. 52 I.C. 985=29 C.L.J. 419. It is no doubt open to the minor on attaining majority to drop the suit as not properly instituted, but he is not bound to do so. he could affirm the previous proceeding and continue the suit. 44 M.L.J. 515=1923 M 553. To reject the plaint filed by a minor without a next friend is improper. Court has to grant time for next friend to come in. 4 L. 390=75 I.C. 1028. Decree against a properly represented minor is binding upon him, but if he has not been properly represented, the decree is a nullity 15 I.C. 903=9 A.L.J. 653. Certificated guar-

dian of a minor must be appointed guardian *ad litem* unless for special reasons Court thinks that some one else should be appointed in the interests of the minor. 22 I.C. 240. Decree obtained on behalf of a minor cannot be set aside merely on the ground of non-compliance with R. (1) and (2). 49 I.C. 954=39 P.W.R. 1919. Minor attaining majority during pendency of suit—Decree based on compromise passed with guardian *ad litem* as party—Minor can set aside the same. 1928 M. 294=118 I.C. 294=55 M.L.J. 374=51 M. 763.

O. 32, R. 2.—R. 2 applies to cases under the Punjab Tenancy Act 35 P.L.R. 428. When suit is brought by a minor as a major and it is found that plaintiff is a minor, Court can allow a next friend to come in and proceed with the suit. 16 M.L.J. 13. See 13 B at 11. See also 3 R. 239=1925 L. 325. Where suit is instituted by a person who is not the proper next friend of a minor, Court must take the suit off the file and should not proceed to try other issues in the suit. 115 I.C. 456. Minor cannot be next friend of other minors. 1925 O 178. As to how the question whether a person is a minor or major is to be decided, see under R 1. As to when objection is to be taken, see 19 M. 127 and 13 C. 189. Persons sued as members of firm—Minor member impleaded as major—Decree in suit not bad 27 A.L.J. 204=114 I.C. 881=1929 A 148.

O. 32, Rr 2 and 15.—Where a suit was instituted in the name of joint family firm consisting of R and his minor son by N, holding a power of attorney on behalf of R, and it was found during the pendency of the suit that R was of unsound mind but was not so at the time the suit was instituted. Held, that in the absence of any finding that the suit had not been properly instituted, Court had no power to order the plaint to be taken off the file. Held, further, that the rules relating to suits on behalf of minor could not be strictly applied under R 15 to the circumstances of the case and that R. 2 did not apply as the suit was properly instituted. 161 I.C. 646=1936 L. 7.

O 32, R. 3. MEANING OF WORDS.—"On being satisfied," meaning of 16 M 344. See 14 C. 204 (209). Also 17 C 849, under R 1 "Proper person" 24 A. 386. The words "any guardian of the minor appointed or declared by an authority competent in that behalf" in sub-r. (4) apply to a guardian appointed under a will of a Hindu father. 31 B 413; 14 C. 212.

Guardian for the suit to be appointed by Court for minor defendant.

satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

Notes.

SCOPE OF RULE.—Provisions of this rule are imperative, and if not substantially complied with, any decree passed against the minor is a nullity. 28 A. 137, 30 C 1021 (P C); 151 I.C. 1066=11 O.W.N. 1036=1934 Oudh 475, 29 A. 328, 29 A. 290; 28 A. 416; 11 C. at 405; 24 C 25, 30 C. 613, 1929 C. 586; 139 I.C. 113=1932 L 521 Before it is competent for Court to appoint a guardian, there must be a suit in which the minor is a defendant in existence 11 C at 405. Suit against minor—Absence of appointment of guardian *ad litem*—Decree is a nullity as against him. See 55 C. 124; 57 M. 973. But see 10 Luck 293=11 O.W.N. 1403=1935 Oudh 183, where it was held that the absence of a formal order by the Court appointing a guardian *ad litem* for a minor defendant is only an irregularity and not an omission fatal to the suit. See also 1935 N 235; 100 I.C. 468=28 Punj.L.R. 627; 92 I.C. 241=1926 N. 267, 15 I.C. 903=9 A.L.J. 653, 22 I.C. 240; 61 P.R. 1915=31 I.C. 45 Though mere absence of recording of formal order of appointment does not vitiate proceedings, where minor had good defence but no such defence is raised and guardian's interest is adverse, the proceedings may be vitiated. 55 C 124=32 C.W.N. 665=1928 C. 844=113 I.C. 843; 57 M. 973=149 I.C. 233=1934 M. 386=66 M.L.J. 609 Setting aside decree—Grounds—Notice not served to all parties—Wrong entry of nature of suit in notice—Guardian appointed and minor represented—Decree whether liable to be set aside 113 I.C. 829=26 A.L.J. 834=1928 A. 621. A guardian must be appointed by the Court, even in cases, when a guardian has been appointed under the Guardian and Wards Act. 24 C. 25. See also 1930 C 455. The rule contemplates a case where the guardian appointed under the Guardian and Wards Act sues to have it declared that the minor was not adopted by her husband 30 C. 613 The provisions of O. 32 relating to "suits by or against minors" are not directly applicable to proceedings in execution. 64 I.C. 25=35 C.L.J. 9. See also 104 I.C. 357; 143 I.C. 228=1933 Pesh 63. R 3 applies to the institution of suits and not for the mere service of notices 15 L.R. 8 (Rev.). R 4 and other rules as to appointment of guardian must be read with R 3 36 I.C. 794=4 L.W. 362. O. 32 is not exhaustive and Court can dismiss a suit filed by a next friend, if it is not in the interests of minor 25 I.C. 738=1 L.W. 875 R 3 does not apply to commutation proceedings under Bengal Tenancy Act. 100 I.C. 146=1927 C 374. Where a minor is not in any way prejudiced by not having a guardian during the comparatively short period of three months when he was a minor, suit does not fall under R. 3. 149 I.C. 986=15 L. 645=36 P.L.R. 315=1934 L. 274 (2)

Object of RULE.—The object of R 3 and 4 is that the minor in suit should be repre-

mented by a fit person so that his interests will be properly guarded. 7 O.L.J. 219=56 I.C. 313 It is obligatory on the Court under R. 3 (1) to appoint a proper person to be guardian of a minor defendant for the suit. 34 C.L.J. 293=26 C.W.N. 781 See also 26 A.L.J. 777, 1927 L. 861 Where decree is obtained against a minor without having a guardian appointed for him or with a disqualified person so appointed the result is if the minor was not represented, that the decree must be regarded as a nullity But where a qualified person was appointed guardian but there was some irregularity in the proceedings or where, on account of the fraud of the opposite party, the appointment of one person as guardian was obtained instead of another who would have conducted the case better on behalf of the minor, the decree is not *ipso facto* a nullity In such a case, the irregularity or fraud must be shown to have prejudiced the minor before he is entitled to appropriate relief. 134 I.C. 188 (2)=1931 M. 674 (Case-law reviewed.) The appointment of guardian by a Court of First Instance enures not only for the term of the proceeding in that Court but also for purposes of appeal 22 M. 187, 39 C.L.J. 590, see also 59 C 1108=1932 C. 888, and for purposes of execution proceedings. 41 C.W.N. 531=1937 C 259 Defective appointment—Representation of minor in suit—No order appointing guardian—Compromise by person professing to act as guardian—Invalid 35 A. 487=40 I.A. 182=25 M.L.J. 492=21 I.C. 288 (P.C.), 33 I.C. 805=14 A.L.J. 589; 26 O.C. 113=74 I.C. 409. Where a father acted as the guardian *ad litem* of his minor son, the fact that there was no formal order of Court appointing him will not vitiate the proceedings, if the minor was in no way prejudiced thereby 74 I.C. 821=1924 O. 178; 26 O.C. 113, 74 I.C. 409=1923 O. 206; 4 Pat L.J. 213=48 I.C. 245, 35 I.C. 868; 33 I.C. 941. Where no formal order was made appointing a guardian *ad litem* as required by R. 3, and no sanction was sought, or granted by the Court to the compromise as required by R. 7, the irregularities are very serious, and the compromise is not binding upon the minor The fact that the minor was near his majority, that he took an active part in the proceedings and that he was effectively represented by his grandmother although no order of appointment was made, will be of no avail. 39 P.L.R. 125 Absence of formal order—Reference to arbitration—Minor substantially represented in proceedings by guardian—Award not a nullity 71 I.C. 7 See also 152 I.C. 839. Representation of minor member of joint Hindu family by the manager. See 53 A. 427=129 I.C. 560=1931 A. 136, 143 I.C. 228=1933 Pesh. 63. A decree based on the award was held to be not binding on the minor if he was not properly represented as required by R. 3 and the irregularity cannot

[S. 456] (2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

Notes.

be condoned 44 B. 202=22 Bom.L.R. 266. Mere fact that leave of Court was not obtained for a reference to arbitration on behalf of a minor will not vitiate the reference and the award where the interests of the minor have in no way been prejudiced. 71 I.C. 7 The appointment of father as guardian *ad litem* without his consent and who does not appear and passing decree *ex parte* even against the minor is illegal. 52 I.C. 636, 38 A. 315=35 I.C. 707=14 A.L.J. 353, 25 I.C. 620. A father should not be appointed guardian of his minor son, where there is a clear conflict of interest between them 15 C.L.J. 446=17 C.W.N. 219. See also 26 A.L.J. 777. The fact that a respondent decree-holder was not properly represented at the instance of the appellant judgment-debtor does not make a decree passed in the appeal in favour of that respondent void and incapable of execution 37 A. 179=13 A.L.J. 179; 34 A. 321=9 A.L.J. 290. Defective appointment—Omission to consult minor's wishes is not a defect. 7 O.L.J. 219=56 I.C. 313; 2 P. 273=4 Pat.L.T. 329. Defective appointment—*Ex parte* decree—Suit to set aside. 4 Pat.L.T. 147=2 P. 335. No person can be appointed guardian without his consent. Where Court has given sanction and approval for appearance of a person as guardian, the absence of formal order of appointment is not always fatal to the proceeding. 3 Pat.L.T. 451=66 I.C. 137. A mere irregularity in the appointment of guardian *ad litem* will not render the decree passed against minor null and void, unless it is proved that the minor's interest has suffered thereby. (*Ibid.*) Where no notice or summons is served on the guardian of the minor, and no order was made appointing guardian and there was no appearance by the so-called guardian at any stage of the proceedings a decree passed against minor is not binding on him (26 C.L.J. 258; 37 A. 179, 20 C.L.J. 469, 2 P.L.T. 617, relied on.) 3 Pat.L.T. 451=66 I.C. 137. For determining whether a minor was sufficiently represented in the execution proceeding, Courts can look at the substance of the transaction 64 I.C. 25=35 C.L.J. 9=109 I.C. 521. An execution sale held of a minor's property without appointing a guardian *ad litem* is materially irregular and the guardian of the minor can set it aside 29 I.C. 211. A duly appointed guardian for a suit is fully entitled to represent the minor in all proceedings which take place in execution of the decree. 48 I.C. 39=5 O.L.J. 551; 41 C.W.N. 531=1937 C. 259. A decree against a minor without a guardian *ad litem* at the time is void, as also all further proceedings. Subsequent appointment of a guardian in execution proceedings will not validate the decree nor other proceedings in its execution. 35 I.C. 154=31 M.L.J. 39; 18 C.L.J. 18=17 C.

W.N. 549. See also 1928 M.W.N. 275. Court has no jurisdiction to sell the minor's interests even though they were safeguarded by other defendants having a common defence. 35 I.C. 154=31 M.L.J. 39. If notice of appointment of guardian *ad litem* is not given to the minors concerned or their mother, they are not bound by the decree passed against the guardian *ad litem* who was a Court Nazir and who had no funds or instructions to defend the suit. 41 A. 235=17 A.L.J. 249.

DUTY OF COURT.—When defendant in a suit is a minor, it is the duty of Court not only to appoint a guardian *ad litem* for him, but also to satisfy itself that the proposed guardian is a fit and proper person to represent the minor in the suit, to put in a proper defence, and generally to act in the interests of the minor 36 Bom.L.R. 844=1934 B. 396.

FIT PERSON—ADVERSE INTEREST.—The provisions of R. 3 are mandatory and leave no option to Court, and they cannot be ignored or overlooked. In a suit against an adult member of a joint Hindu family and his minor nephew on a hundi executed by the former (and not by the minor's father), the uncle is not the proper person to be appointed as guardian of the minor inasmuch as his interests are necessarily *adverse* to those of the minor. The appointment of another guardian *ad litem* is therefore imperative in such a case 151 I.C. 1066=11 O.W.N. 1236=1934 O. 47. The fact that the guardian of the minor is his step brother would not alone be sufficient justification for holding that he is intentionally harming the interests of the minor or that his interest is in any way adverse to that of the minor, especially where he himself is to be equally affected by the decree with the minor. 1935 L. 44. The fact that the person appointed as guardian *ad litem* of a minor defendant happens to be an executant of the deed on which the suit is brought is not invalid. It cannot be said that he is not a fit person to be appointed 10 Luck. 293=1935 Oudh. 183=152 I.C. 839=11 O.W.N. 1403. Where a mortgage debt due to a Mahomedan was fraudulently assigned to the plaintiff by his widow without regard to the interests of her minor daughter who was also entitled to the debt, and the assignee sued to recover the mortgage debt making the mother and daughter parties thereto, held, that the mere fact the mother executed the assignment was not, as a matter of law, sufficient to hold that her interest was adverse to that of the minor or to invalidate the appointment of the mother as the guardian *ad litem* of the minor. 38 L.W. 539=1933 M. 806=65 M.L.J. 548. When a person has executed a document on behalf of a minor, and a suit is filed on that document against the minor, the question whether that person can be validly appointed guardian *ad litem* is not a pure question of law, but one of fact, and no hard

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

Notes.

and fast rule of law can be laid down. There is, however, nothing in the Code, or in the authorities laying down that such a person cannot be appointed guardian, under certain circumstances, he may be a proper person to act as a guardian. 36 Bom. L. R. 844=1934 B. 390; 52 M. 275=1925 M. 213=56 M. L. J. 175 (F.B.); 29 L. W. 393=1929 M. 393. There is nothing in the Code permitting the appointment of joint guardian *ad litem*. Where, in a suit on mortgage against two persons and their minor children, the Court, without issuing any notice to the minors or other persons who might be fitted to act as guardians of the minors and without taking any steps to comply with the provisions of Rr 3 and 4, passes an *ex parte* order appointing the two persons as guardians *ad litem* jointly for the same minors and the interests of the guardians *ad litem* are adverse to those of the minors, the appointment of the guardians *ad litem* is defective. 163 I. C. 499=1936 R. 237.

PROCEDURE.—Defendant alleged to be minor—Issue to be framed and decided—Court's opinion about defendant's appearance is not sufficient. 96 I. C. 273=1926 P. 489. It is not necessary for appointment of a guardian under R. 3 (6) that the list of relatives mentioned in sub-R. (3) should be exhausted. 142 I. C. 629=34 P. L. R. 110=1933 L. 337. Nor will the appointment be irregular merely because the wishes of the natural guardian were not considered by Court. 61 C. 227=59 C. L. J. 9=151 I. C. 399=1934 C. 474. In a suit brought by a next friend on behalf of a minor, the real question to be considered by Court is whether the suit is on its merits in the interests of the minor, and the Court is not justified in dismissing the suit on the ground that the suit was filed by the next friend for his own ends or that the next friend had an adverse interest. 1933 M. W. N. 839. When a certificated guardian of a minor is properly appointed as guardian *ad litem* of the minor in a suit, he does not *ipso facto* cease to be guardian *ad litem*, merely because some other person has got himself appointed guardian of the person and property of the minor by some other Court. There is no inherent disqualification in all persons other than the certificated guardian to be a guardian *ad litem*. 61 C. 1023=39 C. W. N. 293=155 I. C. 882=1935 C. 160, 58 M. 802=1935 M. 795=69 M. L. J. 177. Where a guardian *ad litem* is appointed for a minor defendant and a decree is passed in order that the decree may be set aside, it must be shown that actual prejudice was caused to the minor. Mere possibility of prejudice is not enough. 1934 L. 132. The order for the appointment of a guardian should be made before the minors are asked to file a written statement and not at a late stage of the case when it comes up for hearing of the evidence. The procedure is

defective. But in such a case the decree will bind the minor unless it is shown that the defect of procedure has prejudiced him. 148 I. C. 456=11 O. W. N. 393=1934 O. 171.

NOTICE.—R. 3 (4) imperatively requires service of notice upon the minors. 43 I. C. 728. See also 15 P. L. T. 380=1934 P. 427=14 P. L. T. 441=1933 P. 473. Failure to comply is only an irregularity and while the minor is not prejudiced the proceedings are not vitiated. 88 I. C. 294=1925 A. 548; 15 P. L. T. 380=1934 P. 427. See also 42 I. C. 421=6 L. W. 272. In absence of proof of fraud or collusion, the mere fact that notice of appointment of a guardian *ad litem* was not issued to the minor, does not entitle him to treat the proceedings as a nullity (Case-law reviewed) 75 I. C. 440=5 L. 38=1923 L. 575, 43 I. C. 728, 117 I. C. 475; 149 I. C. 1144=1934 P. 111=15 P. L. T. 160. There is nothing in the Code requiring plaintiff to issue a fresh summons to a minor defendant after he attains majority (*Ibid.*) When appointment of a guardian *ad litem* is proposed, notice must always be sent to the natural guardian of the minor or the person with whom he lives. 36 I. C. 794=4 L. W. 362. The appointment of a guardian *ad litem* for a minor defendant before the date fixed for the hearing of the notice issued to the minor under O. 32, R. 3 (4) and without the consent of the minor may under certain circumstances be regarded as defects or irregularities condonable under S. 99. 154 I. C. 961=1935 O. W. N. 333=1935 Oudh 287. But when a Court sanctions a compromise entered into by such a guardian, which, on the face of it, is injurious to the interests of the minor, it acts illegally in that it fails to consider whether the minor's interests have been properly safeguarded by his would-be guardian. Such a compromise ought not to be sanctioned and will be set aside in revision by High Court (*Ibid.*) A Court can appoint an officer of Court as guardian only when there is no other guardian available. (*Ibid.*) See also 1934 L. 132. When all the near relatives of the minors are parties to the suit and their interests are likely to clash with those of the minors, no notice need be issued on such relations. 114 I. C. 101=1929 Sind 32. An order appointing a guardian *ad litem* of a minor defendant without notice to the minor is without jurisdiction. 2 P. L. T. 116=6 P. L. J. 82; 32 I. C. 380. In appointing a guardian *ad litem* the wishes of the minor defendant should, if possible, be considered, 2 P. L. T. 116=6 P. L. J. 82. The natural father of a minor is his proper guardian to assert his right as adopted heir against rival claimants. 43 M. 288; 22 L. W. 560=49 M. L. J. 549. A mother or in her absence a grandmother may be appointed, and the fact that she is a *pardanashin* lady is not a disqualification. 2 P. L. T. 116=6 P. L. J. 82. Notice

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

1[(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings, in any appellate or revisional Court and any proceedings in the execution of a decree.]

Loc. Ams.—[Allahabad and Oudh] Add as a proviso to O. 32, R. 3 (4).—

"Provided that if the minor is under ten years of age no such notice shall be issued to him."

[Bombay] The words "to the minor and" in line 2 of sub-rule (4) of R. 3 of O. 32 shall be deleted.

Leg. Ref.

¹ Sub-rule (5) of Rule 3 of O. 32 is added by Act XVI of 1937.

Notes.

under R 3 (4) for appointment of a guardian *ad litem* must be served upon the natural guardian. 45 I.C. 253=4 Pat L.W. 373. If a guardian *ad litem* is guilty of negligence and makes no attempt to protect the minor's interests decree will not be binding on minor. (*Ibid.*) See also 1932 A.L.J. 1128=1933 A. 116 Where an officer of Court is appointed as guardian *ad litem*, due notice of such appointment should be given to that officer and the suit should not be dismissed on the mere ground that process fees are not paid for issue of summons to him. 35 P.R. 1912=11 I.C. 317.

NEGLECT OF GUARDIAN.—APPOINTMENT OF FRESH GUARDIAN.—Where *ex parte* decree against a minor was set aside by Court on the ground of negligence of minor's father who acted as guardian, and Court removed the father from guardianship and appointed mother in his stead. *Held*, that the Court had jurisdiction to do so. 55 A. 136=143 I. C. 326=1932 A.L.J. 1128=1933 A. 116.

OFFICER OF COURT AS GUARDIAN.—Omission to adduce evidence when amounts to negligence. 44 M.L.J. 299=1923 M. 465 In absence of proof that guardian *ad litem* could have adduced any useful evidence or was aware of such evidence in the prior suit, it did not constitute negligence or fraud. (*Ibid.*) See also 8 P. 558=1929 P. 360. Officer of Court, guardian—Guardian's address and whereabouts known—Procedure illegal—Decree—Setting aside—Inherent power of Court. 1922 M. 485. When suit is filed against a minor in respect of whom proper guardian has already been appointed but whose identity or appointment is not known to plaintiff Court is competent to appoint an officer of the Court as guardian *ad litem*. 33 I.C. 481. Guardian *ad litem*—Mother acting as such—Failure to defend suits—Right of minor to set aside decree. 29 I.C. 220=13 A.L.J. 437 Guardian *ad litem* does

not continue in his office after decree. 84 I.C. 68=1925 C. 23. Procedure to appoint guardian for a lunatic 62 I.C. 770 Where proposed guardian does not appear, Court must be moved to appoint one of the officers as guardian *ad litem*. Otherwise decree will be null and void (15 C.L.J. 3, Foll.) 17 I.C. 263=16 C.L.J. 318. The object of Rr. 3 and 14, is to provide that minor's interest should not suffer and that he should be properly represented in a suit filed against him. The object of giving notice to minor is that the person may not be a minor at all and the plaintiff may have by mistake sued him as a minor. Notice to guardian and other persons interested is given for the reason that a person who is guardian or who has the custody of the minor is the person best fitted to represent the minor. It is obligatory on the Court that no order should be made appointing a guardian *ad litem* unless and until the necessary notice is given under R. 3 29 Bom.L.R. 1357=105 I.C. 537=1927 B 613, 1934 L. 132 A person who is merely appointed to conduct a case on behalf of a minor is not a lawfully appointed guardian within the meaning of R. 3. 139 I.C. 113=1932 L. 521.

MISREPRESENTATION.—Major described as minor—Decree not binding. 49 I.C. 627. Suit by minor—*Bona fide* mistake—Amendment. 1924 L. 157. A compromise not expressly sanctioned by Court, though beneficial to the minors is not binding on them. 3 P.L.J. 255=46 I.C. 358 (F.B.) Reference to arbitration by next friend or guardian *ad litem* without leave of Court. 33 I.C. 941=9 Bur.L.T. 158. Period of limitation counts from date of the plaint, and not from appointment of the guardian. 4 A. 37 Where certain minors were sued as majors but they appeared in the suit through their mother as guardian and filed a written statement and Court accepted the guardian by permitting her to compromise, *held*, that the omission to formally amend the cause title of the suit as originally instituted was a mere irregularity. 13 P.L.T. 737=12 P. 117=1933 P. 104.

[Lahore] The following sub-rules were substituted for sub-rules (3) and (4) —

"(3) The plaintiff shall file with his plaint a list of relatives of the minor and other persons with their addresses, who *prima facie* are most likely to be capable of acting as guardian for the suit for a minor defendant. The list shall constitute an application by the plaintiff under sub-rule (2) above.

(4) The Court may, at any time after institution of the suit, call upon the plaintiff to furnish such a list, and, in default of compliance, may reject the plaint.

(5) Any application for the appointment of a guardian for the suit and any list furnished under this rule shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor, and that each person proposed is a fit person to be so appointed.

(6) No order shall be made on any application under this rule, except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

Provided that the Court may, if it sees fit, issue notice to the minor also "

[Madras] O 32, Rr 3 and 4 Substitute R 3 for old Rr. 3 and 4

Qualifications to be a next friend or guardian.

3. (1) Any person who is of unsound mind and has attained majority may act as next friend of a minor or as his guardian for the suit.

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend a defendant, or in the case of a guardian for the suit, a plaintiff

Appointed or declared guardians to be preferred and to be superseded only for reasons recorded

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed as the case may be.

Guardians to be appointed by Court.

(3) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor

(4) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. The application, where it is by the plaintiff, shall set forth, in the order of their suitability, a list of persons (with their full addresses for service of notice in Form No 11-A set forth in Appendix H hereto) who are competent and qualified to act as guardian for the suit for the minor

defendant. The Court may, for reasons to be recorded, in any particular case, exempt the applicant from furnishing the list referred to above

(5) The application referred to in the above sub-rule whether made by the plaintiff or

Contents of affidavit in support of the application for appointment of guardian

on behalf of the minor defendants shall be supported by an affidavit verifying the fact that the proposed guardian has not or that no one of the proposed guardians has any interest in the matters in controversy in the suit adverse to that of the minor and that the proposed guardian or guardian are fit persons to be so appointed. The affidavit shall further state

according to the circumstances of each case, (a) particulars of any existing guardian appointed or declared by competent authority; (b) the name and address of the person, if any, who is the *de facto* guardian of the minor; (c) the names and addresses of persons, if any, who in the event of either the natural or the *de facto* guardian or the guardian appointed or declared by competent authority, not being permitted to act, are by reason of relationship or interest or otherwise, suitable persons to act as guardians for the minor for the suit.

Application for appointment of guardian to be separate from application for bringing on record the legal representatives of a deceased party.

(6) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The application shall be by separate petitions.

- (7) No order shall be made on any application under sub-rule (4) above except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or where there is no guardian, upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. The notice required by this sub-rule shall be served six

clear days before the day named in the notice for the hearing of the application and may be in Form No 11 set forth in Appendix H hereto.

- (8) Where the application is by the plaintiff, he shall, along with his application and affidavit referred to in sub-rules (4) and (5) above, produce the necessary forms in duplicate, filled in to the extent that is possible at that stage, for the issue simultaneously of notices to two at least of the proposed guardians for the suit to be selected by the Court from the list referred to in sub-rule (4)

above, together with a duly stamped voucher indicating that the fees prescribed for service have been paid

If one or more of the proposed guardians signify his or their consent to act, the Court shall appoint one of them and intimate the fact of such appointment to the person appointed by registered post. If no one of the persons served signifies his consent to act, the Court shall proceed to serve simultaneously another selected two, if so many there be, of the persons named in the list referred to in sub-rule (4) above, but no fresh application under sub-rule (4) shall be deemed necessary. The applicant shall, within three days of intimation of unwillingness by the first set of proposed guardians, pay the prescribed fee for service and produce the necessary forms duly filled in

- (9) No person shall, without his consent, be appointed guardian for the suit. When-

No person shall be appointed without his consent. ever an application is made proposing the name of a person as guardian for the suit, a notice in Form No 11-A set forth in Appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents

- (10) Where the Court finds no person fit and willing to act as guardian for the suit,

Court guardian—When to be appointed—How he is to be placed in funds the Court may appoint any of its officers or a pleader of the Court to be the guardian and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require.

- (11) When a guardian for the suit of a minor defendant is appointed and it is made

Funds for a guardian other than Court guardian to defend to appeal to the Court that the guardian is not in possession of any or sufficient funds for the conduct of the suit on behalf of the defendant and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance moneys to the guardian for purpose of his defence and all moneys so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the moneys so received by him

[Nagpur.] Rules 3 and 4—For Rr 3 and 4 substitute the following —

"3. Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit of such minor.

4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or as his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act in either capacity.

4-A (1) No person, except the guardian appointed or declared by competent authority, shall, without his consent, be appointed guardian for the suit.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Unless the Court is otherwise satisfied of the fact that the proposed guardian has no interest adverse to that of the minor in the matters in controversy in the suit and that he is a fit person to be so appointed, it shall require such application to be supported by an affidavit verifying the fact.

(4) No order shall be made on any application for the appointment as guardian for the suit of any person, other than a guardian of the minor appointed or declared by competent authority, except upon notice to the proposed guardian for the suit and to any guardian of the minor appointed or declared by competent authority, or, where there is no such guardian, the person in whose care the minor is, and after hearing any objection that may be urged on a day to be specified in the notice. The Court may, in any case, if it thinks fit, issue notice to the minor also.

(5) Where, on or before the specified day, such proposed guardian fails to appear and express his consent to act as guardian for the suit, or, where he is considered unfit, or disqualified under sub-rule (3), the Court may, in the absence of any other person fit and willing to act, appoint any of its officers or a pleader to be guardian for the suit.

(6) In any case in which there is a minor defendant, the Court may direct that a sufficient sum shall be deposited in Court by the plaintiff from which sum the expenses of the minor defendant in the suit shall be paid. The matter shall be adjusted in accordance with the final order passed in the suit in respect of costs.

[Rangoon.] The following shall be substituted for R. 3—3 (1) Where any of the defendants is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper guardian for the suit for such minor.

(2) For this purpose there shall be filed by the plaintiff with the plaint a list of all persons whom the plaintiff considers to be capable of acting as guardian of the minor for the suit. Such list shall be in the form of an application duly verified and requesting that one of such persons may be appointed guardian of the minor for the suit, and shall state for each of such persons whether he is a guardian appointed or declared by competent authority, or a natural guardian, or the custodian of the minor, or a stranger, and shall give the address of each of such persons.

(3) An order for the appointment of a guardian for the suit may also be obtained upon application in the name and on behalf of the minor.

(4) An application under sub-rule (2) or sub-rule (3), shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or where there is no such guardian, upon notice to the father or other natural guardian, of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

Who may act as next friend or be appointed guardian for the suit.

4 [Ss 445, 457.] (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit.

Notes.

O. 32, R. 4. SCOPE AND APPLICATION.—R. 4 does not apply to a non-contentious proceeding in probate. 59 I.C. 435=24 C.W.N. 538. Irregularities in the appointment of guardian *ad litem* do not vitiate the proceedings in the suit. 93 I.C. 848=1926 L. 435. If personal interest of next friend conflicts with his duty towards minor, then unless there be *uberrima fides*, he cannot act as the minor's next friend. In such a case minor is not properly represented and decree in the suit would not bind him. (22 W.R. 290, Foll.) 56 I.C. 97. Under R. 4 it is necessary to see first that the father or any other person, the mother, with whom the minor is living, should be appointed as guardian. Where a father or mother is not appointed guardian of the minor nor are grounds shown for not appointing them but an uncle who has an interest adverse to the minor is appointed, there is no proper appointment of the guardian of the minor. 149 I.C. 988=

1934 A. 212. It is doubtful whether R. 4, can be applied to the case of a Hindu idol. 27 A.L.J. 1251=1929 A. 887.

WHO CAN ACT AS NEXT FRIEND.—Next friend should be a person residing in British India. A guardian who cannot be served is useless, and where a guardian has left the country a fresh guardian should be appointed. 17 M. L.J. 179. The representation of a minor by a non-consenting guardian is no representation at all and all proceedings while the minor is under such guardianship are null and void against him. 1927 C. 488, Rel. on; 1922 P. 448 and 31 A. 572, Cons. 161 I.C. 200=1936 Pesh. 40. The fact that the guardian of the minor is his step-brother would not alone be sufficient justification for holding that he is intentionally harming the interest of the minor or that his interest is in any way adverse to that of the minor especially where he himself is to be equally affected by the decree with the minor. 157 I.C. 801=1935 L. 44. A mother cannot act as next

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff

[Ss 440, 443.] (2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall, without his consent, be appointed guardian for the suit.

[S. 456.] (4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guar-

Notes.

friend in a suit brought by minor sons against their father. 11 C. 733. Natural father of adopted son as guardian. See 49 M.L.J. 549=91 I.C. 742=1925 M. 1285 Mortgage by father before son's birth—Suit against father and minor son. Father's interest is not adverse to minor son. 97 I.C. 703=1926 M. 1146 Married woman under the old Act of 1882. See 29 A. 728; 6 C.L.J. 36. The rule of Mahomedan Law that an uncle cannot be guardian of the property of a minor does not prevent an uncle representing his infant nephew as next friend in a suit. 6 C.L.R. 413. The interest of every litigant in a partition suit is mutually exclusive and comes into direct conflict with that of the other. In such suits, therefore, it cannot be presumed as a matter of course that a minor sister can safely and properly be represented by an adult brother, especially when he happens to be a step-brother. The interest of one is clearly adverse to that of the other and as such one is legally disqualified to act as the next friend of the other. 37 P.L.R. 112 A guardian may refuse to litigate on his ward's behalf a claim which he knows to be false and unfounded. 56 I.C. 97. Where it appears to appellate Court on an examination of the record that a minor has not been properly represented in the suit, the decree cannot be allowed to stand even though there has been no appeal by minor. 51 I.C. 583. A minor, who is represented by a guardian who is the nominee of a party whose interest is adverse to the minor's, is not properly represented in the suit. 45 C. 538=41 I.C. 503=21 C.W.N. 1043 A minor can sue to set aside a decree on the ground that he was not properly represented in the suit. 23 A. 459. Court guardian—Omission to record reasons for appointment of. 44 M.L.J. 515=1923 M. 553. No written permission need be given to the next friend to enable him to act as such. 12 C. 531. Defect in following the rule as to representation of minors is not necessarily fatal to the proceeding and does not render invalid a decree passed against the minors. 43 M. 842=39 M. L.J. 375.

SUB-RULE (2).—31 B. 413; 20 A. 162; 23 B. 403; 10 C. 627 (P.C.). Guardian *ad litem*—Failing to furnish security—Effect of. 54 I. C. 368 Mere omission to obtain the consent of the person whom it is proposed to appoint

guardian of a minor is not fatal to the proceeding unless the minor was prejudiced thereby. 2 P.L.J. 390=40 I.C. 227; 15 C.L.J. 446=17 C.W.N. 219; 37 I.C. 389; 34 C.L.J. 293=26 C.W.N. 781; 43 A. 104=18 A.L.J. 956 See also 155 I.C. 365=1935 A.W.R. 477=1935 A. 649. When a certificated guardian of a minor is properly appointed as guardian *ad litem* of the minor in a suit, he does not *ipso facto* cease to be guardian *ad litem*, merely because some other person has got himself appointed guardian of the person and property of the minor by some other Court. There is no inherent disqualification in all persons other than the certificated guardian to be a guardian *ad litem*. 61 C. 1023=39 C. W.N. 293=1935 C. 160. Where there is no appointment and appearance of a guardian *ad litem* for a minor, the decree passed is, as against the minor, a nullity and not binding on him. 2 P.L.T. 617=62 I.C. 494.

SUB-RULE (3).—The Court has no power to appoint, against his or her will, any person, to be a next friend or guardian. 5 B. 306 Guardian cannot be appointed without his consent. 34 C.L.J. 293=65 I.C. 18=26 C.W.N. 781; 13 I.C. 414=15 C.L.J. 3; 29 I.C. 579=18 M.L.T. 401. Consent need not be express, it may be implied. 4 O.W.N. 356=101 I.C. 632; 4 O.W.N. 791=104 I.C. 814 (47 M. 783, 43 A. 104; 2 P. 296; 101 I.C. 632, Rel. on) Effect of guardian *ad litem* not consenting to appointment. See 54 C. 450=31 C.W.N. 634=103 I.C. 124=1927 C. 488.

SCOPE OF.—R. 4 (3) is mandatory and a Court has no jurisdiction to appoint a guardian *ad litem* on behalf of minor without his consent. [16 C.L.J. 318=20 I.C. 578, Foll., 30 C. 1021 (P.C.), Dist.] 40 I.C. 2; 2 P. 7=4 P.L.T. 575; 4 Pat.L.T. 127=2 P. 296; 37 C.L.J. 496, 20 C.L.J. 409=19 C.W.N. 537, 59 I.C. 664=24 C.W.N. 541. Consent—Need not be express. 43 A. 104=18 A.L.J. 956; 47 M. 783=47 M.L.J. 273, 83 I.C. 290=1923 P. 231; 129 I.C. 175=1931 O. 50. As to cases where consent is implied, see 13 I.C. 563, 4 Pat.L.T. 127=2 P. 296. There is nothing however in sub-cl. (3) which requires Court to obtain the express consent of the guardian; where the guardian so appointed is a certificated guardian whom Court was bound to appoint, consent may be properly presumed when he makes no objection. 4 Pat.L.T. 127=2 P. 296; 1927 O. 560. But see 87 I.C. 238=1925 O. 633. Where interests of a minor have not

dian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

Loc Ams —[Allahabad and Oudh] *Substitute* for original R. No. 4 of O. 32:—

(1) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as next friend, except by leave of the Court.

(2) Subject to the provisions of sub-rule (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by clause (in Oudh read 'sub-rule' for 'clause') (5) of this rule, be entitled to be re-imbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The Court may, in its discretion, for reasons to be recorded, award costs of the suit or compensation under S. 35-A or S. 95 against the next friend personally as if he were a plaintiff.

(5) Costs or compensation awarded under clause (in Oudh read "sub-rule") (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable.

Add the following as R. 4-A of O. 32:—

R. 4-A (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the Court considers for reasons to be recorded that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor, if qualified, or where there is no such guardian the person in whose care the minor is, or any other suitable person who has notified the Court of his willingness to act, or failing any such person, an officer of the Court.

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been prejudiced, any defect in procedure for appointment of his guardian is not fatal. 2 P. 296=4 Pat L.T. 127 Appointment of officer of Court—Absence of inquiry—Proceeding whether vitiated. 8 P. 558=10 Pat L.T. 79=115 I.C. 886=1929 P. 340. Appointment of an officer of Court as guardian *ad litem* of minors in a suit without requiring the party at whose instance he is appointed to deposit necessary funds to enable the guardian to defend the case is a farce. 13 A.L.J. 179=37 A. 179. *See also* 110 I.C. 346. Where appeal is filed against a minor under the guardian *ad litem*, appellant must pay to the guardian such sum of money as would enable him to oppose the appeal. 28 I.C. 352. The wishes of minor should be considered and given due weight in appointment of a person as next friend. If pleader of the minor does not make the application, Court may appoint a proper person bearing in mind the wishes of the minor. 30 Punj L.R. 17=113 I.C. 901=1929 L. 257.

SUB-RULE (4).—A vakil is an officer of the Court for purposes of R. 4. 45 A. 395. When an officer of the Court is appointed as guardian, Court cannot pass a decree against him as guardian of the minor. 4 B. 638; 28 B. 626. In cases where a certificated guardian of a minor is appointed, the appointment of another guardian for suit is illegal and a decree obtained in such a suit is liable to be set aside. 43 M. 808=39 M.L.J. 239. Appointment of Court guardian when natural guardian is available. *See* 93 I.C. 84=1926 M.W. N. 8=1926 M. 950. Duty of Court to require

party applying to make a deposit for the guardian for defending the cause. *See* 93 I.C. 84=1926 M.W.N. 8=1926 M. 950. Appointment of Court nazir as guardian—Practice condemned. 13 R.D. 834=6 O.W. N. 1060. Negligence in conduct of suits on behalf of minors resulting in prejudice to interest of minor—Minor can avoid the decree. 48 A. 44=1926 A. 36. Appointment of Court guardian—Decree passed—Proof of fraud necessary before a suit to set aside decree is allowed. 46 C.L.J. 287=105 I.C. 199=1927 C. 865. In suit for restitution of conjugal rights by husband against his wife where the wife is a minor, a person who is alleged to have been responsible in bringing about the marriage of the defendant with the plaintiff should not be appointed as guardian *ad litem* of defendant. 100 I.C. 458=9 Lah. L.J. 206=28 Punj.L.R. 627.

COSTS.—Court has power to order an unsuccessful infant plaintiff to pay defendant's costs or to direct it to be paid out of minor's estate and *vice versa*. Court can also order next friend or guardian *ad litem* to pay costs personally. 61 C. 227=59 C.L.J. 9=151 I.C. 399=1934 C. 474. Court may provide for costs incurred by guardian in order to obtain legal assistance, even when guardian is himself a pleader. But no guardian should make a profit out of his office. 146 I.C. 986=16 N.L.J. 206=1933 N. 329.

REVISION.—Appointment of a guardian *ad litem* is a matter of procedure, and an error therein is not revisable ordinarily. 46 I.C. 816=5 P.L.W. 92.

Explanation.—An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court.

(3) No person shall without his consent be appointed guardian for the suit; provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court, he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.

(4) Where an officer of the Court is appointed guardian for the suit under sub-rule (2) the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for re-payment or allowance of such costs as justice and the circumstances of the case may require.

[Calcutta.] *Substitute* the words "Except as otherwise provided in this Order" to the words "Where there is no other person fit and willing to act as guardian for the suit".

[Lahore.] New sub-rule (2-A) was inserted—

"(2-A.) Where a minor defendant has no guardian appointed or declared by competent authority, the Court may, subject to the proviso to sub-rule (1), appoint as his guardian for the suit a relative of the minor.

If no proper person be available, who is a relative of the minor, the Court shall appoint one of the other defendants, if any, and failing such other defendant, shall ordinarily proceed under sub-rule (4) of this rule to appoint one of its officers."

The following words were added to sub-rule (3)—

"but the Court may presume such consent to have been given, unless it is expressly refused."

[Nagpur.] *Add* the following rule—

Procedure for appointment of guardian for the suit. "4-A. (1) No person except the guardian appointed by competent authority, shall, without his consent, be appointed guardian for the suit.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Unless the Court is otherwise satisfied of the fact that the proposed guardian has no interest adverse to that of the minor in the matters in controversy in the suit and that he is a fit person to be so appointed, it shall require such application to be supported by an affidavit verifying the fact.

(4) No order shall be made on any application for the appointment as guardian for the suit of any person, other than a guardian of the minor appointed or declared by competent authority, except upon notice to the proposed guardian for the suit and any guardian of the minor appointed or declared by competent authority, or where there is no such guardian, the person in whose care the minor is, and after hearing any objection that may be urged on a day to be specified in the notice. The Court may, in any case, if it thinks fit, issue notice to the minor also.

(5) Where, on or before the specified day, such proposed guardian fails to appear and express his consent to act as guardian for the suit, or, where he is considered unfit, or disqualified under sub-rule (3) the Court may, in the absence of any other person, fit and willing to act, appoint any of its officers or a pleader to be guardian for the suit.

(6) In any case in which there is a minor defendant, the Court may direct that a sufficient sum shall be deposited in Court by the plaintiff from which sum the expenses of the minor defendant in the suit shall be paid. The matter shall be adjusted in accordance with the final order passed in the suit in respect of costs."

[Patna.] In sub-rule (4) for the words "where there is no other person fit and willing to act as guardian for the suit" in the first sentence of the sub-rule *substitute* the following—

"Where the person whom the Court, after hearing objections, if any, under sub-rule (4) of R. 3, proposes to appoint as guardian for the suit, fails within the time fixed in a notice to him, to express his consent to be so appointed."

The following shall be substituted for R. 4—

[Rangoon.] R. 4. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit, provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority no person other than such guardian shall act as the next friend of the minor, or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) In the event of there being no such guardian, the natural guardian of the minor, or, if there is no natural guardian, the person in whose care the minor is, should, subject to the proviso to sub-rule (1), ordinarily be appointed his guardian for the suit.

(4) No person shall without his consent be appointed guardian for the suit.

(5) Where none of the aforementioned persons, or of the persons mentioned by the plaintiff in the list filed by him under sub-rule (2) of R. 3, is fit and willing to act as guardian for the suit, and where no application is made on behalf of the minor under sub-rule (3) of R. 3, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for re-payment or allowance of such costs as justice and the circumstances of the case may require. An advocate or pleader of the Court shall be an officer of the Court for this purpose.

Representation of minor
by next friend or guardian
for the suit

5. [S. 441.] (1) Every application to the Court on behalf of a minor other than an application under Rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

[S. 444.] (2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

Receipt by next friend or
guardian for the suit of prop-
erty under decree for
minor.

6 [S. 461.] (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other moveable property on behalf of a minor either—

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O 32, R 5. ILLUSTRATIVE CASES.—When a guardian *ad litem* has been once appointed by Court for a minor defendant his appointment continues until revoked and an appeal against a decree passed against minor can only be preferred by him. (44 A 35, 22 M 187, 2 A L J 482, Foll.) 41 A 619=20 A L J 599. Suit by authorised agent of guardian on behalf of minor is not a suit in which minor is effectively represented. Judgment in such a suit is not conclusive against minor. 128 I C 763=1930 A. 875. Where certain minors were sued as majors but they appeared in the suit through their mother as guardian and filed a written statement and Court accepted the guardian by permitting her to compromise, *held*, that the omission to formally amend the cause title of the suit as originally instituted was a mere irregularity. 13 Pat L T 737. Minor—Not represented, effect of—Ignorance of decree holder. 27 I C 425. An order for execution passed against a minor without a guardian *ad litem* is invalid, and when it is brought to the notice of Court that such order has been passed, Court should immediately discharge the order. 9 M L J. 144. See also 13 B 234. The words of the Code appear to give discretionary power to Court to discharge the application made by minors who appear without a next friend. 22 C 270 (274). A next friend is not a party to the suit, and cannot appeal in his own name. 9 C 629. Nor can he execute the decree after the death of the minor. 14 W.R. 162, 22 M 187; 29 A. 675. Court has no power to make minor's estate liable for costs. 13 B 234. But see 11 C 213. Where there has been gross negligence of guardian, and minor was not really represented in the suit, it is open to minor to avoid the order. 138 I C 465=1932 A L J. 437=1932 A. 293 (F.B.). Sale in

execution of decree against minor—Guardian *ad litem* neglecting his duties—Person interested in minor must be allowed to set it aside. O 21, R 90 1930 N. 185. See 1929 M 275 (280). (This Order has no direct application to execution petitions if rights of the parties have merged in a valid decree).

O 32, R 6—R 6 prohibits next friend of a minor decree-holder from realising money due under a decree without leave of Court. 19 L W 686=1924 M 279. On an application to enforce a security bond executed by certain sureties hypothecating immovable properties in respect of a certain amount drawn by next friend of the minor plaintiffs on their behalf, *held*, that (i) S 145 was not applicable, as the sureties had not made themselves personally liable and the matter was not connected with the execution of a decree and was not a question between the parties to the suit, (ii) as it was not executed in favour of any named person, it could not be assigned by Court and the only mode of enforcing it was by Court making an order in the suit upon an application to which the sureties are parties and by directing sale of the properties for the realisation of the amount due, (iii) no such direction could however be made till the extent of the liability of next friend was determined in a separate suit. [46 I A. 228=38 M L J. 302 (P.C.), Appl] 57 M 803=148 I C 846=1934 M. 262=66 M L J. 540. A bond executed by a surety for a guardian under R. 6 to the Judge of the Court described by his title, *e.g.*, to the District Munsif, being one to a judicial person can be assigned by the District Munsif. The fact that his full name is not given makes no difference, he being a *persona designata* described by his title of District Munsif. The assignment by the Judge is valid and enables the assignee to maintain a suit on the bond to enforce it against the surety. 44 L W 621=1936 M. 953

(a) by way of compromise before decree or order, or

(b) under a decree or order in favour of the minor

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

Loc. Am.—[Madras] O. 32, R. 6. Add proviso to sub-rule (2)—

"Provided that the Court may, in its discretion, dispense with such security in cases where the next friend or guardian for the suit is the manager of a joint Hindu family or the *karnavan* of a Malabar *tarwad* and the decree is passed in favour of the joint family or the *tarwad*."

7. [S 462.] (1) No next friend or guardian for the suit shall, without

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=71 M.L.J. 675. Where next friend of a minor decree-holder was merely ordered to be allowed to draw money paid into Court by judgment-debtor in satisfaction of decree, and to purchase Government Promissory Notes for the balance and deposit the same into Court but there was no order by the Court granting leave to the next friend to receive any property on behalf of the minor, R. 6 does not apply [41 M. 40, Dist.] 56 M. 687=1933 M. 678=65 M.L.J. 142 (F.B.). Payment to manager of joint Hindu family towards a decree in favour of manager and minor co-parcener cannot be recognized unless sanctioned by Court. 1925 M. 230 (2) =47 M.L.J. 498 See however, 1927 P. 329 (payment to Karta, valid discharge). Whatever the case as regards a compromise without the leave of the Court under R. 7, as regards a valid discharge the question must be one of construction of the decree in each case as to whether the manager has or has not power to receive payment. 31 Bom. L.R. 963=1929 B. 382. Manager of a joint Hindu family acting as next friend, if should furnish security. 103 I.C. 460. When he is not acting as next friend, 43 L.W. 390=1936 M. 434=70 M.L.J. 700 In a suit for partition by two brothers, one of whom was a minor, there was an award made by arbitrators which was made a decree of Court. The major plaintiff settled the claim under the decree with the defendants who applied to have satisfaction of the decree recorded in terms of the settlement. Court entered satisfaction as prayed for with the full knowledge of the fact that the plaintiff had received from the defendants moneys in full satisfaction of the claim under the decree. The major plaintiff did not, however, obtain sanction of Court for receiving money outside Court on behalf of his minor brother. The minor plaintiff after becoming a major, applied to execute the decree. Held, he could not do so, and that the Court having made an order recording satisfaction knowing full well that the money had been received without its previous sanction, must be taken to have approved of the receipt by the major plaintiff of the money on behalf of the minor brother; the defendants were therefore en-

titled to the full benefit of that order and to claim full discharge by reason of the same. 44 L.W. 486=1936 M. 861=71 M.L.J. 388. Order for attachment of surety's property under R. 6 cannot fall within the words "such directions as will, etc." 41 M. 40=39 I.C. 928. Court cannot order payment of money to a person not appointed guardian by any competent authority without demanding security from him. 29 I.C. 475. The guardian *ad litem* of the minor is a trustee and must act strictly in the interests of the minor. If minor is injured by reason of guardian not carrying out his duties efficiently, minor can sue for redress and claim that so far as equity demands, the decree should be set aside or modified (35 P.R. 1898, Foll.; 2 P. R. 1912, Ref.) 14 I.C. 150. Creditors—Minor plaintiff—Right of debtor to demand security 64 I.C. 385. As regards the procedure to be followed, see 17 A. 531; 21 M. 309.

O. 32, R. 6 (2).—When a Hindu father or manager of a joint Hindu family is himself a next friend or guardian of the minor, his powers are controlled by the provisions of the Code relating to next friends and guardians *ad litem* and he cannot do any act in his capacity as father or managing member which he is debarred from doing as next friend or guardian without the leave of Court. 1930 M.W.N. 1240 [36 M. 295 (P. C.), Foll., 29 I.C. 475 and 47 M. 920, Ref.] The advisability of amending R. 6 so as to exempt managers or *kartas* of joint families or *karnavans* of Malabar *Tarwad* from the provisions of the rule pointed out 1930 M.W.N. 1240 Stamp on security bond. See 53 C. 101=1925 C. 906

O. 32, R. 7. SCOPE AND APPLICATION.—There is a heavy duty cast upon the counsel appearing for a minor to satisfy himself that the compromise is for the benefit of the minor, and a similar duty is cast upon the Court to scrutinize the compromise and satisfy itself before sanctioning it. 156 I.C. 153=1935 S. 95. A compromise of suit made on behalf of a minor without strict compliance with the provisions of R. 7 is not enforceable against minor 125 I.C. 587. See also 14 L.R. 513 (Rev.)=16 R.D. 660. The directions in R. 7, are not intended to be merely formal and it is incumbent on the

Agreement or compromise by next friend or guardian for the suit.

the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of

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Court to protect the interests of a minor and of a person of unsound mind and to apply its mind to any compromise which is offered on their behalf in order to ascertain as far as possible that the compromise is really for the benefit of the minor. 1933 A 149. *See also* 136 I.C. 350=35 L.W. 171=1932 M 303, 33 Bom L.R. 1033=134 I.C. 1221=1931 B 500. The provisions of R 7 are imperative. 33 Bom. L.R. 1033=1931 B. 500. *But see* 136 I.C. 254=7 Luck. 493=1932 O. 44 *contra*—“With reference to the suit”—Meaning of, *see* 1937 P. 232=1937 P.W.N. 51. A matter which is not strictly the subject-matter of a suit may relate to or have “reference to the suit” if it forms part of the consideration, (*Ibid*) Where a petition for leave is filed under R 7 Court should consider whether the compromise is or is not in the interests of the minors. If it is satisfied that the petition of compromise is for the benefit of the minors then it should grant leave. If it is not so satisfied it should refuse leave. If leave is granted Court has no option, but to record the compromise and to pass a decree in accordance therewith. In so deciding whether the petition of compromise is for the benefit of the minors, it will be open to Court to make such alterations in the terms of the compromise, agreed to by the parties, as it deems expedient (17 A. 531, 28 A. 585, 47 I.A. 88 and 1929 B. 350, Ref.) 1934 R. 168 *See also* 142 I.C. 751=34 P.L.R. 409=1933 L. 468; 152 I.C. 715=36 Bom.L.R. 738. The provisions of this rule are not applied *en bloc* to proceedings under Land Revenue Acts. But the adult parties who are co-obligees with the minor are not on that account exonerated from liability. 7 Luck. 493=136 I.C. 254=1932 O. 44; 39 M. 409=43 I.A. 99=31 M. L.J. 18=34 I.C. 213 (P.C.). As the provisions of O. 32, have been extended to all proceedings under the Land Revenue Act with a few minor exceptions, a compromise arrived at the partition proceedings on behalf of a minor is invalid if the provisions of R 7 have not been complied with, 14 L.R. 464 (Rev.)=17 R.D. 625. The rule applies to an agreement to refer a suit to arbitration, and to an agreement to be bound by an oath. 27 C. 229, 24 M. 326, 12 M. 483, 27 P.L.R. 729=96 I.C. 748=1926 L. 665 *But see* 38 P.L.R. 629=162 I.C. 921=1936 L. 235 where it was held that agreement by next friend to relinquish claim of the minor should the opposite party take a certain oath, was only a special method of proof and not a compromise, and that as the interest of the minor was identical with that of the next friend, sanction under this rule was not necessary. In the case of a reference to arbitration by a guardian without leave of Court and a decree passed on the basis of an award thereon, the

only person who can repudiate guardian's act is the minor and he should on attaining majority do so by an application for review or by a separate suit and not by way of appeal 58 C 628=130 I.C. 209=35 C.W.N. 238=1931 C 211, 38 L.W. 927=1933 M 862=65 M.L.J. 755 *But see* 28 A 35 Agreement or compromise must be lawful (*See* O 32, R. 3) Abandonment of an issue does not amount to a compromise. 22 M 538, 22 M 378; 27 C. 229; 24 M. 326, 12 M. 483 *But see* 28 A 35. No sanction is necessary for agreement by guardian to be bound by statement of certain witnesses 49 A. 842=25 A.L.J. 729=1927 A. 584, 34 C.W.N. 310 Effect of want of sanction—Compromise without leave—Invalid, though supportable on other grounds 39 M 115=29 M.L.J. 850=20 C.W.N. 201=32 I.C. 258 (P.C.); 47 A. 782=23 A.L.J. 523. The provision of law making it necessary to obtain leave of Court is of great importance to protect the interests of minors and in absence of such leave, a compromise cannot be supported 39 M. 115=29 M.L.J. 856 (P.C.). In absence of an order granting permission the presumption is that no permission was granted. 50 I.C. 752=17 A.L.J. 789 Where Judge wholly failed to consider whether the terms of a compromise were for benefit or prejudice of the minor, *held*, the compromise decree was not binding on minor *See* 139 I.C. 113=1932 L. 521, 1933 A 149 Where minor comes forward to set aside the compromise, Court has no power to uphold it on the ground that it was for the benefit of the minor. 35 B 322=13 Bom.L.R. 280; 44 B. 202=56 I.C. 399; 50 I.C. 752=17 A.L.J. 789. When suit is compromised by Court of Wards on behalf of a minor ward, the compromise does not require the leave of Court in order that it may be binding. 37 I.C. 971=44 C. 829. Court should be very jealous of the interest of minors and should not allow a suit or part of a suit to be withdrawn without being satisfied that it is for their benefit (27 M. 377; 29 C. 735, Rel on) 47 I.C. 508=59 P. R. 1919. A suit lies at the instance of a minor to set aside such a compromise effected by his guardian *ad litem*. (2 P.R. 1912, Ref.) 47 I.C. 508=59 P.R. 1919 Compromise decree—Setting aside—Fraud, proof of—Facts alleged in prior litigation whether can be reopened 116 I.C. 116=1929 M 96. The next friend of a minor cannot transfer to a third party the decree in favour of the minor without leave of Court 41 M.L.J. 75=63 I.C. 285. Compromise by guardian sanctioned by Court—Interest of guardian adverse to that of minor—Validity. 10 L. 86=49 C.L.J. 38=1928 P.C. 294=55 M.L.J. 746 (P.C.). As to what is claiming an interest adverse to minor, *see* 136 I.C. 562=1932 A. 130 Compromise decree—Enforcement as against minor—

the Court so recorded shall be voidable against all parties other than the minor.

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Sanction of Court—Subsequent events if material—Concealment of material facts—Proof 51 C.L.J. 364=1930 C 539.

SCOPE OF SUB-RULE (2) —41 C.L.J. 213=29 C.W.N. 597. Under R 7, cl. (2) an agreement or compromise entered into by the guardian of a minor without the sanction of the Court is voidable. 47 I.C. 508=59 P.R. 1919, 2 P.R. 1912=11 I.C. 523; 41 M.L.J. 75=63 I.C. 285; 12 I.C. 499=34 M. 314, 58 I.C. 178; 44 I.C. 164; 61 I.C. 118=14 S.L.R. 245; 60 C.L.J. 173. Where a minor is represented in mutation proceedings by his elder brother who *bona fide* enters into a compromise with the other party without the leave of the Court as required by R 7, the compromise is not bad for want of such leave. 7 Luck 493=136 I.C. 254=1932 O. 44. Where a compromise petition is presented by a respondent on his own behalf and on behalf of two minor respondents and the compromise is an indivisible one so far as all the three respondents are concerned, if the compromise is held to be bad for the minors it must be held to be bad so far as the other respondent also, as it would be useless to pass a decree on the compromise petition against him only. 1934 R 168.

EXECUTION PROCEEDINGS.—The rule applies to a compromise of execution proceedings. 26 B 109. See also 64 M.L.J. 437 (F.B.), 29 M. 309, 26 B 109; 31 M.L.J. 207, Rel. on, 55 M. 17 (F.B.). Dist. J. 17 Pat.L.T. 743=1936 P 506. And contemplates the existence of a guardian and a pending litigation. 26 B 298. See also 27 B. at 291, 29 M. 309. Proceedings in execution are proceedings in suits and R. 7 applies to execution proceedings as well. [29 M. 309, 26 B 109; 31 M.L.J. 207, Rel. on; 55 M. 17 (F.B.), Dist. J. 56 M. 430=142 I.C. 622 (2)=1933 M. 456=64 M.L.J. 437 (F.B.)]. An agreement varying terms of a decree between parties some of whom are minors is not enforceable unless sanctioned by Court. 40 I.C. 820=1917 M.W.N. 327. A compromise effected after the passing of a decree is governed by R 7. Sanction of the Court is necessary where the minor is a party to the adjustment 35 I.C. 70=31 M.L.J. 207.

SHALL BE VOIDABLE.—A compromise not properly sanctioned can be annulled before a minor attains majority. 26 B 109. See 23 B. 62 and 13 B. 137. See also 60 C.L.J. 173, 30 C. 613. Where judgment-debtor applied to have the sale adjourned and on condition of the same being granted waived his right to a fresh proclamation and such waiver was effected both on behalf of himself and his minor sons, held, that the waiver did not require leave of Court. 150 I.C. 1134=1934 M. 260=66 M.L.J. 464. If guardian has wrongly settled the suit out of Court, that may be a ground for further steps being taken, but that must be at instance of the minor after attaining majority or a next friend or a guardian during minority. The attorneys who received their instructions from guardian cannot go behind those instruc-

tions and continue to represent the minor. 138 I.C. 312 (1)=34 Bom L.R. 614=1932 B. 401 (1). Compromise sanctioned by Court, when can be set aside. 28 Bom.L.R. 1225=50 B. 716=1927 B 11, 104 I.C. 222=1927 L 685 [36 M. 295 (P.C.), Foll.] 46 C.L.J. 441=103 I.C. 522=1927 C. 796, 28 Bom.L.R. 1507=99 I. C. 814=1927 B 87. Compromise arrived at by guardian *ad litem* without leave of Court—Decree passed thereon. In a suit to enforce the terms of the compromise, it is open to the minor to plead in defence the invalidity of the compromise. There is nothing in law to prevent him from taking such a plea in defence. 1936 A.L.J. 1366=1936 A. 811.

POWERS OF NATURAL GUARDIAN.—After appointment of a guardian *ad litem* the powers of a natural guardian to deal with minor's interest so far as they are involved in suit are suspended. 22 Bom.L.R. 725=57 I.C. 417=44 B. 574. A compromise even by a father and managing member as guardian *ad litem* requires leave of Court. 36 M. 295=40 J.A. 132=25 M.L.J. 150 (P.C.) But not so when he is not the guardian-ad-litem. (1937) 1 M.L.J. 384. The natural guardian can on behalf of a minor enter into an arbitration so as to be binding on the minor if it is proper, reasonable and for the benefit of minor. 44 B. 202=22 Bom L.R. 266.

PROOF OF SANCTION.—There ought to be evidence that the attention of Court was directly called to the fact that the minor was a party to the compromise, and it ought to be shown, by an order on petition (or in some way not open to doubt) that leave of Court was obtained. 35 A 487=40 I.A. 182=25 M. L.J. 492=21 I.C. 288 (P.C.); 56 I.C. 97, 16 I.C. 397, 2 P. 538=4 Pat.L.T. 311. See also 39 I.C. 53=36 P.R. 1917, 55 I.C. 218. Compromise on behalf of minor—Proof of benefit to minor—Affidavit by guardian or statement by counsel necessary. 31 Bom L.R. 621=119 I.C. 663=1929 B 350. See also 51 C.L.J. 364. Sanction can be inferred from circumstances. 1926 S 128=20 S.L.R. 116. Presumption as to minor's interest having been considered in giving sanction. See 28 Punj L.R. 184=102 I.C. 358=1927 L. 330 (94 I.C. 104, 36 P.R. 1917, 8 C.L.J. 33, Ref.) 1929 L. 250=122 I.C. 103. Matters to be considered in granting sanction—Court's duty to consider benefit of the minor. See 46 C.L.J. 441=103 I.C. 522=1927 C 790. See also 39 M. 115=29 M.L.J. 856 (P.C.); 29 M. 104; 28 Bom L.R. 362=94 I.C. 104=1926 B 291. As to who can apply for sanction in partition suit by minor, see 91 I.C. 521. A decree passed under a misapprehension of a material fact as to the true position of the minor is not binding on minor. 1 L. 314=56 I.C. 878, 1929 L. 279. An omission to record the sanction does render the compromise *ultra vires* especially in the absence of prejudice to the minors, who could only apply for review. 5 Pat.L.J. 379=1 Pat.L.T. 663. See also 111 I.C. 156=1928 A 534. R. 7 does not compel Judge to reduce this matter to writing, though it is exceedingly desirable he should

Loc Am —[Madras] Add the following in O. 32, R 7 as sub-rule (1-A):—

“(1-A) Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a suit in pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel

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do so. (29 M. 104; 17 A. 531; 8 C.L.J. 31, Ref.) 39 I.C. 53=36 P.R. 1917 Mere recording a compromise and passing a decree according to it is no sanction by Court and therefore not binding on the minor 39 M. 853=30 M.L.J. 465. See also 21 M. at 93, 17 A. at 532, 28 A. 585 (P.C.). It is not necessary that the sanction of Court, if otherwise proved, must be in express terms. 14 I.C. 6 See also 1935 S. 235 (noted *infra*) The attention of Court must be expressly drawn to the fact and its approval obtained 6 Pat.L.J. 199=60 I.C. 980. Leave of the Court must be expressly recorded 35 I.C. 675=1917 P. 77; 6 Pat.L.J. 199=2 Pat.L.T. 325=60 I.C. 980 Even if leave of Court is not expressly recorded that would not make the decree a nullity It would only make the decree voidable at option of the minor 2 P. 538=4 Pat.L.T. 311. No particular formula is necessary to be used by the Court in order to grant leave. (*Ibid*) Compromise—Sanction of Court—Some terms not embodied in decree—Sale in pursuance of compromise—Sale by father and guardian *ad litem*—Effect. 53 I.C. 354=1919 M.W.N. 356 Court is not obliged to pass a formal decree in the exact form which the parties propose. It may make such alterations as may be necessary. Very often it is convenient to set out in a schedule the precise compromise the parties have agreed to and then in the order itself merely to state what the parties actually want as an operative order, e.g., for payment of money. 31 Bom.L.R. 621=119 I.C. 663=1929 B. 350 Sanction of compromise—Permission of Court under S. 29, Guardian and Wards Act, 1890, not necessary. 31 Punj.L.R. 131=122 I.C. 103=1930 L. 250

TRANSFER OF DECREE.—Decree is property and hence the guardian can transfer a decree in favour of the minor without the sanction of Court 40 M.L.J. 124=62 I.C. 255; 56 I.C. 313.

REFERENCE TO ARBITRATION—Where a reference, in which property of minor is involved, is under the Arbitration Act and not with reference to a pending suit, no leave of the Court is necessary. R. 7 contemplates agreement or compromise with reference to a pending suit. (26 B. 298 and 1918 B. 123, Rel. on, 1921 S. 61, Dist.) 1935 S. 235 Where an application requesting that the Court should decide the case after local inspection and local inquiry as an arbitrator is signed by the pleaders duly authorised to compromise make a reference to arbitration and so forth and the fact that some of the defendants are minors and the application is for their benefit is clearly stated, the Court's sanction is presumed from the acceptance of the application. 15 L. 726=1934 L. 176. See also 59 C.L.J. 521=1934 C. 845 Where one of the parties to an

arbitration is a minor, no particular form of sanction that the suit is for the benefit of the minor is required under R. 7 Where the Court appoints a guardian of the minor when it accepts an award it shows that interests of the minor are in its mind (1926 S. 128, Rel. on) 1935 S. 235. In the case of a minor party leave of Court need not be obtained before making an application to refer a dispute to arbitration. (28 A. 25, Foll.) 36 A. 69=12 A.L.J. 57, 43 B. 258=20 Bom.L.R. 970. See also 59 C.L.J. 521=1934 C. 845, 15 L. 726=1934 L. 176, 44 B. 202=22 Bom.L.R. 266. Where after suit on behalf of a minor was referred to arbitration, and a compromise was then entered into by parties and the same was accepted by the arbitrators who passed an award in its terms, the minor is not entitled to have the decree on the award set aside on that ground, especially when there is nothing to show that his guardian was negligent or that the compromise was not advantageous or beneficial to him. 42 L.W. 612=1935 M. 1068=69 M.L.J. 523. But see 1935 S. 235. Where under similar circumstances it was held voidable at the option of the minor on attaining majority See also 19 I.C. 424=15 Bom.L.R. 223. Such an order of reference and the award can be assailed by the minor either in the suit itself or by a separate suit. 1936 A.L.J. 1333=167 I.C. 99=1937 A. 65 (F.B.). Agreement by pleaders of both sides to abide by decision of Munsif after inspection—Reference or compromise. A joint application signed by the pleaders for both the parties by which they agreed to abide by the decision of the Munsif after personal inspection of the locality is not a reference to arbitration but amounts to a compromise between the parties. 125 I.C. 587. Though one member of firm is minor, sanction of Court is not necessary to refer a suit against that firm to arbitration. 1923 L. 103 Where guardian of a minor party to a suit wishes to refer the matter to arbitration, Court ought to fully apply its mind to the matter and consider if the reference would be for minor's benefit. 59 I.C. 31=5 P.W.R. 1921, 52 I.C. 327=145 P.R. 1919, 17 I.C. 388=125 P.R. 1912; 15 S.L.R. 165=1922 S. 1, 39 M. 853=30 M.L.J. 465, 1929 L. 257. An application of next friend of a minor under Sch II, para. 1, C.P. Code, comes within R. 7. 52 I.C. 327=145 P.R. 1919; 15 I.C. 161=95 P.R. 1912; 30 M.L.J. 465. Application to refer a question to arbitration is an agreement within the meaning of R. 7 because the rule has reference to the suit. 95 P.R. 1912=15 I.C. 161 (F.B.); 39 M. 853=30 M.L.J. 465. Where a decree is given on award, there is neither an appeal nor a revision. 15 S.L.R. 165=1922 S. 1.

WITHDRAWAL OF SUIT.—The withdrawal of a suit by a next friend in pursuance of an agreement or compromise entered into with the defendant without leave of Court is

or pleader shall file with the application a certificate to the effect that the agreement or compromise or action proposed is, in his opinion, for the benefit of the minor or other person under disability. A decree or order for the compromise of a suit, appeal or matter, to which a minor or other person under disability is a party, shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24¹ in Appendix D to this Schedule."

Note.—This rule and Form No. 24 supersede R. 119 and Form No. 35 of the Civil Rules of Practice, 1905, and R. 33-A of the Rules of the High Court, Madras, Appellate Side.

8. [S. 447.] (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by any affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

9. [S. 446.] (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty, or, during the pendency of

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voidable at instance of the minor. 27 M. 377; 14 M.L.J. 442, 3 C.L.J. 119; 1 A.L.J. 130. It is necessary that leave should be given after the Court's attention is directly called to the fact that a minor is a party to it, and the Court should apply its mind and ascertain whether the compromise is for the minor's benefit and then has to exercise its discretion; it is to be seen in each particular case from the application and the order thereon as to whether the Court intended to grant such leave. If no such leave is given the compromise or withdrawal is voidable at the instance of the minor by a suit to avoid it, and the minor, on the decree being set aside, will be restored to his original position in the suit. 152 I.C. 715=36 Bom.L.R. 738. When a next friend of a minor plaintiff withdraws from the suit, it is open to the minor through another next friend to have the suit reopened or reviewed. 29 C. 735. See also 20 A. 98, 27 M. 377; 17 M.L.J. 179; 12 B. 553. A suit was filed by a person on his own behalf and on behalf of his minor brother to set aside an alienation by their father, the major brother withdrew from the suit as far as he was concerned, whereupon Court appointed another person who had been impleaded as third plaintiff as next friend of minor. *Held*, that neither O. 32, R. 7 nor O. 23, R. 1 (2) applied to the case, that the institution of the suit for the benefit of the minor made him a ward of the Court, that the withdrawal of the suit on his behalf was not in his interest and that the order appointing third plaintiff as next friend was proper. 148 I.C. 1171=11 O.W.N. 557=1934 O. 257.

WITHDRAWAL OF APPLICATION—Guardian can withdraw his petition to enter into a compromise at any time before the leave is granted. 35 I.C. 675=1917 P. 77. See also 7 L.R. 162 (Rev.). But see 107 I.C. 477=1928 C. 247.

APPEAL—If the parties come to an agreement to settle an appeal on certain terms

which puts an end to it, such a settlement, if it affects the interests of a minor, must under R. 7, be subject to the leave of the Court. 161 I.C. 751=43 L.W. 601=1936 M. 494.

SECURITY.—A next friend of a minor even if he is the managing member is not entitled to draw money from Court on behalf of the minor without furnishing the security. [36 M. 295 (P.C.), Foll.] 29 I.C. 475.

COSTS.—Where a next friend has acted *bona fide* he is entitled to his costs out of the infant's estate. 11 C. 213, 10 C. 248. But see 13 B. 234. As to whether a minor is liable for the costs of an attorney retained by the next friend, see 7 C. 140.

O. 32, R. 8: SCOPE OF RULE.—See 1931 A. 656. Where a guardian *ad litem* to a minor defendant has once been appointed such appointment continues for the whole of the *lis* or until it is revoked by Court and the guardian so appointed is the only person who can file an appeal on behalf of the minor. 41 A. 619, 45 A. 623=21 A.L.J. 691. But see also 16 R.D. 553. (Irregularity in superseding one guardian and appointing another is curable and cannot be interfered with in second appeal. 16 R.D. 553.) Absence of an affidavit is not sufficient to render the proceeding illegal and void as against the minor on the ground that he was not properly represented. 55 I.C. 833=1 L. 27. Where the next friend of a minor sues *in forma pauperis* Court can order next friend to pay the costs of defendant. 1923 N. 43. An application on behalf of a minor made by a guardian *ad litem* discharged long before the date of application, should not be entertained. 6 Pat.L.J. 171=62 I.C. 235.

O. 32, Rr 9 and 10—Partition suit—Compromise—Father as next friend—Father's interest is not adverse to minors. 87 I.C. 42=1925 M. 734=48 M.L.J. 417. Court should remove a next friend under R. 9 if it thinks his interest is adverse to that of the minor and should stay proceedings under R. 10.

the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit

Stay of proceedings on removal, etc., of next friend.

10. [S. 448.] (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

(2) [S. 449.] Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

11. [S. 458.] (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.

Retirement, removal or death of guardian for the suit

Notes.

until the appointment of another next friend 63 I.C. 736=6 Pat.L.J. 317. A suit does not abate by the next friend's death and Court should either appoint a new next friend or keep suit pending till minor attains majority 27 M.L.J. 405=25 I.C. 597. Appeal heard after death of guardian of minor defendant but without a fresh guardian on record—Appeal does not abate—But the appellate decree is invalid. 1928 P. 168=106 I.C. 540=9 P.L.T. 547.

MINOR NOT PROPERLY REPRESENTED—REMEDIES OPEN TO—When a minor is made a defendant, it is the minor who is a party and not his guardian *ad litem*. It is not correct to say that the minor is not a party and cannot be allowed to be heard in the suit itself and if he is not properly represented his remedy is only to bring a separate suit. On the other hand, a minor, if not represented or if not properly represented, has several remedies open to him. He may appeal, apply under O. 9, R. 13, apply for review, apply under O. 32, R. 5 (2) or bring a separate suit. The summary remedy in the suit itself is the least expensive and always open to the minor. 1932 A.L.J. 1128=1933 A. 116=55 A. 136

O. 32, R. 10—Death of next friend—Suit, whether abates—Duty of Court to appoint another next friend. 37 C.W.N. 184=144 I.C. 768=1933 C. 508. Appeal—Death of appellant—Substitution of widow and minor son—Death of widow—Absence of application to appoint new next friend—Procedure—Right of respondents to apply 17 Pat.L.T. 86.

O. 32, R. 11—Guardians are not bound to contest all claims whether well or ill-founded.

The test is whether the inaction of the guardian amounted to neglect of duty or was in the best interests of the infant 6 C.L.J. 448. Mere fact that guardian did not enter appearance and take steps in connection with the appeal does not of itself show that he was either unable or unwilling to act or that he was guilty of neglect towards the minor 59 C. 1108=1932 C. 888. Guardian cannot retire without Court's permission 94 I.C. 340=1926 A. 437. (1922 A. 416, Dist.) Guardian *ad litem*—Permission to retire—Court can refuse. 1928 M. 980=113 I.C. 238 (2). Considerations for Court in giving permission to the guardian to retire or removing him. See 136 I.C. 562=1931 A.L.J. 1102=1932 A. 130 "*Claiming an interest adverse to the minor's*" only means that the interest of the minor cannot be safe in the hands of the guardian (*Ibid*) Dismissal of appeal for default of appearance by guardian of minor—Application for removal of guardian and restoration of appeal—Duty of Court. 21 L.W. 325=1925 M. 774. When a plaintiff fails or refuses to place an officer of Court appointed as guardian in possession of funds, Court can remove the officer appointed under this rule 12 B. 553. The power of the Court under R. 11 to remove the guardian for the suit of a minor defendant and appoint a new guardian instead may be exercised at any time during pendency of the suit and same is not taken away by the fact that an order to try the suit *ex parte* has previously been passed 1920 M.W.N. 241=55 I.C. 945. Inability on the part of the guardian *ad litem* to provide funds is sufficient cause 9 I.C. 435=9 M.L.T. 333. The mere fact that the

(2) [S. 459.] Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

Course to be followed by minor plaintiff or applicant on attaining majority.

12 [S. 450.] (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application

(2) [S. 451.] Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus:—

"A.B., late a minor, by C.D. his next friend, but now having attained majority."

(4) [S. 452.] Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on re-payment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) [S. 453.] Any application under this rule may be made *ex parte* but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

Notes.

guardian *ad litem* did not appear at the hearing of the suit and prosecute the defence would not necessarily go to show that the guardian was grossly negligent. A guardian *ad litem* is not bound to defend a suit if there is no valid defence to take. 14 Pat.L.T. 441 = 1933 P. 473. When a guardian appointed in the Court below fails to appear before High Court, the Court may, in order to safeguard the interests of the minor, appoint another person as guardian and such an appointment will operate as removal of the other guardian who has not appeared. 146 I.C. 824 = 37 C. W.N. 921 = 1933 C. 794. Appeal—Misconduct of guardian *ad litem*—Removal—Jurisdiction of trial Court—Procedure to be adopted—Application for removal made to appellate Court long after appeal was filed—Grounds for removal not set out—Application liable to be dismissed. 1930 A. 456. After a suit is decided the Court is *functus officio* and cannot pass any orders for removal of any guardian *ad litem* of the minor. If any person desires to file an appeal against the decision, he must apply to the appellate Court to remove the original guardian and appoint him in his place so as to enable him to appeal. 122 I.C. 445 = 1930 N. 177. Removal—Admission of claim by guardian *ad litem* who had been removed—Whether admissible as against subsequently appointed guardian. 6 O.W.N. 1060 = 1930 O. 110 = 5 Luck. 453. Where during the pendency of the appeal, the guardian for the minor respondents dies and no effort is made by the Court, under R. 11 to appoint a guardian *ad litem* for them, and a decree is passed, that must be set aside as made during the absence of a guardian *ad litem* and the suit must be remanded to the same lower appellate Court. 1936 P. 570 = 165 I.C. 581. (1) Defendant of unsound mind represented by his brother defendant as guardian *ad litem*—Suit dismissed—Appeal—Both defendants

impleaded as respondents but omission to describe one of them as guardian *ad litem*—Death of guardian *ad litem* pending appeal—No fresh guardian appointed—*Held*, that there was only a misdescription in the heading of the appeal and that the defendant was represented by the guardian *ad litem* but as the appeal had proceeded in the absence of a guardian *ad litem* after his death, the defendant was not represented and the decree passed in the appeal was a nullity and not binding on him. (38 P.L.R. 320 = 161 I.C. 987, Reversed.) 1936 L. 861.

Costs—Costs cannot be decreed against the guardian of a defendant except in the case referred to in this rule. 3 M. 263; 1929 A. 18. Costs cannot be decreed against a guardian who has not been appointed with his previous consent. 5 B. 306. Guardian *ad litem* who is also a party on record can be made to pay costs—O. 32, R. 11 does not control S. 35, C.P. Code. 1928 M.W.N. 318 = 110 I.C. 310 = 1928 M. 590. The appellants in the lower appellate Court who are respondents in the second appeal, not being under a duty to appoint guardian *ad litem* for the minor respondents in the lower Court, should not be made responsible for costs of the appellants in second appeal. 165 I.C. 581 (1) = 1936 P. 570.

O. 32, R. 12.—The title of the suit or application should only be corrected when the suit or application is pending. No correction need be made after final decree, and when it only remains to proceed in execution. 22 C. 274. Suit by next friend—Election to continue—Effect of. 88 I.C. 116 = 1925 S. 330. When the minor, on attaining majority, elects to abandon the suit, he must pay costs of next friend, unless under R. 14, he can show that the suit was unreasonably or improperly instituted. [(1910) 2 Ch. 393, Foll.] 38 L.W. 985 = 65 M.L.J. 841. When next friend is dead no application for his

13. [S. 454.] (1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

Where minor co-plaintiff attaining majority desires to repudiate suit

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.

14. [S. 455.] (1) A minor on attaining majority may, if a sole plaintiff, apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper.

Unreasonable or improper suit.

(2) Notice of the application shall be served on all the parties concerned: and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

Loc. Am.—[Madras.] In O. 32 after R. 14 add the following as R. 14-A.—
 "14-A. The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Courts in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to be a quasi-judicial act within the meaning of S. 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal."

15. [S. 463.] The provisions contained in rules 1 to 14 so far as they

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discharge could be made. 22 C. 274. The case of a defendant attaining majority during pendency of suit is not provided for—Notice of the case need not be given to him—Decree passed by Court in his absence not a nullity. 110 I.C. 725=1928 L. 71. Minor defendant attaining majority during pendency of suit but not electing to come on record and conduct defence himself—Decree in suit passed on foot of his being a minor—Validity against him of—Decree after contest—Decree based on compromise—Distinction—Leave of Court under O. 32, R. 7—Effect. 1928 M. 294=51 M. 763=29 L.W. 455=118 I.C. 294.

O. 32, R. 13—Minor attaining majority during pendency of appeal—Counsel engaged by next friend not appearing on date of hearing—Fresh engagement not given to counsel by *quondam* minor—Dismissal of appeal for want of prosecution—Legality—Proper procedure. 1929 L. 555 (2)=30 P.L.R. 273.

O. 32, R. 14—Next friend of a minor plaintiff died during the pendency of the suit. Suit was subsequently dismissed owing to the indifference of the plaintiff's relations and costs were ordered to be paid out of the estate of the deceased next friend. *Held*, that the order as to costs was made without jurisdiction. 20 O.C. 300=43 I.C. 257=5 O. L.J. 106.

O. 32, R. 15. SCOPE AND APPLICATION.—Court must be satisfied of the title of next friend to intervene and it ought to be satis-

fied that the person is of unsound mind and that he stands in need of protection. 23 B. 658. The fact that there is some evidence in the shape of statements found on the record indicating that a person is of unsound mind is not enough to enable a suit to be maintained on his behalf by a next friend. R. 15 requires that it should be found on enquiry that by reason of unsoundness of mind or mental infirmity that person is incapable of protecting his rights as plaintiff or a defendant as the case may be. Such a finding will have to be arrived at, and it must be arrived at upon an enquiry properly held. 38 C.W.N. 1081. Where the respondent to an appeal dies during its pendency, but no enquiry is made, as no information is given to the Court which would lead to an enquiry, the provisions of the rule are not directly contravened by the omission to appoint a guardian *ad litem*. 158 I.C. 338=1935 O.W.N. 1071. It is not to be assumed as a matter of course that if a plaintiff alleges that a defendant is of unsound mind, the Court must immediately accept it and appoint a guardian *ad litem* under R. 15. Court has to appoint a guardian *ad litem* only when a defendant has been adjudged a lunatic in an inquisition under the Lunacy Act or when the Court itself on inquiry has found that the defendant is of unsound mind. 38 C.W.N. 900=1934 C. 833. Where there was no adjudication that a person was of unsound mind, nor was there any enquiry resulting in the finding of the Courts that he

Application of rules to persons of unsound mind are applicable, shall extend to persons adjudged to be of unsound mind and to persons who, though not so adjudged, are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

16 [S 464] Nothing in this Order shall apply to a Sovereign Prince or

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was by reason of unsoundness of mind or mental infirmity incapable of protecting his interest in the suit, a suit by a person posing himself as the next friend of the lunatic and on his behalf is not competent 161 I.C. 665=1936 R. 121 Inquiry under O. 32, R. 15—Scope of—Act IV of 1912—Lunacy proceedings under—Scope of—Distinction—Finding in latter—Not conclusive in former 50 A. 335=25 A.L.J. 1082=108 I.C. 141=1928 A. 108. The rule applies to execution proceedings. 19 M. 219 (226). The provisions of O. 32, R. 15 of the C. P. Code do not apply in terms to the proceedings before their Lordships of the Privy Council, though their Lordships would ordinarily require an insane person to be adequately represented before them so that his interests might be protected. 158 I.C. 338=1935 O.W.N. 1071. Where one of the parties to the suit is a person of unsound mind, but a major, the Judge should in the first place ascertain whether he is a person of unsound mind, and whether he is to be represented by a guardian or not, and should then proceed with the hearing of the suit. 1933 A. 149. The fact that a person of high position had renounced the world and become a sanyasi, devoting himself wholly to spiritual things and entirely neglecting his worldly affairs, would not of itself, however unusual such conduct might be in a man of high position of a zamindar possessing considerable landed property, justify the Court in holding that by reason of unsoundness of mind or mental infirmity he was incapable of protecting his interests, when suing or being sued within R. 15. But a persistent delusion of being haunted by demons, of persecution by imaginary voices attributed to gases issuing from various parts of his body and the religious megalomania which led him to regard himself as destined to be in some sort of a saviour of the world are symptoms which would justify the conclusion that the person is suffering from systematic delusional insanity and incapable of managing his own affairs. 31 C.W.N. 1087=101 I.C. 363 (2)=1927 P.C. 123 (P.C.). Applicability—Deaf and dumb persons 1930 L. 425=126 I.C. 579.

THE POSITION OF LUNATIC AND MINOR IS THE SAME—A sale of a lunatic's property in execution of a decree against him in a suit in which he was not represented by a guardian *ad litem* is a nullity and the lunatic can resist an action for possession without setting aside the sale. [32 C. 296=32 I.A. 23 (P.C.); 38 M. 1076, Dist.]; 34 I.C. 551=4 L.W. 228; 33 C. 1094; 18 C.W.N. 1329=20 C.L.J. 291. Where guardian of respondent died before appeal was argued and appeal was subsequently decided, held that it was not

valid and binding 1936 L. 861 (Reversing 38 P.L.R. 320=161 I.C. 987). But see 165 I.C. 645=1936 A.L.J. 964=1936 A. 806. (Where it was held that it was only an irregularity and that if there was no prejudice to any party the decision cannot be set aside, and that in any event the appeal could be revived and proceeded with with proper guardian or next friend appointed.) Where a decree is obtained against a lunatic on the refusal of Court to appoint a guardian *ad litem* for him, the representatives of the lunatic cannot after his death raise an objection in execution that the decree was null and void. 45 I.C. 219=5 O.L.J. 90. The provisions of this rule are not exhaustive and lunatic can sue through his next friend though not adjudged a lunatic under any law 33 C. 1094, 24 M. 504, 23 B. 658. See also 13 B. 656. Omission to appoint a guardian *ad litem* for a man of unsound mind does not render the whole suit invalid *ab initio* 22 I.C. 673. Rule applies whether the lunatic is adjudged or not. 3 L.W. 301=34 I.C. 428; 16 I.C. 885, 29 I.C. 595=13 A.L.J. 562, 34 I.C. 551=4 L.W. 228 (7 C. 242, 13 B. 656; 24 M. 504, Foll.) Defendant alleged to be of unsound mind by one party denied by the opposite party—Judicial inquiry is necessary 1922 C. 86. There is no established rule of practice requiring that suits relating to a lunatic's property should be brought by the lunatic manager and not by himself. On the contrary the code contemplates suits by persons of unsound mind whether so adjudged or not. Though it is true that a person so incapacitated has to sue by a next friend, yet next friend is not a party and the absence of a next friend is immaterial. 27 I.C. 459=19 C.W.N. 45. Person of weak mind can sue through a next friend. 83 I.C. 253=1925 N. 245. Notice of unsoundness—Duty to appoint guardian—Decree. 50 I.C. 109=17 A.L.J. 257. Lunatics are under the peculiar protection of the Court and from the mere fact that by reason of the ignorance of the Court no enquiry was made, the decree passed against a lunatic without the appointment of a guardian cannot be said to be binding upon him. Such a decree is a nullity. The lunatic so aggrieved is not confined to the solitary remedy by way of review only, he can through his next friend institute a suit for a declaration that the decree is not binding on him. 166 I.C. 903=1937 A.L.J. 17=1937 A. 29.

ABSENCE OF ENQUIRY INTO UNSOUNDNESS OF MIND—EFFECT ON PROCEEDINGS—Where a suit on behalf of a person of unsound mind has been tried out, without any inquiry into or finding as to the plaintiff's unsound mind, the appellate Court which finds out the defect must itself hold the enquiry, and not direct

Saving for Princes and Chiefs.

Ruling Chief suing or being sued in the name of his State, or being sued by direction of [the Central Government, or the Crown Representative, or a Provincial Government] in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

Loc Am.—[Madras] Add as R. 17 of O 32:—

"17 In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards, the Courts in fixing the day for the defendant to appeal and answer shall allow not less than two months' time between the date of summons and the date for appearance."

ORDER XXXIII.

SUITS BY PAUPERS.

Suit may be instituted *in forma pauperis*.

1. [S. 401.] Subject to the following provisions, any suit may be instituted by a pauper.

Leg. Ref.

For words 'the Governor-General in Council or a Local Government' the words in brackets have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

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the trial Court to hold it, and if as a result of the enquiry the appellate Court finds that unsoundness of mind as required by R 15 is made out, it must hold the trial to be in order and must dispose of the appeal on the merits, but if on the other hand the unsoundness of mind is not made out, the suit must be held to be not in order, and the proceedings being illegal the decree must be held to be a nullity 38 C.W.N. 1081=1935 C. 224.

Revision.—Application for enquiry under R. 15—Wrongful dismissal—High Court can set aside by virtue of inherent powers. 23 A.L.J. 1082=50 A. 335=1928 A. 108

O. 33.—This order applies to pauper suits, and O. 44 applies to pauper appeals. As to applicability of this order to pauper appeals, see 1936 Pesh 69=161 I.C. 954. There is no machinery in O. 33 by which Court is enabled to allow plaintiff to continue as a pauper a suit instituted in the ordinary way. 139 I.C. 520=1932 C. 655=36 C.W.N. 567. But see 36 C.W.N. 1035=56 C.L.J. 148=60 C. 827; 64 M.L.J. 728, 161 I.C. 359=1936 M.W.N. 137=43 L.W. 380=1936 M. 158 (Partition suit); 40 C.W.N. 747=162 I.C. 689=1936 C. 221 (contra). See also 57 M.L.J. 677.

VAKALATNAMA.—When an application for leave to sue as a pauper is granted, a vakalat filed by a pleader in the application must be considered to have become a vakalat given for the suit as well, unless it is distinctly limited and confined to the pauper petition alone. No fresh vakalat is necessary to conduct the suit 152 I.C. 132=1934 M. 690=67 M.L.J. 594.

O. 33, R. 1.—Person entitled to property—If a pauper. 119 I.C. 697=1929 N. 319

SCOPE OF RULE.—An applicant to be disqualified to sue as pauper must be possessed of means sufficient to pay Court-fees, and not merely entitled to property. 105 I.C. 30. Whether a suit instituted in the ordinary way may be continued as a pauper suit. See notes

under O. 33, *supra*. Whether S. 141 makes the general provisions of the Code applicable to proceedings for the grant of succession certificate under the Succession Act of 1925 155 I.C. 1118=1935 A.W.R. 864=1935 A. 735. In 5 C. 819 it was held that Court had power to allow a defendant to defend *in forma pauperis*. English law is different from Indian law. 2 P. 879=4 Pat.L.T. 538. No Court-fee is payable upon a bill or plaint in England and only the costs of conducting the litigation such as payment of fees to lawyers, etc., has to be incurred (*Ibid*)

WHO CAN SUE AS A PAUPER.—A person who has obtained leave to sue under S. 18 of the Religious Endowments Act can be permitted to sue *in forma pauperis*. 24 M. 419. Where a suit is filed on behalf of an estate and the estate is not a pauper, the trustee representing such estate may claim to be allowed to file a suit *in forma pauperis* (7 M. 390, Foll.) 146 I.C. 566=1933 M. 883=65 M.L.J. 781. A minor can sue as a pauper although his next friend has substantial means 3 M. 4, 1929 L. 746 (2); 37 C.L.J. 394=1923 C. 556. A next friend who is a pauper can sue *in forma pauperis* 11 B.L.R. 373. Leave to sue *in forma pauperis*—No assets as executor—Grant of leave. 1930 L. 735 (2)=125 I.C. 611. An executor may be allowed to petition for, and, if entitled thereto, obtain probate *in forma pauperis*. 18 B. 237. An administrator of an estate can also sue as a pauper. 7 M. 390. Order 33 applies to suits by companies. The term 'persons' in the order includes companies also 41 M. 624=34 M.L.J. 421. Firm can be considered to be 'person' under R. 1. Where a firm brings a suit for recovery of certain amount by way of damages for certain wrongful acts but afterwards becomes insolvent and the suit is dismissed as Official Assignee refused to prosecute it the firm can be granted leave to appeal as a pauper even though there is possibility that some of the assets will come back to the firm later 1930 R. 272. A shebait suing his co-shebait and an alienee for recovery of endowed property may be allowed to sue *in forma pauperis*; the fact that his co-shebait is possessed of means is perfectly immaterial. 11 I.C. 892. An idol is a "person"

Explanation.—A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

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who comes within the meaning of R. 1. 31¹ N.L.R. 413=18 N.L.J. 347=158 I.C. 660=1935 N. 209. Where the *shebait* is suing for recovery of possession of debutter properties with an application for permission to bring the suit as a pauper the question that requires consideration is whether the trust property vesting in the idol is sufficient to pay Court-fees or not. 152 I.C. 241 (1)=1934 P. 531. The question whether the *shebait* has funds of his own is irrelevant. 31 N.L.R. 413 (noted *supra*.) (1927 C. 309, Foll.)

EXPLANATION.—See 30 B. 593; 10 B. 207, 10 A. 467=1936 O.W.N. 237. The two clauses in explanation to R. 1 are disjunctive. Hence where there is a fee prescribed in the plaint, possession of a part of the subject-matter can be considered and the words “subject-matter of the suit” in Cl. (2) cannot be imported into Cl. (1). 149 I.C. 1004=1934 A. 323. See also 1933 P. 203; 67 M.L.J. 581. The word “persons” in O. 33 has reference to all those who have a right to institute a suit under the Code. O. 33 applies to all prospective plaintiffs or persons in whom any right to relief exists within the meaning of O. 1, R. 1 of the Code. (1930 R. 272 and 1918 M. 362, Foll.; 1930 R. 259, not Foll.) 31 N.L.R. 413=18 N.L.J. 347=158 I.C. 660=1935 N. 209. A person who applies for leave to sue as a pauper is not bound to try and raise funds by mortgaging his claim. 3 M. 249. Where an applicant for permission to sue as pauper is shown to own considerable properties, but all of them are heavily mortgaged, some being with possession and some being the subject of suits, evidence has to be taken to enable the Court to judge whether any money can be raised on the properties. If it cannot be reasonably held that the applicant can raise the amount necessary for the suit, he will be allowed to sue as a pauper. 152 I.C. 260=40 L.W. 273=1934 M. 562 (1). It cannot be laid down as an abstract proposition that in every case where plaintiff has got a mortgage or similar claim, he cannot be regarded as a pauper. It all depends on circumstances of each case, but until it is shown that plaintiff can raise money, he is a pauper and entitled to permission to sue as such. 152 I.C. 938=40 L.W. 370=1934 M. 561. See also 1929 L. 821. *Suit to redeem*—Equity of redemption—Should be excluded in calculating means. 19 N.L.R. 165=1924 N. 44. See also 145 I.C. 852=1933 M. 679=65 M.L.J. 277. Occupancy tenancy is not property. 90 I.C. 949=1925 N. 438. *Suit in forma pauperis*—Admission of part of the claim by defendant cannot dispauper plaintiff. 47 B. 523=25 Bom L.R. 199. Meaning of the words “other than his necessary wearing apparel and subject-matter of suit”. See 1926 N. 273; 1928 N. 24; 1928 L. 271; 1929 N. 319. “Is not possessed of sufficient means” in the explanation

See 45 C.L.J. 68=100 I.C. 264=1927 C. 309. Mortgage in petitioner's favour is ‘means’ 1929 L. 821. See also 1934 M. 561. Ordinary ornaments of women are wearing apparel and ought to be excluded (*Ibid.*) So also dower debt not reduced to possession. (*Ibid.*) *Explanation*—Sufficient means—Property involved in suit whether can be taken into account—Effect of word ‘possession’—Injunction restraining parties from dealing with suit amount after termination of suit pending decision as to Court-fee—Propriety. 34 C.W.N. 188=1930 C. 147. The existence of joint family property of a joint family of which the applicants suing as paupers are members, may amount to ‘means’ within the meaning of R. 1 149 I.C. 171=1934 A.L.J. 247=1934 A. 396. In considering whether a person is a pauper the subject-matter of the suit should be excluded. A decree obtained by a pauper plaintiff for partition and separate possession of properties subject to his liability to pay debts against which he seeks to appeal in *forma pauperis* in respect of his liability for the debts should be excluded in considering whether he is entitled to leave to appeal as pauper. 152 I.C. 135 (1)=1934 M. 653 (1)=67 M.L.J. 581. For determination of the question whether a person is of sufficient means to enable him to pay Court-fee on the plaint any property of which he may be in possession will not be excluded from consideration, even though it may form part of the subject-matter of his suit. The subject-matter of the suit has to be excluded from the consideration only at the time when Court comes to consider under the second part of the explanation to what property he may be entitled. 144 I.C. 230=1933 P. 203. See also 1930 C. 147; 67 M.L.J. 581. Where plaintiff claims to be owner of the property in dispute but the property is in possession of defendant who sets up adverse title. Held, that it was entirely different from a case where plaintiff in a mortgage suit has the equity of redemption which may be treated as his “asset”; here the plaintiff could not raise a penny on such property which could not, therefore, be treated as his “asset”. (1928 L. 271, Dist.) 1933 L. 528. The mere fact that the applicant's husband has property is not sufficient reason for disallowing her application to sue in *forma pauperis*. 44 I.C. 723=3 Pat L.J. 178. Nor can the earnings of a brother in service be regarded as property belonging to plaintiff. 158 I.C. 369 (1)=1935 L. 965. A person may have rich relations, and yet he or she herself may not be in a position to pay Court-fee. If he is not possessed of any means, the question whether or not the alleged rich relations of the applicant were in a position to pay Court-fee which the applicant would have to pay should not be gone into, and he should be

Loc. Am.—[Bombay.] The following sentence shall be *added* to the Explanation to R. 1 of O. 33, namely—

"In determining whether he is possessed of sufficient means the subject-matter of the suit shall be excluded."

2. [S. 403.] Every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits. a schedule of any moveable or immoveable

Contents of application.

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allowed to sue as a pauper. 146 I.C. 473=1933 A. 556. An applicant for a succession certificate can be considered to be a "pauper" only if he is not possessed of sufficient means to enable him to pay the Court-fee on the application for succession certificate. 155 I.C. 1118=1935 A.W.R. 864=1935 A. 735. The *deposit* required under S. 379, Succession Act, cannot be considered to be the "Court-fee payable on the plaint", or in the case of the application for certificate, on such application, for the purpose of determining whether the applicant is a "pauper". (*Ibid.*) A woman who has been permitted to sue as pauper cannot be asked to furnish security for costs under O. 25, R. 1. 36 I.C. 320=10 Bur.L.T. 105; 1928 L. 960. An order for security for costs passed in an ordinary suit ceases to operate as regards the antecedent costs if leave is given to continue the suit as a pauper before the period for furnishing the security has expired. 13 Bom.L.R. 955=36 B. 415.

APPEAL—Where money deposited into court under decree of lower court and drawn by plaintiff appellant was sufficient for payment of Court-fee on appeal, she cannot be allowed to institute the appeal *in forma pauperis*. 94 I.C. 337=1926 M. 567=50 M.L.J. 114.

REVISION—Order, either rejecting or granting an application for leave to sue *in forma pauperis*, amounts to case decided and if the order falls within the purview of Cls. (a), (b) or (c) revision is competent. 1931 R. 318. From an order allowing a pauper application defendant can have no possible grievance, assuming the order was wrong. The only person really affected is the Crown High Court can interfere in a proper case, but it would be slow to move at the instance of the opposite party. 151 I.C. 316=1934 L. 295. See also 1930 A.L.J. 901=1930 A. 708=52 A. 927.

PRACTICE AND PROCEDURE—Court should not allow plaintiff to sue *in forma pauperis* without affording defendant an opportunity to prove that plaintiff is not a pauper. (10 B. 207, 30 B. 593, Rel. on.) 23 I.C. 974. Order as to pauperism or otherwise ought not to be made on mere conjecture. 1931 R. 318 [referring to 5 R. 296 (F.B.) and 7 R. 339]. Application to sue *in forma pauperis*—Dismissal without deciding fact of pauperism—Legality—Interference in revision. 1930 A.L.J. 901=52 A. 927. Report of *Tahsildar* as to possession of means, when good or otherwise. 28 I.C. 87=39 P.L.R. 1915. Where pauper application is dismissed, Court can extend time for payment of Court-fee. 18 L.W. 451=46 M.L.J. 254. Where subsequent to application to sue as a pauper, the applicant receives a sum of money sufficient to defray

the suit expenses Court has no jurisdiction to grant leave to sue as a pauper. 61 I.C. 958=13 L.W. 76. A suit instituted in the ordinary way may be allowed to be continued *in forma pauperis*. 60 C. 827=57 C. L.J. 441. See also 37 L.W. 725=1933 M. 498=64 M.L.J. 728, 57 M.L.J. 677; but see 36 C.W.N. 567=1932 C. 655=139 I.C. 520. Once application to sue as a pauper is admitted, plaintiff can only be dispaupered under O. 33, R. 9 on the grounds mentioned therein. If during the trial of the suit, it appears to Court that plaintiff has got no cause of action, the plaintiff's suit will be dismissed and he will not be merely dispaupered. 157 I.C. 520=1935 Pat. 449.

BURDEN OF PROOF—As to pauperism is on the applicant himself, see 1926 N. 273.

LIMITATION—An application for leave to sue as a pauper presented five years after attaining majority is barred, and cannot be allowed. 26 I.C. 90=1 M.L.W. 668.

LEGAL REPRESENTATIVE of pauper plaintiff cannot continue suit after plaintiff's death unless such legal representative is also a pauper. 104 I.C. 347=1927 L. 665; 24 L.W. 550=1925 M. 819; 1928 M. 66, 36 B. 279=11 I.C. 724=13 Bom.L.R. 577; 25 A. 137; 33 C. 1163, 26 I.C. 714, 64 I.C. 63. Where one of the applicants to sue as pauper dies during pendency of the application, his legal representative is entitled to be brought on record in his place, and to continue the proceedings as a suit by substitution on payment of court-fees, or else by filing a fresh application for leave to sue as pauper. Court, not allowing the applicants time for substituting the heirs of deceased applicant, acts with material irregularity. 15 Pat. 738=165 I.C. 927=1936 Pat. 591.

O. 33, R. 2.—A petition to sue *in forma pauperis* which fails to comply with the provisions of R. 2 ought to be rejected. 6 Bur. L.T. 141=20 I.C. 640. R. 2 is mandatory. An applicant who is a member of a joint family must enter all the joint family properties in a schedule under R. 2 for information of all Courts inasmuch as he is entitled to a share of that property on partition. The same proposition holds good in respect of a minor member of a joint family. 1934 A.L.J. 247=149 I.C. 171=1934 A. 396. As to necessity for verification of schedule to application, see 138 I.C. 652=1932 L. 548. Whether verification is required in the case of pauper appeals. 1937 Nag. 108. When allegations in plaint show *prima facie* cause of action the application to sue as a pauper should not be dismissed except on merits. 30 I.C. 689. Substantial compliance with the provisions of the rule will be sufficient. 138 I.C. 335=1932 L. 328. Code is not designed as a trap which a litigant must try to avoid

property belonging to the applicant, with the estimated value thereof, shall be annexed thereto, and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

3. [S. 404] Notwithstanding anything contained in these rules, the application shall be presented to the Court by the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

Loc Am.—[Allahabad] In O. 33, R. 3, after the words "unless he is exempted from appearing in Court" add the words "or detained in prison"

4. [S. 406] (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant

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by all means in his power but is designed to enable Court to ascertain the real points in issue between the parties and come to a speedy and clear determination of those points (*Ibid.*) (1929 R. 128, Ref.); 140 I.C. 74. Where a pauper application omits to mention applicant's immoveable property and also fails to submit a list of such property when required, the application is not in proper form 1923 O. 118; 1930 P. 368. But see also 8 Pat.L.T. 794=104 I.C. 364. Application to sue as pauper omitting to mention a few articles of trifling value which would not affect the decision of Court as to pauperism would not be ground for disallowing the application. 140 I.C. 74=1932 P. 308. See also 151 I.C. 635=38 C.W.N. 548=1934 C. 640 In an application for leave to sue as a pauper in respect of a claim under the Fatal Accidents Act, failure to give particulars of all the beneficiaries is a defect in form but where the plaint includes a claim for loss of petitioner's personal effects as well and Court-fee on that portion of the claim alone exceeds the value of the petitioner's belongings, plaint cannot be rejected and the whole claim should be considered on its merits. 59 C.L.J. 391=38 C.W.N. 551=1934 C. 632 Plaint filed with stamp duty—Filing of written statement raising an objection as to valuation of suit and payment of Court-fee—Framing of issues one of which related to the valuation of suit and Court-fee payable—Trial of this issue as a preliminary issue—Decision by Court that additional Court-fee was payable—Application by plaintiff to continue suit *in forma pauperis* on the ground of inability to pay the additional Court-fee demanded—Maintainability—Proper procedure to be followed by Court 30 L.W. 637=1929 M. 828=57 M.L.J. 677; 60 C. 827; 64 M.L.J. 728. See also 35 C.W.N. 1035=55 C.L.J. 148; 35 C.W.N. 567=1932 C. 655=139 I.C. 520.

O. 33, Rr. 2 and 5.—Omission to include one solitary item of property in schedule of properties attached to an application for leave to sue as a pauper is not such a defect

in the form or frame of the application as to call for rejection under R. 5 (a), where the application is otherwise regular. 151 I.C. 635=38 C.W.N. 548=1934 C. 640 See also 140 I.C. 74=1932 P. 308. As to power of Court to reject application under R. 5, and to reject it under O. 7. See 156 I.C. 402=1935 Pat. 193.

O. 33, R. 3—Form of petition—Separate affidavit instead of verification is sufficient 1923 L. 684. An authorized agent in R. 3 does not include a recognized agent or a pleader as such. 80 P.L.R. 1915=28 I.C. 448 See also 7 P. 825 Leave to sue *in forma pauperis* ought not to be refused on insufficient ground If Court does so, High Court will interfere in revision 26 M.L.J. 343=23 I.C. 82 Presentation through the Nazir is sufficient and proper 58 I.C. 961=17 N.L.R. 22. See also 47 M.L.J. 522. It is the ordinary practice for revenue Courts to accept the natural guardian of a child as the guardian for purposes of petty litigation and not, except in important cases, take action as mentioned in O. 33, R. 3 (4). But where a landlord brought a suit for ejectment of minor tenant from what he claimed to be his 'sir' land, an agreement by which the mother of the minor gave up her defence that the minor was a perpetual lessee and gave up possession is one which requires sanction of Court for its validity. 14 L.R. 69 (Rev.)=17 R.D. 64.

O. 33, R. 3 (Rangoon).—Where a petition for leave to sue *in forma pauperis*, although otherwise in proper form, does not state the date on which the verification was signed. Court has jurisdiction under R. 3, as amended by the Rangoon High Court in 1935, to allow an amendment of the petition to enable plaintiff to put in the date upon which the petition was verified 14 R. 311=63 I.C. 842=1936 R. 279

O. 33, R. 4.—Where the applicant who seeks for permission to sue as pauper, is examined under R. 4, the opposite party has right to cross-examine. 60 I.C. 738 Court can enter into merits of a case under R. 4 and for that purpose Judge can examine plaintiff who applies for permission to sue as

If presented by agent, Court may order applicant to be examined by commissioner.

(2) Where the application is presented by an agent the Court may, if it thinks fit, order that the applicant be examined by a commissioner in the manner in which the examination of an absent witness may be taken.

Rejection of application

5. [S. 407.] The Court shall reject an application for permission to sue as a pauper—

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a pauper 3 P 275=1925 P 30 For that purpose Court may avail itself of such help he may render. The opponent has no right to examine applicant on merits of the claim 108 I.C. 657=1928 S. 118 In an inquiry under O. 33 Court cannot take evidence except that of the applicant himself on merits of the claim 46 C 651=52 I.C. 610 But Court cannot examine witness for deciding the question of limitation or any other question than the pauperism of the applicant 52 I.C. 610=46 C. 651. But see 50 I.C. 676, *contra*.

O. 33, R. 5 - An *ex parte* order of rejection passed under this rule is not governed by R. 15. 31 N.L.R. 386=157 I.C. 294=1935 N. 168 Application for leave to sue in *forma pauperis* - Elements to be considered by Court - Plaintiff's allegations to disclose cause of action. 11 I.C. 55=13 C.L.J. 593, 15 I.C. 184=16 C.W.N. 466 (P.C.), see also 1929 R. 209 (1), 142 I.C. 379=1933 S. 82. For purpose of R. 4, Court should not embark upon doubtful questions of fact and law in order to see whether the allegations show cause of action. And the same applies to the question of local jurisdiction (1932 R. 107, Foll.) 141 I.C. 570=34 P.L.R. 557 In a proceeding under O. 33 it is open to Court to consider not only statements made in plaint but also statements made in his examination by the applicant before determining whether his allegations disclose a cause of action as laid down in R. 5 (d), but Court cannot examine other witnesses for deciding questions other than the pauperism of the applicant. 7 R. 361=1929 R. 273 See also 27 A.L.J. 1059=118 I.C. 669 (1). All matters mentioned in R. 5 need not be gone into unless raised 96 I.C. 830=1926 L. 642. Elaborate enquiry as to merits not to be made. 97 I.C. 349=1926 M. 1160, 10 R. 357=139 I.C. 265=1932 R. 107 (F.B.); 141 I.C. 570, 160 I.C. 351=1936 P. 2, 41 M. 620=117 I.C. 95=34 M.L.J. 399 See also notes under R. 6, non-complicated questions of limitation. 23 L.W. 406=92 I.C. 415=1926 M. 135. "Agreement" and "proposed suit" in cl (e) explained 37 I.C. 172 Cause of action means every fact which it would be necessary for the plaintiff to prove if traversed in order to support his right to the judgment of Court 164 I.C. 556=1936 R. 388. "A right to sue in R. 15 is the same thing as a cause of action" in R. 5. 57 I.C. 9=31 C.L.J. 351. "Cause of action" means a subsisting cause of action which can be enforced. 42 I.C. 519=33 M.L.J. 577; 41 M. 620=34 M.L.J. 399, 38 I.C. 566; 37 I.C. 172, 13 M.L.J. 292; 54 I.C. 462=10 L.W. 589, 18 L.W. 53; 1923 M.W.N. 412=1924 M. 80. But see also

29 P.W.R. 1913 R. 5 (d) applies only to a case where allegations in the petition do not disclose a cause of action 11 M. 620=34 M.L.J. 399. Where allegations in plaint show a cause of action an application to sue in *forma pauperis* should not be rejected *in limine*, even though it may be that on merits, plaintiff has no claim. That is a matter for investigation by Court at the trial. 1935 L. 124 Government pleader has a right to cross-examine witnesses of the applicant and can also produce evidence to oppose the application. 12 I.C. 741=8 A.L.J. 1148. Next friend suing on behalf of a minor need not be a pauper. 58 I.C. 446=23 C.W.N. 955. Application for leave to sue in *forma pauperis*. Dismissal of - Application for withdrawal of pauper application to sue in *forma pauperis* bars subsequent pauper suit, not regular suit on payment of fees. 52 I.C. 562 There is no distinction between an order of rejection under R. 5 and an order of refusal under R. 7. Both have the same effect 33 I.C. 812=20 C.W.N. 669. But see next case. Rules for rejecting an application to sue as a pauper. 5 Bur.L.T. 123=16 I.C. 83. See also 156 I.C. 402=1935 P. 193 The fact that claim for some of the properties is not sustainable will not justify Court in declining to grant leave to sue as pauper 16 I.C. 612=1912 M.W.N. 38, 26 I.C. 90=1 L.W. 668. Question of valuation - Court cannot go into pauper petition. 61 I.C. 891 Benamidar cannot be allowed to sue as pauper to give a non-pauper the right to evade the fiscal law by setting up a pauper nominee. 50 I.C. 520=1919 P.H.C.C. 232 Where application is made by a *Hindu widow* to allow her to file a suit in *forma pauperis*, if she is in possession of sufficiently valuable estate left by her husband her application should be rejected But before doing so Court should take into consideration that her possession is only that of a person with a life interest on which it is almost impossible to borrow any money. The argument that to save the estate necessary expenses may be incurred even by selling part of the property is of no avail, for there is always the difficulty of finding a purchaser who will be willing to buy the property under a title of this sort which the reversioners would be sure to attack. 146 I.C. 566=1933 M. 883=65 M.L.J. 781. Insolvency is not one of the grounds mentioned in R. 5 on which such an application can be rejected 1925 M. 791=48 M.L.J. 491. Application for leave to sue as a pauper - Verification defective. 5 Bur.L.T. 123=16 I.C. 83 In an application to sue in *forma pauperis* evidence should be confined

[S. 405.] (a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or

(b) where the applicant is not a pauper, or

(c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or

(d) where his allegations do not show a cause of action, or

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entirely to the question of applicant's pauperism. 54 I.C. 462=10 L.W. 589. But see also 29 P.W.R. 1913. In order to bar an application under R. 5 (e), the agreement must be with reference to the subject-matter of the proposed suit. 37 I.C. 172. Where an application for permission to sue as a pauper is rejected under R. 5, the Court, while rejecting the application can under S. 149, allow the applicant to pay the requisite Court-fee and treat the application as a plaint. If however the Court has refused to allow the applicant to sue as a pauper under R. 7 (3), then the Court while rejecting the application for permission to sue as pauper, cannot under S. 149, allow the applicant to pay the requisite Court-fee and treat the application as a plaint. Where the Court rejects an application for permission to sue as a pauper, it cannot, after rejecting the application, by a separate and subsequent order allow the applicant to pay the requisite Court-fee under S. 149 and treat the application as a plaint. Per *Allsop, J.*—The Court, having once passed an order refusing to allow an applicant to sue as a pauper, may after the proceedings have been reopened, exercise jurisdiction under S. 149. 164 I.C. 305=1936 A.L.J. 760=1936 A.W.R. 672=1936 A. 584 (F.B.). See also 38 P.L.R. 79.

ADMINISTRATION SUIT.—That the applicant under O. 33 was unable to name all the persons in possession of the property left by the deceased in an administration suit is no ground for dismissing the application to conduct the administration suit as a pauper. 138 I.C. 335=1932 L. 328.

SUIT UNDER FATAL ACCIDENTS ACT.—S. 3 of the Fatal Accidents Act requires that full particulars of all the beneficiaries must be given in a plaint in a suit for damages under that Act. Therefore an application for leave to file a suit, as a pauper, for damages in respect of a fatal accident, which does not contain such particulars, is liable to be rejected. 59 C.L.J. 394=1934 C. 712.

JOINT APPLICATION.—The fact that a joint pauper application by two persons to conduct a certain suit was dismissed is no ground for dismissing a subsequent pauper application by one of them. 138 I.C. 335=1932 L. 328 (1929 R. 128, Ref.).

AMENDMENT OF APPLICATION.—Provisions of O. 6, as to amendment of pleadings apply to applications under O. 33. 138 I.C. 652=1932 L. 548. Where a pauper application is in right form Court may at a subsequent stage allow plaint to be amended as to substance at the instance of the applicant's pleader. 11 R. 414=1933 R. 410 (2). It is doubtful whether the provisions of R. 5

were intended to take away the general power of allowing amendment, conferred on Courts by O. 6, R. 17. (138 I.C. 652, Ref.) 141 I.C. 570=34 P.L.R. 557. Under R. 5 the Court can reject an application if defective and if the defect could not be amended, but not without affording an opportunity to the applicant to correct the defect. Court has got ample powers under Ss. 99, 152 and 153 to afford opportunity to rectify defect in pleadings and under S. 153 is bound to do so. 55 A. 216=145 I.C. 436=1933 A.L.J. 110=1933 A. 295.

O. 33, R. 5, cl. (a).—See 26 L.W. 546, 51 M.L.J. 79; 50 M. 63. Value for Court-fee wrongly calculated—Application must be dismissed—Right of fresh application may subsist. 7 R. 359=118 I.C. 415 (2)=1929 R. 128 (2). Only such defects of form as unfavourably reflect on the merits of the application must be regarded as justifying an order refusing to allow the applicant to sue as a pauper. 31 N.L.R. 386=157 I.C. 294=1935 N. 168. Where an application is defective in form by the list of property not being duly verified, the lack of verification might be due to the carelessness or ignorance, or might be deliberate. Whether the formal defect was unintentional or designed could be detected only by giving the applicant an opportunity to regularise the list of property by appending the required verification. If he made the amendment, the formal defect would have been cured, but if he fails to amend, his failure could be considered as cogent evidence of his having withheld information regarding his resources. This circumstance is such as can be reasonably considered as justifying an order of refusal under sub-R. (3), R. 7 (*Ibid.*) It is only when the Court is in a position to find that an opportunity to rectify the error of form was not availed of by the applicant that it would be reasonable to apply the bar of *res judicata* provided in R. 15. (*Ibid.*)

O. 33, R. 5 (c) MEANS—ASSETS WILL FULLY SPENT PRIOR TO LITIGATION.—The petitioner sold his house for Rs. 10,000, on 6th July, 1931. From that date up to 22nd August, 1931, he disbursed the amount to his creditors though they were not pressing him. On 23rd August, 1931 he applied for permission to sue as pauper. Held, that the petition should be dismissed as R. 5 (c) second part covered the case. 148 I.C. 527=1934 L. 681.

O. 33, R. 5, cl. (d)—If the allegations of the applicant *prima facie* disclose a cause of action Court ought not to embark upon the consideration of a complicated or doubtful question of law or fact that may arise upon the allegations for the purpose of determining whether they show a cause of action. 10

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

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R. 357=139 I.C. 265=1932 R. 107 (F.B.) Per *Full Bench*.—To permit Court when considering whether the case falls within R. 5 (d) to take into account other matters of which it has received notice *ahunde* would be to travel outside the scope of O 33 and in effect to allow it to try the suit on the merits of an application. (*Ibid*) See also 1935 M. W.N. 1270=69 M.L.J. 816 The words "cause of action" imply a good and subsisting cause of action and if at the time of the enquiry into the pauperism, Court finds that apart from merits, the suit is on the face of it hopelessly barred by limitation, application must be dismissed [10 R. 357, *Foll.*, 54 A. 525, *Diss.*] 12 R. 124=151 I.C. 826=1934 R. 111. So also if it is found to be barred by *res judicata*, 161 I.C. 47=1936 Pesh. 39 (19 M. 197 *Foll.*) The cause of action may be defined as the bundle of facts which would enable plaintiff to succeed in his suit. Where therefore a plaint sets out that succession to a particular *math* is regulated by custom of nomination followed by election but bases the cause of action on nomination merely, no cause of action is disclosed. Judge should in such a case confine himself to the case of plaintiff as set out in plaint. 14 Pat.L.T. 338=1933 P. 284 As to data and method of ascertaining existence of cause of action. See 101 I.C. 18=1927 M. 441=52 M.L.J. 330. For purpose of deciding whether the allegations of the applicant show a cause of action, under R. 5 (d), Court must take into consideration the averments in the application and any statements by the applicant regarding the merits of the claim made in the course of the examination by the Court under R. (4), but Court is not entitled to take into account any other evidence, oral or documentary, in considering whether the allegations disclose a cause of action. [10 R. 357 (F.B.), *Rel on.*] 151 I.C. 429=1934 R. 214. Where an application is made for leave to sue as a pauper, Court has no jurisdiction to go into the merits of the cause of action. 131 I.C. 64=1931 R. 79; 10 R. 357=139 I.C. 265=1932 R. 107 (F.B.) 1935 L. 961. It should not be rejected *in limine*, even though it may be that on the merits, the plaintiff has no claim. That is a matter for investigation by Court at the trial. 157 I.C. 753 (2)=1935 L. 124 (1) But where on the face of it the plaintiff shows no cause of action petition should be rejected. 138 I.C. 269=1932 A.L.J. 303=1932 A. 487. 30 S.L. R. 314=164 I.C. 571=1936 S. 130.

O. 33, R. 5, cl. (e) is designed in aid of *bona fide* litigants only, and it must be strictly confined to such litigants. 8 P.L.T. 810=103 I.C. 448=1927 P. 352 See also 1932 R. 68; 37 I.C. 172. The agreement contemplated by sub-cl. (e) of R. 5 of O. 33, C. P. Code, is an agreement which is subsisting and effective on the date of the application for leave to sue as pauper. But when the

agreement pleaded is no longer subsisting or effective at the time the application is made, it cannot be a bar to the applicant being allowed to sue as a pauper. 152 I.C. 417=11 O.W.N. 1356. The appellant transferred the whole of his interest in the subject-matter of the litigation to a third party when the suit was pending. After the decree he sought to appeal against it *in forma pauperis* and applied for leave. *Held*, the case fell precisely within the words of R. 5 (e) because though there was no appeal in contemplation at the time of the agreement transferring his interest, an appeal was now "proposed" and the would-be appellant had entered into an agreement under which another person had obtained an interest in the subject-matter of appeal. 162 I.C. 840=1936 M.W.N. 488=43 L.W. 717=1936 M. 665. The agreement referred to in R. 5 (e), which authorises a Court to reject an application for permission to sue as a pauper is one which is champertous. A mortgage bond executed by a lady applicant after the presentation of the application for leave to sue *in forma pauperis*, not for money paid to her in cash, but under pressure for previous loans of her husband does not come under the clause in question, so as to justify Court in rejecting the application. 152 I.C. 514=38 C.W.N. 1069=1934 C. 740 But see 1937 M. W.N. 74=44 L.W. 856=1937 M. 161=(1937) 1 M.L.J. 147, where it was held that the agreement need not be of a champertous character, and that it mattered little with what purpose the agreement has been entered into. A man may advance money to another out of sympathy and because he considers that such other has been unfairly dealt with, and that if he can bring his case before a Court of law, he will have justice done to him. This he can very well do without entering into an agreement with such other which will give him an interest in the subject-matter of the proposed suit. He may expect such other to repay to him, if he is successful, the money which he has advanced, but unless the re-payment can be shown to be secured on the subject-matter of the suit, there is nothing illegal in such an understanding, and such an understanding would not come within the definition of R. 5 (e), (9 B. 371, *Dist.*) 151 I.C. 429=1934 R. 214. Where applicant in his examination makes the following statement. "I have not yet paid any fees to him (his pleader) but I have undertaken to pay him his fees when I obtain a decree for my share," the statement does not amount to giving any definite interest in the subject-matter to the pleader within the meaning of R. 5 (e) and does not justify dismissal of the application. 138 I.C. 831=1932 R. 68.

LIMITATION.—Though pauper application be dismissed, the plaint remains still pending until it is actually dismissed and if Court-fees are paid, limitation will count from date

Loc. Am. — [Aligarh] O 33, R 5 — *Add* the following explanation to R. 5 at the end —

Explanation — An application shall not be rejected under cl (d) merely on the ground that the proposed suit appears to be barred by any law."

O 33, R 5 (a) — *Add* the words "and the applicant, on being required by the Court to make any amendment within a time to be fixed by the Court, fails to do so" between the figure "3" and the word "or"

6. [S. 408] Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

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of the presentation of the petition which will be regarded as the date of plaint 146 I. C. 566=1933 M. 883=65 M L J 781. See also 1933 N 237. A Court is competent to reject an application to sue *in forma pauperis* under R 5 (d) on the ground that the claim is barred by limitation. 11 I.C. 857=4 Bur. L.T. 1919, 57 I.C. 9=31 C.L.J. 351; 53 I.C. 441 (1)=134 P.R. 1919; 18 I.C. 491=58 P.L. R. 1913. See also 1925 M.W.N. 779 But see 54 A. 525=13 I.C. 396=1932 A.L.J. 489=1932 A. 543, *contra*. An application to sue *in forma pauperis* cannot be allowed where cause of action is time-barred. 42 I.C. 519. But see 54 A. 525, *contra*.

TIME FOR PAYMENT OF COURT-FEES — On a pauper application being dismissed, the person so applying cannot claim that time must be granted for giving necessary Court-fees. But it is customary to allow some time to pay Court-fees when a pauper application is dismissed. 146 I.C. 566=1933 M. 883=65 M. L.J. 781. See also 1933 N. 237.

APPEAL — No appeal lies from an order rejecting an application for leave to sue *in forma pauperis* but the applicant can bring a suit in the ordinary way 39 I.C. 942. An order passed by a single Judge of the High Court sitting in Chambers rejecting an application for leave to sue *in forma pauperis* is appealable under the Letters Patent. 130 I.C. 24=32 Bom L.R. 1647=1931 B. 166. After grant of leave to sue as pauper, it was found during trial that the suit had been under-valued and the Munsif returned the plaint for presentation to proper Court. When it was presented in sub-Court, it was rejected on the ground that as an application for leave to sue *in forma pauperis*, it should be presented in person. *Held*, that the order of the sub-Court was appealable but that as the plaint was not presented in person, the sub-court was justified in rejecting it. 1933 M.W.N. 197.

PAUPER APPEALS — Rules, 5 and 7 of O 33 do not directly apply to pauper appeals. Appellate Court cannot address itself to the question whether the plaint shows a cause of action 55 M. 932=139 I.C. 652=1932 M. 523=63 M.L.J. 28.

REVISION — Order rejecting application for leave to sue *in forma pauperis*, if open to revision 20 A.L.J. 55=44 A. 248. But see

10 A. 467; 11 O.W.N. 1356, 21 A. 133, 2 C.W. N. 474, 8 C.W.N. 70, 101 I.C. 18=1927 M. 441=52 M.L.J. 330. But see *contra* 9 R. 86=132 I.C. 705=1931 R. 79, 140 I.C. 381=34 Bom L.R. 1273=1932 B. 584. 1933 S. 82=142 I.C. 379. See also cases under O 33, R 15. The mere fact that the schedule omits one item of property is not sufficient ground for dismissal and High Court can interfere in revision 27 I.C. 891=1 L.W. 1068. See also 9 R. 86=1931 R. 129. Court has jurisdiction to consider the merits of the case on an application to sue *in forma pauperis*; the fact that Court placed reliance on evidence which might not be relevant to a pauper application is not an irregularity affecting its jurisdiction and no revision lies (40 M. 793, Appl., 17 S.L.R. 133, Foll.) 142 I.C. 379=26 S.L.R. 491=1933 S. 82.

REVIEW — Judge refusing an application to sue *in forma pauperis* is competent to entertain a petition of review of his own order. 33 I.C. 812=20 C.W.N. 669.

SECOND APPLICATION — Rule 15 does not bar a second application to sue as pauper. 57 I.C. 9=31 C.L.J. 351. See also 96 I.C. 962=1926 M. 875=51 M.L.J. 79. But see 10 R. 475=140 I.C. 162=1932 R. 195. The rejection of an application under R. 5 is no bar to a subsequent application under R. 15. 10 O.W. N. 1145=1933 O. 534.

O. 33, R. 6 — Evidence as to plaintiff's title cannot be gone into. 45 A. 548=21 A.L. J. 441. Enquiry is to be confined to question of pauperism 5 Bur L.J. 174=99 I.C. 760=1927 R. 72. Evidence on merits not to be let into (*Ibid*) It is fully competent to a Court to take evidence under Rr 6 and 7 on any matters specified in R. 5 and to decide on those matters to the best of its ability. 50 I.C. 520=1919 Pat H.C.C. 232.

O. 33, Rr. 6 and 7 — An order to furnish security for Court-fee as a condition of being permitted to sue as a pauper would stultify the granting of such permission and is not proper 1933 A.L.J. 757=1933 A. 779. Court disposing of pauper application without notice to opposite pleader or Government Vakil acts without jurisdiction and revision lies. 100 I.C. 726=1926 C. 464. Court should pass order only after hearing the evidence 1928 M.W.N. 235. The evidence to be taken under R. 7 read with R. 6 is confined to the question of pauperism. 55

7. [S. 409.] (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

8. [S. 410.] Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the

Notes.

B. 585=34 Bom L R 1273=1932 B 584 (45 A. 548, 46 C. 651, 3 P. 275, 7 R. 361, Foll.).

O. 33, R. 7—No person other than the guardian *ad litem* can compromise a dispute between the minor and another 57 I C. 417=44 B. 574. The materials for forming an opinion whether applicant is or is not subject to any of the prohibitions specified in R. 5 are (1) the application and (2) the evidence of the applicant under R. 4 or R. 7, which is, however, confined to the question of pauperism. Then Court has to hear arguments, if any, offered on the face of (a) the application and (b) the evidence (if any) taken. There is no provision in O. 33 for allowing opponent to put in a written statement or to give evidence. If Court went into merits of the case and actually relied upon the evidence of two witnesses and that of the opponent himself and came to the conclusion that there was no subsisting cause of action, the procedure is unwarranted and illegal and the order should be set aside 140 I C. 381=34 Bom L R 1273=1932 B 584. The power to allow a case to be continued as a pauper suit is included in the power given to Court to allow a suit *in forma pauperis* to be instituted. A suit for partition was filed with a Court fee of Rs. 10. Plaintiff, who was out of possession, was directed to pay *ad valorem* Court-fee and time granted for that purpose. On the last day fixed for payment, plaintiff applied to be allowed to proceed with the suit as a pauper. Held, that Court had jurisdiction to allow the application 36 C. W.N. 1035=56 C.L.J. 148. See also 60 C. 827, 64 M.L.J. 728. But see 139 I C. 520=36 C.W.N. 567=1932 C. 655. See also 1929 M. 828=57 M.L.J. 677. Suit *in forma pauperis*—Subsequent payment of Court-fee—Institution deemed to have been made on the date of the original presentation 18 N.L.R. 44=1922 N. 600, 37 I C. 921=3 O.L.J. 647. If an application for leave to sue *in forma pauperis* is disallowed under R. 7 (3) as not being in conformity with R. 5 (a), the order dismissing the application operates as a bar to fresh application in that behalf by virtue of R. 15 10 R. 475=140 I C. 162=1932 R. 195. It is essential for granting of permission to

pay Court-fees that there should be a pending proceeding before Court. Where therefore an application for leave to sue *in forma pauperis* is rejected under R. 7, there is no proceeding before the Court and the plaint cannot be said to remain, and an order granting plaintiffs permission to pay Court-fees cannot be deemed to be one under S. 149 and the suit must be held to have been instituted on the day on which Court-fee is paid (1922 N. 160 and 1924 M. 118, Rel. on. 1929 P. 637, Diss. from) 147 I C. 732=1933 N. 237. See also 146 I C. 566=65 M.L.J. 781=1933 M. 883, 62 C. 711, 17 L. 831=39 P.L.R. 158=1937 L. 151.

O. 33, R. 8.—Application for leave to sue as a pauper is not a plaint till leave is granted and till then it cannot be returned under O. 7, R. 10. If so returned, High Court will interfere in revision. 52 I C. 688. Court has no jurisdiction to attach before judgment defendant's property before granting plaintiff's application to sue as pauper 25 C.L.J. 159=21 C.W.N. 870. Section 3 of Limitation Act should be read along with R. 8, 22 L.W. 732=49 M.L.J. 538. Pauper application under the old Court-Fees Act—Leave granted after amended Act came into force—Suit decreed with costs—Basis of calculation of Court-fees. See 1926 M. 159. When application has been granted, pauper plaintiff (and therefore the pauper appellant), is not liable to pay Court-fees. Payment of the Court-fee as such is not merely suspended, it has not to be paid at all. 8 R. 294. Application for leave to sue as pauper—Court-fees subsequently paid—Deduction of time when pauper application pending—If allowed 12 I C. 875. Where plaintiff applied to the Munsif and got leave to sue as pauper but subsequently during the course of trial it was found that the suit was under-valued and plaintiff was directed to re-present the plaint to proper Court, held, that the proceedings before the Munsif, being without jurisdiction, were mere nullities and that the leave granted by the Munsif was of no avail to plaintiff and that he should once more apply to sub-Court for leave to sue *in forma pauperis* 56 M. 689=64 M.L.J. 493=1933 M. 417. An application for review of judg-

plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

9. [S. 411.] The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

(a) if he is guilty of vexatious or improper conduct in the course of the suit;

(b) if it appears that his means are such that he ought not to continue to sue as a pauper; or

(c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.

Notes.

ment passed in a suit or appeal *in forma pauperis* must, under the law, be considered to be one in continuation of the suit or appeal as the case may be, which was *in forma pauperis*. Such an application must be held to be maintainable without payment of any court-fee. 40 C.W.N. 1407=1936 C. 752.

O. 33, R. 9.—There is nothing in O. 33, which contemplates a fresh inquiry into pauperism merely from the fact that other defendants are subsequently added to the suit. Although an added defendant can apply under R. 9, for dispaupering the plaintiffs for one of the reasons given in R. 9 yet, in absence of such application, Court has no jurisdiction to pass an order requiring evidence of pauperism to be produced again. 161 I.C. 51=1936 Pesh. 51. Concealment of property—Asset of doubtful value—Insurance policy. Conduct which, by itself, may entitle Court to dispauper a plaintiff. See 46 B. 1017=1922 B. 215. If pauper purposely delays in bringing the legal representatives of the deceased opponent on the record within a reasonable time it is within the discretion of Court to punish him by rejecting his application either under the provisions of R. 9 (a) read with S. 141 treating his failure to bring the legal representatives on the record within the time allowed by the Court as vexatious or improper conduct on his part in the course of the proceedings or under the provisions of S. 151 as an abuse of the process of the Court. 116 I.C. 111 (2)=1929 S. 136. Dispaupering, grounds for. 2 P. 879=4 Pat. L.T. 538. The mere fact that the issue will be decided again in the suit is no reason why it should not be decided in the proceeding for dispaupering. 149 I.C. 1004=1934 A. 323. Pauper plaintiff agreeing to pay his pleader a large sum of money if he wins his case would be a good ground for dispaupering him. 6 Bur. L.J. 152=104 I.C. 316=1927 R. 283. But see 96 I.C. 830=1926 L. 642. (9 B. 371, Dist.) A pauper plaintiff died *pendente lite* and his heir who was added as his legal representative was found to be possessed of sufficient means to pay Court-fee *held*, that as the heir sought to continue the suit in his own capacity and not in any representative capacity, he could be dispaupered under R. 9.

See 131 I.C. 828=1931 M. 324. Where plaintiff in a suit (*in forma pauperis*) dies, his executor is not liable to be dispaupered. 87 I.C. 372=1925 M. 768=48 M.L.J. 390. The word "means" in cl. (b) is to be interpreted with the help of the definition of pauper referred to above. 2 P. 879=4 Pat. L.T. 538. Rule 9 is intended to prevent the pauper continuing his suit when a third party has obtained an interest in the property and hence able to pay Court-fees. 21 I.C. 536=7 S.L.R. 52. R. 9 (c), must be construed as meaning that a person cannot sue as a pauper if at the time of the petition some other person has under an agreement an interest in the subject-matter of the suit. It must be a subsisting interest at the time of the suit. Where therefore a pauper plaintiff, after he has been given leave to sue as pauper, executes a mortgage over the properties affected by the suit, that is a good ground for dispaupering the plaintiff. 59 M. 901=164 I.C. 831=1936 M.W.N. 785=44 L.W. 31=1936 M. 662=71 M.L.J. 355. R. 9 (c) contemplates an agreement in and by which an interest is transferred or created in the subject-matter of the suit in favour of a person who is not entitled to it, and does not cover a case where by virtue of a family settlement between the parties there is a recognition of an antecedent title in one of the parties to the suit. Where a suit is filed *in forma pauperis* by C on a mortgage executed in favour of A and B claiming that the same was executed in their favour *benami* for the plaintiff's father and that plaintiff was therefore entitled to the full amount, impleading as parties to the suit, among others, the mortgagors and B's son who pleads that it is not *benami*, and pending the suit the plaintiff and B's son file a joint memorandum in Court by which the plaintiff agrees that the son of B is entitled to half the amount of the mortgage, such a case is not affected by R. 9 (c) and affords no ground for dispaupering the plaintiff. 1937 M.W.N. 220=45 L.W. 560=(1937) 1 M.L.J. 616.

ORDER UNDER—FINALITY.—When a plaintiff has been declared a pauper, *res judicata* does not prevent the question from being re-opened. The question can be re-opened on any

10. [S. 414.] Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have

Costs where pauper succeeds. been paid by the plaintiff if he had not been permitted to sue as pauper, such amount shall be recoverable by the [Provincial Government] from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

Leg. Ref.

¹For the word 'Government' the words 'Provincial Government' have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

one of three grounds mentioned in R. 9. 149 I.C. 1004=1934 A. 323

O. 33, R. 10.—Order 33, R. 10 creates two distinct and separate rights in the Crown, one right *in rem* against the property and the other right *in personam* against the pauper. 50 I.C. 315=4 P.L.J. 166. Where an appeal in *forma pauperis* is partially accepted, the Government is entitled under R. 10, to the full amount of Court-fee which was payable on the memorandum of appeal, if appellant had not been allowed to appeal in *forma pauperis*. Court-fee leviable on the amount of the subject-matter of the appeal and not on the amount awarded to appellant would therefore be recoverable by Government. 36 P.L.R. 22 (1). Crown can recover Court-fee without a separate suit. (*Ibid.*) Crown debts—Priority of. 34 A. 223=39 I.A. 62=22 M.L.J. 457 (P.C.) Pauper suit—Portion of Court-fee ordered to be paid by defendants—Sale of latter's property in execution of another decree—Right of Government to recover Court-fee out of sale proceeds—Priority over decree-holder 59 M. 872=43 L.W. 725=1936 M.W.N. 76=162 I.C. 868=1936 M. 602=70 M.L.J. 601 This rule does not have the effect of restricting the right of Government to the subject-matter of the pauper suit (*Ibid.*) A pauper succeeding partly in his case should be given the costs proportionate to his success. Pauper plaintiff should not be allowed to penalize defendant by exaggerating his claim 14 A.L.J. 657=38 A. 469, 54 M.L.J. 530=1928 M. 216. Where pauper plaintiff applies for amendment of the plaint, it is not competent to Court to direct plaintiff to pay cost of the amendment. 47 B. 104=1922 B. 385. Amendment of plaint—Payment of costs of adjustment made a condition for granting—Legality. 6 R. 561=114 I.C. 677 (1)=1928 R. 366. Where a woman obtains a decree for maintenance on a suit filed in *forma pauperis* and future maintenance is made a charge on certain property, the proceeds on sale of such property on execution are not attachable by Government for Court-fees. To permit such an attachment would be tantamount to permitting attachment of the right to future maintenance which under S. 60, C.P. Code, is not liable to attachment. 154 I.C. 580=1935 S. 21. See also 57 B. 507=146 I.C. 340=35 Bom. L.R. 615=1933 B. 350. The pro-

per method of recovering Court-fee payable to Government in case the property out of which it is to be recovered is a right to future maintenance, is by Court appointing a Receiver to collect the same and pay to Government, in instalments, if necessary, in order that the maintenance holder may have something to live upon. 49 M. 567=1926 M. 565=50 M.L.J. 279. As to order for payment of Court-fees in suits for maintenance, see 105 I.C. 725=32 C.W.N. 48 (38 A. 469, Doubtful, 14 M. 163, Ref.), 94 I.C. 391=1926 C. 859. Suit in *forma pauperis*—Costs decreed to defendant exceeding claim decreed to plaintiff—Government, if can claim charge 14 L.W. 529=42 M.L.J. 19 Suit in *forma pauperis*—Decree—Court-fee payable to the Secretary of State—Right of decree-holder to execute. 118 I.C. 191=1929 A. 905 (2). Where an application to sue in *forma pauperis* is granted, the suit is deemed to have been instituted on the date when the application was made and where the plaintiff succeeds in the suit, the Court-fee leviable from him is that payable under the law in force on the date when the application for leave to sue as a pauper was made and not the law in force on the date of the decree. (91 I.C. 302, Rel.) 27 S.L.R. 240=1933 S. 354 A suit in *forma pauperis* was compromised and the Court passed a decree in terms of the compromise which made the plaintiff liable to pay the Court-fee due to Government and also made it a first charge on the subject-matter of the compromise. The amount under the decree was paid to the plaintiff by the defendant out of Court before the decree was drawn up and satisfaction was duly recorded. Two years after the decree Government applied for execution against the defendant for the amount of the Court-fee due to them. Held, that the defendant could not be called upon to pay the Court-fee, there being nothing left due from him, and that the application in execution against the defendant was misconceived 39 C.W.N. 1274

PAUPER DECREE-HOLDER—PURCHASE FROM—LIABILITY FOR COURT-FEES—The charge under R. 10 is created by law and a purchaser of a decree obtained by a pauper takes it subject to the charge. The charge however is only for the Court-fees and not for the fees of the Government pleader also. 147 I.C. 751=1934 A. 438

O. 33, Rr. 10-13.—Decree passed in pauper suit—Basis of calculation of Court-fees—Amended Court-fees Act coming into force, effect of. See 96 I.C. 112=1926 M. 474=50 M.L.J. 280. See also 1926 M. 159=49 M.L.J. 538.

Procedure where pauper
fails

11. [S. 412.] Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed,—

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing, the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

Government may apply
or payment of court-fees

12. The ¹[Provincial Government] shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10 or rule 11.

Government to be deemed
a party.

13. All matters arising between the ¹[Provincial Government] and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

Leg. Ref.

¹ For the word 'Government' the words 'Provincial Government' have been substituted by the Government of India (Adaptation of Indian Laws) Orders, 1937

Notes.

O. 33, R. 11—An order dispaupering the plaintiff operates retrospectively in respect of payment of Court-fees 149 I.C. 1004=1934 A. 323. Pauper suit—Dismissal—Order directing defendant to pay court-fee due to Government—Justifiability—Suit involving difficult construction of settlement deed 70 M.L.J. 128.

O. 33, Rr 11 and 12—Pauper suit—Compromise—Court-fee. 35 B 448=12 I.C. 29, 1930 P 353 (2)=11 Pat.L.T. 267 Whenever a suit is dismissed, whether at the request of parties or not, plaintiff is the party defeated and must pay Court-fees to Government. (*Ibid.*) Court may, in disposing of a pauper suit, direct next friend of a minor pauper plaintiff to pay the costs of the suit, but such an order cannot have the effect of depriving Government of the right expressly given to Government by Rr 11 and 12 to have an order that plaintiff shall pay Court-fee payable on plaint to Government. Government may, therefore, apply for such an order in spite of the order of Court directing next friend to pay the costs of suit 166 I.C. 949=45 L.W. 234=1937 M. 145=(1937) 1 M.L.J. 151.

O. 33, Rr 12 and 13—It is not the function of a Court of appeal to give effect to the right of the Government conferred by R. 12, in respect of Court-fee and some other costs incurred by and due to the Government in the trial Court, R. 13 makes it clear that Government should proceed in trial Court for recovery of Court-fee and other costs

due to it to which its right has been declared by R. 12 1937 A.L.J. 171=1937 A.W.R. 113=1937 A. 280 Where a pauper plaintiff, whose suit has been dismissed and who has become liable to pay to Government Court-fee due on the plaint and other costs incurred by Government, prefers an appeal from the decree paying the necessary Court-fee on appeal, appellate Court which has registered the appeal cannot enforce the right of the Government in the matter of Court-fee and other costs either by issuing a process or by directing appellant to pay the said sums on pain of his appeal being dismissed. (*Ibid.*) If after having so directed the appellant, it dismisses the appeal on default of compliance with the direction, the order of dismissal is wholly without jurisdiction, subject to revision and interference by High Court under S. 115. The order of dismissal of the appeal under such circumstances is not a "rejection" and does not amount to a "decree" within the meaning of S. 2(2), so as to be open to second appeal (*Ibid.*)

O. 33, R. 13—Where a pauper plaintiff whose suit has been dismissed has been allowed to appeal *in forma pauperis*, there is no scope for the intervention of Government in the matter of Court-fee, and an application by Government for an order directing appellant to furnish security for payment of Court-fee due to Government in lower Court and appellant is unsustainable. The provisions of O. 41, R. 10, should not be made available or utilised for the benefit of the Government in order to enable it to collect the Court-fee due. Court fee payable to Government is not the costs incurred by a party within the meaning of O. 41, R. 10 Nor can O. 33, R. 13, be invoked to support such an application by Government. 1937 M.W.N. 244=45 L.W. 186=1937 M. 267.

Copy of decree to be sent to Collector.

14. Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.

15. [S. 413.] An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue, but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the [Provincial Government] and by the opposite party in opposing his application for leave to sue as a pauper.

Loc. Am.—[Rangoon] The expression "otherwise than on the ground stated in cl. (a) of r 5" between 'pauper' and shall in line 2 of r. 15.

Costs permission to sue as pauper and of an inquiry into pauperism shall be costs in the suit.

Leg. Ref.

¹ For the word 'Government' the words 'Provincial Government' have been substituted by the Government of India (Adaptation of Indian Laws) Order, 1937

Notes.

O. 33, R. 14—All that the Code directs the Court to do is to send to Collector a copy of the decree which it has passed and which contains an order that plaintiff shall pay a certain sum to Government. What Collector does after receipt of the copy of the decree is no concern of Court. Collector is not the agent of the Court nor is the Court concerned with the collection of revenue. Therefore a decree drawn up in these terms "It is ordered that a copy of this decree be sent to Collector for recovery of Rs 700 from appellants" with a forwarding letter containing the words "for necessary action" is not justified by the Code. 8 R 294

O. 33, R. 15—The provisions of R. 15 are imperative. A person instituting a suit in the ordinary manner cannot do so unless he pays the costs incurred in the application to sue *in forma pauperis* which was dismissed. 54 A. 390=1932 A.L.J. 25=1932 A. 312. But where Court in dismissing the application has either disallowed costs or made no order as to costs, he is entitled to maintain his suit as an ordinary litigant without making any payment to Government or to the opposite party in respect of the costs incurred in opposing the application. 157 I.C. 150=1935 A.W.R. 838=1935 A.L.J. 857=1935 A. 723 (F.B.) R. 15 should be read along with Rr 5, 6 and 7. 57 I.C. 9=31 C.L.J. 351. Orders under R. 5 or 7 bar fresh proceedings under R. 15. 33 I.C. 812=20 C.W.N. 669. But see 10 C.W.N. 1145=1933 O. 534=31 N.L.R. 386=157 I.C. 294=1935 N. 168 (*ex parte* order of rejection). See also 156 I.C. 402=1935 P. 193, *contra*. Where the previous application to sue as pauper was rejected because the process fee paid for the issue of notices on the opposite party was insufficient, held, that a subsequent application for the same purpose was not barred by R. 15 which applies only to applications which have reached the stage mentioned in R. 7. 60 C.

630=37 C.W.N. 309=57 C.L.J. 21=1933 C. 549. See also 10 O.W.N. 1145=1933 O. 534. A petition to sue *in forma pauperis* can be registered as plaint in the suit if full Court-fee is paid. (24 C. 889, F.B.), 14 I.C. 297=16 C.W.N. 641. Dismissal of application for leave to appeal *in forma pauperis*—Applicant, it can be allowed to amend memo. of appeal and stamp it on new valuation. 1935 R. 336. R. 15 makes it a condition precedent for a petitioner, whose application to sue *in forma pauperis* has been rejected, to pay the costs of Government in opposing the application before a regular suit can be entertained; there should be a demand for it. Where there has been no such demand, suit should not be dismissed. (*Ibid*) Where costs are not paid before institution of suit but afterwards, the suit should not be dismissed but must be treated at least as one instituted on the date on which the costs are paid and dealt with on that basis. Even an appellate Court has power to make such an order in an appeal from an order dismissing the suit; the appeal cannot be treated as not competent. 69 M.L.J. 791. Where an application for leave to sue *in forma pauperis* is dismissed, as not pressed, it bars a fresh application in respect of the same right. (20 B. 86, Foll.) 1924 L. 312. But see 56 I.C. 207=1 L. 151. Fresh application can be made if the application to sue *in forma pauperis* is dismissed for default. 2 Bur L.J. 217=1924 R. 161, 56 I.C. 207=1 L. 151. See 85 I.C. 982=1925 M. 986. See also 98 I.C. 26=4 R. 245=1926 R. 200, 96 I.C. 962=1920 M. 875=51 M.L.J. 79. The words "right to sue" in R. 15 have substantially the same meaning as the words "cause of action". The cause of action in the suit for specific performance of a contract is not the same as in a suit for refund of the consideration. Hence where leave to sue *in forma pauperis* for specific performance of a contract to sell immovable property is refused, a subsequent application for leave to sue for refund of money paid under the contract is not barred. 1936 N. 280. Limitation is computed from the date when the pauper petition is filed, a pauper suit being converted into a regular suit. 28 I.C. 504=1915 M.W.N. 228.

ORDER XXXIV.

SUITS RELATING TO MORTGAGES OF IMMOVEABLE PROPERTY.

1. Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

Parties to suits for foreclosure, sale and redemption.

Notes.

O. 34. GENERAL.—It is this order and not S. 34, which determines the question of the rate of interest in the case of mortgages 54 I.A. 1=54 C. 161=1927 P.C. 1=52 M.L.J. 373 (P.C.). The fact of an instalment decree being passed in a mortgage suit on the consent of the parties does not appear to be a circumstance which can *per se* exclude application of this order. 111 I.C. 294=25 N.L.R. 175. This order does not apply to decrees passed in accordance with an award on a reference to arbitration. 121 I.C. 79=1930 L. 116; 33 P.L.R. 975. Nor to a mortgage executed in favour of a Co-operative Society which is enforceable in the manner prescribed by the Co-operative Societies Act (IV of 1912). 142 I.C. 487=1933 N. 211. Nor to compromise decrees. 14 P. 488=16 Pat.L.T. 311=1935 P. 385.

O. 34: SCOPE AND OBJECT.—Order 34 was substituted for sections in the T.P. Act which dealt only with mortgages of immoveable property. A presumption can therefore be drawn that in taking those provisions out of an Act relating to property and incorporating them in an Act relating to procedure the legislature did not intend to extend the scope of the provisions. The heading of O. 34 defines the general words in the substantive provisions and limits their operation to mortgages of immoveable property. 34 Bom.L.R. 1615. But see 59 C. 667=138 I.C. 852=36 C.W.N. 253=1932 C. 524. As regards scope and object of O. 34, see also 25 C.L.J. 553=40 I.C. 845=21 C.W.N. 920; 1925 N. 15. Order 34 is self-contained and meant to provide for all matters it refers to. Its provisions do not allow of the application provided by O. 40 and a Receiver cannot, therefore, be appointed in execution of a mortgage decree. (100 I.C. 735, *Foll.*) 14 L. 457=34 P.L.R. 815=1933 L. 687

O. 34, R. 1: OBJECT AND APPLICABILITY.—The object of R. 1 is that all claims affecting equity of redemption should be disposed of in one and the same suit. 54 I.A. 68=50 M. 180=1927 P.C. 32=52 M.L.J. 338 (P.C.) and to prevent the multiplicity of mortgage suits. 31 C. at 432; 33 C. 425 (433), 28 B. at 16; 32 C. 746, 28 A. 174 (F.B.), 21 A.L.J. 701=1924 A. 107; 50 M. 180. For scope and object of, see 53 M.L.J. 647; 25 C.L.J. 553; 21 C.W.N. 920; 1925 N. 15. R. 1 is a rule of procedure and does not purport to deal with substantive rights of parties or the extinguishment of such rights. 30 S.L.R. 42=164 I.C. 69=1936 S. 87. This rule does not require that in a suit on a mortgage, the owner of equity of redemption must always fill in the role of a defendant. It is enough if all the interests in the property are represented in the suit. A suit by a purchaser of mortgaged property to

enforce a mortgage which he has paid off is competent. 59 M. 1042=43 L.W. 628=1936 M. 814=70 M.L.J. 719. The provisions of this rule do not apply to a suit under S. 12 of the Punjab Redemption of mortgages Act (II of 1913). 14 L. 218=34 P.L.R. 149=1933 L. 179. A charge which has been created by the decree in a suit for money does not convert the suit into a mortgage suit and make this order applicable. 49 M.L.J. 490=1925 M. 1101. As to the effect of S. 22 of the Limitation Act, see 1929 A. 941=121 I.C. 106. As to whether rule requires that persons whose rights are admitted should be made parties, see 29 M. 84; 29 M. 217 at 224; 27 A. 511, 28 C. 517, 25 M. 568, 25 M. at 113; 30 M. 353. But see 20 A. 322. Persons not impleaded as parties to mortgage suit cannot be proceeded against in execution proceedings. 153 I.C. 870=1935 L. 203. Rule only lays down a principle as to who must be made parties, and does not prohibit the joinder of any person as a party. 55 I.C. 433. In a case where the question is who may be made parties or whether an existing party may raise a particular defence, this rule does not apply. 1928 M. 764=113 I.C. 865. It is well known that people are often joined as parties to a mortgage suit to prevent further complications, but the mere fact that a person is joined as a party to the suit, possibly *pro forma*, does not necessarily give the plaintiff a right to sell his interest in the property, particularly when he has entered into no contract with the plaintiff and has no privity of estate with him. 167 I.C. 449=1937 R. 56. When the purchaser is obstructed from taking possession in execution of a mortgage decree, by an alleged purchaser from the mortgagor, his only remedy is a suit for possession against him, giving him an opportunity to redeem. A mortgage suit will as well lie if it is in time. 11 I.C. 74=16 C.L.J. 33. Also 1923 A. 232=65 I.C. 654. Mortgagor cannot bring separate redemption suits for redemption of a single mortgage debt where the interest of mortgagees is divided among several co-sharers. 104 I.C. 648=1927 Bom. 513.

MEANING OF TERMS.—“Mortgaged security” does not mean the mere lands which the mortgagor professes to mortgage, nor the physical object, but it means the interest therein which the mortgagor is competent to transfer by way of mortgage at the date of the transaction (1926 R. 208, *Foll.*) 162 I.C. 731=1936 R. 198.

NON-JOINDER—EFFECT OF.—If a person interested in equity of redemption is known, he ought to be made a party to a redemption suit in order to safeguard his right. But if he is not known or if it was not possible to have made him party, due provision may be

Explanation.—A puisne mortgagee may sue for foreclosure or for sale

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made in the decree for safeguarding his rights. Where he is deliberately omitted, still relief can be given to the parties before Court. 1936 M.W.N. 1005=1937 Mad 136. Where in a mortgage suit the plaintiff had failed to bring all the parties concerned on the record and had also failed to bring before Court materials sufficient to enable it to work out the account, the suit should not, on a Letters Patent appeal, be sent back to the trial Court for the addition of the parties and for accounts to be taken on a proper basis, as that would mean a complete rehearing involving the leading of a considerable amount of new evidence. The suit, in such circumstances, can rightly be dismissed. (59 I.A. 106, *Rel. on.*) 1937 R.L.R. 13. A suit can be filed by a second mortgagee without impleading the first. Similarly if the prior mortgagee brings his suit without impleading the subsequent mortgagees, decree that he may obtain would not prejudicially affect the rights of any person interested in the property. This would be so irrespective of the fact whether he had or had not notice of the subsequent incumbrances. 56 M. 846=1933 M. 583=65 M.L.J. 108 (F.B.) See also 156 I.C. 318=1935 R. 139. If a decree can be passed and given effect to in so far as the rights of the parties actually before the Court are concerned without interfering with the interests of others, there is no reason why the suit should not proceed. 10 P. 341=132 I.C. 100=1931 P. 164. Also 21 A.L.J. 701=1924 A. 107, 1923 N. 234. O. 1, R. 9 provides that no suit shall be defeated by reason of non-joinder of parties and O. 34, R. 1 is subject to O. 1, R. 9 (1923) 2 P. 175; 69 I.C. 677. See also 54 C.L.J. 113=1932 C. 34; 36 C.W.N. 1138. Non-joinder due to want of notice ought not to be penalised. 66 I.C. 631=1922 N. 89 (F.B.). Non-joinder of parties is no ground for reversal of decree by an appellate Court. 5 L.W. 615=40 I.C. 414. Even if non-joinder is a fatal defect, it can be cured under O. 1, R. 10 (2). 27 A. 75; 30 C. 755, 161 I.C. 579=1936 Pat. 153. See also 30 S.L.R. 42=164 I.C. 69=1936 Sind 87. Failure to join some of the heirs of the mortgagor in an appeal by one of the heirs for redemption is not fatal to appeal and a decree can be passed which will bind all the heirs of the mortgagor. In such cases plaintiff will be deemed to be litigating, in absence of fraud or collusion, in the common interest of himself and the other heirs of the mortgagor. 148 I.C. 903=11 O.W.N. 524=1934 O. 220. Non-joinder of one of two divided heirs of deceased mortgagor, enjoying in separate shares is not fatal and the whole amount can be recovered from the impleaded son's share. 35 A. 441=20 I.C. 41, 43 B. 575=51 I.C. 223. Non-joinder of all heirs is not fatal. A decree for a proportionate share of money as against heirs on record should be passed. 66 I.C. 312=25 C.W.N. 594, 89 I.C. 121. Similarly where some of the co-mortgagors owning distinct shares were not made

parties, a decree for a sum proportionate to the interest of the parties impleaded could be given. 35 A. 247=19 I.C. 614. But see 90 I.C. 80, 89 I.C. 121, 48 A. 171, 66 I.C. 312. Where the terms of a lease contain a clear stipulation that the rent is a charge on the property and the lease further stipulates that half rent shall be paid to one party and half to the other, decree for charge attaching to whole property in respect of the demand of one party cannot be refused, merely because the other party has not joined as plaintiff and is impleaded as *pro forma* defendant. 163 I.C. 175 (1)=1936 Pat. 306. In a suit for redemption, if one of the mortgagees was exonerated the suit must be dismissed. 45 I.C. 650=4 Pat.L.W. 291. Where a mortgagee in a suit for enforcement of his mortgage fails to implead a purchaser of a part of equity of redemption, though he has notice of the purchase, and does not take steps to implead him even after objection is taken to such non-joinder, he cannot be granted a decree for the entire mortgage money. There should be proportionate abatement of the mortgage money in the decree. 159 I.C. 159=61 C.L.J. 560=1935 Cal 667. The mortgagee-purchaser is not entitled to eject the purchaser of the equity of redemption when in the suit such purchaser has not been made a party. 25 I.C. 1. But see 20 I.C. 184=11 A.L.J. 362; 49 C. 1048, 22 C.W.N. 543=44 I.C. 521; 1927 A. 611. The transferee of the equity of redemption is not bound by any decree in a mortgage suit in which he was not a party. 45 I.C. 606=21 O. C. 70, also 34 I.C. 367=3 O.L.J. 494, 14 C.L.J. 530; 1927 A. 611, 138 I.C. 752=1932 C. 561. In a suit for possession from the purchaser by persons interested in the equity of redemption who have not been made parties, no decree can be passed without a provision for what may be due to the defendants under the mortgage. 29 I.C. 742. Where owner of equity of redemption was not a party to the mortgage suit, his subsequent dispossession in execution is wrongful. 36 I.C. 744. Where a simple mortgagee brought a suit for sale against mortgagor without impleading certain subsequent purchasers of equity of redemption and properties were sold by auction in execution of a decree in that suit, the purchasers are in the same position as puisne mortgagees and their rights are not affected by the suit and decree obtained in their absence. 133 I.C. 497=1931 M. 542=61 M.L.J. 316 [21 M.L.J. 213 (F.B.), 40 M. 77, 30 M. 500, Ref.] Further it is open to the simple mortgagee or purchaser in execution of mortgage decree to maintain a second suit for sale against the purchasers of equity of redemption. (*Ibid.*) (47 M. 551; 24 Bom.L.R. 741, 24 A.L.J. 661, Ref.) As to effect of non-joinder of necessary parties in a suit for sale. See 84 I.C. 262; 100 I.C. 198=1927 A. 290. As to right of auction-purchaser in case of non-joinder of subsequent mortgagee, see 134 I.C. 1=1931 A.L.J. 729=1931 A. 466 (F.B.). Where the first mortgagee obtained a decree

without making the prior mortgagee a party to the suit; and a prior mortgagee

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on his mortgage without impleading the second mortgagee and purchased properties in execution including the one mortgaged to the latter, and, on failure to get possession, brought a suit against the second mortgagee, who claimed to redeem all the properties, *held*, that the second mortgagee could only redeem the property mortgaged to him. 134 I.C. 959=1931 P. 434. If in a suit for redemption a sub-mortgagee has not been impleaded, his right to bring his own suit for sale of the property mortgaged to him is not affected, but this cannot, however, alter the legal effect of the redemption suit as between mortgagor and mortgagee. 62 M.L.J. 272=55 M. 320=1932 M. 115 [43 A. 469 (P.C.). Dist.] In a suit for foreclosure the person who had a vested remainder and who had not been impleaded as a party to the suit was not bound by the decree. 134 I.C. 865=1931 O. 358. *Obiter*.—The right of a second creditor over a property is not affected by mortgagor being adjudicated an insolvent. But Official Receiver to whom equity of redemption has been assigned by operation of law should be made a party to the suit on the mortgage and Official Receiver should get himself impleaded as a party thereto. 62 Cal. 483=39 C.W.N. 384=1935 Cal. 460. Suit to enforce charge by holder of trust—Receipt—Omission to implead subsequent mortgagee—Effect. 39 C.W.N. 1018. Equitable mortgagee not added as party—Addition after final decree—Power of Court. 40 C.W.N. 1173.

JOINT FAMILY—Code does not affect the rule regarding the indivisibility of a mortgage nor the Mitakshara rule that no coparcener has a definite share till partition is made. 21 I.C. 831=10 N.L.R. 72. See also 1927 B. 513=104 I.C. 648. All the members of a joint family are necessary parties to a suit on a mortgage of the joint family properties and their non-joinder is fatal to the suit. 24 I.C. 252=12 A.L.J. 794, 21 I.C. 712. But see *contra* 1925 P. 59. But in the case of a deceased mortgagee, if his estate is effectively represented by the persons on the record, the suit is good and not defective. In the case of a joint Hindu family, the karta effectively represents the minor sons of a deceased mortgagee, and even if the minor sons are not specifically impleaded, there is no legal defect in the suit. 16 P.L.T. 689. A minor son in a joint Hindu family must be made a party. 28 C. 517. Where some refuse to join as plaintiffs they can be added as defendants. 14 I.C. 35=9 A.L.J. 410. Decree will be binding even on the minor members in the absence of fraud, where they have been represented by major members of the family. 21 I.C. 192. No question of non-joinder of sons can arise when the mortgage by father is not operative as against the sons. 42 C. 1068=19 C.W.N. 849 (F.B.). The essential point in suits by or against managers is not the distinct description of him as manager, but that he is sued or sues in respect of a family debt. 34 A. 549=9 A.L.

J. 819 (F.B.). See also 1930 P. 293. No legal proceeding not filed expressly as manager, short of actual redemption, will deprive his coparceners of their right to redeem. 40 B. 248=18 Bom.L.R. 33. But see 2 P.L.T. 553=63 I.C. 564. The manager alone can file a suit on a mortgage without bringing the other members as parties. 2 P.L.T. 553=63 I.C. 564; 15 I.C. 876. But see 41 C. 727=19 C.L.J. 437. See also 29 I.C. 752=21 C.L.J. 452; 45 I.C. 76=7 L.W. 438, 46 I.C. 727, 37 I.C. 833=1917 Pat.H.C.C. 113. A foreclosure decree against a manager will bind all the members of the joint Hindu family where the manager effectively represents all the members. 36 A. 383=18 C.W.N. 968=41 I.A. 216 (P.C.). It is immaterial whether the suit is laid against him expressly as manager or not. 30 S.L.R. 42=164 I.C. 69=1936 S. 87. In a suit against the mortgagor's father or manager, the non-joinder of the sons is not fatal. 14 I.C. 38. See also 50 I.C. 243; 53 I.C. 411=125 P.R. 1919, also 18 I.C. 848=9 N.I. R. 1. See also 4 P.L.T. 108=2 P. 435=1923 P. 290; 36 I.C. 542=1 P.L.J. 468, 47 A. 427=23 A.L.J. 246=1925 A. 355. But notwithstanding that manager is a party, Court should add as a party any member of the family who applies to be made a party, so as to put forward any defence challenging the mortgage as not having been made for purpose binding on the family. 19 O.C. 58=36 I.C. 64=3 O.L.J. 322. See also 1937 N. 121. Suit on a mortgage executed by son in a Hindu joint family—Plaintiff seeking relief against whole family—Father insisting on issue that the property was his—Issue was allowed to be framed—Father not being stranger. 107 I.C. 814=1928 M. 199 (2). (1926 M. 744, Dist.) The sons or junior members cannot sue to redeem on the ground they were not parties to the suit in which the decree was passed against manager, unless they show that mortgagee was aware of their interest and yet omitted to implead them. 14 I.C. 333=16 C.W.N. 1019. See also 40 I.C. 525=1 P.L.W. 736; 2 P.L.J. 306; 39 I.C. 779=1917 P.H.C.C. 137. Mortgage suit against Hindu coparceners pending partition suit—Non-joinder of one member—Decree does not bind that member. 38 C.W.N. 1045=1935 C. 151.

LANDLORD AND TENANT.—To a suit to enforce a mortgage of a non-transferable occupancy holding the landlord is not a necessary party. 46 I.C. 176=22 C.W.N. 662. A tenant of the mortgagee is a necessary party. At least he is a proper party. 52 I.C. 105. The lessee who has redeemed a mortgage by the lessor and forecloses the lessor, is not liable to be ejected by the lessor. 59 I.C. 511=16 N.L.R. 180.

NECESSARY PARTIES—ILLUSTRATIVE CASES.—All persons interested in mortgagee's interest are necessary parties. 1926 S. 145=91 I.C. 17. A person who obtains an order of attachment in his favour has no interest either in the mortgage security or in the right of redemption and so is not a necessary

need not be joined in a suit to redeem a subsequent mortgage.

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party to a mortgage suit. 58 C 598=134 I C 561=1931 C 763. Also 1931 R. 108=133 I C 482. See *contra* 17 C.W.N. 871, 1923 N. 311; 105 I.C. 427=23 N.L.R. 164. See also under heading "ATTACHING CREDITOR", *infra*. Where a property is sold in execution of a decree and the decree-holder is paid the amount and subsequently another person files a suit claiming relief on the ground of his alleged equitable mortgage over the property but the auction-purchaser is not impleaded, the suit is not maintainable for non-joinder of the auction-purchaser nor is the decree-holder creditor liable to pay any money to the plaintiff. 156 I.C. 749=1935 S. 131. The entire suit fails if a necessary party is added after limitation. 36 I.C. 542=1 P.L.J. 468. Also 25 I.C. 508, 24 I.C. 25=12 A.L.J. 619, 146 I.C. 259=37 C.W.N. 478=1933 C. 621=60 C. 777. Where in a suit for sale of mortgaged property the alienee of the whole interest of the mortgagor in the property is made a party after expiry of the period of limitation, the suit must wholly fail. 150 I.C. 597=1934 Pesh. 38. The mortgagor is a necessary party. 36 B. 624=17 I.C. 87. Also 9 I.C. 940=9 M.L.T. 356. The mortgagor is not a necessary party to a mortgage suit, if the purchaser of the equity of redemption effectively represents him. 28 I.C. 386. In a suit by a sub-mortgagee defendant's mortgagor is not a necessary party. 27 A. 511. In a redemption suit against the sub-mortgagee, original mortgagor is not a necessary party. 24 Bom.L.R. 911=1922 B. 424. The mortgagee's mortgagor is not a necessary party. 67 I.C. 421=3 L.L.J. 373. Neither the mortgagor's benamidar. 29 C.W.N. 784=1925 C. 973. Suit by only one of several heirs of a mortgagee is not maintainable; all must be made parties. 36 I.C. 77; 32 C. 746. Person claiming to be the adopted son of the plaintiff's husband if a necessary party. See 1928 M. 978=113 I.C. 310. Suit for redemption by one of several *urakins* of a temple without impleading the others as parties is not maintainable. 13 I.C. 234=(1911) 2 M.W.N. 537. One co-mortgagee can sue by impleading the others as defendants. 20 I.C. 329. The *kanomdar* is a necessary party to a suit for redemption. 25 M. 568. In a suit for redemption of mortgage, alleged tenants of mortgagee are proper parties. 96 I.C. 848=1926 B. 522=28 Bom.L.R. 759. Mere presence of the purchaser of the equity of redemption as a witness in the suit, in the absence of proof of knowledge of the nature of the omission to implead him, and the decree is therefore not binding upon him. 13 I.C. 874=(1911) 1 U.B.R. 92. Rights between the legal representatives of the deceased mortgagee *inter se* need not be gone into. 107 I.C. 805. The owner of a portion of the mortgaged property which has been released by the mortgagee is still a necessary party to the suit by the mortgagee. If the mortgagee fails to implead him, he is not entitled to a

decree for the entire amount of the mortgage unless he proves that the other mortgagors have not been prejudiced by the omission. 27 N.L.R. 4=130 I.C. 809=1931 N. 44. As to whether purchaser of a part of mortgaged property need be impleaded, see 49 A. 923. Suit to recover money under Kootu Chit Fund—All subscribers to chit fund are necessary parties. 103 I.C. 814=53 M.L.J. 550=1927 M. 773. In a suit by a Company to have it declared that a mortgage entered into by its secretaries is void, no relief can be granted unless the mortgagee is made a party. 139 I.C. 556=1932 P.C. 244=63 M.L.J. 851 (P.C.). A trespasser is not a necessary party at all. 47 I.C. 536; 28 N.L.R. 69. Simply because a person has some title to the lands by reason of an entry in village papers, he is not entitled to be made a party in a redemption suit. 87 I.C. 679=1925 A. 593. In a suit to declare a right to redeem by a necessary party not impleaded in the prior suit, the mortgagee purchaser in execution of the decree in that suit, is entitled to raise all defences open to a purchaser. 47 C. 924=47 I.A. 91=39 M.L.J. 108=24 C.W.N. 254 (P.C.). See also 102 I.C. 645=1927 A. 611=25 A.L.J. 732. In a suit for accounts against the assignee decree-holder who had purchased the mortgage properties and who had been declared by Court to hold the property as trustee for the co-mortgagees who owned distinct interest therein, all the co-mortgagees are necessary parties to the suit, and a suit brought by some one of them without impleading the others is bad for non-joinder of parties. 134 I.C. 64=35 C.W.N. 977=1931 P.C. 229=61 M.L.J. 294 (P.C.). Where the mortgagor's (a Buddhist) wife dies leaving children, and the mortgagor states that he has transferred his right to another, subject to the mortgage, the transferee and children, though proper parties, are not necessary parties to a suit on the mortgage. 158 I.C. 828=1935 R. 315.

PARAMOUNT TITLE — Persons claiming paramount title are not to be made parties. 136 I.C. 728=33 Punj.L.R. 240. Also 138 I.C. 671=1932 C. 512, 1934 A.L.J. 1177, 144 I.C. 267=15 N.L.J. 17; 38 A. 488=43 I.A. 187=31 M.L.J. 571 (P.C.), 40 A. 584=46 I.C. 559=16 A.L.J. 639; 25 I.C. 233=12 A.L.J. 1088; 44 B. 698=57 I.C. 577=22 Bom.L.R. 815, 54 I.C. 806, 1928 Pat.H.C. 305, 40 I.C. 865, 24 I.C. 871=1 O.L.J. 261, 44 C. 425=21 C.W.N. 177=37 I.C. 277=27 C.L.J. 212. Their addition is bound to lead to confusion. 155 I.C. 156=1934 A.L.J. 1177=1935 A. 205. In a suit on a mortgage executed by a Hindu father, his sons who were impleaded as defendants pleaded that they had separated from their father 25 years earlier and claimed a paramount title in the property mortgaged and asked to be discharged. *Held*, that the question of their paramount title in the mortgaged property cannot be investigated in the suit, and that they must therefore be discharged from the suit. 18 N.L.J. 291. But see 22 I.C. 976=1914 M.W.N. 623, 102 I.C. 435, 39 M.

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L.T. 459, 100 I.C. 195; 4 R. 214=98 I.C. 11=1926 R. 208, 23 L.W. 664=1926 M. 744=96 I.C. 26. Also 40 I.C. 288=4 O.L.J. 261; 10 P.L.T. 645; 1927 S. 265; 1927 O. 607 (2); 1928 M. 764. They can be added where it may be convenient to decide such title in the suit 1935 N. 68. But joinder of persons claiming paramount title does not make the proceedings irregular 5 L.W. 615=40 I.C. 414. See *contra* 10 P. 234=130 I.C. 257=1931 P. 64. [38 A. 488 (P.C.); 32 C. 726, 33 C. 425, Ref.] But where a party has without jurisdiction gone to trial on the merits, he will not be allowed to plead after failing on the merits that his paramount title should not have been adjudicated upon. (*Ibid.*) Where in a mortgage suit defendant possesses both paramount title and interest in equity of redemption, he should not be allowed to rely on his paramount title and plead it, but in a subsequent suit he can plead his paramount title and cannot be estopped from pleading it as the question will not become *res judicata*. 58 C. 122=134 I.C. 892=35 C.W.N. 510. In a suit on a mortgage a third party claimed an interest in the fields, not in the mortgagor's interest. On their claim they had no right to redeem, so no decree should be passed against them. They can in no way be disadvantaged by the fact that their claim is not adjudicated on in the mortgage suit. 162 I.C. 731=1936 R. 198. The rule that in a mortgage suit persons claiming under a paramount title are not proper parties is not inflexible. An adopted son is a necessary party in a suit on a mortgage by the executrix of the estate of his deceased adoptive father. 11 I.C. 826=14 C.L.J. 108. See also 1935 N. 68. Where the non-determination of the title of persons claiming paramount title leads to inconvenience or hardship, it must be tried in the suit itself. 45 I.C. 691. Where in a mortgage executed by the son plaintiff seeks relief against the father also, the issue as to whether the property was the self-acquired property of the father, the son having no right to it, must be raised and determined in the suit itself and not left to be determined in execution. 107 I.C. 814=1928 M. 199 (2). See also 1928 M. 764. Where such a person is made a party and his title gone into, he cannot ask for a reversal of decree on the ground of his title not being triable in suit. 10 O.L.J. 263=1924 O. 19. Rights between legal representatives of a deceased plaintiff mortgagee *inter se* need not be gone into. 1927 M. 1071=107 I.C. 805. Where the plaintiff in a mortgage suit dies and only some of the representatives are brought on record and others not, the whole suit must be decreed. 1927 M. 1071=107 I.C. 805. See also 1926 C. 1192=96 I.C. 698. Order 2, R. 3 cannot apply to a case where the defendant is added as party in one capacity but pleads paramount title in another capacity. 1928 M. 764=113 I.C. 865. Vendee from mortgagor prior to mortgage, if proper party in a suit on mortgage. 1936 A.W.R. 157=1937 A. 251.

PRIOR MORTGAGEE.—A prior mortgagee

need not be added in a suit by a puisne mortgagee. 13 I.C. 182=1912 M.W.N. 41; 2 Pat. L.J. 118=1917 Pat.H.C. C. 194. Nor the purchaser of the prior mortgagor's rights. 88 I.C. 803. Where a prior mortgagee, on being joined in a suit on a subsequent mortgage raises no objection to his being joined as a party, and, does not object to the issues framed by the Court as to the genuineness or otherwise of his mortgage, but on the contrary accepts the issues and offers evidence in support of his title as a mortgagee and each party has full opportunity of adducing evidence as it wishes and the merits of the case have not been affected by the introduction of the issues, the Court has jurisdiction to decide the matters raised in the suit on the contention of the prior mortgagee being joined as a party. Having assumed the role of being a proper and a necessary party to the suit, he cannot, after the issues have been decided against him, contend that he was not properly joined as a party in the suit 164 I.C. 445=1936 R. 340. Where a prior mortgagee has allowed himself to be joined in a suit by the puisne mortgagee, he is bound to redeem the subsequent mortgage and he can therefore claim subrogation 25 N.L.R. 171=118 I.C. 54=1929 N. 135. The mere fact that the prior mortgagee was impleaded by mistake does not affect the nature of the decree that should be passed. 1930 A.L.J. 321=1930 A. 113. A prior mortgagee decree-holder who has obtained the decree without impleading the puisne mortgagee is entitled to use prior mortgage as a shield for prior payment, when he is sued by the puisne mortgagee on his mortgage 43 A. 469=48 I.A. 365=42 M.L.J. 15=1922 P.C. 11 (P.C.). In such a suit by the puisne mortgagee, the prior mortgagee purchaser cannot set up any higher rights than any stranger purchaser, but can set up only the amount of the decree made in his suit. 42 A. 364=47 I.A. 71=38 M.L.J. 419 (P.C.). Where a prior mortgagee is not impleaded, the decree on the puisne mortgagee's suit is not a bar to a suit by the prior mortgagee on his own mortgage. 47 C. 662=47 I.A. 11=38 M.L.J. 424 (P.C.) When the prior mortgagee obtains a decree in a foreclosure suit without impleading the puisne mortgagee, it is open to him subsequently to deposit the money due to the puisne mortgagee and redeem him. 20 A.L.J. 401=44 A. 462=1922 A. 135. But see 40 M.L.J. 126=62 I.C. 833. A puisne mortgagee decree-holder purchaser can redeem the prior mortgage, or at least his rights as second mortgagee are not extinguished 38 B. 24=21 I.C. 39=15 Bom.L.R. 817. A foreclosure decree without impleading a subsequent mortgagee amounts to nothing 39 I.C. 849=13 N.L.R. 69; 1912 M.W.N. 41. The object and nature of relief claimed should be clearly stated, when a prior mortgagee is made a party. Otherwise the decree will not bind him. 58 I.C. 33=1 Pat.L.T. 629. Where the puisne mortgagee impleaded the prior mortgagee and claimed priority over him, a defence ought to be raised. Where the priority raised

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was adjudicated, it would be *res judicata* in a subsequent suit by the prior mortgagee 4 Pat.L.T. 108=2 P. 435 A first mortgagee, in possession under a prior sale, may always shield himself under his mortgage and purchase though his right to possession may be defective. 1 Bur L.J. 217=1923 R. 107, 9 R. 1=132 I.C. 281=1931 R. 105 See also 33 I.C. 243

PUISNE MORTGAGEE.—A puisne mortgagee must be joined as a party to a redemption suit. 28 A. 162, 28 A. 174 (F.B.). He is a necessary party to a suit by the prior mortgagee 81 P.W.R. 1916=33 I.C. 815=86 P.R. 1916. Also 39 D. 138=27 I.C. 1005, 17 Bom. L.R. 144. But see also 9 A.L.J. 323=14 I.C. 674 (2)=34 A. 323 When he was not impleaded, and a second suit was brought by him, the prior mortgagee is entitled only to the decree amount on his mortgage and not to any interest subsequent to his decree 42 A. 364=47 I.A. 71=38 M.L.J. 419 (P.C.). Where he is not made a party, he is not bound by any order for sale obtained in such suit by the prior mortgagee Neither is he bound to pay off the decree on the prior mortgage if at the time of his own suit for sale the execution of the decree had become barred 40 A. 407=45 I.A. 130=35 M.L.J. 1 (P.C.). Also 115 I.C. 552=1929 P. 94 See *contra* 23 M.L.J. 284=17 I.C. 291=1912 M.W.N. 1119. A sale of the property at the instance of the prior mortgagee in a suit by him without impleading the puisne mortgagee as a party, does not affect the puisne mortgagee's right to redeem or sue on his own mortgage. 13 P. 364=1934 P. 648, 38 C.W.N. 1178, 21 M.L.J. 213=9 I.C. 513=9 M.L.T. 431, 58 I.C. 295=16 N.L.R. 215. See also 39 C. 527=39 I.A. 68=22 M.L.J. 468 (P.C.), 38 B. 24=21 I.C. 39=15 Bom L.R. 817; 81 P.W.R. 1916=33 I.C. 815=86 P.R. 1916, 44 I.C. 753=1918 M.W.N. 251=7 L.W. 420; 21 I.C. 554 Mortgage suit—Subsequent mortgagee not made party—Auction-purchaser taking possession of property from the subsequent mortgagee—Ejectment suit against purchaser—Maintainability. 45 C.L.J. 4=100 I.C. 420=1927 C. 259 See also 24 A.L.J. 661=1926 A. 480=97 I.C. 4 (2) Where in a mortgage suit one of the defendants is impleaded as a subsequent purchaser of the mortgaged property along with other defendants, and such defendant disclaims all interest under the sale and asserts that he has no claim upon the property conveyed thereby the Court should at once discharge him from suit without putting in issue the controversial points between defendants *inter se* and giving decision thereon. 27 N.L.R. 312=134 I.C. 274=1931 N. 161. Where a prior and a puisne mortgagee each brings a suit without impleading the other as a party, and the properties are sold by different parties, it is incumbent on the Court in a suit for establishing the priority of claim as between the purchasers, to grant relief according to equities on the basis of the exact position of the parties 37 I.C. 343=14 A.L.J. 1146. But see 28 I.C. 67=8

S.L.R. 264; 24 A.L.J. 661=1926 A. 480=97 I.C. 4 (2). Where a prior mortgagee gets a money decree on his mortgage without impleading a puisne mortgagee and purchaser of the property in execution, he could not claim the property free of the puisne mortgage. 29 I.C. 757 In a subsequent suit for redemption by a puisne mortgagee while in the prior suit he was not made a party by a prior mortgagee, the decree, should direct a redemption upon payment of what was found due on such prior mortgage up to date of sale. 36 A. 123=22 I.C. 387=12 A.L.J. 41. Also 33 A. 370=9 I.C. 670=8 A.L.J. 155; 38 I.C. 179=1 Pat.L.W. 269, 24 A.L.J. 661=1926 A. 480 Prior mortgagee not impleaded in second mortgagee's suit but second mortgagee impleaded in prior mortgagee's suit. The purchaser in the prior mortgagee's suit was entitled to priority as against the purchaser in the other. 1928 L. 505=112 I.C. 699 (2). The omission to implead a puisne mortgagee over a portion of the properties, does not render the suit wholly dismissable but affects only such of the properties as have been mortgaged to him 45 A. 484=21 I.C. 271=11 A.L.J. 749 Failure of a puisne mortgagee to appear and contest when impleaded estops him from claiming any priority as having paid over any prior lien. 29 I.C. 875=19 C.W.N. 947. Where a person is made a party and he claims priority as the assignee of a prior mortgage, it is not necessary to decide his priority 9 I.C. 643=9 M.L.T. 410 Where a puisne mortgagee was a party to the suit but not to a compromise decree passed therein, and execution was taken on the compromise decree, the puisne mortgagee's rights are not affected, and the proceedings in execution are a nullity 41 M.L.J. 547=15 L.W. 123=1922 M. 307. See also 58 I.C. 295=16 N.L.R. 215. A suit for sale of property on a subsequent simple mortgage can be maintained subject to the prior usufructuary mortgage, though the mortgagee in both cases is the same 50 I.C. 40 See also 69 I.C. 897=10 L.B.R. 360 Neither this rule nor any other provision of law requires the holder of a first mortgage to disclose his second over the same property. There is nothing to prevent him from obtaining a decree for sale on each of them in a separate suit. 12 O.L.J. 127=86 I.C. 748=1925 O. 379 (2). But see also 53 I.C. 753=6 O.L.J. 482 There is nothing in law to prevent the prior mortgagee from bringing a suit without impleading a second mortgagee Where the same person holds two mortgages, there is some risk of curtailment of some rights of the mortgagee when he chooses to sue separately on his mortgages. He may not be allowed to sell the properties in a subsequent decree when they were already sold in a prior decree 4 Pat.L.T. 546=2 Pat. 874=1924 P. 77. See also 50 A. 742=1928 A. 378=114 I.C. 38. The omission to implead the puisne mortgagee as a party to the suit within limitation time does not involve a dismissal of the suit. 2 P. 175=4 Pat.L.T. 698=1922 P. 651; 2 Pat.L.J. 118=1917 Pat.H.C.C. 194, 16 I.C. 674=10

Preliminary decree in foreclosure suit

2. (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

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A.L.J. 134 Suit for sale—Subsequent mortgagee joined beyond limitation—Whole suit cannot be dismissed—Decree can be passed subject to subsequent mortgagee's rights 101 I.C. 775=1927 A. 488 (1)

ATTACHING CREDITOR.—Where a decree-holder attaches the property of the judgment-debtor which is already mortgaged, the attaching decree holder does not acquire any interest in or charge on the mortgaged property which he attaches having regard to S.64, C.P. Code, and as such he is not a necessary party to a suit on the mortgage by the mortgagee I.L.R. (1936) N. 127=165 I.C. 939 (1)=1936 N. 209 Although it is open to the attaching creditor to come into the mortgage suit and claim redemption before the Court sale put an end to his attachment and to his character of attaching creditor, he is not entitled to disturb the title acquired by any person under the mortgage decree on the ground that he has not been impleaded in the mortgage suit (*Ibid*) The holder of a money decree against the mortgagor who has obtained an order for a receiver in execution of his decree is not a person having an interest in the mortgaged property or in the right of redemption so as to make him a necessary party to a suit on the mortgage under O. 34, R. 1. Such a person is not a party whose presence before the Court is necessary in order to enable the Court effectually and completely to adjudicate upon and settle questions involved in the suit The Court has consequently no power to add him as a party under O. 1, R. 10 (2). The fact that the decree in his favour is a consent decree which provides that the property comprised in the mortgage will remain charged for the decretal amount cannot give him the right to redeem the mortgage under S. 91 of the T.P. Act, when that decree has not been registered 164 I.C. 1009=40 C.W.N. 974 Attaching creditor not impleaded—Purchase by him in execution sale—Subsequent addition in execution of decree on mortgage—Pleas open. 4 A.W.R. 723=1934 A.L.J. 1085=1934 A. 1027 The amended S. 91 of the T.P. Act does not mention an attaching creditor as one of the persons entitled to redeem a mortgage and under the present law he can in no sense be said to be a necessary party to a mortgage suit. Assuming that he is a necessary party under that section before its amendment, the result of his non-joinder cannot be fatal to the rights of the mortgagee, but the obvious result would be that the rights of the attaching creditor would not in any way be affected either by the decree in the mortgage suit or even perhaps by the sale on the basis of the said decree. 163 I.C. 966=9 R.A. 105=1936 A.W.R. 595=1936 A.L.J. 708=1936 A. 512.

RECEIVER.—In a foreclosure suit instituted while the mortgagor was alive and he died and his representatives are declared insolvent, the Receiver is not a necessary party. 29 C.W.N. 771=86 I.C. 1042=1925 C. 785. A

Receiver appointed in partition suit previous to the mortgage suit is not a necessary party especially when his possession is not disturbed 7 P. 520=111 I.C. 57=1928 P. 304.

EXECUTOR.—In a suit on a mortgage by an executor under a Mahomedan will a decree can validly be passed against the executor alone as he represented sufficiently all persons beneficially interested within the meaning of O. 34, R. 1 1931 B. 533=33 Bom.L.R. 1056

OFFICIAL RECEIVER.—*Obiter*—The rights of a secured creditor over a property are not affected by the mortgagor being adjudicated an insolvent But Official Receiver to whom equity of redemption has been assigned by operation of law should be made a party to the suit on the mortgage and Official Receiver should get himself impleaded as a party thereto 39 C.W.N. 384.

SIMULTANEOUS MORTGAGES.—In a suit for sale by one of two simultaneous mortgagees without impleading the other, the whole property is liable to be sold and the other has only a right of redemption 10 I.C. 422.

O. 34, Rr 2-8 A LEGISLATIVE AMENDMENTS.—O. 34, new Rr 2 to 8-A have been substituted for old Rr. 2-8 by Act XXI of 1929. The reason for this substitution of these new rules has been explained as follows in the Report of the Select Committee: "This order relates to mortgage suits and its provisions were originally in the Transfer of Property Act (Ss 85 to 99), but were transferred to the C. P. Code in 1908. The amendment of the T. P. Act, particularly the provisions relating to mortgages, necessitated the amendment of Rr 2 to 8, 10, 11 and 15 of the Order

We propose to make the following amendments in this rule, *viz* —

(1) It should be expressly stated that the decree passed under this rule is "preliminary"

(2) In cl. (a) of the present rule, the Court is merely directed to take an account of what would be due to the plaintiff on account of (a) principal and interest on the mortgage, and (b) the costs of the suit. Under Ss. 72 and 76 of the T. P. Act, a mortgagee is authorised to spend money for certain necessary purposes in connexion with the mortgage security. Under S. 63-A of the T. P. Act, as proposed to be added, a mortgagee is allowed to spend money for improvements in certain circumstances. The above provisions also provide that the money so spent by a mortgagee should be added to the principal money. Clause (a) is, therefore, amended to make it clear that in taking an account sums spent by a mortgagee for necessary costs, charges and expenses in respect of the mortgage security, together with interest thereon, must be taken into account.

(3) Clause (a) of the present R. 2 provides that the account of the sum due to the plaintiff will be taken up to the date fixed for payment in the preliminary decree The date

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—

- (i) principal and interest on the mortgage,
- (ii) the costs of suit, if any, awarded to him, and
- (iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage-security, together with interest thereon; or

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so fixed is to be within six months from the date of the decree. Clause (b), however, which relates to the declaration by a Court of the amount due to a mortgagee, merely provides that the amount due at the date of the decree is to be declared. Although cl. (c) provides that the Court has to fix a date for the payment of the amount so declared within six months, no provision is made for awarding costs, charges and expenses incurred by a mortgagee in respect of the mortgage security subsequent to the date of the declaration or the decree. This seems anomalous. There is no reason why a mortgagee should lose subsequent costs, charges and expenses where the Court declares the amount. The scheme of O. 34 of the C. P. Code is to draw a clear distinction between a preliminary and a final decree; R 2 is amended to make it clear that the amount to be declared or found due on taking accounts should be up to the date of the preliminary decree. The defendant will then be in a position to know what sum he has to pay in order to claim redemption. Care is taken to provide in cl. (c) of sub-R. (1) of the amended rule that after tendering the amount so declared or found to be due, the defendant has to pay the amount which the Court may adjudge for subsequent interest and subsequent costs, charges and expenses. Rules 10 and 11 have been amended to empower a Court to adjudge the amount due in respect of such interest and costs.

(4) Although cl. (a) of this rule refers to the date fixed for payment of the amount found to be due on taking accounts, cl. (c) refers to the date within six months from the date of the declaration of the amount due by the Court under cl. (b). This appears to be an error. The date fixed for payment must be within six months from the date when the Court declares the amount due or, where it directs an account to be taken, from the date when such account is confirmed by the Court. Our amendment makes this clear.

(5) As the mortgagor or any other person seeking redemption, has to bear all costs and expenses of the redemption, in cl. (c) of sub-R. (1) it is made clear that the costs of re-conveyance or re-transfer by the mortgagee on payment of the amount due by the mortgagor shall be borne by the mortgagor or such other person.

(6) The proviso to sub-R. (2) to R. 3 provides for the extension of the time fixed for payment in the final decree. The power of the Court to extend the time fixed for payment is well recognised and is exercised at any time before a final decree for foreclosure is passed. The proper place for this provision is in the rule relating to the preliminary

decree. The proviso is, therefore, placed in R 2 as sub-R. (2). The expression "postpone the day" in this proviso has been replaced by the words "extend the time" to make it clear that the time can be extended even after the expiry of the period once fixed. Sub-R. (2) also makes it clear that the extension of the time fixed for payment must be subject to such term as the Court may fix. It is not fair that after the plaintiff has obtained a decree for payment of the amount due on the mortgage and when the payment has been already postponed for six months, the plaintiff should be made to wait for payment for a further period without getting compensation. A defendant who applies for an extension of time must be put on terms before his application is granted.

(7) As clauses (a) and (b) of sub-R. (1) will provide for the adjudication of the amount due to a mortgagee till the date of the preliminary decree, in sub-R. (1), clause (c), it is made clear that after the payment of that amount the defendant is bound to pay subsequent costs and subsequent interest due to the plaintiff till the date of actual payment, which may be on or before the date fixed in the preliminary decree or such other date to which the time for payment may have been extended under sub-Rule (2). It has been well established that the mortgagee can add to the mortgage-money the amount spent by him between the passing of the preliminary decree and the final decree (44 C. 448).

(8) It has been held that the right of a mortgagor to redeem the mortgaged property subsists till a final decree for a foreclosure is passed. (27 C. 705) Default in payment on the day originally fixed in the preliminary decree for payment or on the day to which the time for payment may have been extended by the Court does not *ipso facto* extinguish the mortgagor's right of redemption. It is open to a mortgagor to apply for extension of time till a final decree for foreclosure has been passed, and he can do so even after the expiry of the period once fixed. 39 M. 882, 28 B 102. Clause (d) of R 2, as at present worded, is not consistent with the above rulings. It provides that, if payment, as provided in the rule, is not made, the defendant will be debarred from all right to redeem the property. In sub-R. (2) of the amended rule, therefore, it is made clear that, on non-payment of the amount due, the plaintiff will have only a right to apply for a decree for foreclosure. We propose to make it clear that the right of the plaintiff to file an application arises not only when the amount adjudged due in the preliminary decree is not paid in full, but

- (b) declaring the amount so due at that date; and
(c) directing—

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also if any portion of the sums for subsequent costs and subsequent interest remains to be paid.

(9) Rules 2 to 8 of O. 34 do not specially provide for decrees in suits for foreclosure or sale in which, besides the mortgagor, other persons who are entitled to redeem, such as subsequent mortgagees or persons subrogated to their rights, are joined as parties. This omission was sought to be remedied by providing forms for decrees in such suits—Form Nos. 9 to 11 in Appendix D to the Code. Under O. 48, R. 1 of the C. P. C. forms are not binding and can be varied by the Courts. An express provision in O. 34 itself is necessary to give full statutory force to the forms. As such cases will be of varied type and cannot all be anticipated, it will suffice to enact in O. 34, that in such cases the rights of the parties will be regulated in accordance with the forms given in the Appendix, with such variations as the circumstances of the case may require. Provisions to that effect are embodied in sub-rule (3) of R. 2 and sub-rule (3) of R. 4. In a redemption suit by a mortgagor such difficulties will not arise. Consequential amendments have been made in R. 7 and 8.

We propose to amend this rule in accordance with the alterations made in R. 2. It is expressly stated that the decree made under this rule is final. For the reasons stated in paragraph (5) above, it is made clear in this rule that the payment by the mortgagor can be made at any time till the final decree for foreclosure is actually passed. It is also made clear that on payment of the amount declared or found to be due in the preliminary decree, together with the amount due for the subsequent costs and subsequent interest, the mortgagee can, on the application of the mortgagor, be ordered to re-convey or re-transfer the mortgaged property. The provision regarding the application by a mortgagor has been added to avoid difficulties which arise in such cases, as 50 B. 730. Owing to the absence of words to that effect in the original R. 8, the Court found it difficult to hold what article of limitation applied to a final decree on payment by the mortgagor. In sub-rule (3) of the proposed rule it is provided that on foreclosure the liability of the defendant not only in respect of the mortgage but for the costs of the suit also, is discharged and extinguished. The effect of a final decree for foreclosure is to vest the mortgaged property absolutely in the mortgagee and to extinguish not only the debt due on the mortgage but all liability arising in respect of the suit brought to enforce it. It is desirable that foreclosure, which is an exceptional remedy, should extinguish in toto the whole of the liability of the mortgagor.

We propose to amend this rule, which relates to a preliminary decree for sale, on the lines of R. 2. As by the amendment in the T. P. Act it is proposed to allow the remedy of foreclosure only in the cases of a mortgage by conditional sale and an anomalous mortgage providing the remedy of foreclosure, the power of the Court to grant the alternative relief of sale can only be exercised in the case of such an anomalous mortgage. By the very nature of the mortgage by conditional sale the Court cannot order a sale of the property. We propose to amend clause (2) by stating clearly that it applies only to an anomalous mortgage which provides for foreclosure. Sub-rule (3) is added to R. 4 on the same lines as R. 2 (3). It provides for a case where, besides the mortgagor, there are other parties in a suit for sale.

It should, however, be noted that in the case of a decree for sale there is no reason why the Court should extend the time for payment. Even after the sale is held, there is an opportunity to a mortgagor to redeem before the confirmation of the sale. No necessity, therefore, exists for empowering Courts to enlarge the time before passing a final decree for sale. 20 A. 354.

Section 89 of the T. P. Act which was replaced by R. 5 of O. 34, C. P. Code, contained at the end the words "and thereupon the defendant's right to redeem and the security shall both be extinguished." These words gave rise to the view that an order absolute under the section had the effect of extinguishing the rights arising out of the mortgage and substituting for them rights under the decree and the mortgagor could not redeem after the order absolute was made. (45 I. A. 130, 47 I. A. 71.) To avoid this result the words quoted above which occurred in S. 89 were omitted in the corresponding R. 5 of O. 34. No doubt is, therefore, left that the right of a mortgagor to redeem is not extinguished by the mere passing of a final decree. (42 A. 517. See also 48 I. A. 465 at 472.) We propose to lay it down definitely that the right of a mortgagor to redeem subsists till the confirmation of the sale held in execution of the decree passed against him under R. 4 or 7. We have, however, made a provision for compensating the purchaser when a mortgagor seeks to redeem after the sale has taken place but before it is confirmed.

The words 'any such sale' in R. 6 and its position after Rr. 3 to 5 led to the view being taken that the personal decree for the balance of the amount due to a mortgagor after the sale can only be passed in a suit by a mortgagee for sale, and not in a redemption suit by a mortgagor, although in a redemption decree in default of payment by the mortgagor a sale of the mortgaged property can be ordered. In 42 C. 294, it is held that as this rule does not

(1) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under

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require an application by a mortgagee for the passing of a personal decree for the balance of the mortgage-money, no period of limitation applies for claiming such relief. This view is not followed by other Courts. (40 A. 551.) This point is made clear by introducing the words 'on application by the plaintiff' in R. 6, and the words 'on application by the defendant' in R. 8-A."

O. 34, R. 2.—The words "derived title" in sub-clause (1) (c) (i) will apply to a sub-mortgage which is derivative mortgage. 20 A. at 401. This rule and R. 4 do not contemplate two successive suits on one and the same mortgage. 39 A. 506=41 I. C. 233. In executing mortgage decree Court can sell the items in a particular order to adjust the equities of the parties before it. 29 M. 217. In a suit where mortgagor claimed decree for money against mortgaged property and person of mortgagor, Court cannot direct possession to be given to mortgagee on default of payment of decree amount. It is bound to decree sale only under O. 34, R. 4. 167 I. C. 26=1937 Pesh. 31.

Accounts.—Relationship as mortgagor and mortgagee does not cease with the decree. 28 I. C. 571=21 C. L. J. 284. Mortgagee who pays arrears of revenue to save the property from sale, after the preliminary decree, has a charge for the amount over the property. 43 I. C. 190=12 Bur. L. T. 36, 144 I. C. 392=1933 R. 112. Accounts should be taken before final decree. Provision for taking accounts in execution is not in accordance with law. 15 I. C. 362=1912 M. W. N. 400. See also 23 M. L. T. 158=7 I. W. 269, 5 P. L. J. 595. Compromise of suit by same defendants.—Necessity of evidence to found decree against others.—Failure to take accounts is fatal. 31 C. W. N. 804=1927 P. C. 17=52 M. L. J. 407 (P. C.).

Costs.—Costs in suit form part of the entire amount to be realised from the property. 41 C. L. J. 607=1925 C. 1135. In absence of express provision to recover costs personally, mortgagee can add costs of appeal to mortgage security. 45 A. 630=21 A. L. J. 617, 41 A. 473=17 A. L. J. 582. See also 129 I. C. 554=1931 A. 124. Court can order costs to be recovered personally if there is a condition to that effect in the mortgage-deed, and an appeal lies from such an order. 47 I. C. 542. But where mortgagor has chosen to raise an untenable defence, it is proper to direct him to pay costs if the security is not sufficient. 52 B. 459=108 I. C. 794=1928 B. 123. When a final decree for foreclosure is passed, it is in lieu of principal and interest as well as costs of suit. 88 I. C. 203=1925 O. 351.

DATE OF PAYMENT.—Effect of fixing a

time for payment in a compromise mortgage decree in a foreclosure suit is that ownership passes to the mortgagee when the payment was not made in time. 2 L. 53=3 L. J. 68. See also 58 P. L. R. 1919. It is not an absolute rule of law that less than six months cannot be allowed for redemption. 31 C. W. N. 804=1927 P. C. 17=52 M. L. J. 407 (P. C.).

EXTENSION OF TIME.—Where a preliminary consent decree for payment in instalments is passed, decree-holder must apply for final decree before proceeding to execute, and Court can extend time. 1922 N. 182. See also 1928 N. 333. But see 9 C. 771=4 Bur. L. T. 43. See also 10 I. C. 536=14 C. L. J. 648. Payment after final decree cannot be accepted. 32 I. C. 779. The words "good cause" must be literally interpreted and is not to be assumed from non-payment or delayed payments. 26 I. C. 701=10 N. L. R. 150=1930 N. 55 (1)=119 I. C. 680; 116 I. C. 511=1929 N. 263, 122 I. C. 443=1930 N. 198, 55 I. A. 207=55 C. 821=32 C. W. N. 796=47 C. L. J. 607, 28 L. W. 9; 109 I. C. 467, 1928 P. C. 139, 55 M. L. J. 31 (P. C.). Extension is not a matter of right but is discretionary. 39 M. 882=31 I. C. 200. In foreclosure suits discretion must be exercised liberally. 90 I. C. 936. Where appellate Court confirms lower Court's decree the time fixed in the preliminary decree runs from the date of the preliminary decree. 16 I. C. 799=14 M. L. T. 194. See also 63 I. C. 799, 7 P. 76. Appellate Court can extend time for payment and fix a date itself independently of lower Court's date. 66 I. C. 673=8 O. L. J. 407. Until an order for foreclosure absolute in proper form is made, mortgagor can, upon a proper application, redeem the mortgage. 27 C. 705. And the mere fact that the mortgagee has been put in possession does not matter. 25 A. 231. See also 23 M. 133. Court can extend time when application for final decree is filed and no further separate application is necessary. 21 N. L. R. 47=1925 N. 291.

FINAL DECREE.—After final decree an appeal on preliminary decree is not open. It may be amended as an appeal on the final decree. 33 C. L. J. 414=61 I. C. 923=25 C. W. N. 776. The mere fact of an instalment decree having been passed in a mortgage suit by consent of parties does not dispense with a final decree before execution. 1928 N. 333=25 N. L. R. 175. Where a preliminary decree was passed on a mortgage by a Hindu father, for the entire amount, but the mortgagor's sons obtained a decree declaring the mortgage to be binding for a smaller sum only, the mortgagee should ask Court at the time of the final decree to re-affirm his right, if he wanted the balance to continue as a mortgage debt, to incorporate it in that decree also. 1929 A. 15=26 A. L. J. 374.

clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to defendant, or to such person as the

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FORM OF DECREE.—In a suit by one co-owner for redemption of the whole mortgage. Court can ascertain the plaintiff's share and pass a decree both for partition and redemption. 32 M.L.J. 489=39 I.C. 46.

INTEREST.—The question as to rate of interest in mortgages is to be determined under O. 34 and not S. 34. 1927 P.C. 1=54 C. 161=54 I.A. 1=52 M.L.J. 373 (P.C.). Section 34 does not give any jurisdiction to Court with regard to interest after the date of the suit in cases to which O. 34, Rr. 2 and 4 apply, and further since R. 11 makes full provision for payment of interest during the period while the matter rests within the domain of contract, the discretion under S. 34 cannot be exercised in mortgage suit where the law of *dandupat* prevents the inclusion of any interest *pendente lite* in the calculation. 27 N.L.R. 312=134 I.C. 274=1931 N. 161. [26 C. 39 (P.C.); 34 C. 150 (P.C.), 54 C. 161 (P.C.), Foll.], 1935 P. 98. See also 130 I.C. 159=1931 N. 88. Interest after date of suit when not provided for in judgment, must be deemed to have been refused. 37 B. 326=40 I.A. 68=17 C.W.N. 573=25 M.L.J. 101 (P.C.). Court has power to award interest in final decree when by inadvertence it is not provided for in preliminary decree. 42 I.C. 625=2 P.L.W. 208. Mortgagee can get a decree for interest on the amount decreed from date of suit to date of realization 37 P.W.R. 1911=10 I.C. 846. As to rate of interest up to date of decree, see 1935 P. 98. Mortgagee is ordinarily entitled to interest at rate stipulated in bond till date fixed for payment. From that date to date of realization he is entitled to reasonable interest. 31 C. 138. Also 36 A. 220=12 A.L.J. 283, 18 C. 965=17 C.L.J. 221, 17 C.W.N. 457=17 C.L.J. 120; 20 I.C. 917=1913 M.W.N. 649, 30 C. 953, 31 C. 138; 29 A. 322, 29 C.W.N. 118=85 I.C. 218. Though it is correct to allow interest at the bond rate up to the expiry of the period of grace, there is nothing in the Code compelling Court to do so. The statutory authority for allowing interest at bond rate beyond the date of the preliminary decree appears to be in O. 34, R. 11 and even that only says that the Court "may" order. 140 I.C. 104=1932 P. 332. Court must award interest at contract rate even after the date fixed for redemption though the mortgage deed is silent as regards the same. 28 I.C. 195=2 L.W. 236. Interest subsequent to date fixed for redemption is calculated on the aggregate of principal, interest and costs declared to be found payable on the date

fixed for redemption. 42 M. 465=36 M.L.J. 288. Also 31 I.C. 320. Court can relieve penal interest or reduce it when the transaction is substantially unfair. 29 C. W.N. 118=85 I.C. 218=1925 C. 268 (2), 34 I.C. 745=19 O.C. 166. In a preliminary decree payment of interest till realization means interest up to the days of grace. 2 Pat L.T. 78=5 P.L.J. 598. If mortgagor wishes to redeem earlier than the date fixed for payment, he must pay interest up to the day so fixed, and not only up to the date of his payment. 49 I.C. 160=12 S.L.R. 59. Interest at the contract rate need not necessarily be given after date fixed for redemption. 29 A. 322. Also 6 Pat. L.T. 459=88 I.C. 323=1925 P. 455. After date fixed for payment in the decree, interest must be allowed at Court rate and not at a contract rate. 10 I.C. 695=7 N.L.R. 14. The period for payment fixed in the preliminary decree cannot be extended by an unsuccessful appeal either by the mortgagor or mortgagee, so as to secure interest at contract rate. 17 C.W.N. 457=17 C.L.J. 120. See also 7 P. 76. Though in a previous decree which has become inoperative no future interest was allowed, it does not bar the allowing of interest in a subsequent fresh suit. 58 P.R. 1915=30 I.C. 104.

NOTICE.—Notice to mortgagor between preliminary and final decrees not necessary. 24 A.L.J. 914=1926 A. 757=97 I.C. 277 (27 M. 40; 29 C. 644, Rel. on.)

PAYMENT INTO COURT.—The payment must be in Court. No other settlement can be recognised. 12 P.R. 1913=16 I.C. 987. Also 42 M. 61=35 M.L.J. 579, 30 L.W. 551=1929 M.W.N. 807. But see *contra* in 25 C.L.J. 553=21 C.W.N. 920, 27 I.C. 919=11 N.L.R. 16, 57 I.C. 473=5 P.L.J. 672. No unratified adjustment can be recognised, even though the adjustment was agreed upon even before the passing of the preliminary decree. 54 I.C. 137=37 M.L.J. 356.

MODE OF CALCULATION.—The period of six months fixed in the preliminary decree runs from date of that decree and not from date of dismissal of an appeal from that decree, in the absence of enlargement of time by appellate Court. 25 C.W.N. 440=36 C.L.J. 159. Also 37 I.C. 779; 104 I.C. 730=1927 P. 345=8 P.L.T. 597. When accounts are directed to be taken, date of payment should be fixed within six months from date of declaring in Court the amount due on taking accounts. 27 I.C. 813=21 C.L.J. 75.

CONSENT DECREE.—Where a consent decree for instalment payment is passed whether execution can proceed even with-

defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall, also, if necessary, put the defendant in possession of the property; and

(11) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require

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out a final decree. 10 I.C. 536=14 C.L.J. 648. See also 1922 N. 182, 1928 N. 333 =111 I.C. 294.

FINAL DECREE.—An application for final decree is expressly required and necessary. 1 Pat. L.J. 368=38 I.C. 385. Also 51 I.C. 881=4 Pat. L.J. 347. No notice need be given to the judgment-debtor before order absolute for foreclosure is made. 39 C. 644. See also 27 M. 40. But see 42 I.C. 750=20 O.C. 268. But an *ex parte* order can be set aside. 32 C. 253 (F.B.). See also 27 A.L.J. 370, 119 I.C. 240=1929 A. 279. Right to redeem revives even after foreclosure, if mortgagee pursues his remedy on the personal covenant. 10 I.C. 748=13 Bom. L.R. 162. Suit by the holder of two independent mortgages over same property—Sale subject to mortgages—Form of decree. 8 Pat. L.T. 255=98 I.C. 968=1927 P. 47.

LIMITATION—When mortgage decree was passed before the new Code an application for order absolute was governed by Art. 182 of the Limitation Act. 36 A. 350=27 M.L.J. 17=23 I.C. 649 (P.C.). Art. 181 of the Limitation Act applies to applications for final decree for foreclosure. 3 Pat. L.T. 565=1 P. 435. But see *contra* 30 I.C. 719=42 C. 294. The passing of final decree is not a process in execution for the purpose of limitation. 39 M. 488=28 M.L.J. 491. There is no limitation for an application to pay money into Court as it is a continuing right till final decree. 25 I.C. 752=17 O.C. 347.

MERGER.—The mortgage debt merges in

the final decree. 42 A. 304=47 I.A. 71=38 M.L.J. 419 (P.C.), 40 A. 407=45 I.A. 130=35 M.L.J. 1 (P.C.). See also 35 A. 250=18 I.C. 923. For the same reason no interest can be demanded on the mortgage amount after the mortgagee has purchased the properties in execution and been put in possession. 21 I.C. 593. On account of this merger no payment after final decree can be taken to be a payment by way of redemption. 23 O.C. 334=60 I.C. 213. The merger does not affect the security though the security becomes merged in the decree. 27 I.C. 780=21 C.L.J. 104. The view that the prior mortgage subsists even after passing of the final decree is no longer law. Such a view was expressed in 44 I.C. 753=7 L.W. 420.

RIGHT OF REDEMPTION—The right of redemption exists even after preliminary decree till passing of final decree even though the six months allowed has passed. 70 I.C. 152=26 C.W.N. 532. Also 18 I.C. 357, 130 I.C. 196=1931 A. 223=1931 A.L.J. 265. The right of a puisne mortgagee to redeem survives even after a final decree in a suit by a prior mortgagor to which he was not a party. 49 C. 626=1922 C. 23. As to rights of a purchaser at a sale by prior mortgagee, when the decree is in favour of the puisne mortgagee is allowed to be barred. See 83 I.C. 1033=1925 A. 6.

APPEAL—The fact that an appeal has been preferred does not operate to stay proceedings under this rule. 1930 P. 227. Order declining to extend time cannot be appealed against. 124 I.C. 241 (1)=1930 N. 240.

3. 1[(1) Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree, and also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.]

4. 1[(1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in clauses (a), (b) and (c) (i) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final

Leg Ref.

¹ Substituted by S 4 of L. P. Amendment Supplementary Act, (XXI of 1929)

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O. 34, R. 3 SCOPE OF.—Power of Court to amend preliminary decree. 147 I.C. 788 = 11 O.W.N. 35 = 1934 O. 45. It is open to the parties to contract themselves out of the provisions of R. 3 and agree to have a consent decree passed in such terms as would make it operate as a final decree at once, or even to modify a preliminary decree for foreclosure or sale by agreed terms and conditions as to obviate the necessity of getting it made final through Court under this rule. But the intention of the parties as expressed in the terms of the compromise on which the decree is based has to be determined and given effect to in all such cases. *Held*, in this case, that in spite of the variation in the terms of the original preliminary decree for foreclosure, the parties intended to treat it essentially as a preliminary decree which required to be made final under R. 3. 143 I.C. 787 = 29 N.L.R. 227 = 1933 N. 164. But an undertaking given by the mortgagor in the deed of compromise that he would not oppose the application for making the preliminary decree final would not avail the mortgagee, for directly the application is made, under R. 3 for making the preliminary decree final the mortgagor gets a statutory right to pray for extension of time for good and sufficient cause. 143 I.C. 787 = 29 N.L.R. 227 = 1933

N. 164. Rule 3 should not be read independently of other provisions of law, *e.g.*, S. 52, T.P. Act, and hence a final decree for foreclosure would extinguish not only the rights of the mortgagor but also the rights of his transferee *pendente lite*. 55 A. 235 = 144 I.C. 70 = 1933 A.L.J. 113 = 1933 A. 201.

O. 34, R. 4 SCOPE OF.—Where the words in a mortgage deed with regard to redemption after the period of three years has elapsed clearly indicate that the redemption was considered to be *deiquetur* at the end of the stipulated period and that it was not intended that the mortgagee should continue to occupy the land afterwards, it will be inequitable to refuse relief to recover the mortgaged money by sale of the property as plaintiff is entitled to a decree for the sale, as contemplated by O. 34. 160 I.C. 986 = 1936 Pesh. 43. Where the compromise between the parties on which the consent decree is based does not contain any provision which entitles the decree-holder to have the hypothecated property sold straightaway without obtaining a decree under O. 34, R. 4 but it merely declares the right of the decree-holder to obtain satisfaction of his decree by sale of the hypothecated property and is silent as regards the manner in which the sale of such property is to be obtained and does not contain any words to signify that the decree-holder can have the sale of the hypothecated property under the consent decree itself the provisions of R. 14 apply to the case. The decree-holder can

decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the

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proceed against the person and other property of the judgment-debtors in execution of the consent decree but if he desires to have the hypothecated property sold he should institute a suit under R. 4. 13 I C 603=1932 A 439=1932 A L J 486 Even in the case of anomalous mortgages a decree for sale and foreclosure can be passed. 18 I C 24 See also 115 I C. 839 (2)=1929 O. 282 Even in cases where the doctrine of marshalling does not strictly apply, the Court has power under R. 4 to direct in what order the mortgaged property shall be sold, and this right has now been expressly set forth in cl (4) of the amended R. 4 and although in that clause only subsequent mortgagees are mentioned, or persons deriving their title from them, it must be taken to include subsequent purchasers also 130 I C 817=1931 N. 91. A decree under this rule is only a decree *in rem* and not a final decree, and the suit in which such a decree is passed does not terminate until an order absolute is made under R. 5 23 A 331, 29 A. 76 A combined decree cannot be passed under this rule and under R. 6 31 C 792. But see 25 A 541; 29 A 12 A decree under this rule must not order defendants personally to pay costs 30 M. 464 Property comprised in the mortgage, which is subject to a charge for maintenance, can be sold 29 A 205 As to powers of a Receiver appointed under this rule in a mortgage suit against the decree-holder for account and possession, see 29 C W.N. 413=1924 P C 202 (P C.) Where a plaintiff in a mortgage suit has no right to a personal decree he cannot apply for enforcement of personal remedies Until auction sale he has no right to take possession of the property or any income of the property Under those circumstances the Court has no jurisdiction to appoint a Receiver under O. 40 or pass an order of attachment before judgment under O. 38, R. 5 or a temporary injunction under O. 39 150 I C 1035=1934 A L J 561=1934 A 772

CONSENT DECREE, RR. 4 AND 5—See 27 C W N 621=50 C 650 Also 4 Pat.L.T. 311=2 P 538, 49 A. 297=100 I C 59=1927 A 167 Rule 5 applies to a decree prepared under this rule when the decree directs the payment of the full amount due thereunder on a fixed date. 49 A. 297=1927 A 167=100 I C 57 In a compromise decree time for payment may be extended beyond six months 1929 A. 881. Rule 4 has no application to compromise decrees providing for instalment payment. 49 A. 297 See also 48 C L J 357=114 I C 156=1929 C. 11 A mortgage suit was compromised and the terms of compromise provided that mortgagor was to pay the decretal amount by nine annual instalments of Rs. 2,000 each, and in default of any in-

stalment, decree-holders were given right to realize the amount due by sale of mortgaged property without the necessity of getting a final decree prepared. Judgment-debtor committed default and applied for extension of time to make the deposit *Held*, that as the decree that was passed in the case was in no sense a preliminary decree for sale under O. 34, but a composite decree in terms of the compromise under O. 23, R. 3, the provisions of R. 4 did not apply and the Court had no power either under that rule or S. 148 to extend the time fixed in the compromise for payment of instalments. 9 Luck 387=147 I C. 559=11 O.W.N. 92=1934 O 44. See also 152 I C 854=1934 C 735. A decree passed in accordance with a compromise is a final one and capable of execution. 55 I.C. 816=5 Lah L.J. 67. In such a case it is open to the parties to dispense with the formal passing of a final decree. 134 I.C. 80=35 C W.N. 332=1931 C 546 Similarly a decree based on an award is itself executable. 4 Pat.L.T. 694=3 P 221

COMPROMISE DECREE.—Per *Dhavlé, J*—A compromise decree in a mortgage suit, expressly called a preliminary mortgage decree, and providing for payments in instalments and also providing that it is not to be made final until a specified date over twelve years later, does not come under R. 4 Rule 5 is not accordingly applicable to the case. 14 P 488=16 Pat L.T. 311=1935 P. 385. When a decree is in the nature of a composite decree (a money-decree with a lien on the property hypothecated, fixing a time for payment and in default ordering sale of property) no final decree is necessary 7 Lah L J 397=1925 L 640 Preliminary decree is not executable—Personal liability of mortgagor arises only when proceeds of sale are insufficient—Decree under R. 6 necessary 1926 M. 415=1926 M.W.N. 143=50 M L J 39=93 I C 99

FORM OF DECREE—Form No 10 of Appendix D applies to a case where a puisne mortgagee sues for redemption of the prior mortgage and foreclosure or sale on subsequent mortgage Where the puisne mortgagee impleads in his suit as a defendant a person who, in respect of the plaintiff's mortgage, is in the position of a prior mortgagee with regard to certain properties, and subsequent mortgagee with regard to the remaining properties as also with regard to an additional property, and does not offer to redeem the prior mortgage but impleads the defendant merely to give him an opportunity to settle the order in which the properties should be sold, the latter is not entitled as of right to get a decree in Form No 10 in respect of the properties covered by the prior mortgage. It is for the plaintiff to seek relief and a decree in favour of the prior mortgagee as such in accordance

sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with

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with Form No. 10 may result in hampering the relief which the plaintiff is entitled to get in his suit. In such circumstances, the Court would be acting properly in directing a decree to be drawn up in Form No. 9 with the necessary variations. 65 C.L.J. 1. With regard to the properties covered by the subsequent mortgage, the defendant is not entitled to get a mortgage decree for sale in respect of the additional property which is not included in the mortgage in favour of the plaintiff. Forms Nos. 9 to 11 mentioned in R. 4 (4) relate to the same property which is the subject-matter of the mortgage whether as between the mortgagor and the mortgagee or as amongst successive mortgagees. If the additional property is to be excluded from the decree for sale, it follows that the defendant is not entitled to get a personal decree. This view is consistent with para (4), cl. (v) of Form No. 9 (*Ibid.*) Where in a suit on the first mortgage the rights of the subsequent mortgagees are adjudged, it is necessary to safeguard their interests including the right to obtain an order that the property be sold. The subsequent mortgagees cannot be deprived of the right of putting up the property to sale in all circumstances. Para 7 of Form No. 9 of Appendix D must be interpreted as authorising the Court to pass suitable orders so as to safeguard the right of the subsequent mortgagees, if any, to obtain a final decree or to sell the property. 160 I.C. 165=1936 O.W.N. 139=1936 O. 183. Where sale is impossible, Court can give directions for the disposal of the fund which represents the property. 20 C.L.J. 469=19 C.W.N. 537. This rule should not be overlooked in framing mortgage decrees. 20 P.L.R. 1915=26 I.C. 913. See also 103 I.C. 437=1927 L. 445. Where a co-mortgagee sues for sale making the other co-mortgagee party defendant and the decree specifies the amounts to be paid to the plaintiff and to the defendant co-mortgagee, there cannot be said to be two decrees. 1930 A. 634. Where the decree is irregular not being in accordance with this rule, a sale held under it is not void. 41 M. 403=34 M. L.J. 463=45 I.A. 54 (P.C.) Preliminary decree made final by endorsement on preliminary decree—Absence of a formal decree is only a mere irregularity. 94 I.C. 58=1926 L. 364. Nature of subsequent mortgagee's right to marshal. See 1930 M. 178=125 I.C. 66.

INTEREST—The "subsequent interest" which R. 4 (1), before its amendment in 1929, provided for payment out of the sale proceeds could only be the interest on the decretal amount awarded under S. 34. 63 I.A. 114=15 P. 210=40 C.W.N. 328=1936 P.C. 63=70 M.L.J. 355 (P.C.) Mortgage decree prior to 1929—Interest from date

fixed for redemption to date of realisation—Award of—Power of Court before and after amendment. (*Ibid.*) Where in a mortgage-deed it is provided that the interest is to be made a charge on the property, the decree should be prepared on that basis, as the mortgagee is entitled to follow the mortgaged property for the full satisfaction of his claims under the mortgage. 1933 L. 941. Where in a mortgage suit interest is calculated at the contract rate up to the date *dis datus* the decree is subject to the rule of *dampnat* up to that date. 59 I.C. 121. Where preliminary decree in a mortgage suit provides for interest up to date of realisation decree-holder is entitled to such interest even though final decree does not give any express direction regarding the same (Nature of preliminary and final decree discussed) 130 I.C. 337=7 O.W.N. 1205=1931 O. 47. Interest up to realization at Court rate means interest on the whole amount due, i.e., principal and interest at the contractual rate. 26 O.C. 59=1923 O. 241. Interest to be awarded at the contractual rate up to date fixed for payment. 8 L. 721=103 I.C. 437=1927 L. 445; 1935 A.L.J. 1161=1935 A. 1003; even up to the extended time granted by appellate Court. 1930 P. 380. Interest should be calculated as ceasing from date of deposit of money in Court and not from date of removal by decree-holder. 145 I.C. 144=1933 L. 126 (1). Interest after date of sale in mortgage-decree—Court has discretion to grant or not. 1926 L. 11. See 8 L. 721. There is no provision which enables a Court which has passed a decree bearing interest to disallow further interest on that decree, except when the decree can be altered on review, or to correct a clerical mistake or to bring the decree in conformity with the wording of the judgment. 1933 R. 323. Where a decree fails to provide for the extinguishment of the right to redeem a fresh suit for redemption is not barred. 15 I.C. 15=10 A.L.J. 36. In a suit for mortgage money and personal decree, the stage at which the mortgagor should ask the Court for ordering payment by instalments and fixing the instalments would be reached, when decree-holder applied under O. 34, R. 6 to the Court to proceed against the person of the mortgagor. 167 I.C. 26=1937 Pesh. 31.

LIMITATION—Art. 181 of the Limitation Act applies to an application for passing of final decree. 48 I.C. 934=15 N.L.R. 36. There is no period of limitation for deposit of money directed by preliminary decree. It can be paid at any time before passing of final decree. 9 O. L. J. 14=1922 O. 33. Where there has been an appeal from preliminary decree, the period of 3 years fixed by Art. 181, Limitation Act, runs from date of decree of appellate Court and not from the expiry of the term fixed by preliminary

such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage-security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

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decree 54 I A 52=8 L 253=1927 P C. 25 =52 M.L.J. 366 (P.C.).

NATURE OF PROCEEDINGS.—Till passing of final decree suit is considered pending. Suit will abate if the legal representatives of a deceased plaintiff are not brought on record. 40 A 203=16 A L J. 85; also 33 I.C. 496=12 N L R 50 A final decree against a mortgagor dead at the time is void and incapable of execution 4 P L J. 240=50 I. C 529=1919 P H C C 105 (F B) An application for a final decree is not one in execution A second application therefore cannot be regarded as revival of an application which has been disposed of 43 I.C. 518=16 A L J. 143 See also 39 I C 849 =13 N L R 69 Where an *ex parte* mortgage-decree is set aside, the suit would be considered pending during the period when the proceedings to set aside the *ex parte* decree were pending 65 I C. 709 The rule does not expressly provide for the issue of notice before passing of final decree; yet an *ex parte* decree in such a case is liable to be set aside 1922 N. 175=67 I C 282; 120 I C. 332=1930 N. 136.

EXTENSION OF TIME FOR PAYMENT—Whatever may be the view before the Amending Act (XXI of 1929) it is now clear that under R. 4 (2) the Court that passed the preliminary decree could, on good cause being shown, postpone the date fixed by the Court from time to time before the plaintiff could be entitled to ask for a final decree under R 5 (3). 53 A 283=1931 A 386=1931 A. L J 508 (F B). Circumstances to be considered by Court regarding grant of time. 1933 R 323

PAYMENT INTO COURT—Where payment of a prior mortgage is directed before sale of mortgaged property, but does not specify the date of payment, the payment must be made within six months of the date of the decree. 43 A 320=19 A L J. 83. If a mortgagor pays into Court the amount determined to be due, it is a good tender though it may be finally adjudged that a larger sum is due from

him. 16 I C 374. Court should take into account payments by the judgment-debtor out of Court for purpose of determining the amount to be entered in final decree 1 P.L.T. 416=5 P L J. 672. Where a payment was actually made in Court by a judgment-debtor to the attaching creditor of the plaintiff, and it was noted to have been made in the presence of the presiding Judge, there is very little distinction between such a payment 'in' Court and a payment made 'into' Court. 158 I C. 419=1935 O W N. 1087.

COSTS—Ordinarily costs must be included in the amount due on the mortgage and the property must be sold for the total amount and decree for costs cannot be executed separately as a personal decree against the mortgagor. 129 I C 554=1931 A 124. After date fixed for payment interest on the costs awarded by the preliminary decree should be allowed 89 I C. 228=L.R. 6 A 479 See notes under R 2 Where the mortgagor appeals against the preliminary decree and the appeal is dismissed with costs, such costs also can be added to the mortgage security though, of course, the Court of appeal can order otherwise. As a matter of practice such costs are added to the mortgage money. 157 I.C 625=1935 O. 452.

APPEAL—It is generally expedient that proceedings for the preparation of final decree should not be stayed pending an appeal from preliminary decree because the mere passing of a final decree will not in any way affect the rights of the parties to the appeal from preliminary decree. 54 A. 344=136 I C. 75=1932 A 238=1932 A.L.J. 43, 13 P. 379=149 I C 40=15 P L.T. 205=1934 P 225 There is no duty on appellate Court to fix or extend time for payment 118 I C 670=1929 A. 677 Where a preliminary decree is passed in a mortgage suit and an appeal is preferred therefrom, a final decree can be prepared by trial Court at the end of the period allowed for payment of the mortgage debt 53 A. 283=1931 A. L J 508=1931 A 386 (F.B.)

(4) Where in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require.]

Loc. Ams.—[Allahabad and Oudh] O. 34, R. 4 —

After the words "the Court may" insert the words "of its own motion, or".

[Calcutta] Re-number sub-rules (3) and (4), R. 4, O. 34 as sub-rules (4) and (5) respectively and insert the following as sub-rule (3) —

"(3) The Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage debt, the mortgagor shall pay the balance personally." (Notification dated 3rd February, 1933.)

5. (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the

Notes.

O 34, R. 5.—Scope of, and how it differs from S 89, T P Act, see 90 I C. 746 This rule if overrides Art 166, Limitation Act—Sale in execution of mortgage-decree—Application to set aside beyond 30 days of sale but before confirmation—If barred. (1937) 1 M L J. 569 The amendment to O. 34, R. 5 by Act IX of 1929, has no retrospective operation 36 C W N 955 It is well settled that the law of procedure governs all pending cases from the time it comes into force, unless there is anything in the amending Act to the contrary The provisions of R. 5, as amended by Act XXI of 1929 which came into force on the 1st April, 1930 are, therefore, applicable to a sale which takes place thereafter, and the right to redeem is available to the judgment-debtor till the date of the confirmation of the sale 164 I C 53=38 P L R 259=1936 L. 562. R. 5 has no application to a compromise Decree is executable without final decree 106 I C. 395=1928 M. 38. Proceedings under this rule are not proceedings in execution of a decree, but in continuation of the original suit 29 C 651, 27 A 625 See also 25 M 537. Rule 5 recognizes only one method of payment into Court under preliminary decree and when no such payment is made Court is bound to pass the final decree 1926 M 1069=24 L.W 520=97 I C. 989 Where a preliminary decree expressly directs the defendant to make payment into Court, the Court is bound to pass a final decree for sale, if the money has not been paid in the manner directed by the preliminary decree, and cannot be asked to recognize a payment out of Court as an adjustment, compromise or satisfaction under O 23, R. 3. 158 I C 83=1935 L 168 However, in such cases, if the payment is admitted by both parties, the satisfaction based on such payment ought to be recorded under O 23, R. 3, in spite of its not being made into Court 155 I.C. 231=1935 O 313. By force of S. 141, the provisions of

O 9, R 14 are applicable to an application for a final decree on a mortgage and so before dismissing such an application for failure to serve the defendants, Court should satisfy itself that the terms of O. 9, R. 5 were complied with 1931 M W N 1002=1931 M 795 A decree-holder who attaches in execution of his decree a preliminary mortgage decree obtained by his judgment-debtor in a certain suit, has no *locus standi* to apply under R. 5 (2), for the preparation of a final decree 1936 A.L.J. 1154=1936 A 857 Under this rule the property which can be sold in execution of mortgage-decree is the mortgaged property only, and no other property, and therefore where property sold in execution of a mortgage-decree and bought by the mortgagee purchaser was not included in the mortgage suit or decree, but was fraudulently inserted in the sale certificate, the purchaser can get no more property than that which was really included in the mortgage-decree (27 B. 334 and 10 M. 241, Foll) 162 I C. 383=1936 R 127.

CONSTRUCTION OF RULE.—See 29 M. 37; 28 A 778, 1935 O W N. 541=155 I.C. 231=1935 O 313.

CONSENT DECREE.—There is nothing in law which prohibits the payment towards a compromise decree out of Court. 20 A L J 602=44 A. 668. Strictly speaking this rule has no application to a compromise decree—Compromise decree—No final decree made—Decree is executable 106 I C. 395=1928 M 38; 31 Bom.L R. 439 But, where a preliminary decree for sale based on a compromise is not only headed and described as a preliminary decree but expressly contemplates and provides for the passing of a final decree in certain eventualities, an application for a final decree should not be rejected on the ground that the decree being one based on a compromise, no final decree is required and that the decree passed in terms of the compromise is itself executable. 160 I C. 174=1936 O. 173. A mortgage of an impartible estate contrary to S. 4 of the

defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

Notes.

Madras Act II of 1904 cannot be validated by the device of a consent decree. The mortgagor can resist an application for a final decree on the ground the mortgage was not binding. 50 I.C. 577=37 M.L.J. 65.

EXECUTION PROCEEDINGS.—A prior mortgagee getting a decree without impleading a puisne mortgagee can execute his decree for sale. 43 A. 204=61 I.C. 942 (F.B.). Execution proceedings do not terminate with sale. If sale proceeds are insufficient the holder may take further steps to recover the balance. 35 B. 452=18 Bom.L.R. 661. Proceedings to get a decree absolute for sale are not proceedings by way of execution of preliminary decree but are proceedings in suit to obtain a final decree for sale which would be the only decree capable of execution. 136 I.C. 732=1932 L. 231=33 P.L.R. 138, 14 P. 488=16 P.L.T. 311=1935 P. 385. Decree-holder bound to apply for final decree, and barred from making an application for sale in an execution Court. 1929 A. 881. Where a preliminary decree was executed without objection by judgment-debtor, the order operates as *res judicata*. 26 M.L.J. 225=23 I.C. 390. In the execution of a mortgage decree executing Court has power to order sale of the property mortgaged, even though the property may be situated beyond local limits of its jurisdiction. (14 C. 661; 21 C. 639, 15 C. 667; 49 M. 746, 80 I.C. 901, Foll.) 14 L. 457=143 I.C. 574=34 P.L.R. 815=1933 L. 687.

FINAL DECREE.—Court-fee for an appeal against an order rejecting an application for a final decree is an *ad valorem* fee on amount claimed. 57 I.C. 67; also 39 C. W.N. 315; 35 A. 476=11 A.L.J. 801. It is on the appellate decree when an appeal is preferred against a preliminary decree, that the final decree ought to be passed. 39 A. 641=15 A.L.J. 734. Final decree can be passed even during the pendency of an appeal from the preliminary decree. 108 I.C. 751. Where a preliminary decree expressly directs the defendant to make payment into Court, Court is bound to pass a final decree for sale, if the money has not been paid in the manner directed by the preliminary decree, and cannot be asked to recognize a payment out of Court as an adjustment, compromise or satisfaction under O. 23, R. 3. 145 I.C. 117=1933 L. 168. A mortgage-decree passed under S. 15-B of the Dekkhan Agriculturists' Relief Act need not be made final. 25 Bom.L.R. 1214=48 B. 172. Once the final decree is passed the mortgage-deed as well as the right to redeem are extinguished so that the security cannot be the basis of a second suit. 40 M.L.J. 126=62 I.C. 833. Cf. 3 P.L.T. 232. A final decree is essential before execution can be taken. 42 B. 309=20 Bom.L.R. 481; also 32 I.C. 981. Omission to

draw up a formal decree is only a formal defect. 51 B. 125=1927 B. 131=100 I.C. 956. See also 94 I.C. 58. Notice to judgment-debtor is not prescribed by law before passing of final decree, but in practice it is given. 19 N.L.R. 124=1923 N. 320. If application is made within one year from date of the decree, no notice to defendant need be given. 1925 M. 506. But *ex parte* order can be set aside. 32 C. 2531 (F.B.). See also 30 L.W. 551=1930 M. 105. While it is not obligatory upon a Court to issue notice to judgment-debtors on application of decree-holder for a final decree on his mortgage, it is nevertheless advisable to do so and Court will not be acting *ultra vires* in adopting such a course. 1931 M.W.N. 1002=1931 M. 795 (1929 M.W.N. 867, Ref.). Where no date is fixed for the passing of final decree, notice is necessary. 29 L.W. 393=118 I.C. 831=1929 M. 393. A final decree extinguishes a personal covenant, but the charge subsists. Mortgagor's right to redeem remains in force till the actual sale and distribution of proceeds. 3 P.L.T. 232. Cf. 40 M.L.J. 126=62 I.C. 833. An application for final decree is essential and an application for execution cannot be treated as an application for a final decree. 1923 S. 14. An oral application is sufficient and it may be presumed when an order has been made. 87 I.C. 820 (2). When payment under preliminary decree has been made there is no necessity for an application for a final decree. 23 A.L.J. 405=47 A. 546. In a suit for sale on a mortgage only one decree for sale can be passed. 9 I.C. 835=8 A.L.J. 364. A transfer of a final decree for sale does not require registration. 86 I.C. 591=1925 O. 399. Mortgage suit.—One of the mortgagors dead before preliminary decree—Application for exoneration of his share filed after preliminary decree and before final decree is not maintainable. 49 A. 809=120 I.C. 1=1927 A. 589. Purchaser of equity of redemption obtaining assignment of mortgagee's rights has right to apply for final decree—Rights of assignee may be traced back to the date of suit itself. [45 C. 94 (P.C.). Rel. on.] 100 I.C. 338=1927 M. 560. Application for final decree against legal representatives—Defences open. See 123 I.C. 376=1930 A. 348. Where a preliminary decree is properly passed in a mortgage suit the final decree passed thereon is not invalidated by reason of any defect as to parties. Final decree is only voidable at instance of the heirs of the deceased mortgagor who have not been formally brought on record after death of the mortgagor during the interval. 37 C.W.N. 812=1933 C. 798. Question of personal liability for costs is one of construction of decree. 109 I.C. 63=1928 M. 604. See also under R. 2.

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the said decree, and, also, if necessary,—

Notes.

LIMITATION—Art. 181 of the Limitation Act applies to an application for final decree and time runs from date when the default occurred, *i.e.*, when payment ought to have been made. 22 C.L.J. 66=19 C.W.N. 473; 39 A. 532=15 A.L.J. 448; *also* 87 I.C. 746=1925 C. 1030. But *see* 29 I.C. 120=19 C.W.N. 470, *contra*. *See also* 32 I.C. 39, 25 C.W.N. 376=33 C.L.J. 260. When prior to 1909 an application for an order absolute was barred under Art. 17 of the Limitation Act, the present rule does not entitle the decree-holder to apply for a final decree. 22 I.C. 40. When time fixed for payment expired after the passing of the Code but the preliminary decree was passed prior thereto, Art. 182 applies. 48 I.C. 32=5 O.L.J. 572. When an appeal has been preferred on preliminary decree, period of limitation commences from date of the decree in appeal. 47 I.C. 206=21 O.C. 176; *also* 1 P. 444=3 P.L.T. 329. This applies also to cases where final decree has been passed by lower Court pending appeal from preliminary decree, and the appellate Court merely confirmed the preliminary decree [39 A. 641; 6 P. 24 (P.C.); 5 L. 257; 1930 M.W.N. 104 and 1933 M.W.N. 623, *Foll.*] 38 L.W. 946=66 M.L.J. 24. But *see contra* 41 I.C. 858=20 O.C. 205. A final decree in a mortgage suit can be pending after disposal of the appeal. 1926 A. 291=92 I.C. 608. Where after a preliminary decree for foreclosure was confirmed by appellate Court and a final decree was passed, an application was put in by the mortgagors for amendment of the preliminary decree by excluding proprietary rights in the mortgaged *sur* land, *held*, that the application was not maintainable. The decree that could be amended was the decree that was sought to be executed. Though the amendment of the preliminary decree would have the effect of automatically amending the final decree in cases where the final decree is passed either before the appeal is filed against the preliminary decree or during its pendency, that principle did not apply when the final decree is made after the decision of the appeal against the preliminary decree. 142 I.C. 880=15 N.L.J. 124. When after the limitation period has run against the plaintiff, one of the defendants applies to set aside the preliminary decree, this fact does not revive plaintiff's right to apply for final decree. 87 I.C. 746=1925 C. 1030. If a preliminary mortgage-decree under R. 4, purporting to be in terms of the compromise of parties, provides for payment of mortgage amount in instalments payable on fixed dates, has not been appealed against,

it becomes final and there is nothing to debar decree-holder from applying for preparation of the final decree under R. 5 within three years from the date of default in payment of an instalment. The fact that three years have elapsed from the date of the preliminary decree is immaterial. 130 I.C. 487=1931 A. 340=1931 A.L.J. 58. After a preliminary decree was passed in a mortgage suit, the application by the decree-holder for the preparation of a final decree was dismissed for default. Decree-holder died two years later and his sons applied for substitution of their names and the restoration of their father's application for final decree. Lower Court allowed the former and dismissed the latter on the ground that it was time-barred. *Held*, that the rights and liabilities of the parties having been fixed by the preliminary decree, lower Court ought to have passed a final decree, even though the application was out of time. 151 I.C. 145=11 O.W.N. 495=1934 O. 209.

ORDER ABSOLUTE.—On passing of an order absolute for sale, the mortgage right is extinguished and only the right under the decree subsists. 40 A. 407=45 I.A. 130=35 M.L.J. 1 (P.C.) (affirming 20 I.C. 59=11 A.L.J. 634). *See also* 55 I.C. 969=42 A. 364 (P.C.). An application for an order absolute under S. 89 of the T.P. Act is an application in execution. 40 B. 321=18 Bom.L.R. 38. An order absolute against a widow as mortgagor and one of her heirs brought on record after her death, does not bind the other heirs. 39 A. 67=14 A.L.J. 982. In an execution application a prayer for sale implies also a prayer for making the decree absolute. 34 I.C. 756=3 L.W. 468. Where a preliminary decree was passed before the passing of the new Code and the order absolute was made after the passing of the Act, no final decree need be passed. 4 P.L.T. 213=48 I.C. 245.

SECOND ORDER.—A second order absolute for sale can be obtained for the amount for which the first order was obtained, including the interest since accrued due. 25 A. 264. Also for selling portion of mortgaged property not sold under the first order. 25 A. 212.

POWERS OF COURT.—At the time of the passing of the final decree Court has no power to go behind the preliminary decree. 27 A.L.J. 425=115 I.C. 462=1929 A. 252. Plaintiff in the application for final decree need not give the description of the property, unless he desires to omit any property. 27 A.L.J. 1097=117 I.C. 102=1929 A. 551 (1). This rule says nothing about the specification of the mortgaged property. All it says is that the mortgaged property

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser

Notes

which the plaintiff is entitled to sell shall be sold 38 A 398=34 I C 79. Court may direct that the interest of mortgagor shall be put up for sale in the first instance, and if insufficient, then his son's if the son also promised to pay the amount. 36 B. 68=13 Bom L R 1161. The rights of the mortgagee under a final decree for sale cannot be interfered with by Court by intercepting the rents or profits or by the appointment of a Receiver. 43 I C 22. Court is not justified in fixing instalment where amount is agreed to be paid in lump sum 1930 L 132. Court can fix the order in which the properties are to be sold 36 I C 516=4 L W 327, 31 C.W N 521=101 I C. 124=1927 C. 522. But see 51 I.C 444=4 Pat L J. 207. Court has no power to extend time after final decree is passed in a suit for sale 9 O & A L R 319=1924 O. 179. A mortgagee decree-holder is not entitled to dictate to Court the order in which the properties should be sold though he has a paramount right to have his claim satisfied by sale of every part of the mortgaged property. Court has full power to regulate the order in which and the conditions subject to which the properties should be sold 53 A 391=129 I C 708=1931 A L J. 108. When mortgage-deed provides in what order properties are to be sold, it is not open to the decree-holder to change that order. 51 I C. 444=4 Pat.L J 207. Properties belonging to a stranger vendee from the mortgagor need not be sold prior to selling those of judgment-debtor 22 M L J. 125=12 I.C 429. Applications for passing final decree could be dismissed on the ground that list of mortgaged property was not given and because of mistake in calculating interest 49 A 592=1927 A. 439=101 I C 676. Dismissal of an application for a final decree in a mortgage suit for failure to pay batta cannot be construed as a dismissal of the suit itself; after a preliminary decree has been passed, Court has no power to dismiss the suit. Nor does the application preclude another application for the same purpose. 140 I.C. 324=63 M L J. 719=56 M 310.

RIGHT OF REDEMPTION—After the dismissal of an application under O 21, R 90, and before confirmation of sale, if judgment-debtor pays the necessary amount and applies to have the sale set aside, Court under O 34, R 5 as amended must set aside the sale, notwithstanding that the applicant by his own actions and manoeuvres prevents the confirmation of sale for a long

period R. 5 (amended) as it stands enables judgment-debtor to apply at any time before confirmation. 152 I.C 1059=38 C. W N 924=1934 C 822. Till actual sale right of redemption subsists. 18 A.L.J. 622=42 A 517. Also 9 I C 158, 34 P.L R. 373=142 I C 313=1933 L 361. But see *contra* 43 I C. 399. Where a mortgagor wants to redeem the property after the decree for sale obtained by the mortgagee, he must pay the amount mentioned in the mortgage-decree for redemption. He cannot ask the mortgagee to account for the profits subsequent to the date of the decree for sale as the mortgagee is deemed to have given up all rights under mortgage after such decree. If mortgagee has realised anything unlawfully, mortgagor may be entitled to recover the same by separate proceedings. 34 P. L. R 373=142 I C 313=1933 L 361. A final decree for sale if not executed within the period of time allowed by law will not bar a subsequent suit by mortgagor to redeem. 86 I C 527=1925 M 1191. The right of a subsequent mortgagee, who is a party to a suit on a prior mortgage, to redeem the prior mortgage continues only up to date of the confirmation of the sale in execution of the decree obtained in that suit. 1 P.L J. 261=37 I C 433. On this rule, see also 33 C 890, 31 C 863, 28 A 28, 26 A 185, 28 C 73, 28 A 193; 26 A 318, 26 A 504. See 25 A 42. In a sale held in pursuance of R. 5, the stranger auction-purchaser acquires the right of the mortgagee and also of the mortgagor and it cannot be said that the right of redemption remained in the mortgagor after sale or in any event after confirmation thereof 35 C W N 877. Even where purchaser is not a stranger but the puisne mortgagee himself, his purchase is competent and then too the mortgagor's right to redeem the first mortgage is extinguished 59 C 117=35 C W N 877=1932 C 126.

APPEAL—An order directing drawing up of a final decree is not a decree nor an appealable order within the meaning of O. 43 57 M 437=148 I C 134=1934 M. 198=66 M.L J. 178. See 25 M 244 (F.B.). Appeal from a preliminary decree may be preferred even after passing of final decree. At least Court can order amendment to convert it as an appeal from the final decree also. 106 I.C. 128=1928 C 167. Where after a preliminary decree for foreclosure was confirmed by appellate Court and a final decree was passed, an application was put in by mortgagors for amendment of preliminary decree by excluding proprietary rights in the mortgaged *sir* land, *held*, that the applica-

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

[Madras].—"Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf and after notice to all the parties, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of Rule 4".

6. 1[Where the net proceeds of any sale held under the last preceding rule

Leg. Ref.

¹ Substituted by T P Amendment Supplementary Act (XXI) of 1929)

Notes.

tion was not maintainable 142 I C. 880. When passing a final decree Court can recognise a payment made out of Court even though it has not been certified. 20 A L J. 602=44 A. 668. At the time of final decree Court can set right any patent error or omission which is discovered in the preliminary decree 38 A 398=14 A L J. 502. An application for execution may be treated as one for final decree though the latter has not specifically been prayed for 7 L L J. 397=1925 L. 640 Suit for redemption of mortgage—Mesne profits left unascertained—Application for ascertaining mesne profits—Nature of—Decree in such a case 92 I C 314=1926 M 305. Once an application for final decree is dismissed only an appeal lies and no second application can be filed 42 M L J 51=16 L W. 198=1922 M. 65. See also 137 I.C 273=1932 L. 214=33 P. L R 56 (42 M. 52, Foll.). When an appeal is preferred from a decision of a Court dismissing an application under this rule, it is not necessary to make the auction-purchaser a respondent 164 I C. 53=38 P.L.R 259=1936 L. 562 Appeal from preliminary decree dismissed with costs—Final decree already passed—Application for its amendment so as to include costs of appeal—Order allowing application—Effect of 155 I C 495=1935 A.L.J 289=1935 A. 606

O 34, R. 6.—An unpaid vendor who has a statutory charge on the property sold by him, has all the right of a simple mortgagee under S. 100 of the T. P. Act. In a suit to enforce the charge, he can, when the net proceeds of the sale have proved insufficient and if the balance is legally recoverable from the defendant-vendee, claim a personal decree for such amount 157 I C 533=1935 A.L.J. 279=1935 A. 411. The object of the present rule is to benefit the mortgagor and if he waives his right by consenting to a money decree he cannot subsequently object to the mortgaged property being sold in execution of such decree 9 I C 939=9 M.L.T 261. Rule 6 makes no specific reference to Form No 8 in the Appendix to the Code and is not controlled

by the latter Held, that an application for a personal decree is governed by Art. 181, Limitation Act, and time commences to run from date of the order confirming sale In this connection the fact that the taxation of costs has not been completed is immaterial. 60 C. 19=143 I.C. 679=1933 C 251 If a personal remedy against the mortgagor is barred the decree ceases to be a decree for payment of money and Rr 18 and 19 of O 21 will not apply because there is no possibility of there being a decree enforceable against the person and other property of the mortgagor 143 I C. 542=14 Pat L.T 189=1933 P 210 (2) Where consent preliminary decree was passed in respect of mortgaged property outside original jurisdiction of Rangoon High Court and later personal decree was applied for after exhausting the properties, question of jurisdiction cannot be raised at that stage 167 I.C. 80=1937 R. 12.

SCOPE OF —Where the mortgaged property cannot be sold at all, no question of the net proceeds of the sale being insufficient arises and O 34, R. 6 has no application 1935 L 336 Decrees passed under this rule are supplemental decrees, separate and distinct from the original decree 21 C 26 Application under this rule is not an execution application It is by itself the starting point of a fresh simple money decree. Order 9 would apply to it. 124 I.C. 729. Rule 6 only says "any sale" It does not lay down that the sale must be of entire mortgaged property Even if only a portion of mortgaged property has been in fact sold and the remainder is no longer available for sale, owing to the action of other claimants, and not through any act or default of the mortgagee, the latter is entitled to a personal decree under R 6. 9 O W N. 1128, but not where the other portion is no longer available for sale owing to the act of the mortgagee himself in releasing it in favour of one of the heirs of the mortgagor on receipt of a certain sum of money from him 166 I.C. 673=1937 O.W.N. 100=1937 O 252. See also 164 I C. 817=1936 O.W.N. 732 (Release in favour of a subsequent purchaser) Where a mortgage decree merely declared a charge on the properties, it is to be construed as a decree for

Recovery of balance due on mortgage in suit for sale

are found insufficient to pay the amount due to the plaintiff, the Court, on application by him may, if the balance is legally recoverable from the defendant

Notes.

sale and the present rule is applicable thereto. 30 I C. 280=2 L W. 689. Where a decree for sale becomes inoperative on the mortgagor being declared not to have been the owner of the mortgaged property at the date of mortgage, R. 6 can have no application. Plaintiff cannot obtain a simple money decree before the sale of the mortgaged property and the sale proceeds proving insufficient to satisfy the mortgage money. 136 I C 829=1932 A L J. 317=1932 A. 358. Where the mortgaged property had not been sold owing to a third party having been declared to be the owner thereof, *held*, that the mortgagee could apply for a personal decree 15 L. 607=147 I C. 1018=35 P L R 17=1934 L. 174. Or where it was sold in execution of decree on prior mortgage, and no balance was left after satisfying it 37 P L R 285=1935 L 850, *See also* 158 I C 422=1935 O.W.N. 1081. Or where it could not be sold on the ground that it was ancestral 1935 L 536. "Amount due" means the amount to recover which decree for sale was passed 1929 A 15. But *see* 39 C W N. 1229, where it was held it included any enhanced interest agreed to be paid by mortgagor in consideration of postponement of sale in execution. The words "the amount due" includes costs 30 M 464. Where a decree based on compromise was substantially in accordance with Rr 4 and 5 of O 34, and where the proceeds of the sale were not sufficient to satisfy the decree, *held*, that the mere fact that the sale was held under the compromise decree did not preclude an application under this R 6, for a personal decree 10 O W. N 1097=1933 O. 520 *See also* 1933 O 214=10 O W N 223=144 I C 661. In a suit on a mortgage executed by a guardian the plaintiffs had prayed for certain reliefs including the relief of a personal decree. The plaintiffs' claim was admitted by the defendant's guardian, who allowed a decree to be passed without contest. The entire claim was thus decreed. Therefore the Court granted all the reliefs prayed for in the plaint and relief for a personal decree was entered in the preliminary decree as a decree over. *Held*, that the insertion of the clause relating to decree over was quite correct 144 I C 931=10 O W N. 653=1933 O 352 (F B). Where a mortgage decree passed on a compromise expressly authorized the decree-holder to apply for a personal decree, and this was not contrary to the terms of the compromise but was in accordance with the intention of the parties, the decree-holder is entitled to a personal decree for the balance remaining due after the sale of the mortgaged property 162 I C 536=1936 O W N 476=1936 O 259. Even though the *decree* itself makes no

mention of the personal remedy, if it was contained in the compromise, the party would be entitled to proceed in execution against the other properties without applying under this rule 15 P. 345=17 Pat L.T. 540=1936 P. 568. Compromise decree in mortgage suits—Charge continuing on mortgaged property—Extinguishment of a portion of property by fire and acquisition of the remainder by municipality—Maintainability of application under this rule—Limitation 30 Bom L R 724. Application under this rule—Arrangement exonerating defendant from personal liability—Arrangement entered into after final decree for sale—If can be pleaded in bar—Adjustment 69 M L.J. 765 (F.B.). This rule does not prevent attachment before judgment under O 38, R 5, being granted in suitable cases 163 I.C. 336=1936 A.L.J. 314=1936 A.W.R. 362=1936 A. 408.

APPLICATION—This rule does not permit of a personal decree being passed against the mortgagor or his surety unless on the date of the suit founded on the mortgage the balance is legally recoverable. 20 N L.J 42. A covenant to pay is implied in every transaction of loan, when a person borrows money he must be deemed to have entered into an implied contract to repay the money borrowed and plaintiff is entitled to sue for mortgage money on this implied contract. Unless there was some specific condition in the bond absolving the borrower from liability to repay the loan he must be held liable on the implied covenant contained in his unconditional acknowledgment of the fact that he was taking the loan. Mortgagee is entitled to add to mortgage amount any sum paid by him for saving the mortgaged property from sale and he is entitled to a personal decree for that portion of amount as well. 149 I.C 1197=1934 P 433. Preliminary decree reserving plaintiff's right to apply for personal decree—Defendant not appealing—Right to object to application for personal decree. 11 O. W.N. 1196. An application under this rule does not in any way resemble an application for attachment of property. 24 I C 35=18 C W.N. 492. An application under this rule is an application in the suit 33 C. at 873. But *see* 25 M 244 and 21 A. 453. Proceedings under this rule are not in the nature of a separate suit but merely a final step in working out the mortgage decree and there is no question of limitation 5 O. W N 1094=4 Luck 237=114 I C 769=1929 O 59. When a combined decree has been passed, an application under this rule is unnecessary 33 M L.J. 543=42 I C 282. *Also* 25 I C 50=1914 M W N 497, 27 I C. 72=18 O C. 55; 25 I.C. 121=17 O C. 153; 3 Luck 411=108 I C 723=1928 O 490. When a right to pro-

otherwise than out of the property sold, pass a decree for such balance.]

Notes.

ceed under this rule has not been determined in the suit, an application under this rule can be objected to on the ground that part of the decree amount was barred at the time of suit 46 I C 892 Question of personal liability can be decided at the time the suit is decided, and the matter so decided is *res judicata* when an application under this rule is made 28 A 365; 144 I C. 738=34 P L R 171=1933 L. 329 A mortgage decree against a Hindu father had reserved liberty to apply for a personal decree against him Property was sold but before confirmation the sons of mortgagor obtained a declaration that mortgage was not binding on them *Held*, that the conditional clause in the decree regarding the personal decree became operative, that mortgagee was entitled to move executing Court for passing a personal decree under R. 6 in spite of the declaration obtained by the sons and in execution of that personal decree to proceed against the entire property 1933 L. 768 A preliminary decree passed in terms of Form No. 4, App D, C. P. Code, declaring that "*Plaintiff shall be at liberty to apply for a personal decree*," constitutes an adjudication on the point, and if defendant does not appeal from it, he is precluded from disputing its correctness afterwards 144 I C 931=10 O.W.N. 653=1933 O 352 (F B.). A mortgage decree carries with it the liability to pay the amount personally. The power of Court to give a mortgagee a relief by granting a personal decree does not depend upon this rule. In the case of a compromise decree or of an award even though the personal remedy is not mentioned, an application for the same is not necessary but Court can give relief. 32 Bom L R 439=1930 B 208 See also 115 I C 336=1929 S 44. And much more so where though the award is silent about personal decree, the Court passes a decree on the basis of the award in the usual form, and there was no appeal against it. 158 I.C 493=1935 O.W.N. 1103. As to applicability of this rule to an anomalous mortgage, see 1937 P W.N 60 =1937 Pat 261

FORUM.—The supplemental decree can be passed only by the Court in which the original suit was instituted. 33 M L J. 382 =42 I.C. 953; 27 C 272. Where the mortgage suit and the mortgage come within the jurisdiction of the Court at A and not within the jurisdiction of the Court at F, the existence of a charge on the property at F does not give the Court at F jurisdiction to entertain an application under O 34, R. 6, because that rule only applies to a personal covenant arising from a mortgage. 1931 A.L.J 893=1931 A. 192

COMBINED DECREE.—The decree for sale can also provide that if the proceeds of sale are insufficient, the balance can be collected

personally. 47 C 370=36 M L J. 215=46 I A. 294 (P C) Also 43 M. 421=38 M L J. 203 If a Court passes a composite decree, combining a decree for sale and a personal decree, the decree is valid and the personal decree, though made at the time of the decree for sale, operates at a future date when the sale takes place and fails to satisfy the mortgage debt 10 O W N 1087=1933 O 529 Though a composite decree for sale and also in terms of R. 6 may be passed at one and the same time, yet neither a plaintiff is bound to ask for the second relief in the plaint of the suit nor is Court bound even where such a relief is prayed for, to adjudicate upon it Hence where Court has not adjudicated upon it, nor have the parties asked for such relief, the question can be considered when the contingency arises 10 O W N. 1097=1933 O 520 If a combined decree it is not proper to direct that in default of payment, plaintiff can recover the decree amount by sale of the properties 24 Bom.L R. 843=1923 B. 32 Where a preliminary decree provided also for personal decree for any "legally" realisable balance, and the final decree omitted it, *held*, it was not a combined decree, the question whether any legally realisable balance existed, being yet to be determined 53 I.C. 904=23 C W N. 924 When once such a decree is passed it cannot be questioned in execution proceedings 24 I C 195=27 M L J 25 When decree provides for a personal remedy, executing Court cannot enquire into defendant's personal liability 32 I C 820. Where a party feels aggrieved by the provision for a personal decree in a preliminary decree, he must appeal; otherwise his remedy is barred 6 O.W.N 969 So also where the mortgagee made a claim for a personal decree in the original suit and the claim was rejected upon its merits and no appeal was lodged against that decree, the doctrine of *res judicata* applies, and a subsequent application for a personal decree under this rule is not maintainable. 1936 A L J. 1228=1936 A W.R 1033. When a combined decree is passed the personal remedy may be availed of even before sale of the properties 22 I.C 293; 10 I C. 975, 26 M. L J. 83=21 I C 782 As to the validity of combined decree, see 59 I.C. 1314=140 I.C 788=36 C W.N. 709. See also 152 I C 770=60 C L.J 522=38 C W N 850 =1934 C 764 (2) Under R. 6, mortgagee is not entitled to apply for personal decree until the mortgaged property has been actually sold and the sale proceeds found insufficient to meet his claim. The original decree should, therefore, merely reserve the right to apply for a personal decree. 31 N.L.R. (Supp) 124=160 I C 196=1936 N. 34.

COSTS.—A mortgage decree-holder can realise his decree for costs otherwise than

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by proceeding under S. 90, T. P. Act, if the Court has passed a personal decree for costs 15 I.C. 23=16 C.W.N. 731 Where in a suit for sale by the mortgagee against the mortgagor and his sons, the hypotheca was sold and plaintiff applied for a personal decree against father for the balance due under the mortgage and costs and against sons for the amount due for costs, *held*, that it was open to plaintiff notwithstanding the amalgamation of the amount due under the mortgage, subsequent interest and costs into one sum, to assume that costs were part of the remaining balance and to ask for a decree for costs as though they were still legally recoverable from the sons 55 M. 332=135 I.C. 578=1932 M. 155 (2)=62 M.L.J. 93. Where mortgaged property has been sold and found insufficient, a personal decree for costs is available. 12 M.L.T. 312=17 I.C. 244. Unless decree otherwise provides, costs may be recovered from the sale proceeds of mortgaged property. 38 I.C. 241=2 P.L.J. 51 A final personal money decree for costs may be given against the mortgagor even in a case where the personal remedy of mortgagee against the mortgagor for the mortgage money and interest thereon is time-barred. 9 R. 186=133 I.C. 225=1931 R. 153 Where a prior mortgagee sued the mortgagor and a puisne mortgagee and was given a decree for sale of the properties mortgaged to him and an order for costs making the puisne mortgagee liable for them jointly with the mortgagor, the puisne mortgagee is, in the absence of a special order or special reasons to the contrary, personally liable for the costs. 133 I.C. 225=1931 R. 153. Mortgagee has a right to the execution against puisne mortgagee personally in respect of such part of the costs which was payable by him separately, although a final personal money decree could not be passed against him under O. 34, R. 6 133 I.C. 93=1931 R. 181 (2).

LIMITATION.—In the case of an application under R. 6, the time from which limitation would run is the date of confirmation of the sale, for unless the sale was confirmed by Court after disposing of all the objections against it, the deficiency in the amount cannot be ascertained for the purpose of R. 6 58 C. 741=130 I.C. 815=35 C.W.N. 231=1931 C. 166. And where there is an appeal from an order dismissing an application by the judgment-debtor to set aside the sale, the period of three years under Art. 181, Limitation Act, for an application for a personal decree against the mortgagee begins to run from the date of the appellate order and not from the date when the sale was confirmed by the lower Court 157 I.C. 942=42 L.W. 518=1935 M. 640, 1937 A.L.J. 135=1937 A. 285. A personal decree under this rule can be passed within six years from the date provided in mortgage bond for

payment 17 A.L.J. 647=50 I.C. 640. Personal remedy can be enforced on the basis of a registered deed within six years under Art. 116, Limitation Act 27 A.L.J. 1294=123 I.C. 321=1930 A. 69 (F.B.). An application for a personal decree may be made even after six years from the date of bond provided the suit has been filed within six years from that date 27 I.C. 770=2 L.W. 66, 36 C.W.N. 117 Article 181 does not apply to an application under this rule 30 I.C. 719=42 C. 294. But see *contra* 1933 C. 251; 21 I.C. 530=1913 M.W.N. 867 Also 39 I.C. 854=13 N.L.R. 76; 10 I.C. 21 See also 111 I.C. 221. Sale in pursuance of mortgage decree subsequently held void—Application for personal decree three years after that is barred. 1927 M. 941=97 I.C. 502=24 L.W. 280 Where the mortgagee's claim for the principal amount is barred, the mortgagee is debarred from recovering from mortgagors personally the interest which accrued due during the six years immediately preceding the institution of the suit. 163 I.C. 100=38 P.L.R. 74=1936 L. 387 (111 I.C. 808=1928 L. 653, *Not Foll.*) But, there can be a personal decree against the mortgagor for the amount of costs incurred in the mortgage suit, even though his personal liability for the principal amount and interest is barred by time. (*Ibid*) But, see 14 R. 538, which held, on a construction of R. 3 of O. 34, as amended by that High Court, that a personal decree for costs cannot be passed, under the above circumstances when there is nothing in the preliminary decree which says that the mortgagee shall be at liberty to apply for a personal decree in respect of the costs alone, or enforce payment independently of the amount which is otherwise due on the mortgage. Where a mortgage deed fixed eight years for re-payment, but also contained a default clause that if interest was not paid annually, the mortgagee may recover interest and principal without reference to the period fixed, *held*, that the limitation for a decree under R. 6 commenced to run not after the expiry of one year within which mortgagor continued default for payment of interest, but it commenced to run after the expiry of eight years' term stipulated in the deed. 148 I.C. 951=1934 A. L. J. 261=1934 A. 397=56 A. 954 (F. B.). Where a person stands surety for a mortgage debt, giving a guarantee of the mortgagor's title to the mortgaged property and undertaking to compensate the mortgagee for any loss caused to him in consequence of proof of the mortgagor's title being defective, a suit against the surety on the contract of guarantee for a personal decree against the surety is governed by Art. 116 of the Limitation Act and must be filed within 6 years from the date on which the mortgage debt became payable 20 N.L.J. 42.

NOTICE.—Before making a decree under this rule, it is right to issue notice to judgment-debtor to show cause, except pos-

Notes.

sibly in cases where decree has made him personally liable 35 I.C. 288=9 Bur.L. T. 245. Where Court has to decide whether the execution of the decree should proceed without a supplemental decree under this rule an order without notice to judgment-debtor directing execution to issue cannot be supported. 56 I.C. 801=31 C.L.J. 382. Also 17 I.C. 927=16 C.L.J. 394, 30 I.C. 188=29 M.L.J. 120.

PERSONAL LIABILITY.—A charge-holder is, as much as a mortgagee, entitled to a personal remedy in the event of deficiency of the proceeds of sale 59 C. 1314=140 I.C. 788=36 C.W.N. 709. See also 1935 A.L.J. 279=1935 A.W.R. 344. A personal decree cannot be obtained against a purchaser of the equity of redemption 34 A. 63=39 I.A. 7=21 M.L.J. 1158 (P.C.). Also 38 A. 209=14 A.L.J. 151; 17 C.W.N. 457=17 C.L.J. 120, 95 I.C. 970 (2)=1923 P.C. 54 (P.C.). The secured creditor of a Hindu widow, on the security proving insufficient to satisfy his decree thereon, is entitled to proceed against the other properties. 85 I.C. 963=1925 A. 352. A minor mortgagee cannot get a decree under this rule against a puisne mortgagee for the costs due. 23 A. 439; 29 A. 12. See also 31 B. 244, 29 A. 260; 26 A. 93, 26 A. 25. An *ex parte* decree for personal liability against a person other than the mortgagor can be set aside. 60 I.C. 368=2 P.L.T. 251. An unsuccessful mortgagee-appellant must personally pay the costs of appeal but the mortgagee can also add it to the security 41 A. 473=17 A.L.J. 582. The personal liability of a mortgagor when arises, see 50 C. 718=1924 C. 209. A personal decree can be made against mortgagor at the appellate stage 26 C.W.N. 318=1922 C. 52 (47 C. 370, Foll.) Where mortgagor sells the equity of redemption and a pre-emption suit ensues in respect of such sale, the pre-emptors, in the absence of a contract to that effect, are not personally liable for the mortgage money. 144 I.C. 738=34 P.L.R. 171=1933 L. 329. A decree under R. 6 can only be made against defendants in the original suit 1927 A. 691=103 I.C. 264 (1). Court cannot direct that no property other than those mortgaged be sold. Whether the other properties can be proceeded against is to be determined under an application under this rule 23 I.C. 389. When mortgage decree directs that the defendants "do pay" they are personally liable 1918 M.W.N. 146=43 I.C. 871=7 L.W. 36. When in a compromise decree there is no provision taking away the personal liability, the mortgagor was personally liable, if sale proceeds were found insufficient 88 I.C. 507. Personal liability is ordinarily presumed to exist in the absence of a contract to the contrary. The right to proceed against the person must be specifically reserved by the decree itself 42 I.C. 288=6 L.W. 692, 26 M.L.J. 375=23 I.C. 544, 1927 M.W.N. 330. But see

1927 M. 779=53 M.L.J. 489=103 I.C. 528. A personal relief against a defendant includes a relief against any property in his possession. 27 I.C. 72=18 O.C. 55. A formal decree under this rule is necessary even where the original compromise decree declared the other properties too as being liable 48 I.C. 608=3 P.L.J. 649. Consent decree providing for further execution in case proceeds of sale of certain properties were found insufficient—No need for applying for further decree under O. 34, R. 6 5 O.W.N. 135=1928 O. 490=3 Luck. 411.

RIGHT TO PERSONAL DECREE.—Right to personal decree accrues when final decree is made though personal decree can be made only after exhausting property by sale 54 I.A. 129=54 C. 500=1927 P.C. 73=52 M.L.J. 565 (P.C.). See also 50 A. 321=25 A.L.J. 1042=1928 A. 71, 111 I.C. 808=1928 L. 653. Where a member of a joint family mortgaged the family properties without necessity, a personal decree against him is unchallenged in appeal by the mortgagee is valid 21 A.L.J. 754=46 A. 32. Also 38 I.C. 691. A mortgagee, if can proceed concurrently with all his remedies 35 I.C. 43. For conditions to be satisfied before personal decree can be granted, see 17 I.C. 263=16 C.L.J. 318; 15 I.C. 911=15 C.L.J. 684; 21 I.C. 283=16 O.C. 238. When a mortgage decree for sale has been obtained, without executing it, a personal decree cannot be obtained 42 A. 519=18 A.L.J. 628. Also 20 I.C. 829=17 C.W.N. 1039. Personal decree obtained without informing of a prior refusal to grant the same cannot be set aside as fraudulent. 38 A. 7=30 I.C. 792. Where an application for personal remedy is dismissed for default, fresh application is barred under O. 9, R. 9 8 R. 316=1930 R. 257, 26 N.L.R. 154=1930 N. 188. If a person entitled to bring the properties to sale under a decree neglects and allows a third person having no such rights to sell a portion of the property, he cannot afterwards be allowed to have a relief under this rule. 20 I.C. 320. Court has a discretion in refusing a personal remedy when mortgagee wilfully omits to sell the hypotheca 48 I.C. 322=45 C. 702; also 38 M.L.J. 93=51 I.C. 34. Personal decree cannot be granted where mortgagor is found to have no rights in the properties mortgaged even before sale 14 I.C. 591=9 A.L.J. 569. But see *contra* 38 M. 677=23 I.C. 515; also 23 O.C. 145=57 I.C. 967, 9 I.C. 752=14 O.C. 62; 1928 A. 71=25 A.L.J. 1042. A decree against the assets in the hands of the sons can be passed where amount realised by sale of mortgaged property was insufficient 14 I.C. 55 (1). When defendant becomes insolvent, a personal decree for balance of unsatisfied amount cannot be passed. 34 A. 106=12 I.C. 587. Where mortgagor has been adjudged insolvent with reference to certain debts which were provable in insolvency the

Preliminary decree in redemption suit

7 1[(1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for—

Leg Ref

¹ Substituted by Act XX of 1929

Notes.

order of discharge does not and cannot prejudicially affect the legal rights of the creditor against the debtor in respect of debts which were not provable in insolvency. The order of discharge cannot take away the statutory right of decree-holder to apply for a decree under R. 6, which right accrued subsequently 1932 A.L.J. 237=1932 A. 336=54 A 428 When an application under this rule is refused, whether special remedy under S 47, Provincial Insolvency Act available 6 O W N 982 When personal remedy is barred it cannot be passed 21 Bom L.R. 410=46 B 848. A personal decree cannot be obtained before a final mortgage decree is passed 50 I.C. 924=46 C 245 When in a decree for sale power is given both to the prior and puisne mortgagees to sell, either can apply for a personal decree. 33 M L J 382=42 I.C. 953, also 34 I.C. 48=2 O L J 614 When an application under this rule is disallowed, no separate suit for personal remedy is maintainable. 23 O C 145=57 I.C. 967 A personal decree may be obtained on abandonment of all claims against the property 9 I.C. 403=14 O C 217 (26 A 25, 29 A 369; 25 A 79; 28 A 19, Foll), also 53 I.C. 922=1919 P H C C 390 Also when the mortgaged property is not available for sale through no fault of the mortgagee. 25 A L J 1042=50 A 321=1928 A 71, 144 I.C. 698=1933 L 792 It is not necessary that mortgagee had to put to sale the mortgaged property before a personal decree can be passed 32 C W N 1160=117 I.C. 530=1929 C 121, 144 I.C. 698=1933 L 792 See also 143 I.C. 542=14 Pat L T 189=1933 P 210 (2) Decree-holder can have a personal remedy when after selling a part, he is not permitted to sell the rest and his debt is unsatisfied 61 I.C. 635=6 P L J 106 Omission of a small portion of the property in the plaint does not bar personal remedy 42 I.C. 56=2 P L J 538, 1933 M W N 744. Sale in execution of mortgage decree—Sale set aside—Right to maintain application for personal relief against any property in his possession 49 A 506=1927 A 395 See also 1927 M 941=97 I.C. 502

APPEAL—An order holding that an application for simple money decree is not maintainable amounts to decree and is appealable 144 I.C. 468=1933 A.L.J. 738=1933 A 429 An appeal from an order refusing to make a decree under this rule must bear *ad valorem* Court-fee calculated on the subject-matter of appeal. 40 A 553; also 35 I.C. 158=14 A.L.J. 328, 19 I.C.

971=18 C L J 133; 30 I.C. 497=18 O.C. 121 An application for a decree under R. 6 cannot be considered to come under "plaint" and consequently an appeal does not lie under O 43, R 1 (1), from order returning such application to be presented to the proper Court 1931 A. 192=1931 A.L.J. 893 Preliminary decree—Appeal by mortgagee pending—Personal decree—Appeal from—Court-fee—If to be *ad valorem* 39 C W N 315.

O 34, R 7—Scope of the rule, see 23 Bom L.R. 1176=46 B. 348; 84 I.C. 67=1925 L 31 Reversioners filed a suit for declaration that certain mortgage executed by the widow was invalid and for possession It was found that part of the mortgage debt was valid and binding and decree conditional on payment of certain amount within certain time which was made a charge on the property *Held*, that even though the suit was not for redemption, the decree was in the form of a decree for redemption, and that Court had discretion to extend time for payment under R 7 (Cases *inf.*) 145 I.C. 927=1933 M 762=65 M L J 592. A mortgage having been executed by a minor, his next friend sued to have it declared invalid and cancelled Finding of Court was that mortgagor was a minor but that he had practised fraud on mortgagee in obtaining money and that the money was utilised for purposes binding on minor's family Decree was passed that on payment of mortgage amount within a date fixed the mortgage deed was to be cancelled The amount not having been paid within the date, mortgagee applied for an order for sale *Held*, that the decree should be treated as a decree for redemption and that mortgagee was entitled to claim the benefit of this rule 41 L W 458=68 M L J 546=1935 M 478. This rule applies only to a mortgagee and has no application to the case of a co-mortgagor who has redeemed the entire mortgage 1923 L 122 As to distinction between deposits under this rule and under S. 83, T P Act, see 2 O.W.N 826 Under R 7 (c) the money should be paid into Court As to validity of payment made outside Court, see 102 I.C. 428=1927 O 275 When deposit is made to discharge a valid mortgage a final decree itself may be passed without being preceded by a preliminary decree. 1922 A 479. All proceedings till final decree are proceedings in suit 37 A. 226=13 A L J. 307 As to form of decree, see 146 P W R 1913=19 I.C. 856 In a suit for redemption of a usufructuary mortgage Court passed a decree on 4th November, 1925, "the suit decreed conditional on the plaintiff depositing Rs 199-5-0 to the credit of the defendant in this Court within six months, prepare a preliminary

- (i) principal and interest on the mortgage,
- (ii) the costs of suit, if any, awarded to him, and
- (iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or
- (b) declaring the amount so due at that date, and
- (c) directing—
- (i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as pro-

Notes

decree for redemption under O. 34, R. 7 on failure their suit shall stand dismissed." Plaintiffs failed to pay within time fixed and their application for extension of time was granted. On deposit of the money final decree was passed directing delivery of possession. In second appeal by mortgagee it was contended that the decree passed on 4th November, 1925 was absolute in its character and the Court had no power to extend the time. *Held*, the Court of first instance had power to grant extension of time under O. 34, R. 8 proviso or under S. 148. 145 I.C. 591=1933 A. 157. A mortgagor decree holder who fails to pay within date fixed but pays it before the decree is made absolute, is entitled to redeem. 29 I.C. 438.

MESNE PROFITS—A separate suit for mesne profits after date of payment fixed in the preliminary decree would lie. 2 O. W. N. 826=1926 O. 113. There is no provision in Rr. 7, 8 and 10, for taking into consideration any mesne profits that might become due to the plaintiffs by the failure of the defendant to deliver possession to plaintiff after the final decree. That question is outside the scope of a mortgage suit for redemption. Any amounts payable before the date of final decree will alone be taken into consideration. The suit continues until the passing of the final decree and when it is passed the relationship of mortgagor and mortgagee ceases, and thereafter the defendant remaining in possession is a trespasser. Plaintiff, therefore, has a fresh cause of action against him. 1935 A.L.J. 115=1935 A. 96.

ACCOUNTS—Where mortgagor covenants in the deed of mortgage to pay the rent of mortgaged property to zamindar but fails to pay the same, and mortgagee in consequence pays the rent, the latter can ask for the amount paid by him to be added to the mortgage money in a suit for redemption. It is not necessary that the mortgagee should file a separate suit for recovery of the amount. 150 I.C. 879=1934 A.L.J. 637=1934 A. 888. Only an interlocutory order and not a decree for accounts can be passed prior to preliminary decree. 23 A.L.J. 691=47 A. 803. A comparison of O. 34, R. 7

and O. 20, R. 17 makes it clear that directions by Court with regard to the mode in which the account is to be taken or vouched will not at least in redemption suits amount to preliminary decrees. 14 P.L.T. 735. An interlocutory order should be followed by specification of consequence of payment or non-payment of the ascertained amount on a day fixed to make it a preliminary decree. 10 O.L.J. 374=1924 O. 140. When a preliminary decree fixes the amount due instead of directing an account to be taken, it does not become a final decree. 22 C.W.N. 374=44 C. 448. Cf. 10 O.L.J. 374=1924 O. 140; see 87 I.C. 585=1925 A. 492. S. 13 of the Dekhan Agriculturists' Relief Act provides for an account to be taken to the date of suit but not thereafter. In a suit on a mortgage executed by an agriculturist, accounts can therefore be taken only up to the date of suit. 37 Bom.L.R. 76=1935 B. 122=154 I.C. 770. The general law will apply in regard to accounts between the date of plaint and the date of the preliminary decree. The mortgagee is entitled to what is allowed by R. 7, i.e., principal, interests, costs and other costs, charges, expenses and interest thereon. The interest due would be governed by R. 11. 36 Bom.L.R. 1242=1935 B. 97.

APPEAL—Where an appeal from a preliminary decree is dismissed it is the decree of the appellate Court which constitutes the effective preliminary decree in the cause and it is therefore necessary for appellate Court to pass a fresh decree fixing a fresh date for payment and making a fresh calculation of the amount which will be due on that date. 29 N.L.R. 130=1935 N. 236.

LIMITATION—Suit for recovery of overpayment or surplus profits from usufructuary mortgagee is governed by Art. 148 of the Limitation Act. 26 C.W.N. 123=1922 C. 189. As to form of decree where a sub-mortgagee is a party, see 4 O.L.J. 475=42 I.C. 66.

O. 34, Rr. 7, 8 and 10.—See 152 I.C. 921=1935 A.L.J. 115=1935 A. 96 (noted under R. 7 *supra* under head 'Mesne Profits').

O. 34, Rr. 7 and 11.—See 154 I.C. 770=37 Bom.L.R. 76=1935 B. 122 and 154 I.C. 780=37 Bom.L.R. 1242=1935 B. 97.

vided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him or, where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary, put the plaintiff in possession of the property, and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-Rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.]

8. (1) Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under

Final decree in redemption suit.

Notes

Both noted under R 7 *supra* under head 'Accounts'

O 34, R 8: SCOPE.—This rule applies to redemption suits only 18 A L J. 771 =43 A. 25 Cf. 35 A 116=11 A L J. 62 Proviso applies only to cl. (4) and not to cl. (1). When mortgagee has taken no action himself the proviso would not apply if mortgagor makes payment of the money due under the decree 28 O C 261=90 I C. 418 Sub-rule (4) authorizes a decree for sale only on application by mortgagee 146 P W R. 1913=19 I C 856; also 28 O C. 46=1925 O 255 Under the sub-rule it is open to a defendant to ask upon the happening of a contingency such as on mortgagor's failing to pay before a certain date that mortgaged property or a sufficient part thereof be sold. 132 I.C 562=1931 A 427 A final decree could be passed under R 8 (1) both at the instance of mortgagor as well as mortgagee 1927 B. 32=50 B 730=98 I.C 943 The mortgagor himself can apply for sale in a redemption suit If he does not pay the amount, suit need not be dismissed 36 M 32=21 M.L J 941 Conditional decree in redemption suit—Condition not fulfilled—Provisions of R. 8 not complied with by decree-holder—No final decree—A second suit for

redemption is maintainable. 1927 L. 9=7 L 420=27 Punj L.R. 659

N B.—The words "and the mortgage is not simple or usufructuary" in sub-rule (2) follow the ruling in 29 A 481.

FORUM.—The application under sub-rule (4) must be made to Court of First Instance even when the decree under R. 7 has been made by appellate Court. 23 A. 88; 23 M. 521; also 39 A 396=39 I.C. 630; 39 M 876=29 M L.J 708.

PAYMENT INTO COURT.—The rule distinctly lays down that payment must be made into Court So, after the passing of the preliminary decree, no payment or adjustment of the mortgage money made out of Court can be pleaded against the passing of the final decree There is no difference in this respect between the decree in a foreclosure suit and the decree in a redemption suit. 1931 M. 592=131 I C. 487=54 M. 708. Though if after a preliminary decree the mortgagor alleges that he has paid the amount out of Court and the mortgagee disputes it, Court will not recognize a payment not made in accordance with the directions of the decree into Court, it does not, however, affect the right of the mortgagor and the mortgagee to settle between themselves out of Court and report the matter to the Court 1931 M.W.N.

sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the defendant to deliver up the documents referred to in the preliminary decree, and, if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged property as directed in the said decree, and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule unless the plaintiff, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an anomalous mortgage as is hereinbefore referred to in rule 7, pass a final decree declaring that the plaintiff and all persons claiming under him are debarred from all right to redeem the mortgaged property and, also, if necessary, ordering the plaintiff to put the defendant in possession of the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

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1141=62 M.L.J. 272=55 M. 320=1932 M 115. (42 M. 61, Ref.)

EXTENSION OF TIME.—According to the T. P. Act prior to passing of the new Code payment may be made before an order absolute, but according to the Code an extension of time has to be obtained. 9 I.C. 337=14 O.C. 19 Time allowed for payment can be enlarged, and this can be done even after time originally given has expired. 28 B. 102, 26 B. at 126 Delayed payment may be accepted if no loss is caused to mortgagee. 50 I.C. 201=6 O.L.J. 94, 101 I.C. 734=13 O.L.J. 828. Time cannot be enlarged merely because an appeal is preferred against the decree which is afterwards dismissed or withdrawn. 17 C.W.N. 457; 17 C.L.J. 120, also 41 I.C. 268=32 M.L.J. 455 But a party who is not bound to perform anything under the decree and who appeals to enlarge his interests under the decree is entitled to reckon the period in his favour from date of appellate decree. 41 I.C. 268=32 M.L.J. 455 A separate application for enlargement is not needed. 26 B. 126 Where in a partition suit an alienation was

impeached as not binding and the alienee was made a party and Court directed possession from alienee, on payment of a certain amount and he defaulted, time can be extended for payment 37 M.L.J. 695=43 M. 357 Court of first instance can grant extension of time under R. 8, proviso or S. 148 in case of failure to deposit amount within the time fixed 1933 A. 157=145 I.C. 591 Court cannot extend time when the decree was a compromise decree by which possession was to be delivered if payment was made on a particular date and in default possession of the mortgagee was to continue. 28 I.C. 862=18 O.C. 58 When time for payment is extended, interest at contract rate ought to be paid for the time extended 9 O.L.J. 439=1922 O. 268 Laches on the part of mortgagee—Extension of time allowed 100 I.C. 1039=1927 B. 175=29 Bom. L.R. 228

LIMITATION.—There is no period of limitation for passing a final decree in a redemption suit 22 I.C. 283 For an application under cl. (4), Art. 181 of the Limitation Act would apply. 28 O.C. 46=1925 O. 255 Mortgagee could execute decree at any time within limitation. If he failed, he would have right to sue again for redemp-

8-A. Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due to the defendant, the Court, on application by him may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.

9. Notwithstanding anything hereinbefore contained if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him: and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

10. In finally adjusting the amount to be paid to a mortgagee in case of a

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tion so long as his right to redeem remained alive. 146 P W.R. 1913=19 I C. 856. So long as no final decree for sale or foreclosure is passed, mortgagor had the right to pay the amount due under the preliminary decree even beyond twelve years from date fixed for payment under the consent preliminary decree 28 O C 26=90 I C 418. No notice need be given to *kanamdar* after decree for redemption and before delivery of possession to the mortgagor 45 M L. J 687=1924 M 102.

ACCOUNTS.—In a decree for redemption, accounts must be carried forward up to the date when possession is given 16 I C 184. The relationship of mortgagor and mortgagee subsists even after preliminary decree and mortgagee should account for rents and profits 42 I C 230. After the decree for redemption, Court should see that all rights acquired by the mortgagee are transferred to mortgagor 57 I C 763. Final decree should be for mortgage amount *minus* excess profits 103 I C 290=1927 N 302.

APPEAL.—An order granting time is appealable 35 A 116=18 I C 14. But no second appeal lies 47 B 956=25 Bom L R 920.

O 34, R 8-A: APPLICABILITY.—R 8-A of O 34 inserted by Act XXI of 1929, does not apply to usufructuary mortgages 9 O W N 1059=1933 O 40=141 I C 428.

O 34, R 9.—Applicability.—Suit for sale by some heirs of mortgagee—Other heirs joined as co-defendants along with mortgagors—Decree for surplus amount in favour of mortgagors against co-defendants.—Whether can be passed 1936 O W N. 306.

O 34, New Rr 10 and 11 have been substituted for old Rr 10 and 11. The necessity for the substitution of these new rules have been explained as follows.—

"Rule 10, as it stands, refers to the subsequent costs of the suit only. In finally adjusting the amount the Court has also to take into consideration other costs, charges and expenses which the mortgagee may have incurred since the date of the preliminary decree. The mortgagee must be en-

titled to the amount so spent. 44 C. 448. Rule 10 is, therefore, amended to empower the Court to take such sums into consideration. After the account is once taken or the amount declared in a preliminary decree, it is necessary that the power of the Court to take into account sums spent subsequently should be expressly recognized.

We have proposed that the provisions of R 11 which lay down the principle of 'redeem up and foreclose down' should be embodied in the new S 94 of the Act. This rule should, therefore, be omitted.

There being no specific rule as to interest, we propose that a new rule should be framed dealing exclusively with interest, and this rule we propose to number as 11.

Under S 2 of the Usury Laws Repeal Act (XXVIII of 1855), in any suit in which interest is recoverable the amount is to be adjusted or decreed by the Court at the rate (if any) agreed upon by the parties. Again, this provision is subject to the provisions of the Usurious Loans Act, 1918 and S 74 of the Indian Contract Act enabling the Court to reduce the rate if in its opinion it is penal or exorbitant. Under S 3 of Act XXVIII of 1855, it is at the discretion of the Court to vary the rate agreed upon if it decides to allow further interest on the amount adjudged or decreed to be due. When no such rate has been fixed, the Court can award interest at the rate it deems reasonable. It was at one time thought that the Court was not competent to award interest after the date fixed for payment in a mortgage deed. It is, however, now well established that, even if there is no covenant for the payment of interest after the period fixed in the deed, interest can still be awarded by way of damages or under the Interest Act (XXXII of 1839), the rate allowed is generally the same as that stipulated in the deed (L R. 25 I A. 9). As observed by the Privy Council, the scheme of the provisions in O. 34 of the Code, is that a general account should be taken once for all and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day and that, after the expiration of that day, if the property

Costs of mortgagee subsequent to decree.

foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit, the conduct of the mortgagee has been such as to disentitle him thereto, add to the mortgage-money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

11. In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely:—

Notes.

is not redeemed, the matter should pass from the domain of contract to that of judgment and the rights of the parties should thenceforth depend not on the contract or the bond, but on the directions in the decree L.R. 34 I A 9 at 21; 54 I A 1. Up to the day fixed for payment in the preliminary decree in a mortgage suit, interest is generally allowed at the contract rate and thereafter up to the day of realization or actual payment it is entirely at the discretion of the Court to allow it at such rate as it deems reasonable. 20 C. 360; 21 M. 364; 20 B. 744; 23 I.A. 138 (P.C.). The result of the above decisions has been embodied in the new R. 11.

The absence of any provision in O 34 and corresponding old Ss 85 to 99 of the T. P. Act regarding *post-diem* interest has also led a curious divergence of views. Some Courts held that the portion of the decree which awards such interest is to be treated as a decree for the payment of money and executed as such 17 A 581, 18 A. 316. This view, however, has not been adopted by other Courts which held that it must be treated as part of the mortgage money and is to be recoverable out of the mortgaged property in the same way as the principal and the costs of the suit. 21 C. 274; 18 M. 248; 24 C. 766. This provision is intended to put an end to that divergence. It is proposed to provide that such interest is part of the mortgage money.

No change has been effected in Rr. 9 or 12 to 14.—(*Report of Select Committee.*)

O. 34, R. 10—Costs which should have been included in the final decree and not so included are not claimable in execution. 44 A 350=20 A L.J. 170. Costs allowed in decree form part of the mortgage debt. 24 I.C. 63=12 A L J 645 See 88 I C. 829=1925 A 68. This rule has nothing to do with costs awarded in execution proceedings. 48 A 682=1926 A. 722 (1)=96 I C. 592.

COSTS IN APPEAL.—Decree for costs in appeal, if personal 19 I C 384. But see *contra* in 48 I C 329 Where appeal was dismissed with costs and meanwhile final decree was passed by the lower Court, appellant would be personally liable for costs. 24 I C. 873. But see 93 I.C. 223=1926 A. 343, *contra*. Where only one of the defend-

ants appealed, costs awarded are against him personally. 19 I.C 729. Where application is made for final decree after an appellate decree for costs is passed against one defendant alone, decree-holder cannot ask for costs of appeal to be included with the amount finally held due. 20 I.C. 42=11 A L J 975

O. 34, R. 11 (new).—The new R. 11 as amended in 1929 only reproduces the view previously held by the majority of the High Courts 63 I A 114=15 P. 210=40 C W N 328=1936 P C 63=70 M.L.J. 355 (P C)

Order 34, Rr 2 and 4 deal respectively with a decree in a mortgage suit for foreclosure and for sale, and the words used in the rules seem to infer that the question of interest up to the date of the decree is one which is not within the discretion of the Court. But R 11, dealing with interest after the decree, is clearly a matter within the discretion of the Court, as the word used there is "may". 14 Pat. 400=16 Pat. L T. 579=156 I.C. 290=1935 P. 98 Even where there is no express stipulation in a mortgage document for *post diem* interest, such interest may be awarded either under a contract to be implied or as compensation and the usual practice is to award such interest at contract rate 145 I.C. 762=1933 M. 171. Where a mortgage deed provides that in case of non-payment of interest for a period of six months such interest was to be added to the principal and interest and compound interest is to run on it, Court can give effect to that provision and allow interest on the aggregate amount and not merely on the principal amount. 151 I.C 856=11 O W.N 1141=1934 O. 473. But see 154 I C 46=1935 O.W.N 228=1935 O 263 Where in a mortgage bond there is no precise definition of the rate of interest prior to default, it is not possible to draw an inference that the parties intended that after the whole amount became due, interest should be paid at the rate which can be deduced from the arrangement regarding addition of *sauai* and payment by instalments. In such a case Court should allow a reasonable rate of interest after default. Interest allowed at 12 per cent per annum 28 N L R. 1=136 I.C. 887=1932 N 39. See also 1933 M. 171. Though it is correct to allow interest at the bond rate

(a) interest up to the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or, where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of the preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security up to the date of the preliminary decree and added to the mortgage-money,—at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum, and

(b) subsequent interest up to the date of realization or actual payment at such rate as the Court deems reasonable—

(i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause, and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10.

12. Where any property the sale of which is directed under this Order

Sale of property subject to prior mortgage

is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such

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up to the expiry of the period of grace, there is nothing in the Code compelling Court to do so. The statutory authority for allowing interest at bond rate beyond the date of the preliminary decree appears to be in R 11 and even that only says that the Court "may" order. 140 I.C. 104=13 Pat L.T. 545=1932 P. 332. Under R 11 (a) (ii) Court has power to award interest on costs of suit only from date of preliminary decree and not during the pendency of the suit. 154 I.C. 46=1935 O.W.N. 228=1935 O. 263. Under R. 11 (a) (i), Court has power to allow interest at the contractual rate up to the date fixed for payment only on the "principal amount", which means the principal money secured by the deed of mortgage and does not include interest which has accrued due before the suit. An order allowing interest at the contractual rate on the entire amount claimed in the suit, is therefore wrong (*Ibid.*) As regards interest subsequent to the date fixed for payment, cl (b) of R 11 makes provision for interest on the aggregate of the principal sums specified in cl (a) and of interest thereon as calculated in accordance with that clause at such rate as Court deems reasonable. The usual rate of interest allowed in such cases is 6 per cent. per annum and sufficient grounds have to be made out for allowing interest at a higher rate. (*Ibid.*) The awarding of future interest rests on the discretion of trial Court which will not without sufficient grounds be interfered with by appellate Court. 139 I.C. 64=9 O.W.N. 253=1932 O. 255, 8 Luck. 315=10 O.

W.N. 173=1933 O. 128; 1935 P. 98. See also 154 I.C. 46=1935 O.W.N. 228=1935 O. 263 as to award of subsequent interest. In case of mortgage the question as to the rate of interest is to be determined under R 11 and not S. 34. 10 O.W.N. 173=1933 O. 128=8 Luck. 315=144 I.C. 983.

O 34, R 12.—The provisions of this rule apply to usufructuary mortgages. 30 M 408. The rights of a prior mortgagee though *ex parte*, can be determined in a suit by puisne mortgagee. 27 I.C. 164. A sale without reference to a prior mortgagee and without his consent free of his mortgage is irregular. 19 I.C. 2 (R.). Sale in execution of mortgage decree—Proclamation exempting purchaser from liability for outgoing prior to date of payment of purchase money—Charge for arrears of taxes to Corporation not mentioned—Rights of purchaser and decree-holder. 61 C. 956=38 C.W.N. 971=1934 C. 842. A puisne mortgagee has no power to sell free of prior mortgage without consent of prior mortgagee who therefore can subsequently sue on his own mortgage. 47 C. 662=47 I.A. 11=38 M.L.J. 424 (P.C.). The rule does not require that the consent of the plaintiff is necessary or of any other person besides the prior mortgagee. The rule does not moreover say that Court can make such an order only on the application of the plaintiff or any specified person. The rule confers a general power on Court which Court can exercise so long as the conditions are satisfied on the application of anybody or even of its own motion. Where in a sale of the mortgaged properties in execution of a

prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

Application of proceeds. 13. (1) Such proceeds shall be brought into Court and applied as follows:—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.

14. (1) Where a mortgagee has obtained a decree for the payment of

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decree in a suit on a subsequent mortgage the prior mortgagee applied paying the properties be sold free of his prior mortgages. *Held*, that R. 12 applied to the case and that executing Court had power to grant the order prayed for. 157 I.C. 40=1935 M. 453. But, see *contra* 41 L.W. 565=1935 M. 660=68 M.L.J. 738, where it was held that a prior mortgagee can himself make no application under R. 12. It is the decree holder in the suit who alone can make the application, when he makes it, the prior mortgagee, whose rights must be safeguarded, has to be consulted as to whether he prefers to have the sale subject to or free of his mortgage. It is not necessary that the decree should reserve rights admitted by the parties and order the sale to be subject to them. As to how a decree which omits to reserve such rights is to be construed, see 29 M. 84. A sale cannot be held subject to a puisne mortgage, whether the same is in favour of a third party or the decree-holder. 25 M. at 114. Where a purchaser in a mortgage decree by a prior mortgagee to which the subsequent mortgagee was not a party is impleaded by the subsequent mortgagee in his suit and the property is sold at auction against him, he is bound by the proceedings in that suit. He might either avail himself of the provisions of Rr. 12 and 13 and claim that the property should be sold free from his encumbrance and that his amount should be paid to him in the first instance, or he may redeem the subsequent mortgage and prevent the sale of property. By allowing the property to be sold against him, he loses his right of redemption. If he does not avail himself of either of these rights and rests content with sale of the property taking place, subject to his pre-

vious mortgage, he can have no remedy except that of suing on the previous mortgage provided limitation has not expired. 147 I.C. 380=1934 A.L.J. 188=1934 A. 73.

O. 34, R. 13.—Rule applies to sales held free of prior mortgages and the principle of the rule applies also to the appropriation of sale proceeds held subject to a mortgage. 28 I.C. 691=25 M.L.J. 552. A puisne mortgagee who is not a party to the suit can claim the surplus sale proceeds. 90 I.C. 410. Rule 13 does not apply to the case of a surety who is made liable for interest under a mortgage decree. The rule is meant to regulate the position as between the mortgagor and mortgagee and to protect the position of the mortgagee. Therefore when the mortgaged properties are sold under the decree, the surety cannot claim that the interest must be deemed to have been paid out of the sale proceeds under Cl. (3) of R. 13. The claim for interest due by the surety is a claim apart from the claim upon the mortgage. It is in reality a separate cause of action. The surety still remains liable to pay the interest due. 158 I.C. 126=1935 L. 334.

O. 34, R. 14: SCOPE.—This rule does not apply to consent decrees, because the mortgagor can waive the benefit of the rule. 157 I.C. 292=1935 N. 129. The rule is really intended to create a prohibition to the mortgagee securing the sale of the mortgaged property without first bringing a suit for the sale thereof. 16 L. 640=1935 L. 672 (F.B.). And also to a creditor who has obtained a simple money decree in satisfaction of a claim arising under the mortgage to put the mortgaged property itself to sale in execution of his decree as long as the mortgage subsists. 1936 A.L.J. 692=1936 A. 663. Difference between the provisions of

Suit for sale necessary for bringing mortgaged property to sale.

money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he

Notes.

this rule and S. 99, T P Act, is that by the repeal of S 99, a mortgagee can sell the mortgaged property on a claim unconnected with the mortgage. See 1925 M W N 907=49 M.L.J. 643, 33 M.L.J. 601=6 L.W 701. Also 35 B 248=13 Bom L R 245. This rule is an exception to O 2, R 2. The personal remedy under a personal covenant in a mortgage-deed cannot be had by sale of the property mortgaged 63 I.C 303. Also 2 P.L.J. 55=38 I.C. 791. Where defendant brought a summary suit to enforce a charge which the mortgagors had created in his favour subsequent to the mortgage, but he omitted to sue on the mortgage or reserve his rights to do so, *held*, on a subsequent suit on the mortgage by the defendant, that the suit was barred by O. 2, R 2; and that R 14 did not apply as it was confined to mortgages of immoveable property. 34 Bom.L.R. 1615. The rule applies to enforcement of a charge for rent payable in money to the landlord by tenant. 39 M L J. 30=43 M 786. See *contra* 48 I.C. 694=42 M. 114, 1927 C. J. 884=104 I.C. 353 (1)=55 C. 104. The rule does not apply to the case of a mortgage which did not or which could not come into operation. 55 I.C. 417. Nor to a consent decree in suit for dissolution of partnership, creating charge 60 C. 1467=149 I.C 224=1934 C 327. Where the compromise in which the liability under the suit promissory note became merged created a mortgage or charge and the decree that followed related to the satisfaction of the claim arising under the mortgage or charge, *held*, that R. 14 applied even if it be assumed that mortgage or charge must precede the decree. 138 I.C 603=1932 A.L.J 486=1932 A 439. An order directing security to pay does not amount to a decree for the payment of money within this rule. 38 I.C 130. A sale in contravention of S 99 is merely irregular and is valid unless set aside before confirmation. 97 I.C 256. See also 11 O W N. 1403=1935 O 183.

MEANING OF TERMS.—“Mortgagee” in this rule means the holder of a subsisting and effective mortgage. 39 A 86=14 A.L.J. 902. The words “bringing the property to sale” include not only all the steps preliminary to sale but the sale itself. 41 I.C. 73=45 C. 530. Only sale should not be held, attachment in execution of money decree is not prohibited. 18 I.C. 201=4 O L J 571.

CHARGE.—Rule applies only where the charge was created prior to decree. 46 I.C. 169. Also 1925 M W N. 907=49 M L J. 643; and not where money decree itself creates charge, 36 Bom L.R. 523=151 I.C. 96=1934 B 241. See also 30 N L.R. 325=150 I.C. 492=1934 N. 147. Where mort-

gagee pays Government revenue to protect his mortgage lien, his remedy is by suit under this order. 5 P L J. 248=1 P.L.T. 225. A charge created by will not compulsorily registrable, whose terms the auction-purchaser could not be cognizant of, cannot be enforced against the latter. 23 I.C 867=1 O L J 43.

CLAIM UNDER MORTGAGE.—A mortgagee granting lease of property to the mortgagor cannot bring to sale the property, under a rent decree based on the lease. To escape this rule, the claim should be unconnected with the mortgage transaction. 1 P.L.T. 694=57 I.C 384. Also 41 A. 399=17 A. L J 481, 1925 M 127=47 M.L.J. 798; 44 B. 366=22 Bom L R. 131. See *contra* 47 C 377=24 C W N 229 (F.B.) A decree for costs in a suit for possession by mortgagee against mortgagor can be executed by sale of equity of redemption. It is not a claim arising under the mortgage. 35 A 518=11 A L J 841. Also 20 I.C 898=16 O C 350. A decree-holder seeking to execute his decree for costs of the Privy Council against the property offered as security must proceed by suit as it is a claim arising under the mortgage. 27 I.C 365=19 C.W N 178. A decree-holder getting a money decree on a mortgage bond with a declaration of lien on the property cannot bring the property to sale but must sue on the basis of the declared lien. 40 I.C 230=25 C L J. 354. A security bond for due performance of appellate decree can be enforced in execution. 18 I.C 900=17 C L. J 267 (F B). Also 1925 M W N. 907=49 M L J 643, 149 I.C 1104=1934 A L J 865=4 A W R 514=1934 A 524 (1). A mortgagee can very well purchase equity of redemption sold in execution of a money decree by a stranger. 43 I.C 212=27 C L J 431. A mortgagee can sell mortgaged property in execution, in a claim unconnected with the mortgage. 30 I.C 988=42 C. 780; 18 P R 1916=33 I.C 802; 20 I.C. 523=7 S.L.R 11, 27 C W N 38=37 C L J 265. It is not sufficient if the claim is connected with the mortgage. It must also be one arising under the mortgage. Thus equity of redemption may be sold in execution of money decree obtained by mortgagee for payment of land revenue to save mortgaged property from revenue sale. 1935 R 438. See also 1936 R 47.

MONEY-DECREES.—Where in a suit for sale only a money-decree was passed, the mortgage having been held to be unenforceable, this rule does not bar sale in execution of the money-decree. 18 A L J 677=42 A 566. Also 41 M L.J 160=14 L.W 331; 19 A L J 728=43 A 677. Where therefore in a suit on a mortgage executed by a Hindu

may institute such suit notwithstanding anything contained in Order II, Rule 2.

Notes.

father, the sons successfully impeach the mortgage as having been made without legal necessity or other justifying cause and a simple money decree is passed against the father, R. 14 is no bar to the decree-holder obtaining satisfaction of his decree by attachment and sale of the property covered by the mortgage-deed. 157 I.C. 1010=1935 A.W.R. 431=1935 A. 507, so also where it is found that amount claimed is not charged on mortgaged property, and money decree above is granted. 1935 A.W.R. 1216. Mortgage—Suit on—Claim for money decree only—If bar to subsequent suit for sale. (1937) 1 M.L.J. 469. Mortgagee sued for money decree and stated in the plaint that he surrendered the mortgage security, on applying for leave to execute the money decree against property which was security for loan, held, that mere averment in the plaint that the mortgagee gave up the right under the mortgage for the purposes of the suit did not extinguish the mortgagee's rights and that therefore provisions of R. 14 would apply. 13 R. 292=157 I.C. 363=1935 R. 132. A sale in execution of a money decree for the mortgage debt in favour of the mortgagee can be set aside in a redemption suit by the mortgagor even after confirmation of sale. 46 I.C. 493=28 C.L.J. 151. Also 36 A. 516=12 A.L.J. 855. But see *contra* 37 A. 165=13 A.L.J. 138 (F.B.). Also 41 B. 357=19 Bom.L.R. 75; 47 C. 377=24 C.W.N. 229 (F.B.); 18 P.R. 1916=33 I.C. 802; 15 I.C. 589. The mortgagee purchaser in contravention of this rule is not a trustee for the mortgagor. 50 I.C. 472=1919 Pat.H.C.C. 92. Also see 47 C. 377=24 C.W.N. 229 (F.B.). But when in a consent decree a charge was created, the decree can directly be executed and no separate suit to enforce the charge is necessary. 35 C.L.J. 61=1922 C. 35. Also 2 P. 787, 103 I.C. 449. *Contra* 22 Bom.L.R. 650=44 B. 981. It can have no application where the charge is created by the decree itself. 43 B. 631=21 Bom.L.R. 698=157 I.C. 292=1935 N. 129. But see 1935 M.W.N. 1236=69 M.L.J. 854, where it was held, that the holder of a decree which declares in favour of the plaintiff a charge on certain properties for unpaid purchase-money cannot bring the properties to sale by execution of the decree, without getting a preliminary decree for sale as contemplated by O. 34, R. 14. The rule does not apply to a case where a money decree is given under a different mortgage. 49 B. 208=27 Bom.L.R. 202; 131 I.C. 119=1931 A.L.J. 159=1931 A. 350. Where the whole of the property mortgaged was leased to the mortgagor by the mortgagee, a decree for arrears of rent represents in substance the usufruct of the mortgaged property and the decree is a decree which the mortgagee has obtained for the payment of money in satisfaction of a claim

arising under the mortgage. So, he could not by reason of the provisions of R. 14 attach the property and put the same up for sale. 162 I.C. 402=1936 A.L.J. 1218=1936 A. 708. See also 40 C.W.N. 343. A maintenance decree-holder can proceed in execution against the property charged under the maintenance decree. 47 I.C. 630=23 M.L.T. 355. Also 6 P.L.T. 802=4 P. 693. See also 12 P. 359=145 I.C. 1=14 P. L.T. (Sup.) 1=1933 P. 306. Even a decree-holder attaching a maintenance decree with charge, is entitled in execution to bring the charged property to sale. 148 I.C. 196=1934 N. 83. Under this rule property given as security in a compromise decree could not be subject to sale in execution of the decree. 37 I.C. 397. Where a money decree is ordered to be paid in instalments on the judgment-debtor executing a security bond hypothecating immovable property for the satisfaction of the decree and default is committed in the payment of instalments, the hypothecated property can be sold in execution of the decree and a fresh suit is not necessary. 15 P. 545=17 P.L.T. 434=1936 P. 289. The rule does not prevent sale of the mortgaged property of a surety under a compromise decree where the suit was for money. 38 A. 327=14 A.L.J. 385. Where security is given to a Court itself, a fresh suit upon the security is not necessary. The security can be realised in execution. 30 C.W.N. 683=95 I.C. 908=1926 C. 889. The defendant executed a security bond whereby he undertook to pay on behalf of another and he also undertook that if he failed to pay, his properties mentioned in schedule attached to the bond were to be security and the plaintiff was to have first charge over them. The deed was duly registered. The amount was not paid by both and plaintiff sued defendant for payment of the amount and on non-payment, sale of land offered as security was asked for. Court gave only a money decree and plaintiff applied in execution for attachment and sale of property. Defendant objected that the properties cannot be sold except by a suit under R. 14, for enforcement of mortgage. Held, that the suit of the plaintiff must be considered as a suit on a mortgage, that as the relief as to sale of property was refused in the suit, a suit under R. 14 would be barred under Expl. 5, S. 11, that the mortgage was not existing after refusal of such relief and that plaintiff was entitled to have the decree executed by attachment and sale. 145 I.C. 373=1933 R. 158. R. 14 relieves a plaintiff from the bar of *res judicata* contained in O. 2, R. 2 but not the bar under S. 11. 145 I.C. 373=1933 R. 158. An arrangement for maintenance payable by a zemindar and his heirs to the junior members creates a charge on the assets of the Zemindary. 42 M. 581=36 M.L.J. 164=23 C.W.N. 549

(2) Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended

15. All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds within the meaning of section 58, and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

Loc. Am.—[Oudh.] In O. 34, R. 15, read R 15 as R 15 (1) and add the following as R. 15 (2) —

"(2) Where a decree orders payment of money and charges it on immovable property on default of payment, the amount can be realised by sale of that property in execution of that very decree."

ORDER XXXV.

INTERPLEADER.

Plant in interpleader-suits

1. [S. 471.] In every suit of interpleader the plaintiff shall, in addition to the other statements necessary for plaints, state—

(a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs;

(b) the claims made by defendants severally; and

(c) that there is no collusion between the plaintiff and any of the defendants.

2. [S. 472.] Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

Notes

(P C.) The limitation period to set aside sale in contravention of this rule is three years. 1920 P H.C C 259 Cf. 41 I. C. 333=2 P L J. 587 Where a person hypothecates his properties as security for mesne profits that might be awarded by an appellate Court and executes a bond without naming the obligee, a suit to enforce the obligation against the surety is not maintainable. The remedy is by application in the original suit itself to make the surety a party and pass a decree against him for mesne profits 42 A 158=46 I A. 228=33 M L.J. 302 (P C.)

O. 34, R. 15.—Where in a suit for the recovery of money, defendants accept a personal decree against themselves, and submit to a declaration in the decree that a portion of their immovable property should be charged for payment of the decretal amount, the decree is nothing but a personal decree, and although it also creates a charge, it cannot be regarded as a decree under O. 34 150 I C. 95=1934 N. 140. The rule applies to enforcement of a charge, payable in money 39 M.L.J. 30=43 M 786. Because the words of S. 100 of the T P. Act are very wide the provisions of S. 68 as to the liability of a mortgagor apply to a person creating a mere charge also. 33 I.C 321=27 M.L.J. 494. A charge-holder is, as much as a mortgagee, entitled to a personal remedy in the event of deficiency of the proceeds of sale. 59 C. 1314=140 I.C 788=36 C W.N 709=1932 C 775. A per-

son who has obtained a charge decree in respect of a property for royalties due to him from the property, has no right to insist on retaining possession of the property as against an execution purchaser till his dues are paid, when the possession held by him is not attributable, to the mortgage or charge. He can insist on his due being paid if he has been let into possession by the mortgagor on the person against whom the charge was held. But when his possession is not so attributable, but wrongful, as having been wrested from the execution-purchaser, he cannot insist on possession being retained till his dues, i.e., the amounts due under the charge decree are paid. I L. R (1937) 1 C 203=64 C L J 280=1937 C. 129

O 35, R. 1.—When the preliminary decree is passed in an interpleader suit it becomes to all intents and purposes a partition suit 1930 M. 988=60 M L.J 79. Interpleader-suit—Interest sufficient to disentitle plaintiff from suing—Applicability of English Law See 4 R 465 Where a mortgagee does not deny an assignment by him of his rights under the bond but contends that it is void, the mortgagor is not bound to bring an interpleader-suit making the mortgagee and his assignee to interplead as between them 1 L.W 419=15 M L T 331; 23 I.C. 607=27 M.L.J. 134.

O. 35, R. 2.—Investment of money deposited in Court pending decision with a party is objectionable as the successful party is entitled to the money from Court with-

3. [S. 476.] Where any of the defendants in an interpleader-suit is actually suing the plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by

Procedure where defendant is suing plaintiff

the Court in which the interpleader-suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-suit.

4. [S. 473.] (1) At the first hearing the Court may—

Procedure at first hearing

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit, or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff.

and shall proceed to try the suit in the ordinary manner.

5. [S. 474.] Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for

Agents and tenants may not institute interpleader suits.

the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Illustrations.

(a) *A* deposits a box of jewels with *B* as his agent. *C* alleges that the jewels were wrongfully obtained from him by *A*, and claims them from *B*. *B* cannot institute an interpleader suit against *A* and *C*.

(b) *A* deposits a box of jewels with *B* as his agent. He then writes to *C* for the purpose of making the jewels a security for debt due from himself to *C*. *A* afterwards alleges that *C*'s debt is satisfied, and *C* alleges the contrary. Both claim the jewels from *B*. *B* may institute an interpleader suit against *A* and *C*.

6. [S. 475.] Where the suit is properly instituted, the Court may provide for the costs of the original plaintiff by giving him a

Charge for plaintiff's costs.

charge on the thing claimed or in some other effectual way.

ORDER XXXVI.

SPECIAL CASE.

1. [S. 527.] (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement

Power to state case for Court's opinion.

in writing stating such question in the form of a case for the opinion of the Court, and providing that,

upon the finding of the Court with respect to such question,—

Notes.

out further proceedings 24 M L J. 404=19 I.C. 219.

O 35, R 4.—Interpleader suit—Non-appearance of claimants—Procedure. 53 I C 365=21 Bom L R 948.

O 35, R 5.—A Railway Company by accepting goods for carriage does not become the agent of the consignor within the meaning of the rule. The Company may file

an interpleader suit. 28 I C 948=17 Bom. L R 339. A tenant has no right to bring a suit to determine which of the two defendants, both of whom claim rent from him is his landlord. 48 I.C. 733, 13 I.C. 40=15 C L J. 653.

O 36, R. 1.—Where a special case is stated by consent it can only be re-opened by mutual consent 43 B 281=20 Bom. L.R. 839

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them; or

(b) some property, moveable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them; or

(c) one or more of the parties shall do, or refrain from doing, some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.

2. [S. 528.] Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing, any particular act, the estimated value of the property to be delivered, or to which the act specified has reference, shall be stated in the agreement.

3. [S. 529.] (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as a defendant or defendants; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

4. [S. 530.] Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statement contained therein.

5. [S. 531.] (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suits so far as the same are applicable.

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—

(a) that the agreement was duly executed by them.

(b) that they have a *bona fide* interest in the question stated therein and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow.

ORDER XXXVII.

SUMMARY PROCEDURE ON NEGOTIABLE INSTRUMENTS.

Application of order.

1. [S. 538.] This order shall apply only to—

(a) the High Courts of Judicature at Fort William, Madras and Bombay;

Notes.

O 36, Rr 2 and 3.—Where the case referred began by saying that the parties had concurred in stating the question of law arising therein in accordance with the Code for the opinion of the Court and ended by setting out the question but it did not contain an agreement by the parties to pay money or deliver property consequent on the finding by the Court, *held*, that the provisions of S. 90 and O 36, R. 2 of the Code were not satisfied. Under these sec-

tions the filing of a proper agreement is a necessary condition. 32 Bom.L.R. 416=1930 B. 232. Special case submitted for opinion and declaration—Other efficacious remedy open to parties under Special Act—Case whether one “fit to be decided”. (*Ibid*)

O 37, R 1.—Other conditions being fulfilled a suit on a Shah Jog hundi will lie under O. 37 98 I.C. 78=1927 S. 90. Suit on hundi or in the alternative for compensation is maintainable under O 37. 1928 S 86=107 I C 218. A suit on a nego-

1[(b) ...]

(c) The Court of the Judicial Commissioner of Sind; and

(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1832, have been already applied.

Loc Ams—[Allahabad.] *Add Cl (c)* any Court in the Province of Agra exercising the powers of a Small Cause Court".

[Calcutta.] O 37, R. (1), Sch. 1.

In R 1 of O 37, in the first schedule—

(a) in cl (c) the word "and" shall be omitted,

(b) after cl (c) the following clause shall be inserted, namely—

"(cc) all Civil Courts (except Courts of Small Causes) in the districts of Chittagong, Dacca, Pabna and 24 Parganas; and".

[Lahore.] Rule 1 *Add* the word 'and' and the following as Cl. (e):—

(e) The Courts of the District Judge and the Subordinate Judges of the First Class of the Delhi Province and the Courts of the District Judges and Subordinate Judges of the first class in the civil districts of Lahore and Amritsar in the Province of the Punjab.

2. (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder,

Institution of summary suits upon bills of exchange, etc be instituted by presenting a plaint in the form prescribed; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from

time to time prescribed.

Leg Ref

¹ Cl. (b) has been omitted by the Government of India (Adaptation of Indian Laws) Order, 1937; and it ran as follows — "(b) the Chief Court of Lower Burma;"

² Notifications under S. 538 of Act XIV of 1882 in the various list of Local Rules and Orders. The Notifications are kept in force. See S 157.

Notes.

uable instrument provided for under O 37, falls under the category of suits of the nature referred to in S. 128 (2) (f) and Art 5 of Limitation Act applies to such cases. 1927 S. 90=98 I.C. 78. O. 37 refers only to the mode of trial in suits and does not confer any jurisdiction. 13 I.C. 244=5 S.L.R. 155. In a suit on promissory note oral agreement as to payment of interest cannot be set up to obtain a decree thereon. 49 C. 716=1922 C 513. Where in a suit on a pro-note under O. 37, defendant applies for leave to appear and defend the suit, and Court doubts the sincerity of the defence, it should grant leave on condition that he should pay into Court the amount claimed. 60 I.C. 639=12 L.W. 712. In summary suits under O. 37, it is impossible to go into partnership accounts and so the plea that it is part of partnership account cannot be raised. 9 I.C. 299 Cl (e) to R 1, added by Lahore High Court, is not *ultra vires*. 8 L. 156=9 Lah L.J 57=1927 L. 174. Subordinate Judge invested with Small Cause powers has not, when exercising those powers, authority to act under R. 1 51 M. 491=55 M.L.J. 114=1928 M. 517

O. 37, R. 2.—The effect of R. 2 is that if Judge refuses leave to defend or gives leave on terms which defendant is not able to comply with, the plaint is taken to be admit-

ted and plaintiff becomes automatically entitled to a decree. So such an order is a 'judgment' within the meaning of cl 15 of the Letters Patent and an appeal lies therefrom. 34 Bom L R. 252=1932 B 163. The acceptor, drawer and endorser may be sued in one suit. 16 C. 804. The operation of S. 80 of the Negotiable Instruments Act is not excluded by this rule. On the other hand, it makes S 79 or 80 of the Negotiable Instruments Act, as the case may be, specifically applicable to a case filed under O. 37 of the Code. Where a person claimed in the plaint 33½ per cent. interest on instruments of debt which contained no agreement as to the exact rate of interest, *held*, interest should be awarded at the rate of 6 per cent. from the date of hundies to the date of decree and subsequent interest also at the same rate thereafter. 56 M 398=1933 M 299=64 M.L.J 117. Interest cannot be recovered unless specified in the note and no evidence regarding any agreement to pay can be given. 30 C. 446. O 37 contains provision for summary procedure, which is antagonistic to an investigation of claims to a set-off, unless of the clearest description. 49 I.C. 193=12 S.L.R 70. An affidavit in support of an application for leave to defend as required must disclose facts sufficient to support the application (*Ibid.*) Firm being sued—Partner entering appearance should obtain leave to defend. 50 B 666=1926 B. 585. If a defendant who has obtained no leave to defend a summary suit can ask the Court to make the decretal amount payable by instalments. 50 B. 262=1926 B. 250=94 I.C. 9. Suit under—Plaintiff's right to costs—Suit cognisable by Small Cause Court—Need for certificate of Judge—Presidency, Small Cause Courts Act, S. 22 56 C. 484=33 C.W.N. 95=1929 C. 560. In a suit on

(2) [S. 532.] In any case in which the plaintiff and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall be entitled to a decree.

1["(a) for the principal sum due on the instrument and for interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of Negotiable Instruments Act, 1881, up to the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest up to the date of the decree at the same rate or at such other rate as the Court thinks fit; and

(b) for such subsequent interest, if any, as the Court may order under section 34 of this Code; and

(c) for such sum for costs as may be prescribed:

Provided that if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.

(3) A decree passed under this rule may be executed forthwith."']

Loc. Ams.—[Bombay] In sub-rule (1) of R. 2 of O. 37 after the words "promissory notes" the following words shall be *inserted*, namely:—

"And all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on a contract express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only."

[Rangoon.] In O. 37, R. 2, sub-rule (2), the following shall be *inserted* after the words "pursuance thereof"—

"Or of his applying for such leave within ten days from the service of the summons on him and on proof that the summons was duly served on him more than ten days before."

3. [S. 533.] (1) The Court shall, upon application by the defendant, give

Leg Ref.

¹ Substituted by Act XXX of 1926, S. 4.

Notes.

a promissory note the plaintiff referred to the pledges in respect of the jewellery for payment of money due in respect of the promissory note but asked leave under O. 2, R. 2 to reserve his right as such pledgee. The defendant applied for leave to defend on the ground that since the execution of the promissory note various amounts had been paid in satisfaction and that upon proper account being taken it would be found that the amount claimed was in excess of the amount due. *Held*, that leave to defend be granted on the defendant giving security for costs only. 1936 C. 476

INSTALMENT ORDER—JURISDICTION TO HEAR DEFENDANT—At the time of passing a decree under R. 2, Court has jurisdiction to hear defendant on the question whether or not the amount held to be due from him should be made payable by instalments. The effect of R. 2 is not to abrogate the jurisdiction of Court which it otherwise possesses in respect of it. 11 R. 424=1933 R. 245

O. 37, R. 3. LEAVE TO DEFEND—GRANT OF—**TEST**—The question to be considered on an application under R. 3 is whether or not a triable issue is disclosed by defendants on affidavit or otherwise; a triable issue meaning a plea which is at least plausible. Once Court comes to the conclusion that there is

a triable issue in the case, it must grant leave to defend without requiring defendant either to pay the amount claimed into Court or to furnish security therefor; such a condition must be imposed only in exceptional cases where, for instance, there appears to be so grave suspicion that Court comes to the conclusion that the defence is put in only in order to obtain further time. *Held*, on facts, that leave to defend must be granted but that as there was a strong suspicion in the mind of Judge with regard to a part of the defence raised, he was asked to furnish security to the extent of half of plaintiff's claim. 1934 S. 191. Where, in a suit on hundies, defendant himself showed that the hundies were not without consideration, *held*, that he could not be granted leave to defend the suit. 145 I.C. 725=1933 L. 440. Where the Court is not satisfied with the *bona fides* of the defendant, and vague and indefinite assertions have been made by him to gain time, it is open to the Court to grant leave to defend only conditionally, *i.e.*, on the defendant paying into Court the amount claimed (1920 M. 969, *Foll*) 165 I. C. 166=1936 L. 584

LEAVE TO DEFEND—WHEN TO BE UNCONDITIONAL—TRIAL ISSUE—MEANING OF—If a defendant in a summary suit sets up a defence in his affidavit in support of his application for leave to defend, which, if he should succeed in proving, would entitle him to succeed in the suit, the Master or the

Defendant showing defence on merits to have leave to appeal.

leave to appear and to defend the suit upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the

application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

Loc Ams.—[Bombay.] In R. 3 of O. 37, the following sub-rule (3) shall be inserted—

"(3) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)." **[Lahore.]**

In R. 3 the following sub-rule (3) shall be inserted.—
"(3) The provisions of S. 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

4. [S. 534.] After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

5. [S. 535.] In any proceeding under this Order the Court may order the bill, hundis or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all the proceedings shall be stayed until the plaintiff gives security for the costs thereof.

Notes.

Court hearing the application has no discretion in the matter, and unconditional leave to defend must be granted. A triable issue in such a case has been raised, and it is not open to the Master or anybody else other than trial Judge to go into the merits and find out whether the case of the defendant is true. 58 M. 116=68 M. L. J. 16. In a summary suit, if the defendant raises a triable issue, he must be given an opportunity to have his case tried, but at the same time the plaintiff should not suffer by any concession shown to the defendant. 41 L. W. 573=1935 M. 302=68 M. L. J. 407.

REVISION—It will not be right to crystallise into rules of law the circumstance under which the Court, in the exercise of the discretion vested in it by R. 3 (2), can demand security. If in any particular case High Court is satisfied that the discretion has been arbitrarily or perversely exercised, it will interfere in revision. 161 I. C. 182=43 L. W. 298=1936 M. 246=70 M. L. J. 241.

O. 37, Rr. 3 and 4—*Ex parte* decree in summary suit—Remedy of defendant not obtaining leave to defend. 11 I. C. 433. High Court has power to extend time within which a defendant can come in and obtain leave to defend. 3 C. 539; 18 B. 717; 6 Beng. L. R. App. 64. Where defendant shows a defence apparently real, leave to appear and defend will be granted. 6 Beng. L. R. App. 64. Application under R. 3—Question to be decided is whether there is

trial issue between the parties and where it exists leave should be granted without requiring deposit or security from defendant. 98 I. C. 72=1927 S. 60. Summary suit on a bill of exchange—Counter claim for damages. 120 I. C. 528. Where money is deposited by a defendant as a condition precedent to the setting aside of a decree under the rule, the decretal amount is a charge on the deposit if final judgment is passed against the defendant. Court is not competent to enquire into the ownership of the money deposited. 38 I. C. 481=32 M. L. J. 503. An order charging the property of an insolvent-debtor for the re-payment of plaintiff's claim on condition of granting permission to defend his suit is a permanent charge till re-payment of claim. 58 I. C. 10=24 C. W. N. 401. Summary suit—Leave to defend granted on condition of furnishing security—Condition not fulfilled—*Ex parte* decree—Same if appealable—Propriety of interlocutory order whether can be challenged. 32 Bom. L. R. 660=125 I. C. 438=1930 B. 364.

APPEAL—An appeal lies from an order refusing to set aside an *ex parte* decree. 2 B. 644. See 42 C. 735.

O. 37, R. 4—An order rejecting an application under this rule is not appealable. An appeal is competent from the decree passed under O. 37 and the rejection of an application under R. 4 could also form a ground of appeal preferred against the decree passed. 39 P. L. R. J. & K. 11.

6. [S. 536.] The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

Recovery of cost of noting non-acceptance of dishonoured bill or note.

7. [S. 537.] Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

Procedure in suits.

ORDER XXXVIII.

ARREST AND ATTACHMENT BEFORE JUDGMENT.

Arrest before Judgment.

1. [Ss. 477 and 478] Where at any stage of a suit, other than a suit, of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

Where defendant may be called upon to furnish security for appearance.

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(i) has absconded or left the local limits of the jurisdiction of the Court, or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance:

Notes.

O. 38, R. 1 —An application in writing to enforce an award under Sch II, para 20, becomes a suit for the purposes of O 38 dealing with attachment before judgment 1927 B 259=29 Bom L.R. 342=101 I C 430 Arrest before judgment—Security for appearance—Order when to be passed—Principles guiding in passing orders See 50 M 27=1926 M 584=50 M L.J. 348

SCOPE AND OBJECT OF.—The object of the surety bond this rule is to secure the rights of judgment-creditor Government is not interested in the proceedings in any way. 28 I C 92=8 S L R 270 Small Cause Court cannot attach immoveable property. 28 C W N 16=1924 C 193 Rulings to the contrary are not now good law See now Act I of 1926 Mere fact that an appeal is pending against a decree is no reason for not enforcing execution by arrest when the execution has not been stayed. 1924 L. 360

MORTGAGEE, RIGHT OF.—A mortgagee cannot obtain an order for attachment before judgment of the mortgagor's other properties, simply on the ground that mortgagor had suffered his other properties to be sold in execution of other decrees for payment of Government Revenue. He must show that mortgagor had been deliberately and fraudu-

lently effecting sales or mortgages of his other properties with a view to defeat mortgagee's right to personal decree 140 I C. 457=36 C W N 746=1932 C. 790 See also 33 Bom L. R. 514=1931 B. 329 (3 P 966, 46 C 245, 16 A. 186, Fol.)

ILLUSTRATIVE CASES.—Where the master of a vessel is sued for repairs done to the vessel, and he is about to leave the jurisdiction of Court with the vessel, he can be arrested under this rule 14 C 695 An officer proceeding from Burma to England on leave, and who resides for a few days at Madras can also be arrested 8 M 205 Minor defendant without guardian—Conditional order of attachment of property is valid 106 I.C 142=1928 M. 1

SUIT FOR DAMAGES FOR MALICIOUS ATTACHMENT.—Where an application to vacate order for attachment before judgment was not prosecuted to its conclusion, no suit for malicious attachment is maintainable as long as the original order of attachment had not been set aside 59 C. 1073=36 C W. N. 447=1932 C 821 Injunction restraining alienation of properties—Prejudice to business capacity and loss of faith in credit not grounds for award of damages 59 C. 1082=139 I C 515=36 C W N 323=1932 C. 695

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

2 [S. 479.] (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against

him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

3 [S. 480.] (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation and shall call upon the defendant to find fresh security.

4. [S. 481.] Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or, where a decree is passed against the defendant, until the decree has been satisfied:

Procedure where defendant fails to furnish security or find fresh security

Notes.

O. 38, R. 2.—Where a warrant of arrest is ordered under R. 1 and the person proceeded against offers to furnish security, the security should be limited to the amount claimed 56 C 700=1929 C. 732 Where a surety under R. 2, gave a bond to produce defendant when called upon to produce him and plaintiff decree-holder having made his application against the surety the latter produced defendant in Court but it appeared that defendant had previously applied for being adjudicated an insolvent and had obtained exemption from arrest, *held*, that the surety satisfied the condition of his bond when he produced defendant in Court and he was under no legal liability to see that he was in an attachable condition. 38 L. W 832=65 M.L.J. 793=1934 M. 24 A surety bond which provides that the liability of the surety extends to paying the amount claimed in the suit in the event of a decree being passed is not illegal 115 I C 244 (1). Money paid into Court by a defendant arrested before judgment sufficient to answer the plaintiff's claim, is ear-marked for the suit and is subject to the lien of the plaintiff for his decree amount in case he succeeds. 41 M. 1053=36 M.L.J. 355. His lien subsists even when the claim of decree-holder is dis-

allowed but subsequently upheld in appeal 97 I C 1020=51 M.L.J. 436=1926 M. 1104. Insolvency of defendant before decree does not vest the money in Official Receiver. (*Ibid*) The case is different if security is given for the appearance of defendant. (39 M 903; 29 B. 405, Dist.) (*Ibid*.) O. 21, R. 63 requires a claimant whose objection to an attachment before judgment has been disallowed to bring a suit on his title within the period prescribed by Art. 11. (41 M 23, overruled.) 41 M. 849=35 M.L.J. 231 (F B.).

O 38, R. 3 —Section 135 of the Contract Act has no application to the case of a surety under this rule and his obligation continues even though the parties to the suit entered into a compromise on the strength of which a decree was passed by the Court 37 M L J 435=43 M 272 Order discharging surety but directing judgment-debtor not to leave the Court—Legality. 1929 L. 163 Surety's application for discharge—Production of judgment-debtor—Withdrawal of application of discharge—Subsequent insolvency of judgment-debtor—Surety not discharged from his obligations 6 R. 241=1928 R 184=111 I.C. 15

O. 38, R. 4 —Imprisonment under this rule becomes after decree, imprisonment in

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees:

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

Attachment before Judgment.

5 [S. 483.] (1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

Where defendant may be called upon to furnish security for production of property.

Notes

execution of a decree 7 B 431. Where in execution of a money decree, the share of a Hindu co-parcener in the family property was attached during his lifetime and brought to sale after his death his interest passes to the auction-purchaser and precludes the title arising from survivorship. [4 M 302, (Foll.); 5 C. 48 (P C.), 25 C 179 (P C.), Ref.] 24 I C. 667=1914 M.W.N 733

O 38, R 5 SCOPE OF RULE—Application to restrain person temporarily from withdrawing amount at his credit and Court's order thereon are really for attachment before judgment 16 I C 473, 1929 R. 94. It is essential that plaintiff must make out a *prima facie* case before any attachment before judgment or an injunction can be granted. Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience likely to arise in consequence of refusal will be greater than that from granting it. Neither an attachment nor an injunction should be lightly granted. It is only where it is essential that property should be kept in its existing condition pending the suit that the Court should interfere under O 38, R. 5 (1) or under O 39, R 1 61 C 814=38 C.W.N 771=1934 C 694. Attachment before judgment confers no right on the party who obtains the order of attachment. 37 A. 578=13 A.L.J 732; 151 I.C. 317=59 C.L.J 18=1934 C. 426. Nor does it give any interest in the attached property 30 I C 38=21 C.L.J 614. A person gets no rights through his attachment before judgment, if the defendant is adjudicated insolvent after the attachment but before the decree and the property vests in Official Receiver 117 I.C. 145=1930 S 127. Where during pendency of a suit defendant agreed and paid a certain amount into the hands of plaintiff's pleader in part satisfaction of the money to which plaintiff may become entitled and plaintiff subsequently obtained a decree but meanwhile another creditor filed an application in insolvency and defendant was adjudged insolvent after the decree in the earlier suit had been made. *Held*, that the money deposited with plaintiff's pleader in the earlier suit did not form part of the

assets of the insolvent and original plaintiff was entitled to appropriate the same towards his decree 145 I.C 826=37 C.W.N 475=1933 C. 625. The property may be moveable or immoveable, and it is immaterial whether it is in the actual possession of defendant or of some other person on his behalf. 17 A. 82, 9 Bom.L.R. 540. A conditional order of attachment that simply prevents the property from alienation by the minors pending the disposal of the application for appointment of a guardian is not invalid merely because the guardian proposed appears in Court and says he is unwilling to act. 106 I.C. 142=1928 M 1

ORDER FOR ATTACHMENT UNDER—GROUNDS FOR—PROOF OF PRESENT INTENTION—In an application for an attachment before judgment under R 5 (1), plaintiff must thoroughly satisfy Court that defendant intends to obstruct or delay the execution of any decree that might be passed against him or with such intent is about to dispose of his property. Mere vague allegations are not sufficient, nor would the mere fact that defendant has in the past mortgaged or disposed of his property be a sufficient ground for levying attachment. There must be a present intention. Where the affidavit in support of application for attachment is sworn not by plaintiff himself, but by an employee of his, who states that defendant is trying to or is about to dispose of his properties with intent to obstruct and delay the execution of the decree, and that the statements are based partly on information and partly on belief—without stating which are based on belief, and which on information *held*, that the affidavit was defective and inadequate, and that the attachment was rightly refused. Under R. 5 (1), the Court may be satisfied "otherwise", i.e., from admissions in the objections filed by the defendant, if there are such admissions 61 C 814=38 C.W.N. 771=1934 C. 694=38 P.L.R. 772=1936 L. 33. It is doubtful if circumstances would ever arise which would justify Court in allowing an order of attachment in respect of property under the control of the Court of Wards. 150 I.C. 1142=1934 N. 169 (2). Where it was alleged that *defendant company* were realising their assets to prevent satisfaction of

(a) is about to dispose of the whole or any part of his property, or

Notes.

plaintiff's claim, *ibid.*, that it was a fit case to order attachment before judgment 148 I.C. 719=1934 L 594. An order of attachment before judgment can only be made after defendant fails to show cause to the contrary or to furnish security 23 I.C. 107, 1936 A.W.R. 362=1936 A.L.J. 314=163 I.C. 336=1936 A 408. The power should be exercised only on clear proof of the existence of the mischief aimed at, 5 Pat.L.T. 124=1924 P. 312. If Court accepts the view that defendant has no intention of alienating the property, there is no power to order attachment (*Ibid.*) Intent to obstruct or to delay the execution within the terms of the rule must be clearly proved. Vague allegations will not suffice. 23 Bom. L.R. 1228=46 B 431; 1928 P. 172=44 I.C. 240 [See also 41 I.C. 89.] Trustee failing to produce accounts. Defendant attempting to dispose of property during pendency of suit is not enough. 45 B. 1256=23 Bom L.R. 550. Allegation that defendant is running into debts is not sufficient. 1927 C 354=101 I.C. 9=31 C.W. N 432. See also 94 I.C. 880=1926 C 855. Court ought to withdraw attachment before judgment on the dismissal of a suit. Attachment is not however revived by reversal of the dismissal on appeal 9 I.C. 918=13 C.L.J. 243. An attachment applied for before judgment but actually effected after decree has still the force of the attachment before judgment. 42 M. 1=35 M.L.J. 387. Dismissal of the subsequent execution application will not put an end to the attachment (*Ibid.*) An attachment before judgment ceases to be operative on the dismissal of the first application for execution. (17 N. L.R. 121, Foll.) 1922 N 81. Where property is attached before judgment a decree in plaintiff's favour does not determine the attachment which continues in force 1919 Pat.H.C.C. 465=53 I.C. 20. An attachment followed by decree prevents the accrual of title by survivorship where judgment-debtor dies after attachment of decree but before the order for sale 24 I.C. 320=26 M.L.J. 517. An attachment before judgment becomes one in execution on an application for execution, and R 57 of O. 21 will apply to it equally with the other rules of O. 21 63 I.C. 712=17 N.L.R. 121; 31 Bom L.R. 1101=1929 B 455. Civil Court has no power to issue a warrant of attachment before judgment on property situated without its jurisdiction 25 I.C. 771. See also 8 M 20; 5 B.H.C.R. 570, 24 C.L.J. 533=22 C.W.N. 160. But see 1926 L. 330=93 I.C. 361; 1928 L 376. Property outside the jurisdiction of High Court—Mode of attachment. See 94 I.C. 116=1926 B 278=28 Bom L.R. 380. See O. 38, R. 13 newly added by Act I of 1926, which was passed to set at rest the conflict of rulings between the different High

Courts regarding the power of a Court of Small Causes to order attachment before judgment of immovable property. As to the conflict of rulings before Act I of 1926, see 1923 C 176, 49 C. 994; 1925 C. 1, 52 C. 275; 82 I.C. 109=40 C.L.J. 119; 28 C.W.N. 1056; 48 M 488=1925 M. 589; 43 I.C. 717, 53 I.C. 814; 46 C 717=31 C.L.J. 179. There is no suit before Court until the application to sue *in forma pauperis* has been granted. Consequently Court has no jurisdiction to attach defendant's property before judgment before application is filed as a suit 25 C.L.J. 159=21 C.W. N 870. A mortgagee may, after preliminary decree, attach other properties of the mortgagor, if the hypothecation is insufficient and mortgagor intends to dispose of his other properties fraudulently 46 C 245; 37 A. 423=13 A.L.J. 565; 1929 L 402. Mortgagee decree-holder selling portion of mortgaged property and realising substantial amount—Remainder not sold—Application by him to attach non-mortgaged properties—Maintainability 1936 A.L.J. 314=1936 A. 408. Attachment before judgment—Money deposited by sureties for release of attachment—Assets held by Court—Rateable distribution. 26 C.W.N. 169=1922 C. 19. A surety's liability ceases as soon as the first Court dismisses the suit. His liability is not revived by appellate Court subsequently decreeing plaintiff's claim 29 I.C. 271=147 P.L.R. 1915, 47 M.L.J. 523; 12 B 71, 5 R 492. See also 12 Bur L.T. 89=52 I.C. 930. But if trial Court decrees the suit, and appellate Court dismisses it and second appellate Court restores the decision of trial Court, the liability of surety is also restored 14 Rang 361=1936 Rang 342. Surety entering into agreement before trial Court is bound by decree passed in appeal 51 B 31=1927 B 84=99 I.C. 820. But see 5 R 492. Where a surety bond has been given for the property attached before judgment the decree in the suit can be executed against the surety also 45 I.C. 429=11 S.L.R. 122. Surety under—Bond—Amount of—Bond providing for liability of surety for decretal amount and not value of property to be attached—If illegal 1936 C. 143. The liability of the surety is the same whether the judgment has been arrived at by the Courts after a regular trial or on an award passed by the arbitrator appointed in the suit. Arbitration is an ordinary incident of the suit. (*Ibid.*) An order of discharge of surety without notice to the parties is rescindable at the instance of any party. 37 I.C. 919.

NOTICE TO PARTY—FORM OF NOTICE.— Issue of notice to defendant is absolutely necessary before an order is passed. Where no notice is issued, no foundation is laid for an action under R. 5 (3). Before passing the order of attachment before judgment

[S. 484.] (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

Notes.

ment, the Court must faithfully and strictly carry out the stringent procedure as laid down in R. 5 and no short cuts are permissible. 38 P. L. R. 772=1936 L. 33. An order granting application for attachment before judgment without issuing notice to defendant under O. 38, R. 5 (1) can be deemed to have been one under O. 38, R. 6 and is therefore appealable under O. 43, R. 1 (g). (*Ibid.*) Even if there is no appeal against the order, the Court may treat the memorandum of appeal as an application for revision, and can interfere on the ground that the order of the Court below is unjust and unfair and was passed in defiance of the legal procedure prescribed by the Code (*Ibid.*) Notice to the party under R. 5 should be sent on Form No. 5, Appendix F. Issuing notice on the general form merely directing the defendant to appear on the date fixed and show cause against the application and informing that if he did not appear and show cause the application would be disposed of in his absence amounts to an irregularity and is objectionable though not necessarily wholly *ultra vires* or void *ab initio*. 148 I. C. 509=1934 A. 456. The wording of O. 38, R. 5 and of Form No. 5 in Appendix F to the Code, shows that the legislature intended that the notice to the defendant to furnish security or to show cause against it and the order for the conditional attachment of his property should be issued simultaneously and in one and the same form. Where, therefore, the notice issued under that rule only directed defendant to show cause why the application for attachment before judgment should not be allowed and it did not appear that any notice was to be (or in fact), issued to him about the furnishing of security, *held*, that the warrant was illegal, the resistance whereto was no offence under S. 186 of the Penal Code. *Held, further*, that even if a notice relating to security was in fact issued to defendant, as it was not consolidated with the order of attachment, the requirements of law were not fulfilled. 146 I. C. 183=1933 A. L. J. 932=1933 A. 759. Appendix F, Form 6—Surety bond under—Parties entering into compromise—Surety is discharged. 54 B. 118=1930 B. 122. Attachment before judgment—Security—Attaching creditor whether acquires charge on money deposited. 32 I. C. 190=39 M. 903.

ORDER CONDITIONAL under R. 5 (3) cannot be made without accompanying order under R. 5 (1) to furnish security or to show cause why it should not be furnished. 37 I. C. 907. Where a conditional order for attachment before judgment has already been issued it is not necessary to issue or serve a fresh order of attachment before judgment after the conditional order is made absolute. 37 C. W. N. 1164. Secu-

rity and attachment whether can be ordered at the same time. 1927 C. 354=101 I. C. 9=31 C. W. N. 432. What is not a conditional order. 33 I. C. 689=23 C. L. J. 392. Rule 5 contemplates attachment of property which the defendant is about to dispose of and not of the property already disposed of. 1928 L. 772.

PROCEDURE under R. 5. See 106 I. C. 808. MEANING OF WORDS.—The words "to produce and place at the disposal of the Court" refer only to such property as is capable of being produced in Court. 17 A. 82. "Is satisfied," meaning of. 13 C. L. R. 356; 16 A. at 188.

MORTGAGE SUIT.—In a mortgage suit, plaintiffs, sometime after applying for final decree, and before final decree was in fact passed, applied for attachment before judgment of the defendant's properties on the ground that he was about to dispose of his other properties in order to defeat the personal decree that may be passed against him under R. 6. *Held*, that the application was maintainable at that stage. 1933 A. L. J. 37=1933 A. 191. As to power of Court to order attachment before judgment of mortgagor's other properties, *see also* 33 B. M. L. R. 514=1931 B. 329 (3 P. 966, 46 C. 245, 16 A. 186, Foll.) *See also* 140 I. C. 457=36 C. W. N. 746=1932 C. 790. Where a plaintiff in a mortgage suit has no right in a personal decree he cannot apply for enforcement of personal remedies. His remedy is limited to bringing the mortgaged property to sale and he can only obtain a remedy from the date of the auction sale. Until that auction sale he has no right to take possession of the property or any income of the property. Under those circumstances Court has jurisdiction to appoint a receiver under O. 40 or pass an order of attachment before judgment under O. 38, R. 5 or a temporary injunction under O. 39. 150 I. C. 1035=1934 A. L. J. 561=1934 A. 772. *See also* 146 I. C. 338=1933 A. L. J. 1269=1933 A. 557. But the rulings of the other High Courts are otherwise. *See notes to* O. 40, R. 1, under heading "*In mortgage suits*". *infra*.

PROPERTY OUTSIDE JURISDICTION can be the subject-matter of an order of attachment before judgment. 9 R. 561=1932 R. 279.

FOREIGN STATE PROPERTY in Civil Court constituted under Order in Council under Foreign Jurisdiction Act is not competent to attach before judgment movable property of a defendant British subject which is in a foreign State. 134 I. C. 822=1931 L. 723.

APPEAL.—Order rejecting application for attachment—Absence of conditional order—Appeal from order rejecting—Maintainability. *Sec* 14 Pat. 1. The Code does not contemplate appeal from order directing the defendant to furnish security. 50 C. 215=1923 C. 639. Appeal lies from order of

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

[S. 483, last para.] (2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

[S. 484, last para.] (3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

6. [S. 485.] (1) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

Notes.

attachment made under O. 6. (*Ibid.*) Where application for attachment before judgment is dismissed by the Court of first instance after hearing the defendants no appeal lies against that order. 33 I.C. 689 = 23 C.L.J. 392; 146 I.C. 838 = 1933 A.L.J. 1269 = 1933 A. 557. See also 14 P. 1. Appeal from order is not limited to the grounds mentioned in Rr. 5 and 6. Order under R. 5 that certain properties are not attachable is maintainable. Such an appeal does not become infructuous by the subsequent passing of a decree. 53 C.L.J. 289 = 37 C.W.N. 978 = 1933 C. 757. Where Court directed defendant to give security for satisfaction of any decree that may be passed in favour of plaintiff and noted that on failure of security being furnished further action under R. 6 would be taken and defendant failed to furnish security, *held*, that appeal against the order was maintainable though no formal order of attachment had been made. 148 I.C. 719 = 1934 L. 594.

REVISION.—No revision lies from order of dismissal of application for attachment before judgment. See 146 I.C. 338 = 1933 A.L.J. 1269 = 1933 A. 557.

COMPENSATION FOR WRONGFUL ATTACHMENT.—Compensation under S. 95 can be awarded even in respect of *conditional attachments* before judgment. 35 C.W.N. 546. Where the only ground put forward in application was that unless the attachment was made plaintiff in the event of success would have difficulty in realising the decretal amount, an order of attachment would be entirely unjustified. Where such application was granted the case is clearly one in which defendant is entitled to reasonable compensation against plaintiff under S. 95.

151 I.C. 283 = 11 O.W.N. 1135 = 1934 O. 429 (2).

O. 38, R. 6.—As to scope of R. 6, see 107 I.C. 276 (1). Order conditional under R. 6 cannot be passed unless the defendant has failed to furnish security, or fails to show cause. 57 I.C. 907. See also 1927 C. 354 = 101 I.C. 9. Scope of enquiry—Procedure prescribed by O. 21, Rr. 58 and 59—Applicability—Person not having interest in property whether can apply. 48 C.L.J. 594 = 115 I.C. 268 = 1929 C. 162, 1928 L. 445 (1). Court attaching a debt either before judgment or in execution has no power to enquire into the truth or existence of the alleged debt. 34 L.W. 906 = 61 M.L.J. 863. Application for attachment—Court ordering petition closed on respondent undertaking not to alienate properties—Appeal lies against order. 1928 M.W.N. 125 (50 C. 215, Ref.) See also 140 I.C. 95 = 1932 A.L.J. 228 = 1932 A. 269. In suit on promissory note, plaintiff obtained attachment before judgment and thereupon a third person stood surety and executed a bond which recited "If the suit is to be decreed in favour of the plaintiff in accordance with the plaint he can recover the decree amount from me personally and from my properties and if the suit is to be dismissed the security bond should get cancelled. On this condition this bond is executed." Subsequently the suit was dismissed for default but was afterwards restored to file, and a decree was passed in favour of the plaintiff. *Held*, that the security bond had reference to the ultimate issue of the suit in trial Court and that the restoration of the suit dismissed for default also restored the bond and that the surety could therefore be proceeded against and made liable. 58 M. 721 = 41 L.W. 479 = 68 M.L.J. 444 (F.B.).

Mode of making attachment

7. [S. 486.] Save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Investigation of claim to property attached before judgment.

8. [S. 487.] Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money.

Removal of attachment when security furnished or suit dismissed

9. [S. 488.] Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the cost of the attachment or when the suit is dismissed.

Notes.

O 38, R. 7.—The mode of executing attachment before judgment is the same as that provided for attachment after decree is passed. In the case of immoveable property the procedure prescribed by O. 21, R. 54 should be adopted. 37 C.W.N. 1164=1934 C. 251. The meaning of the saving clause in R. 7 is that attachment before judgment in order to be effective *must comply with the provisions of Rr 5 and 6*. Order of attachment before judgment can only be made after defendant had failed to show cause to the contrary or to furnish the security required. Where defendant has not been served with notice under R. 5 to furnish security or to show cause, the attachment is illegal and *ultra vires*. 1933 A.L.J. 1501=1934 A. 165. When there is an attachment before judgment, time for consideration of the question *whether the attached debt is due to judgment-debtor* can be decided when the garnishee order is going to be enforced. 146 I.C. 457=1933 A. 481. Order of attachment before judgment of moveables found at a certain place does not authorize the *nazir* to take away the things from that place. 59 C.L.J. 389=1934 C. 780. No property can be declared to be attached unless first the order of attachment has been issued and secondly in execution of that order the other things prescribed by the rules in the Code have been done. Where however there was no positive evidence that the attachment was not effected in accordance with law and no such contention was raised in the lower Court, *held*, that Court should give effect to the presumption regarding the regularity of official acts and proceed on the view that there was a valid attachment duly effected. 58 C. 598=134 I.C. 561=1931 C. 763.

O 38, R. 8.—This rule which prescribes the manner of investigation, is silent as to the result. O 21, R. 60 does not apply to claims to property attached before judgment. 20 B. at 407. *See also* 41 M. 23=39 I.C. 863. The effect of O 38, R. 8 is to make O 21, R. 63 applicable to orders passed on objections to attachment before

judgment. 9 R. 561=1931 R. 279. Enquiry under—Scope of—Power of Court to decide question of title. 119 I.C. 555=1929 P. 747. *See also* 146 I.C. 457=1933 A. 481; 1933 A. 953=147 I.C. 482. It is not necessary for any person who has a claim to property attached before judgment to prefer a claim, though he may do so if he wishes under the provisions of R. 8. His failure to do so, however, cannot amount to any negligence or justify his subsequent claim being dismissed under the proviso to O. 21, R. 58 (1). 31 N.L.R. 426=1935 N. 222. *See also* 168 I.C. 364=1937 P. 245.

O. 38, R. 9.—On dismissal of a suit, attachment before judgment *ipso facto* comes to an end and does not revive when an appeal is lodged. 45 C. 780=22 C.W.N. 927, 113 I.C. 63=1928 M. 976, even though Court did not pass an order withdrawing it. 53 M. 334=1930 M. 514=58 M.L.J. 675 (F.B.) (Overruling 56 M.L.J. 70). Even dismissal of a suit for default puts an end to attachment. It is not revived on the subsequent restoration of suit. 9 R. 472=134 I.C. 748=1931 R. 281. [But *see* 58 M. 721 (F.B.) (noted *supra* under O. 38, R. 6)] The last words of R. 9 are merely directory. They do not mean that in the absence of an order removing the attachment on the dismissal of a suit, the attachment before judgment is rendered a perpetual attachment (*Ibid*). When a suit is dismissed attachment before judgment terminates without any order of Court and if the judgment is reversed on appeal or annulled on review the judgment does not revive it so as to affect alienations made before the date of such reversal. Even where plaintiff on the reversal of the decree of first Court dismissing his suit and on appeal gets a decree in his favour and re-attaches the property in suit his claim is not one enforceable under the original attachment. 1933 A.L.J. 1501=1934 A. 165. On the abatement of the suit the attachment before judgment also abates, but does not revive when the abatement is set aside. 47 C.L.J. 282=1928 C. 234=109 I.C. 164. Suit in O. 38, R. 9

Attachment before judgment not to affect rights of strangers nor bar decree-holder from applying for sale.

11. [S. 490.] Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

Notes.

does not include proceedings in appeal 5 R. 492=105 I.C. 540=1927 R. 310. But see 51 B. 31. Surety for removal of attachment—Liability ceases on dismissal of suit 5 R. 492=105 I.C. 540=1927 R. 310; 1929 R. 94. But see 51 B. 31.

O. 38, R. 10.—O. 38, R. 10 is not limited to rights *in rem* 23 C.L.J. 115=21 C.W.N. 158. Attachment before judgment only prevents alienation of property by judgment-debtor and does not confer any priority of title on attaching creditor. It is no bar to attachment by another decree-holder. 151 I.C. 317=59 C.L.J. 18=1934 C. 426. See also 151 I.C. 683=1934 P. 413. Agreement by attaching creditor consenting to sale of attached property does not require registration as attachment confers no right or interest in him. 151 I.C. 683=1934 P. 413. Attachment has no effect against the Official Assignee 26 M. 673. See 21 B. 273, 17 M. 144; 31 Bom. L.R. 320. See S. 53. When adjudication is made, insolvent's property, vests in the Receivers and the Receivers' rights are not affected by prior attachment, whether attachment is before judgment, or after decree. Attachment by itself does not give the attaching creditor any charge or lien on the property, nor does it give him any priority in respect of the property attached as against the Official Assignee or Receiver 145 I.C. 695=29 N.L.R. 303=1933 N. 229. The effect of an attachment before or after judgment is the same provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place. 26 C. 531; 33 C.W.N. 805. When a person attaches property he also attaches the profits thereof. 12 W.R. 391. A re-attachment of property after decree does not imply an abandonment of an attachment obtained before decree 6 C. 129 (P.C.), 16 I.C. 384; 56 C. 416. Where the attached decree is sold in execution of another decree the attachment ceases, and no further proceedings can be taken against the property on the basis of that attachment. 2 P.L.T. 240=61 I.C. 922. Attachment before judgment—Property sold—Decree—Proceeds recovered by previous decree-holder—Suit to recover share. 45 B. 360=22 Bom. L.R. 1407. Attachment before judgment—Money decree-holder—Right to proceed against property—Prior-

10. [S. 489.] Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

ties 91 I.C. 93 (2)=1926 R. 85. An agreement for sale entered into before an attachment before judgment is perfectly valid and can be enforced 106 I.C. 356=1928 P. 199=9 P.L.T. 5. So also subsequent sale in pursuance of contract of sale prior to attachment is not void. 1936 N. 163. See also 1937 N. 143.

O. 38, R. 11.—Where there is an order in execution for sale of a property attached before judgment under Art. 11, Limitation Act, the period of limitation is one year to set aside the order. 44 M. 902=41 M.L.J. 252. But see also 41 M. 23. This rule gives the same effect to an attachment before judgment after a decree is passed as an attachment after judgment. 2 P.L.T. 719=6 P.L.J. 332. O. 38, R. 9 refers to what takes place while suit is pending. R. 11 provides for what is to happen when suit is disposed of. After decree is passed attachment becomes one in execution and ceases to be one before judgment. 53 B. 543=31 Bom. L.R. 652=119 I.C. 769=1929 B. 321. Attachment before judgment—Decree passed in favour of attaching creditor—Subsequent attachment and sale of the same by a third party—Sale not confirmed—Original attachment is revived. 99 I.C. 895=44 C.L.J. 553=1927 C. 240. Attachment actually made after judgment cannot be deemed in law to be made before judgment, simply because it happens that the application for such attachment was made before the judgment was actually passed. The legal effect of the attachment comes into being only when the attachment is actually made, and its nature is defined also by the time when it is made and not when it is ordered. 1937 M. 84. There must be some unmistakable declaration of the decree-holder's intention to execute the decree, before the attachment before judgment can become an attachment in execution of the decree. (*Ibid*) In ordinary cases such an election or declaration of intention would be made by presenting an execution application, but in every case it is not necessary that it should be done in this manner and in no other. If intention to execute can be inferred by other circumstances it is sufficient. (*Ibid*.)

ATTACHMENT BEFORE JUDGMENT OF JOINT FAMILY PROPERTY—SURVIVORSHIP.—An attachment before judgment of a coparcener's interest, when not followed by a decree during the said coparcener's lifetime does

12. Nothing in this order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

1[13. Nothing in this order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immovable property.]

ORDER XXXIX.

TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

Temporary Injunctions

Cases in which temporary injunction may be granted

1. [S. 492.] Where in any suit it is proved by affidavit or otherwise,—

Leg. Ref.

¹ This rule was inserted by Act I of 1926.

Notes.

not operate to defeat the right of survivorship 1931 M W N 1015.

O 39. APPLICABILITY.—O 39 is applicable to proceedings in liquidation of company. 1926 L 525=98 I C 10.

SCOPE.—Court's powers under this order—Application for attachment before judgment—Undertaking by defendant—Acceptance by Court and dismissal of application—Defendant subsequently acting in breach of undertaking—Jurisdiction to punish. 44 L W 714

O. 39, R 1: PRINCIPLE OF TEMPORARY INJUNCTION.—The granting of temporary injunction is a matter of discretion. 26 M. 168 (174); 1933 L. 203=14 L 330, 1933 N. 153=146 I C 727. As to inherent power to issue temporary injunction, see 1934 S 179; 140 I C 843=1933 L 73 There is no general rule to guide the discretion of Courts. 29 I C 855=21 C L J. 469 If the Court finds that there is a substantial question to be investigated and that matters should be preserved in *status quo* till final disposal of that question it is sufficient ground for granting injunction (*Ibid.*); 103 I C 167=1928 S. 82, 110 I C 621 See also 1934 L 26 (2)=154 I C. 421 Issue of temporary injunction is governed by the same principles as the grant of a permanent injunction at the trial of a case. That the suit would become infructuous if it did not issue is by itself no ground in law if there was no *prima facie* case made out in support of it. 14 L 330=1933 L. 203 The real point is not how the question should be decided at the hearing of the case, but whether there is a substantial question to be investigated. 1922 L. 356 Court must first see that there is a *bona fide* contention between the parties and then on which side in the event of success the balance of inconvenience will lie if the injunction does not issue. 1922 L. 356; 5 L L J. 262=1923 L. 227; 1926 C 837=95 I C 667=43 C L J 405, 1926 P. 318=96 I C 623; 1929 S. 182, 1930 S. 287. In granting temporary injunction Court has to see balance of convenience and inconvenience of both sides. 66 I C 599, 46 C. 1001=23 C W N 677, 146 I C 67, 1933 L. 621; 151 I C 862=1934 S 136. When mortgagee or attaching creditor is proceeding to

sell the right, title and interest of his debtor, the balance of convenience is in favour of the creditor, that no injunction should issue in such cases, and all that Court might do *ex majeure cautela* is to require the creditor to give an undertaking that at the time of the sale, whether it be through Court or otherwise, the intending purchasers should be informed of the pendency of the suit. 1929 S 182. There must be a probability of the plaintiff succeeding. 18 I C 394=17 C. W N. 964, 24 L W 839=1927 M. 188=99 I C 383. When a decree has been passed against a party who is himself seeking the injunction, the Court has no jurisdiction whatever to grant the injunction, merely because an appeal is pending in another suit, on the ground that the property is in danger of being wrongfully sold in execution 43 L. W. 383=1936 M. 276=59 M 744=70 M L J 257. The Court will have to be satisfied that the applicant has a *prima facie* case and further that the protection of his interest requires that an injunction should issue temporarily 17 I C 219=23 M L J. 316; 1927 M. 188=99 I C 383, 29 P L R 50, 103 I C 372; 110 I C 118=1928 L. 235, 156 I C. 698=1935 S. 128 The applicant must also show an actual or threatened violation of that right, productive of irreparable or at least serious damage, his conduct must be such as not to disentitle him to assistance, it should be fair and honest, and in particular there must be no acquiescence or delay. There must be a greater convenience in granting than in refusing the injunction; and equally efficacious relief must not be obtainable by any other usual mode of proceedings, except in case of breach of trust. 160 I C 569=1936 Pesh. 11 That the defendant would not be worse off if injunction is granted is no proper ground for its grant. 15 P 404=17 P L T. 109=1936 P. 226 Where a plaintiff out of possession claims possession, the Court will not grant an injunction against a defendant in possession under a claim of right unless the threatened injury would be irreparable 46 C 1001=23 C W N. 677; 146 I C. 67=1933 L. 621, 1933 L 282 The word "injury" means an act which is contrary to law 55 I C 403=2 L L J 283 By the term "irreparable injury" is meant injury which is substantial and could never be remedied or adequately remedied or atoned for by damages. 1937 N. 137.

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

Notes.

Plaintiff as owner sold certain land, divided into building plots and approved by Municipality Municipal Committee gave notice calling upon him to construct certain external and internal roads and informed that if he failed to do so, the committee would construct the roads and recover the cost of doing so from the plaintiff. The latter brought a suit and applied for a temporary injunction to restrain the committee from acting in that way. *Held*, that the inconvenience caused to the plaintiff by refusing to issue an injunction would not be irreparable and could be obviously remedied by damages. Therefore he was not entitled to the injunction claimed by him. (*Ibid*) Party to prove irreparable loss would accrue if injunction is not granted 93 I.C. 848=1926 L. 435. In a suit for permanent injunction a temporary injunction ought not to be refused where the refusal would defeat the object of the suit 43 I.C. 24. As regards proper course when applications for mandatory injunctions are made, see 16 Bom L.R. 288=38 B. 381. Under colour of temporary injunction a plaintiff cannot seek a relief, which forms the cause of action in the suit. 27 I.C. 617; 29 I.C. 855=21 C.L.J. 469, 18 I.C. 394=17 C.W.N. 964. See also 56 B. 254=137 I.C. 379=34 Bom.L.R. 231=1932 B. 166; 1933 S. 118. Suit for declaration only—Another suit necessary to seek relief—Injury which is sought to be prevented by injunction—Temporary injunction cannot be granted. 96 I.C. 439=1926 L. 504=8 L.L.J. 289. But see 92 I.C. 723=1926 L. 523. A plaintiff making a considerable delay is not to be assisted at the expense of the defendant. 29 I.C. 855=21 C.L.J. 469. In granting temporary injunction Court should exercise wise discretion and see that the machinery of Court is not abused for fraudulent purposes. 9 I.C. 277. The order must not create totally new state of things. 67 I.C. 742, 66 I.C. 599. Defendant residing outside jurisdiction—Acts within jurisdiction—Interference with acts of religion. 4 P.L.T. 48. The onus is upon the petitioner to show that his inconvenience exceeds that of the other side. 70 I.C. 864=15 S.L.R. 5. Court has no jurisdiction to grant injunction under its inherent powers 1927 M. 687=102 I.C. 700=26 L.W. 899. See also 140 I.C. 843. Court has no jurisdiction to issue temporary injunction against a person not party to suit. 96 I.C. 540=1927 L. 284. Issue of temporary injunction against a co-sharer in possession. 1928 C. 293. In granting or refusing injunction Court should have regard to balance of convenience. 144 I.C. 54 (1)=1933 S. 118. (1929 S. 182, Foll.)

PRINCIPLES.—The object of an interim injunction is to preserve *status quo*. When an application is made the Judge should ask himself the question whether the plaintiff is

likely to suffer any damage or any irreparable damage and if he comes to the conclusion that the plaintiff would not suffer any serious damage, injunction should be refused 152 I.C. 563=1934 Cal 713. In doubtful cases where the question as to the legal right is one on which Court is not prepared to pass an opinion, or the legal right being admitted, the fact of its violation is denied, the course of Court is either to grant the injunction or to order the motion to stand over pending the trial of the legal right. In determining which of these alternatives is to be adopted, Court is governed by considerations as to the comparative mischief or inconvenience to the parties which may arise from granting or withholding the injunction. 28 S.L.R. 161=1934 Sind 180.

GRANT OF INJUNCTION AND ATTACHMENT BEFORE JUDGMENT—CONDITIONS.—It is essential that the plaintiff must make out a *prima facie* case before an injunction or an attachment before judgment can be granted. Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience which is likely to arise in consequence of refusal will be greater than that from granting it. An attachment or an injunction should not be lightly granted. It is only where it is essential that property should be kept in its existing condition pending the suit that the Court should interfere under O. 39, R. 1 or under O. 38, R. 5(1). 61 C. 814=38 C.W.N. 771=1934 C. 694. 'Injunction pending disposal of the suit' period for which it is in force 43 A. 383=19 A.L.J. 174. Injunction granted *pendente lite* ends with suit. 1930 A. 387 (2). The offending of religious prejudices is no ground for granting an injunction 1 C.W.N. 429. "Suit" in O. 39 includes proceedings. 1926 L. 525=26 Punj.L.R. 803.

DELAY.—The essence of an application for an interlocutory injunction is that it should be made with promptness. Improper delay although it does not amount to acquiescence may deprive a plaintiff of his right to such a remedy. Injunction refused on account of delay in a case of infringement of trademark. 139 I.C. 490. When the suit was delayed till the last day and the temporary injunction was applied for on the very day that the suit was instituted and the men were going to be discharged although it was known long before, that they were going to be discharged, *held*, that this in itself was a sufficient reason for refusing to issue the temporary injunction 1933 L. 203=14 L. 330.

TEMPORARY AND PERPETUAL INJUNCTIONS.—The rule refers only to temporary injunctions leaving perpetual injunctions to be governed by the provisions of the Specific Relief Act. 6 B. 266 (279). The issue of temporary injunction is not governed by the same principles as the granting of a permanent injunction. 26 M. 168 (174). R. 1 does not

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,

Notes.

authorise Court to grant a temporary mandatory injunction. 24 L.W. 839=1927 M. 188=99 I.C. 383. But see 94 I.C. 840=1926 S. 201

WITHDRAWAL OF RELIEF FOR PERMANENT INJUNCTION—Ordinarily if a plaintiff makes no prayer for a permanent injunction in a plaint, a temporary or interim injunction of a like nature should not be issued. But there may be cases in which a relief in the shape of a permanent injunction may not be necessary the other reliefs granted by the decree being sufficient. Consequently the withdrawal of the relief for permanent injunction cannot preclude plaintiff from asking for a temporary injunction. 137 I.C. 519=36 C.W.N. 291=1932 C. 353

INJUNCTION OR RECEIVER.—Distinction between a case in which a temporary injunction may be granted, and a case in which a receiver may be appointed. See 22 C. 459 (465); 1 A.L.J. 527. Proof of waste is a ground for appointing a receiver 53 I.C. 760=10 L.W. 551; 105 I.C. 131. The digging of a well is not waste W.R. (1864) 275.

NOTICE OF APPLICATION—Notice, however short should, if possible, be given before an injunction is granted 27 B at 451 See R. 3. The other side must be given an opportunity to show cause 7 A. 550, and when no *ex parte* order is made liberty to have it varied or set aside must be implied. 9 A. 36 (42)

JURISDICTION—High Court can grant an injunction under its general equity jurisdiction independently of Code. 34 C. 97; 34 C. 101. High Court, as appellate or revisional authority, has no jurisdiction to issue an injunction apart from and except in accordance with the provisions of O. 39. (35 L.W. 168, Diss. from.) 56 M. 563=141 I.C. 607=1933 M. 500 (2)=64 M.L.J. 112. The injunction should be issued to the party and not the Court 2 A.L.J. 601. Only Court in which the suit is filed, and not Court to which a decree is sent for execution can grant an injunction. 12 C. 515. An inferior Court can issue an injunction to stop a sale in execution of a decree by a superior Court 23 C. 341. But see 31 C. 480 (486). District Court cannot issue an injunction to stay waste in respect of property in dispute in a suit pending in a subordinate Court. In case it wants to do so it should withdraw the case to its own file. 2 Bom H.C.R. 103. The mere fact that a person resides outside the jurisdiction of Court is not *per se* sufficient to prevent the Court from granting an injunction. 2 C.W.N. 521. Application to restrain a suit in a Small Cause Court does not come within the provision of this rule 27 B 357. As to power of subordinate Court to stay foreign suit, see 27 L.W. 418. High Court in its original jurisdiction has power to make an order of injunction and also to order the arrest of a person disobeying it, though he be resident beyond the limits of its ordinary original jurisdiction, and to transfer the

same for execution to the District Judge within whose jurisdiction such person resides. Such orders are not *ultra vires* or without jurisdiction. And the District Judge acts in the lawful exercise of his powers in arresting the party in execution of the writ sent to him. 61 C. 971=59 C.L.J. 463=38 C.W.N. 799=1934 C. 818

PRACTICE—Before granting temporary injunction it is usual to put the applicant upon terms to abide by such order as Court shall think fit to make by way of damages resulting from passing of the order. 1 A.L.J. 527. An application for an injunction restraining the defendant in a pending suit from prosecuting on action in a foreign Court must be made at a very early stage of the proceedings. 59 I.C. 218=24 C.W.N. 735. A party is presumed to have knowledge of a prohibitory order "not to alienate his property" when it is made in the open Court, in the presence of the parties appearing before the Court 42 A. 98=17 A.L.J. 1127. An interlocutory injunction in a suit for perpetual injunction is dissolved *ipso facto* by the decree granting a perpetual injunction 42 C. 550=18 C.W.N. 1189.

HIGH COURT, POWERS OF.—The powers of High Court in the matter of issuing injunction are not confined to the provisions of O. 39, Rr 1 and 2. Any order may be made which justice and expediency require 137 I.C. 519=54 C.L.J. 317=36 C.W.N. 291=1932 C. 353. See also 136 I.C. 346=1932 M. 180. High Court, as appellate or revisional authority, has no jurisdiction to issue an injunction apart from and except in accordance with the provisions of O. 39. 37 L.W. 110=64 M.L.J. 112.

APPEAL.—An order of injunction is purely discretionary and a party appealing against it should prove that the Court acted wrongly in the exercise of its jurisdiction. 22 I.C. 710=19 C.L.J. 305. See also 12 M. 186; 1930 Sind 287; 146 I.C. 727=1933 N. 153; 1933 L. 282. Order refusing grant of a temporary injunction is appealable 18 C.L.J. 39=17 C.W.N. 996; 152 I.C. 563=1934 C. 713, but see 150. I.C. 15=36 P.L.R. 142=1934 L. 79 (2). Appellate Court should be very reluctant in interfering with the discretion exercised by lower Court in granting temporary injunction. 160 I.C. 569=1936 Pesh. 11. An order granting temporary injunction cannot be the subject of an appeal but is subject to the revisional jurisdiction of High Court 1927 M. 687=102 I.C. 700=26 L.W. 899. A security bond furnished in pursuance of an order of the trial Court under this rule becomes ineffectual as soon as the disposal of the suit by it, and it does not enure to the benefit of the decree-holder so as to enable him to enforce the decree of the appellate Court against the surety. 37 P.L.R. 489=1935 L. 718

ILLUSTRATIVE CASES. (1) ACCOUNT SUIT.—In a suit for recovery of money due on settled accounts application was filed for appointing a receiver and for order directing

the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting,

Notes.

defendant to produce certain books of account not connected with the suit in order that the plaintiff, if he gets a decree, may be in a better position to realise his decree-debt. Court ordered the production but defendant refused, whereupon the Court passed an order compelling him to produce them failing which a complaint was to be laid for disobedience of the Court's order. *Held*, that O 39, R 1 (b) had no application and that even if it did apply it was overridden by O. 21, R. 41 and that the order should be set aside. 57 M 635=148 I C 79=1934 M. 199=66 M L J. 498.

(2) ARBITRATION PROCEEDINGS.—An interlocutory injunction should not be granted upon novel considerations interfering with arbitrators. 31 C L J. 167=24 C.W.N. 612=47 C. 611. Principles governing grant of temporary injunction restraining arbitration. 54 I C. 546.

(3) ALIENATION.—An alienation pending a temporary injunction is not void. 253 P.L.R. 1914=25 I C 180; 108 I C. 395. A temporary injunction restraining alienation of a house pending decision of a suit for recovery of money does not render a sale void as against a *bona fide* purchaser for valuable consideration without notice of any fraud or collusion, on the part of the vendor even though it might have been made in defiance of the restraining order. 1930 L. 858=128 I.C. 304. *See also* 1930 A. 387 (2)=127 I.C. 577.

(4) COPYRIGHT.—Where the legal right of plaintiff, namely his copyright in a particular book was admitted and only its violation by the threatened publication of an alleged similar book was not denied, and it further appeared that if the injunction was not issued irreparable injury or inconvenience might result to plaintiff, it is a proper case in which a temporary injunction should be issued. 132 I C. 585=1931 L. 624. *See also* 34 P.L.R. 249. In suit for a perpetual injunction against defendants, who, it was alleged, had infringed plaintiffs' copyright by copying a large number of judgment from plaintiffs' journal 'Lahore Law Times' and compiling and publishing a book called "Consolidated Revenue Rulings", it appeared that the allegation referred to the rulings portion only of the 'Law Times' and that of past years; secondly, defendants' publication consisted not merely of Lahore Rulings but those of other places as well, thirdly, the plaintiffs had, by bringing out a similar book at a cheaper price, substantially reduced the chance of a loss to themselves; lastly, trial Court had, by directing defendants to keep a separate account of their sales, amply safeguarded their interests. *Held*, in the circumstances, a temporary injunction was not necessary. 34 P.L.R. 249=1933 L. 448.

(5) CO-SHARERS.—One co-sharer can restrain another from building on the land. 41 C. 436=18 C.W.N. 176.

(6) DECLARATION OF TITLE.—In a suit for

declaration of title, plaintiff applied for an injunction to restrain defendants from alienating the properties; the affidavit in support of the application was inadequate and defective and merely alleged that defendants were trying to dispose of the properties and stated that the allegation was based partly on information which the plaintiff believed to be true and partly on belief, but did not state which part was based on information and which part on belief; nor did he state the grounds of belief. There was no overt act suggested in the application towards the alienation of the properties, such as negotiations or offer of sale, and there was no proof of the property being in danger of alienation. Lower Court refused the injunction. *Held*, that the injunction was properly refused and for reasons which were sound and unanswerable under R. 1. *Held, further*, that in a suit for declaration, an injunction should not be granted where the plaintiff is out of possession and does not ask for consequential relief or for a permanent injunction. 61 C. 814=38 C.W.N. 771=1934 C. 694.

(7) ELECTION PETITION.—*Per Pollock, A J C.*—In deciding whether an injunction should issue to restrain elected members from performing their duties, a Civil Court should be guided by the balance of justice and convenience; the occasions must be few on which it will be more just and convenient to hold up elections or the administration of newly elected bodies more or less indefinitely whilst one or more individual persons sue for a declaration that the elections have been or are going to be invalidly conducted. 143 I. C. 514=29 N L R 278=1933 N 193 (F.B.) Where the effect of granting a temporary injunction will be to deprive finally and for ever the defendants of the right which they claim (which in this case was to hold the election without delay) and would be tantamount to granting the plaintiff the relief sought in his suit and might deprive the defendants of a right to which they are really entitled, the temporary injunction shall not be granted, for it would be a grave injustice to the defendants for which they could not be adequately compensated afterwards. Moreover, a Court cannot be asked to give the relief which forms the cause of action in the suit under colour of a temporary injunction. 151 I C. 862=1934 S. 136. Where plaintiffs filed a suit for a declaration that they were the only elected members and that the defendants were not the members, and applied for an interim injunction restraining them from attending the meetings, *Held*, that the likelihood of injury and inconvenience was much greater if the defendants were not allowed to function as members and that the injunction should not be granted. 151 I.C. 675=60 C L J. 1=1934 C. 621. Though a candidate for election to a Local Board like any one else has a right to pursue his legal remedies whatever they may be,

damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

Notes.

save in exceptional circumstances it is an abuse for a candidate, who for some reason is shut out to make his pursuits of his remedies in the Civil Court, a weapon for dislocating electoral machinery and stopping an election. Unless in very extreme cases the Court cannot grant an injunction restraining the holding of an election at the instance of a candidate whose nomination has been rejected. 140 I.C. 441. Where the holding of an election would result in no irreparable harm, damage or waste, no injunction is to be granted. 97 I.C. 172=1926 M. 1147.

(8) CORPORATIONS AND COMPANY.—The plaintiffs sued for a declaration that they were the directors of a company and not defendants and alleged that they were unlawfully excluded by defendants from participation in management of the company. *Held*, that there was a continuing invasion of plaintiffs' rights and the case was a fit one in which Court should grant a temporary injunction to prevent the injury to plaintiffs' rights. 55 A. 399=1933 A.L.J. 290=1933 A. 344.

(9) EXECUTION PROCEEDINGS AND SALE.—A plaintiff, who after being defeated under O. 21, R. 99, brings a suit under R. 103 of the same order, is not entitled to get a temporary injunction restraining the defendant from taking possession of the property. 27 I.C. 56=16 Bom.L.R. 676. A prohibitory order by way of injunction can be issued so long as property in dispute is in danger of being wrongfully sold in execution of a decree, but once it is sold, no such order can be passed. 54 I.C. 928. Property sold in execution of decree on dismissal of objector's suit under O. 21, R. 63, but possession not delivered.—Objector appealing.—Injunction preventing delivery of possession may be issued. 1930 L. 850. A sale held in ignorance of an order by way of an injunction staying the sale is an irregularity, but the sale will not be set aside unless judgment-debtor has sustained substantial injury by reason of such irregularity. 54 I.C. 928. Where it is fairly established that there is a danger of a wrongful sale in execution, an injunction can properly be granted. 25 I.C. 9; 1930 L. 108 (2). But *see also* 75 I.C. 381. A court has jurisdiction to issue an injunction upon a person residing outside its territorial limits if he has property within the jurisdiction. 75 I.C. 381. *See also* 130 I.C. 252=1931 C. 279. In a case in which the defendants have submitted to jurisdiction of a Court by entering appearance, Court has jurisdiction to grant an injunction restraining the defendants from executing in another Court a decree which they had obtained against plaintiff. (Case-law referred to.) 1 P. 356=4 Pat.L.T. 10. A Court has no power to issue a temporary injunction to restrain the defendant from executing a decree lawfully obtained by him. 23 L.W. 85=1926 M. 258=92 I.C. 615.

(10) LEGISLATIVE PROCEEDINGS, RESTRAINT, OF.—*See* 56 B. 251=34 Bom.L.R. 231=1932 B. 166. Cited under O. 39, R. 2.

(11) PARTY WALL.—In order to entitle the plaintiff to a temporary injunction, it is necessary for him to make out a strong *prima facie* case. Where the demolition of the party wall is likely to seriously endanger plaintiff's buildings and the lives of its inmates and property, Court ought to grant a temporary injunction under R. 1 1933 S. 24 (Case-law reviewed.)

(12) GUARDIANSHIP PROCEEDINGS.—Whether a proceeding for the appointment of a guardian can be treated as a suit or a proceeding to restrain the other party from committing a "breach of contract" or "other injury" within the meaning of R. 2, *see* 137 I.C. 425=1932 C. 719.

(13) MARRIAGE.—Temporary injunction to restrain marriage, when not to be granted. 17 A.L.J. 1138=42A. 134; when to be granted, 28 N.L.R. 332.

(14) MINORS.—A suit was brought on behalf of minors. It was found that the minors had no strong *prima facie* case and that it was a collusive one. Further it was found that defendants were maintaining proper and accurate accounts. *Held* no interim temporary injunction should be granted. 146 I.C. 67=1933 L. 621.

(15) MORTGAGE SUIT.—Where a plaintiff in a mortgage suit has no right in a personal decree he cannot apply for enforcement of personal remedies. His remedy is limited to bring the mortgaged property to sale and he can only obtain a remedy from the date of the auction sale. Until that auction sale, he has no right to take possession of the property or any income of the property, under those circumstances Court has no jurisdiction to appoint a receiver under O. 40 or pass an order of attachment before judgment under O. 38, R. 5 or a temporary injunction under O. 39. 150 I.C. 1035=1934 A.L.J. 561=1934 A. 772. *See also* 144 I.C. 54=1933 S. 118 (*See also* under O. 40, R. 1, *infra* under heading "In mortgage suits").

(16) MUHAMMADAN ENDOWMENT.—Appointment of co-mutwalli by the first mutwalli, grantor of waqf, does not invite the application of the rule unless there is danger of waste of property. 35 I.C. 718=14 A.L.J. 554.

(17) RIGHT OF WORSHIP.—Injunction to restrain plaintiff from preventing defendants entering and worshipping in certain temple not proper. 1 P.L.J. 560. As to grant of temporary injunction in a suit to declare that a certain article of a temple is sacred and for injunction to restrain sale thereof. *See* 70 M.L.J. 315.

(18) SALE IN EXECUTION OF MORTGAGE DECREE.—The language of O. 39, R. 1 is wide enough to cover the case of a sale in execution of a mortgage decree. In the case

Loc Ams —[*Almabad.*] R 1. In cl. (a) *delete* the words "or wrongfully sold in execution of a decree" and *delete* the word "sale" after the words "damaging alienation" in cl. (b)

[*Calcutta*] *Re-number* R 1, O 39 as R 1 (1) and *add* the following as sub-rules (2) and (3).—

"(2) In case of disobedience, or of breach of the terms of such temporary injunction or order the Court granting the injunction or making such order may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release."

"(3) The property attached under sub-rule (2) may, when the Court considers it fit so to direct, be sold and, out of the proceeds, the Court may award such compensation to the injured party as it finds proper and shall pay the balance, if any, to the party entitled thereto."

[*Nagpur and Oudh*] In R 1 *delete* the words "or wrongfully sold in execution of a decree" in cl. (a) and *delete* the word "Sale" after the words "damaging alienation" and *insert* the following as proviso to the rule—

"Provided that, if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a

Notes.

where the property of *A* is going to be sold at the instance of *B* who had obtained a mortgage of the same property from *C* and had instituted a suit to obtain a declaration that the mortgaged property was really his and not of *C* he is entitled to a temporary injunction. 35 C.W.N. 910. (11 C, 146, Ref.) In a suit by the sons for partition and declaration that the debts incurred by the father were illegal and immoral and so not binding, the sons applied for a temporary injunction to stop the sale, threatened by some of the creditors. Apart from considerations of balance of convenience, the chief ground for granting or refusing an injunction in such a case is whether plaintiffs have or have not a *bona fide* claim, and to a certain extent, it is inevitable that the Court should prejudge the merits of the case in deciding the question if the plaintiffs have or have not a *bona fide* claim. 127 I.C. 345=1931 N. 106.

(19) **SECURITY AND ACCOUNTS.**—An order directing the furnishing of security and submission of accounts passed on an application for the issue of interim injunction is not an order under R 1 17 I.C. 361=17 C.W.N. 318. An order to defendants to prepare an inventory and to keep accounts is not an order under the inherent powers of Court but one under R 1. 1923 L. 48=72 I.C. 569. In a case falling under R 1, it is not necessary that Court should order the petitioner to furnish security to compensate the decree-holder for any loss that may be caused by a temporary injunction against him being granted. A.I.R. 1934 L. 26 (2).

(20) **SECURITY FOR MESNE PROFITS.**—Stay of confirmation of sale.—Order not communicated—Decree-holder-purchaser given possession on condition of giving security for mesne profits. 133 I.C. 128=1931 L. 289.

(21) **SPECIFIC PERFORMANCE.**—A temporary injunction will be granted to a plaintiff restraining defendants from selling property to a third person during the pendency of a suit for specific performance of contract for sale. 57 I.C. 847. *See also* in the case of contract for lease 16 I.C. 359=17 C.L.J. 427.

(22) **STRANGER TO SUIT.**—A Court has no jurisdiction to issue an injunction upon a

person who is not a party before it. 3 P.L.J. 456=46 I.C. 224, 51 I.C. 108=46 P.L.R. 1919

(23) **STAY OF PROCEEDINGS IN REVENUE COURT.**—Where an application was made to the High Court for stay of a partition proceeding in a Revenue Court which was not subordinate to High Court, *held*, that the stay could not be granted as High Court had no power and that an injunction also could not be issued for that purpose. 53 A. 180=132 I.C. 42=1931 A. 57 (2).

(24) **SUIT FOR POSSESSION.**—Restraining execution of decree for possession.—Receiver.—Appointment of. 24 Bom. L.R. 378=1922 B 385. In a suit for possession, an injunction restraining defendant from committing waste may be granted. 38 C. 791=13 C.L.J. 394

(25) **TRADE MARK.**—*See* 21 I.C. 258=40 C. 570, 139 I.C. 490=1932 Sind 127. Where on an application for interim injunction pending a suit to restrain defendant from passing off goods bearing mark and figure similar to those used by plaintiff, Court finds that defendant's article is comparatively new, it would be a greater inconvenience to allow him to flood the market with his goods and possibly infringe plaintiffs' rights than to restrain defendant for a short time and compensate him, if so entitled, for the loss sustained by him in consequence. 1934 M. 226=38 L.W. 771=65 M.L.J. 617. In a suit the plaintiff charged the defendant with imitating his trade-mark and applied for an injunction against defendant under O 39, Rr. 1 and 2, a comparison of the get up of the parcels containing the products of plaintiff and defendant respectively displayed a remarkable similarity which could scarcely be said to be accidental. Plaintiff took immediate action by way of criminal prosecution as soon as he became aware of the alleged infringement. And it also appeared that if an injunction did not issue the balance of inconvenience would be against the plaintiff, *held*, on these considerations that the plaintiff was entitled to an injunction against defendant under Rr. 1 and 2. 1934 S. 194=153 I.C. 324. Where in a suit for injunction and other reliefs for infringement of trade-mark by the defendants, plaintiff prays for a temporary injunction

temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders "

[Rangoon] R 1 In cl. (a) the words "or wrongfully sold in execution of a decree" shall be *deleted* and in the last sentence the word "sale" occurring between the words "alienation" and "removal" shall be *deleted*

2. [S 493.] (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from

Notes.

Court has to see on which side the balance of convenience lies assuming that the infringement exists. Where the loss to defendants by the grant of injunction cannot be remedied if plaintiff fails, but plaintiff's interests can be otherwise safe guarded, the injunction should be refused. 1933 L. 1046.

O. 39, R. 2 [See also NOTES UNDER R 1.—GENERAL.] The words "of any kind" have been inserted to supersede the rule in 22 A. 449 Sub-rule (3) has been remodelled to give effect to the decision in 19 B at 155. As to whether a Court can of its own motion punish for disobedience, see 26 M. 494. The Code is not exhaustive and Court has inherent jurisdiction to act *ex debito justitiæ* in order to do that real and substantial justice for the administration of which alone it exists (23 C 351, Foll.) 1923 L 144 (2)=73 I.C. 909. See also 140 I.C. 843=34 P.L.R. 51=1933 L. 73. Injunction can be granted only against defendant—Principles governing the same. 79 I.C. 233=1923 L. 47, 96 I.C. 286 1926 L. 589.

PRINCIPLES GOVERNING GRANT OF INJUNCTION.—It is not open to a Court frivolously and vexatiously to issue a temporary injunction without proper cause and due consideration. 14 L. 330=34 P.L.R. 975=1933 L. 203. See also I.L.R. (1937) 1 C. 382. Where the relief asked for by way of an injunction on an interlocutory application is in effect the whole relief that is asked for in the plaint in the suit, the effect of granting the injunction will be to decide the whole suit. It is not a rule, and it is not the usual practice of the Court to grant such an injunction on motion, especially when there is no statement of pleading as to the injury likely to be caused by not getting the injunction or as to the urgency of the matter. 40 C.W.N. 1201. The issue of a temporary injunction is governed by the same principles as the grant of a permanent injunction at the trial of a case. That the suit would become infructuous if it did not issue is by itself no ground in law, if there was no *prima facie* case made out in support of it. 14 L. 330=34 P.L.R. 974=1933 L. 203. See also 151 I.C. 862=1933 S. 136. The issue of a temporary injunction staying further proceedings in another Court in the exercise of equitable jurisdiction was refused as the petitioner could easily raise his plea of want of jurisdiction in the other Court. 1933 L. 592. When a suit is pending in a Civil Court, the Court has jurisdiction under this

rule to issue a temporary injunction if it is satisfied that injury is likely to be caused to the plaintiff. The fact that the Court ultimately discovers that the suit does not lie or that it should fail on some other ground does not oust its jurisdiction under that rule. 1935 A.L.J. 139=1935 A. 106. If the relief which the plaintiff seeks cannot be granted, no temporary injunction can be issued by the Court. 152 I.C. 98=1934 A. 876. Under sub-rule (1), Court may grant an injunction restraining a person living outside its own jurisdiction from instituting certain proceedings. 130 I.C. 252=57 C. 1280=1931 C. 279. Civil Court has no jurisdiction to restrain a party by an injunction from pursuing her remedy, under S. 488, Cr. P. Code, in a criminal Court. 1930 Cr.C. 1153=1930 C. 763. Single Judge of High Court has jurisdiction to pass the order of stay, subject to certain conditions. 17 A.L.J. 1127=42 A. 98. In a suit before High Court on the original side, Judge can restrain defendant by an injunction from proceeding with a suit instituted by him in a mofussil Court. 44 B. 283=21 Bom.L.R. 963. Where pending the disposal of an appeal by High Court the party had filed a suit in the lower Court and thereupon an application was made to High Court for injunction restraining the party from proceeding with the suit till the disposal of the appeal, *held*, that the injunction could be granted if the balance of convenience was in favour of such a course. 31 P.L.R. 550 (1). Courts in India have power to issue temporary injunctions in a mandatory form. (38 B. 381, Diss.) 41 M. 208=33 M.L.J. 448; 24 L.W. 854=1927 M. 210=99 I.C. 566. On an interlocutory application, Court has power to pass a mandatory injunction before the suit is heard, 28 I.C. 121=16 Bom. L.R. 566. It is doubtful whether mofussil Courts have power to grant mandatory injunction on interlocutory applications, 38 B. 381=16 Bom.L.R. 288. Under O. 39, R. 2 (1) Court may grant an injunction restraining a person living within the jurisdiction of another Court from instituting certain proceedings. 57 C. 1280. Court has no jurisdiction to issue an injunction against a person not a party to the suit or to summon before it any person not a party to the injunction. 44 I.C. 496, 96 I.C. 540. District Court can demand security from the guardian of the person of a female infant ward to prevent his giving her in marriage without the consent of her "proper male relations." 20

committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

Notes.

P.L.R. 1914=23 I.C. 351 High Court has power under this rule to interfere and restrain a party from proceeding with a suit pending in another Court. 24 L.W. 421=97 I.C. 938=1926 M. 1126. Suit to contest election—Injunction *pendente lite* 20 I.C. 676=41 C. 384.

DELAY.—When suit was delayed till the last day and temporary injunction was applied for on the very day that the suit was instituted and the men were going to be discharged although it was known long before that they were going to be discharged, *Held*, that this in itself was a sufficient reason for refusing to issue the temporary injunction. 14 Lah. 330=34 P.L.R. 975=1933 Lah. 203.

TRADE NAME.—Infringement—Temporary injunction, grant of. *See* 21 I.C. 258=40 C. 570. *See also* 139 I.C. 490=1932 S. 127. (*See cases under Trade Mark in R. 1 supra*)

RESTRAINING INTRODUCTION OF BILL IN LEGISLATIVE ASSEMBLY.—An interlocutory injunction can only be granted if the Court is satisfied that in all probability the declaration which is the foundation for the permanent injunction claimed will be made when the suit comes to be tried. The Court cannot make a declaration that a Bill in the form in which it was at that moment sought to be introduced in the Legislative Assembly is *ultra vires*, because a Bill as such has no legal effect and if the declaration refers to a future Act which may be passed, the Court is then invited to deal with a future and hypothetical question which may never arise. In a suit for such a declaration, it follows no interlocutory injunction can be granted 56 B. 254=34 Bom. L.R. 231=1932 B. 166.

DISOBEDIENCE OF INTUNCTION—CONSEQUENCES.—When there is an injunction against Government in respect of certain quarry, persons who with knowledge of the injunction and with permission of Government work at the quarry are guilty of contempt. It is immaterial that they were not themselves parties to the suit and whether they were or were not bound by the injunction. 16 Pat. 159=18 Pat. L.T. 95=1937 Pat. 65 (S.B.). Where the true owner of a pension is prevented by injunction from getting his pension from Government he should be committed for contempt if he disobeys the Court's injunction and gets the pension from the Government 20 C.W.N. 457=35 I.C. 378 (P.C.). Provisions of R. 2 (3), O. 39 were intended to be applied to breach of injunction under R. 1 also but as cl (3) is included under R. 2, it would follow that the provisions of that clause will not apply to R. 1. 1930 A. 387 (2). Injunction restraining defendant company from disposing of the goods—Assistant of the firm cannot be punis-

hed for disobedience 42 C. 1169=21 C.L.J. 578. Sub-Judge could issue a temporary injunction staying the execution of a decree proceeding in a Munsiff's Court 1923 L. 144 (2)=73 I.C. 909, 16 C.L.J. 585=15 I.C. 614=18 C.W.N. 92. Decree of Revenue Court—Injunction—Extent of operation—Disobedience—Government's liability 20 C.W.N. 457=35 I.C. 378 (P.C.). An injunction which is discharged subsequently must be obeyed during its subsistence. (*Ibid*) Disobedience of injunction issued by Court—Suit transferred to another Court—Jurisdiction of second Court to punish disobedience. 22 I.C. 499=18 C.W.N. 470, 46 M. 83=43 M.L.J. 71. O. 39, R. 2 (3), C. P. Code, applies not only to disobedience of an order issued under clauses (1) and (2) of that rule and applies equally to disobedience of all injunctions issued under S. 94 of the Code. High Court in its appellate side has jurisdiction over the whole of the Presidency. 1926 M. 574=50 M.L.J. 401=95 I.C. 196 (2) Unless Court has jurisdiction over the subject-matter of the controversy, disobedience of its injunction is not punishable. An injunction in matter beyond the jurisdiction of a Court is void 15 C.L.J. 147=16 C.W.N. 447. Injunction—Breach of—Karnavan restrained from contracting loans—Validity of loans contracted thereafter. 47 I.C. 778=35 M.L.J. 96 The provision as to punishment for disobedience to orders of Court is not confined to suits of the nature contemplated by R. 2. 44 I.C. 56=7 L.W. 328. Marriage of ward in disobedience of guardian's undertaking given to Court—Offence—Penalty—Persons assisting guardian not liable for contempt 31 Bom. L.R. 1120. Where a temporary injunction was obtained against a person directing him not to get the girl who had gone to his house married and when the person was not responsible in promoting or bringing about the marriage but did not do all that he could do to prevent it, it cannot be said that he actually disobeyed the order as it was passed and so an order for his detention in prison is incompetent. 118 I.C. 675=1929 N. 273 O. 39 has to be read along with S. 94, cl (8) (*Ibid*) R. 2 applies to case of disobedience to an order to do or abstain from doing a single act. (*Ibid*) 39 M. 907=30 M.L.J. 523 Court is not bound under R. 2 (3) in the first instance to attach property and then only order imprisonment. The matter is one for the discretion of Court 39 M. 907=30 M.L.J. 523, 26 M.L.J. 37=22 I.C. 404. Attachment of property is not a suitable form of remedy except where a person is ordered to do something and he does not do it. 31 C.W.N. 814=1927 C. 598=105 I.C. 348. An order for attachment of property or imprisonment of the person guilty of disobedience of an injunction is not an enforcement of the

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

3. [S. 494] The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

Before granting injunction court to direct notice to opposite party.

Order for injunction may be discharged, varied or set aside.

4. [S 496.] Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Notes.

order of injunction but is a punishment for past disobedience (*ibid.*) A bettor of contempt of Court cannot be punished 1927 C 598=105 I C. 348=31 C.W.N. 814.

HIGH COURT—POWERS OF.—The powers of High Court to issue injunctions in appropriate cases are not confined to the provisions of O. 39. Any orders may be made which the ends of justice or expediency may require 136 I C. 346=1932 M. 180, 137 I C. 519=36 C.W.N. 291=54 C.L.J. 317=1932 C. 353

APPEAL.—An order refusing to attach property of a person who had disobeyed an injunction is appealable. 26 M L J 37=22 I C 404 See also 1922 L 347, 118 I C. 675=1929 N. 273.

O 39, R. 2 (3).—Cl. (3) of this rule applies to disobedience generally of an injunction granted by the Court. The words "in case of disobedience," in that clause are wide enough to cover breaches of an injunction issued under R 1 of O 39, for which no penalty is provided elsewhere 16 Pat.L.T. 309=1935 Pat. 274. 15 Pat 320=17 Pat.L.T. 61=1936 Pat. 23 "Court granting the injunction"—Meaning of.—Grant of injunction by one Court—Allocation of suit for trial to another Court of same jurisdiction—Jurisdiction to punish for breach of injunction 61 C.L.J. 543 Where a party disobeys an injunction order restraining alienation of certain properties, Court can punish the party in contempt under O 39, R 2 (3). 131 I C. 343=1931 L 201. Before a Court commits a party to prison for alleged disobedience to an order for injunction in a case where the party contends that he received no notice of the order, the party should be given an opportunity of establishing his contention 137 I.C. 425=1932 C. 719

O. 39, R. 3.—If the object is likely to be defeated by delay, Court may grant an *ex parte* injunction without notice to opposite party. 64 I.C. 534=13 Bur.L.T. 227. Appel-

late Court can order stay of an interim injunction *ex parte* provided it thinks that a fit case has been made out. Where the interim order, so far as the relief claimed in the suit is concerned, really decides the action, appellate Court is justified in ordering a stay so that as far as that issue is concerned it might remain open until it has heard the appeal. An order in appeal does not confirm the interlocutory order. A totally different order, based on the merits, is passed which dissolves the injunction. The stay order merely operates to prevent for the time being the injunction taking effect. When the injunction itself is dissolved, the stay order is completely vacated 136 I C 822=1932 A. 223

O. 39, R. 4.—When injunction is granted *ex parte*, liberty to apply to Judge to vary or set aside his order must be implied 9 A. 36 (42). Appeal See O 43, R. 1, cl. (x) and 15 A 8 O. 39, R. 4 is intended to cover two classes of cases—(1) when an urgent order *ex parte* has been passed under R 3, R 4 will allow the party against whom it has been passed to apply to have it discharged or varied or set aside, and (2) when an injunction order already in force has, owing to fresh circumstances, become unduly harsh or unnecessary or unworkable, it would be open to either party to apply under R 4 to the Court to discharge, vary, or set it aside. R. 4 is not intended to set at naught the ordinary *curius curiae* that, once a Court has decided a matter after giving each side an opportunity of being heard, its order is final and binding on itself as much as on the parties, and cannot be re-opened except on the presentation of some new matter not available when the original order was passed 1929 M 803=120 I C 862 Whatever be the scope of this rule it cannot be that a party can appeal against a mere reiteration of the original order of injunction when he has failed to appeal against the original order 1929 M 803=120 I C. 862

5. [S. 495.] An injunction directed to a corporation is binding not only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Injunction to corporation
binding on its officers

Interlocutory Orders.

6. [S. 498.] The Court may, on the application of any party to a suit, order the sale, by any person named in such order, and in such manner and on such terms as it thinks fit, of any moveable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

Power to order interim
sale

Detention, preservation,
inspection, etc., of subject-
matter of suit

7. [S. 499] (1) The Court may on the application of any party to a suit, and on such terms as it thinks fit,—

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein,

(b) for all or any of the purposes aforesaid authorise any person to enter upon or into any land or building in the possession of any other party to such suit; and

(c) for all or any of the purposes aforesaid authorise any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule.

8. [S. 500] (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the defendant at any time after institution of the suit.

Application for such or-
ders to be after notice.

Notes.

O. 39, R. 5.—The rule applies only to Corporations strictly so called, i.e., to bodies authorised by law to act as a person in law and not unregistered or unincorporated bodies or associations. 38 I.C. 572=9 Bur L.T. 247. On this rule, *see also* 55 A 399=1933 A 344. Equity acts *in personam* and an injunction must be addressed to the defendant personally. The Secretary of State as a corporation sole would be an individual, but neither 'the N.W. Ry. Administration, Lahore' nor the Agent of the Railway an individual. That would amount only to a suit against the office of Agent and not against the person or official himself. 14 L. 330=34 P.L.R. 975=1933 L. 203.

O. 39, R. 6.—The power of Court to order sale of moveable property is independent *inter alia* on the said property being the subject-matter of the suit or having been attached before judgment. If either of these conditions do not exist, then Court cannot exercise the power conferred by R. 6. 134 I.C. 118=1932 L. 51. As to whether application under this rule is one in execution, *see* 40 C.W.N. 1317.

O. 39, Rr. 6 and 7.—Where property attached before judgment is released on security which comprised some items of attached property, the plaintiff is preferentially entitled to execute his decree against

the property given as security. 11 L.W. 6=56 I.C. 267. In a suit for damages alleged to have been caused by the erection by the defendant of an adjoining house, the defendant is entitled to an order to enter into the house of the plaintiff and to inspect the same. 24 C. 117. *See also* 16 B 511. Power of Court to order inventory—Jurisdiction of probate Court to pass such order. 49 C.L.J. 484=1929 C. 498. R 6 merely gives power to a Court to sell a perishable article and certainly does not authorize it to send a commissioner to sell any crop. 1930 M. 224=126 I.C. 284.

O 39, R. 7.—Where what was required was a decision on the question as to whether what was asserted by one of the parties, namely, that certain structures standing on the land were recent and not old structures was a true assertion or not and Court issued a commission for local investigation, *Held*, that the appropriate procedure was under R 7 and not under R 4 or 9 of O 26. 37 C. W.N. 143=144 I.C. 870=1933 C 475. An order by a Court, in reference to certain constructions over a site which is in dispute directing that the situation then existing should not be altered pending disposal of a suit is an order which the Court is competent to pass under this rule. 1935 A.M.L.J. 117.

O. 39, R. 8.—The term "may" must be read

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

9. [S. 501.] Where land paying revenue to Government, or tenure liable to sale, is the subject-matter of a suit, if the party in possession of such land or tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure; and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

10. [S. 502.] Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court.

ORDER XL

APPOINTMENT OF RECEIVERS.

Appointment of receivers

1. [S. 503.] (1) Where it appears to the Court to be just and convenient, the Court may by order—

Notes.

with the words "at any time". 7 M 241. When an interlocutory order is refused by one Judge the proper course is to apply for a review or to appeal from it 16 B 511

O. 39, R 10—In case the defendant refuses to deposit the money in Court, he is liable to pay interest from the date of the order. 16 W.R. 297. The rule does not cover a case where the money is held by another Court to credit of another suit 27 M 168. Admission which is insufficient under O 12, R. 6 is also so under O. 39, R 10. 1927 S 25=97 I C 623.

O. 40, R 1: SCOPE OF RULE.—The rule intends to give power of appointing Receiver only to the Court in which the suit is brought or by which the property has been attached. 23 C 517 (519). See also 24 B 38 (42) O. 40 if applies to mortgage decrees 100 I C 735 (1)=1927 A 419 Receiver can be appointed even after a decree is passed 8 M 229 (233). Court can order that the Receiver should continue permanently after decree when such continuance is necessary. 19 M 120 (P C). Receiver can be appointed in respect of immoveable property notwithstanding the fact that a Magistrate has passed an order under S 145 of the Cr. P. Code. 22 A. 214 Discretion given by this rule is one that should be used with greatest care and caution. 5 A 56; 133 I C 433; 134 I C 799=1931 L 688; 15 C. 818 (822); 23 C.L.J. 567; 16 C.W.N. 997; 28 C.W.N. 86=1924 C 456; 134 I.C. 799=1931 L. 688; 1932 L. 82=133 I.

C. 433. Remedy is derived from English practice and is an exceptional remedy. 100 I.C. 735 (1)=1927 A. 419. As to power of Court to appoint receiver in suit wrongly valued or wrongly framed, see 1936 L. 102 Pendency of proceedings is a condition precedent for appointment of receiver Where on an appeal against preliminary decree, the High Court stayed further proceedings, the original Court has no power to appoint receiver 45 L.W. 519=1937 M. 163=(1937) 1 M.L.J. 605. Execution of decree—Properties outside jurisdiction—Receiver—Power of Court to appoint 40 C.W.N. 1056.

GROUND FOR APPOINTMENT—AND WHO CAN BE APPOINTED—Grounds for appointment of a Receiver, see 11 I C. 703; 1926 S. 83; 106 I. C. 167, 134 I C. 799=1931 L. 688. An appointment of Receiver can be made only on proof of strong grounds of necessity 11 I C 403. The first essential condition is that the applicant must have "an interest" in the property to be affected by the order. 61 I C. 849=6 P.L.J. 366 Receiver should not be appointed where no risk of loss is shown. 12 I.C. 198=4 Bur LT 241. See also 1933 S 231 Public nature of the matter has got to be taken into account in the appointment of Receiver. 96 I.C. 30=1926 C. 1092. It would be very improper to take property out of the hands of ladies of culture and well capable of managing the property and of examining accounts 11 I C. 703. On application for appointment of a receiver, plaintiff must show that *prima facie* defendant has

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no title to the property and that he (the plaintiff) has the title. 161 I.C. 838=1936 O.W.N. 460. The burden of proof is on the applicant to show that it is just and convenient that a receiver should be appointed, and it is not for the opposite party to show cause why no receiver should be appointed. 1937 O.W.N. 243=1937 O. 232. Mere existence of apprehension in the mind of the plaintiff that the defendant would wrongfully dispose of his property is not alone sufficient to justify an order for receivership without further inquiry as to the basis of these apprehensions and existence of such apprehensions. 1936 L. 102. As to what is meant by "just and convenient" 28 C.W.N. 86=1924 C. 456; 34 C.W.N. 440=1930 C. 610. "Just and convenient" means just and convenient in view of the equities in favour of both the parties. 1932 C. 189=59 C. 205=35 C.W.N. 1066. See also 132 I.C. 349=1931 O. 307, 34 C.W.N. 440=1930 C. 610. The words do not mean just or convenient to one party or the other but just or convenient according to judicial notions of what is right and just. 159 I.C. 93=1935 M. 875. Appointment of Receiver is just and convenient if the main object is to preserve the property. 1923 L. 239 (2). Receiver should be an impartial person and wholly disinterested in the subject-matter of the suit. 18 I.C. 398=17 C.W.N. 581, 28 C.W.N. 86=1924 C. 456. But it is competent to Court upon the consent of parties and in a proper case, without such consent to appoint a person mixed up in the subject-matter of the litigation, if it will be beneficial to the estate. 23 C.W.N. 86=1924 C. 456. Order on an application under O. 40, R. 1 should not express an opinion on the merits of the case (*Ibid.*). Appointment of an interim Receiver pending the final appointment of a common manager can be made only on evidence of necessity for such appointment. 34 I.C. 83 O. 40, R. 1 does not lay down notice to the opposite party. 22 C. 459, 21 M.L.J. 821; 107 P.R. 1908, 36 P.R. 1910 (Dist.) 1923 L. 239 (2). Where there are a large number of outstanding due to the estate of the deceased person, some of which are liable to be lost owing to the efflux of time, and the heir of the deceased is a lady and there is a *bona fide* dispute between the parties, Court is justified in appointing a Receiver to recover the outstanding and to bring the proceeds into Court. 1923 L. 239 (2)=71 I.C. 743 Mahant—Disputes regarding title—Convenience. 69 I.C. 361. Court may make an order appointing a Receiver *suo motu*. 1922 L. 444=67 I.C. 383. Such appointment is one made under this rule, and is appealable under O. 43, R. 1. 163 I.C. 204=1936 O.W.N. 1134=1936 Oudh 337. Court has jurisdiction to appoint a receiver to maintain the *status quo ante* pending a suit or appeal. (*Ibid.*) Appointment of Receiver in suit in which possession cannot be decreed to plaintiff. 92 I.C. 599=1926 M. 155. Court has got power to appoint a Receiver in a declaratory suit

and appellate Court should not interfere with the discretion exercised by the lower Court. 94 I.C. 39=27 Punj.L.R. 138, 45 L.W. 519=1937 Mad 163=(1937) 1 M.L.J. 605. Where defendant has been put in possession of the properties in dispute by the Revenue Courts after contest on the ground of his having a *prima facie* title to them, it would not be just and convenient for the Court to deprive him of that possession and to appoint a receiver in his place to manage the properties. 166 I.C. 983=1937 O.W.N. 197. Poverty of the defendant trustee is no ground for appointment of a Receiver unless there be in addition some danger to the estate. 29 M.L.J. 209=29 I.C. 485, 1933 Sind 231. The late production of accounts and documents by manager is not sufficient to warrant the appointment of a Receiver. 17 I.C. 261=1912 M.W.N. 904. Mere fact that a Muhammadan widow is entitled to a lien for dower on her husband's estate is no ground for refusing the appointment of a receiver summarily without enquiry. 1923 N. 21. That receiver has not been appointed at a prior stage of the suit is no ground for refusing the application at a later stage, when fresh grounds are made out. 1923 N. 21. Court has no jurisdiction to appoint a Receiver at the instance of a simple money-creditor unless he establishes a special equity in his favour. 61 I.C. 849=6 P.L.J. 366, 34 C.W.N. 440=1930 C. 610. As, for example, in the case of a creditor who has a right against a specific fund or estate. 1936 Lah 102. (1922 Pat. 318 *Rel on*) In a fit and proper case receiver may be appointed in respect of defendant's properties, (not the subject matter of suit), even in a suit for recovery of amount due on a promissory note. 1935 Rang 398. A prior incumbrancer desiring to take possession is entitled to have the Receiver obtained by a puisne incumbrancer discharged, and a Receiver of his own substituted. 61 I.C. 849, 6 P.L.J. 366. The insolvency of an administrator is a good reason for appointing a Receiver. 48 I.C. 152=11 Bur.L.T. 127.

SELECTION OF RECEIVER.—Ordinarily a party to a litigation should not be appointed a Receiver unless very exceptional circumstances are established to justify such an appointment. 18 C.L.J. 638=18 C.W.N. 533. See also 1929 L. 780. One of the parties to suit will not be appointed without the consent of the other. 19 I.C. 873=17 C.W.N. 974; 25 I.C. 602. When a non-resident is appointed Receiver there must be adequate guarantee that he will be subject to the effective control of the Court. 19 I.C. 873=17 C.W.N. 974. That the Receiver resides at a great distance from the property to be managed, is not an absolute disqualification, but is an important circumstance to be taken into consideration. 19 I.C. 873=17 C.W.N. 974. A person who is guardian of an incapacitated defendant in a suit is not always disqualified to be Receiver. 35 I.C. 939=4 L.W. 285. While appointing a Receiver, the wishes of the creditors are entitled to a great weight,

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as they have virtually the right of nomination. 115 I.C. 881=1929 P. 114

PRIMA FACIE CASE.—21 M.L.J. 821=11 I.C. 170, 3 Pat.L.T. 466; 43 I.C. 550, 1928 M. 813. Alienation by Hindu widow—Suit by reversioner to set aside—Appointment of receiver not proper. 32 Bom.L.R. 1013.

PUBLIC OFFICER.—Receiver is public officer. 58 C. 850=35 C.W.N. 161=1932 C. 503.

REMUNERATION.—Court has a discretion if it thinks fit to allow him remuneration at a fixed rate. 1923 C. 516=76 I.C. 583. Receiver's remuneration must come out of the estate of the insolvent and the legal representatives of the insolvent cannot be made personally liable for the same. (*Ibid*) The appointment should be made for the protection of property or the prevention of injury according to legal principles. The rule does not confer an arbitrary and non-regulated discretion on Court. 34 I.C. 693=23 C.L.J. 567; 9 I.C. 985=13 C.L.J. 495, 5 Lah.L.J. 583=1923 L. 623; 55 C. 720=32 C.W.N. 681=54 M.L.J. 423=1928 P.C. 49 (P.C.). As to remuneration of Receiver, *see also* 131 I.C. 655=1931 M. 500=60 M.L.J. 332. Discretion of Court in declaratory suit in respect of agricultural lands. 5 Lah.L.J. 583=1923 L. 623.

WASTE, WHAT IS.—A mere intention to transfer by a life tenant does not constitute waste but may constitute danger to the reversionary interests and to protect them Court may appoint a Receiver. 44 B. 727=57 I.C. 553. Where it is clearly proved that an estate is so grossly mismanaged that the whole estate will be jeopardised, it is a clear case for the appointment of Receiver. 25 I.C. 406=18 C.W.N. 537; 21 M.L.J. 821=11 I.C. 870. *See also* 134 I.C. 799=1931 L. 688, 1933 A. 138 (waste by widow).

EFFECT OF APPOINTMENT.—Property in the possession of Receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. 47 M. 47=43 M.L.J. 211. The refusal to make Receiver party to the execution proceedings is a material irregularity justifying interference of High Court under S. 115 (*Ibid*). Where Receiver is appointed, property vests in him only when the orders under O. 40, R. 1 (b), (c) and (d) are made (*Ibid*). 1923 N. 6. Appointment of receiver for collecting amount due under decree—Effect of—Creditor getting such receiver appointed—Right to priority over attaching creditor. A step of that kind is no more than getting the property attached or issuing an injunction against the defendant not to alienate his property and it does not amount to a charge and therefore does not confer priority over others who had obtained order of attachment. 153 I.C. 259 (2)=1935 M. 146. Effect of appointment does not bar execution. 6 Pat.L.J. 208=62 I.C. 469. Where Agent of owner is appointed Receiver, whether it terminates the agency. 1936 M. 980. Appointment of Receiver—Effect of—If involves transference of ownership—Duty to

report to Collector under U.P. Land Revenue Act. 1936 R.D. 238.

CONFLICT OF JURISDICTION.—SECOND RECEIVER BY ANOTHER COURT.—Where a receiver is appointed, his possession is that of the Court which appointed him and it cannot be disturbed without its leave. If any one, whoever he may be, disturbs the possession of the receiver, he will be guilty of contempt of Court. It follows from this that when a receiver is appointed by one Court to take charge of any properties, another receiver cannot as a rule be appointed by a different Court to take possession of or exercise any control over the same properties without the leave of the former Court. To make any such appointment would be obviously inconsistent with the first appointment and result in a conflict of jurisdictions. 146 I.C. 966=1933 L. 671.

RIGHTS OF THIRD PARTIES.—A Court cannot appoint a receiver to take charge of property which is in the possession of third party and when that party claims to be in possession thereof in his own right. 1935 Rang. 398. Though O. 40, governs the appointment of receivers in execution, R. 1 (2) of O. 40, bars the appointment of a receiver to take possession of, and to realise the income from, the occupancy and proprietary tenancies of a judgment-debtor. To so appoint is contrary to the Tenancy Act and is tantamount to an ejectment of the tenant. 1937 A.L.J. 267=1937 All. 389. *See* 17 L.W. 64=1923 M. 304. The rule that the possession of Receiver may not be disturbed without leave, does not apply, so far as third persons are concerned until a Receiver has been actually appointed, and is in possession. 23 C.W.N. 952=29 C.L.J. 424. Receiver—Possession of—Legality of—Right of third parties to question—Order appointing Receiver not challenged—Effect. 56 M.L.J. 95.

CONTEMPT BY RECEIVER.—22 C. 648, *see also* 30 C. 696.

CONTEMPT OF COURT.—Where a receiver is appointed to take possession of property the person in possession of property cannot interfere with the Receiver, but should apply to the Court for redress. 18 C.W.N. 289=22 I.C. 417.

DISCHARGE OF RECEIVER.—23 C.L.J. 217=20 C.W.N. 789. Court which has the power of appointing the Receiver is also invested with the power of dismissal. 1931 A.L.J. 13=1931 A. 72. A Receiver appointed in a suit for proceedings by consent of parties, may be discharged, even before the termination of the suit or proceeding. 13 L.W. 367=61 I.C. 562. Neither the termination of the suit in decree nor the pendency of the appeal against that decree will put an end to the authority of the Receiver appointed to collect rents. 33 I.C. 69, 5 Pat.L.J. 513=1 Pat.L.T. 643. A Receiver who has once been appointed should be discharged only for proved incapacity. 115 I.C. 881=1921 P. 114.

HIGH COURT, POWERS OF.—High Court has no jurisdiction to examine the accounts in

(a) appoint a Receiver of any property, whether before or after decree;

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order to ascertain the liability of a Receiver appointed by a Subordinate Court, he not being an officer of High Court. 4 P.L.J. 636=54 I.C. 207 High Court has power to appoint a Receiver in a testamentary suit 17 B. 388

SUIT AGAINST RECEIVER.—Where the Receiver dies, further proceedings can be continued against his successor and no one else. 61 I.C. 888. Permission to conduct a suit implies permission to institute a suit 63 I.C. 843. A permission granted by a Court to sue a Receiver relates back to the time of the institution of the suit. (*Ibid.*) A Receiver if an officer of Court—Suit against 62 I.C. 768=26 C.W.N. 992. The necessity to obtain sanction before institution of a suit against the Receiver is imposed by the Common Law, merely to enforce due respect towards Courts of Justice, and omission to do so does not affect the jurisdiction of Courts. Per *Sadasiva Aiyar, J.*, in 70 I.C. 759=42 M.L.J. 339, 43 M. 793=59 I.C. 568. It is illegality which can be cured by obtaining it during the course of litigation 43 M. 793=59 I.C. 568; 61 I.C. 888, 63 I.C. 843. It is clear law that as a Receiver is an officer of Court he cannot be sued for acts done in his official capacity by a third party except with the leave of Court 1 R. 138=1923 R. 208, 102 I.C. 797=1927 P. 297=8 P.L.T. 629.

LEAVE OF COURT.—Proceedings cannot be instituted against a Receiver without the permission of Court and if so instituted they constitute a contempt of Court 19 C.L.J. 191=18 C.W.N. 546. See also 130 I.C. 836=1931 P. 204 (Permission of Court is necessary before attaching properties in the hands of the Receiver). To charge a Receiver for the breach of the ordinary criminal law of the country sanction is not necessary. 15 I.C. 491=13 Cr.L.J. 491. It is not a general rule of law that sanction of Court appointing a Receiver is not necessary in the case of criminal proceedings against him arising out of his office 15 I.C. 489=13 Cr.L.J. 489. Leave of Court is necessary both for execution of a decree against Receiver of the property of judgment-debtor as well as for prosecuting an application for rateable distribution against Receiver. 14 C.L.J. 55=15 C.W.N. 925. An application for rateable distribution of the proceeds of sale in the hands of a Receiver does not require leave of Court. 34 Bom.L.R. 1405=1932 B. 622. Receiver appointed by appellate Court—Proper Court to grant sanction for attachment of properties in his possession. 1929 L. 147. Such leave may be obtained at a subsequent stage of the proceedings. 14 C.L.J. 55=15 C.W.N. 925. A prohibitory order against the Receiver is not equivalent to the grant of leave to execute the decree, (*Ibid.*) Receiver appointed by one Court—Subsequently sued in another Court with the leave of the appointing Court. Such leave does not render him amenable to the other Court's jurisdiction

and an injunction against him is illegal. 7 P. 684=1928 P. 321.

LEAVE OF COURT NOT NECESSARY FOR EXERCISE OF STATUTORY RIGHT.—The rule forbidding the bringing of a suit against a Receiver is a mere procedure of Court not resting on any statutory authority, whereas the right to bring a suit under O. 21, R. 63 was statutory; and a statutory right to sue cannot be defeated by any rule of practice 37 L.W. 346=147 I.C. 526=1933 M. 340.

LEAVE TO SUE.—A Receiver appointed under the Code merely holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of Court is necessary in order that by impleading him the estate may be bound. A Receiver under the Insolvency Act holds a different capacity altogether. He is more than a mere officer of Court; the insolvent's estate vests in him. He alone, and no one else, represents the estate. No leave is accordingly necessary for suing him. 21 A.L.J. 737=46 A. 16. But where a party to a suit is appointed Receiver, leave is not prerequisite to his filing suit in respect of the property. He may sue, as party. By being appointed Receiver, he does not lose his privilege as a party. The strictness of the rule as to the necessity of the leave applies more appositely to the case of the appointment of a person who is not a party to the suit or who is not interested in it 55 C. 1216. Grant of subsequent leave will cure the defect. 46 C. 352=23 C.W.N. 496, 56 I.C. 424=22 Bom.L.R. 319. A suit against a Receiver without leave of Court should be dismissed and not remanded to lower Court for obtaining the necessary leave. 24 I.C. 622. In every case a Receiver as such need not be sued but remedy can be obtained by party, by application to Court. 10 I.C. 673=9 M.L.T. 300. There is no statutory provision which requires a party to obtain leave of Court to sue a Receiver. The rule is based on public policy. 4 P.L.J. 20=47 I.C. 719; 51 I.C. 706. A Court should not refuse leave to sue ordinarily. 4 P.L.J. 20. A decree against a Receiver without permission must be set aside. 17 I.C. 916=3 Bur.L.T. 163.

POWERS OF RECEIVER.—A Receiver appointed by Court is not ordinarily the representative or the agent of either party in the administration of the trust. But his appointment is for the benefit of all parties and he holds the property of those ultimately found to be true owners 1930 M. 4; 1928 C. 402. A Receiver is not a judicial officer. He is merely a custodian of properties by order of the Court. In that capacity it may be his duty to institute suits on behalf of the estate in the Court of the Judge. It is unthinkable that any such officer should also be the Judge in the Court in which the suits are instituted. Where Court authorises Receiver to hold an enquiry as to heirs in a contested succession proceedings, *held*, that the order was invalid in law. 121 I.C. 433=

(b) remove any person from the possession or custody of the property,

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31 Bom.L.R. 1081=1929 B. 478. Where Receiver was given power to collect outstandings and do all things necessary for the realisation and preservation of the assets of firm, *held*, Receiver had no authority to mortgage the property of the firm. 44 M.L.J. 602=50 C. 338=1 R. 66=50 I.A. 77 (P.C.). A Receiver in possession of the estate is entitled to require payment of rent. 58 I.C. 301. In a partition suit in which a Receiver is authorised to sell properties there can be no difficulty in directing him to convey the properties. 43 C. 124=19 C.W.N. 817. Court may confer on a Receiver all such powers for the realization of properties and the execution of the documents as the owner has. (*Ibid*) Also all such powers as to bringing and defending suits. 27 I.C. 459=19 C.W.N. 45. If a joint Hindu family can sue to recover possession of family property, there is no reason why a receiver of the joint family estate cannot likewise sue. 39 Bom.L.R. 224. Plaintiff appointed Receiver by Court cannot appropriate partnership moneys to his own use. 1925 P.C. 257=92 I.C. 274=23 L.W. 628 (P.C.). On appointment of a Receiver the estate vests in him and thereafter the Receiver is the only person competent to prosecute suits and obtain decrees. 11 I.C. 102=15 C.L.J. 339. The general powers of Receiver who can sue and defend a suit with the express permission of Court do not necessarily contain a power to sue and liability to be sued. 66 P.K. 1913=17 I.C. 751. A Receiver appointed in execution can prosecute a cause of action outside the jurisdiction of the Court by which he was appointed Receiver. 1921 M.W.N. 106=61 I.C. 753. A Receiver appointed to collect outstandings can file suits in that behalf even though the suit in which he was appointed has terminated in a decree or an appeal is pending from that decree. 33 I.C. 69. Termination of litigation in which Receiver was appointed—Absence of order of discharge—Appointing Court closed—Competency of Receiver to prefer appeal against adverse orders. 30 L.W. 713=57 M.L.J. 668. Receiver's powers are entirely conditioned by terms of his appointment, subject to any subsequent change by the Court under which he holds the appointment. 32 I.C. 207=30 M.L.J. 456. Suit by Receiver to cover property sold prior to his appointment 35 M. 578. A Receiver appointed by a Court can oust a mortgagee decree-holder put in possession of the lands subsequent to his mortgage decree. 6 P.L.J. 37=61 I.C. 67. R.I. does not permit of the appointment of a Receiver in respect of properties not comprised in suit. 17 I.C. 16. Receiver can collect only such assets as become due to the estate after his appointment. Rents falling due prior to his appointment are not such assets. 42 I.C. 785=1917 P.H.C.C. 311. Generally speaking a person who is appointed by Court as the manager of the property in dispute has no power to

pledge the credit of an individual party. While in law it is more usual to have that doctrine applied to a Receiver and manager, the doctrine is equally applicable to any person appointed by the Court as an officer of the Court. 1929 C. 659. Lease of debutter property—Need for sanction of Court—Application for leave containing misrepresentations—Effect—Term not mentioned in application—Whether can be included in lease. 50 C.L.J. 333=1929 C. 828. Receiver—Appointment in execution of mortgage decree—Purchase of properties without leave of Court—Legality—Sale if liable to be set aside. *See* 68 M.L.J. 597.

DUTIES OF RECEIVER—19 B. 660. Delegation of powers to receiver. *See* 65 I.C. 837=34 C.L.J. 123.

COSTS DUE TO RECEIVER.—19 B. 660; 134 I.C. 272=1931 N. 143, 30 C. 696.

LIABILITY OF RECEIVER—Receiver would be personally liable for breach of contract for which sanction of Court has not been obtained. 58 C. 174=134 I.C. 1266=1931 C. 491. (*See* the same case as to rights of third parties and right of Receiver to be indemnified.) As to personal liability of Receiver to pay costs, *see* 134 I.C. 272=1931 N. 143. Where Receiver is guilty of wilful default or gross negligence, the only provision for taking action against him, apart from proceeding against the security, is that his property can be attached. The fact that the rule provides for the enforcement of such an order by attachment implies that it is the only way to be enforced and that arrest and imprisonment are not to be the methods of enforcement. 1931 M. 760=62 M.L.J. 199.

REMEDY AGAINST RECEIVER—26 M. 492. As to personal liability of Receiver, *see* 1925 P. 602, 58 C. 174=134 I.C. 1266=1931 C. 491.

REMOVAL OF RECEIVER—19 W.R. 66, 13 M. 300. Court that appoints a Receiver has also power to remove him. 134 I.C. 454=1931 A. 72. Where a Receiver appointed under this rule is replaced by another Receiver, the new Receiver should be made a party to the proceedings. 28 M. 157. An order removing a Receiver is one falling under R. 1 (a) as the power of appointment includes also the power of removal and is appealable. 92 I.C. 940=53 C. 319=1926 C. 593. But *see also* 60 C. 162. Court may in the exercise of its discretion make any order discharging or removing a Receiver for the proper care and management of the property in its custody and Receiver has no right of appeal against the order of removal passed by the Court appointing him. 60 C. 162=1933 C. 52=57 C.L.J. 408.

APPEAL.—A decision that it is just and convenient to appoint a receiver does not amount to an order appointing a receiver and no appeal lies against such order until a receiver is actually appointed because it is possible that the final order appointing a receiver may never be made. 148 I.C. 184=1934 N. 64. An order merely declaring that a Receiver

(c) commit the same to the possession, custody or management of the receiver; and

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should be appointed is appealable even though nobody is named as Receiver. 13 Pat.L.T. 525=1932 P. 360 (following 40 M. 18 and 1 P. 625.) An order refusing to appoint a Receiver is open to appeal. 30 I.C. 545=17 Bom.L.R. 680. See also 17 C. 680; 10 M. 179 (F.B.). In such an appeal it is inexpedient to go into the merits of the case pending in the lower Court. 32 C. 741. An order refusing an application for removal of a Receiver cannot be appealed from. 23 C.L.J. 217=20 C.W.N. 789; 24 I.C. 862. See also 40 C. 862. A Civil Court cannot appoint a Receiver in respect of properties for which a Criminal Court has already appointed a Receiver under S. 136. Cr. P. Code, unless the Magistrate withdraws the attachment. 40 C. 862=17 C.W.N. 1070. A Court of appeal will not, except in an extreme case, disturb an order for the appointment of Receiver by a Court below. 5 L.L.J. 533=1923 L. 623, 1927 L. 65. If appointment of Receiver is not made on sound judicial lines, appellate Court should interfere. 96 I.C. 30=1926 C. 1092, 55 C. 720=32 C.W.N. 681=55 M.L.J. 423=1928 P.C. 49 (P.C.) The pronouncement by a Court that a Receiver should be appointed without naming a specific person is appealable. 40 M. 18=32 M.L.J. 304; 1 P. 625=1922 P. 250; 4 P.L.T. 210. An order dismissing an objection to the appointment of a Receiver of property of which the objector is in possession is appealable. 48 I.C. 133=3 Pat.L.J. 573. The appointment of a receiver is a matter entirely within the discretion of the trial Judge and unless it can be shown by the appellant that the trial judge has not exercised a judicial discretion in the matter, he cannot succeed in his appeal against an order rejecting his application for the appointment of a receiver. 166 I.C. 983=1937 O.W.N. 197. No second appeal lies against an order appointing a Receiver in execution. 114 I.C. 839=1929 M. 20. Proceedings under S. 12, Guardians and Wards Act—Order appointing Receiver—Appeal lies. 1929 N. 119. An order giving directions to a Receiver for the restoration of property does not fall under O. 40, R. 1 (d) and is not appealable. 1933 L. 216=145 I.C. 200. O. 40, R. 4 gives the Court a judicial discretion to take action against the receiver or not, and when the Court has exercised its discretion by not taking such action, the appellate Court will not entertain an appeal against such exercise of discretion. 150 I.C. 750 (1)=1934 A. 907.

APPEAL TO PRIVY COUNCIL—R. 13 of O. 45 applies where an application for appointing a Receiver is made after leave to appeal to Privy Council is granted, but the principle for appointing a Receiver shall be the same as laid down in R. 1. 12 I.C. 198=4 Bur.L.T. 241.

Review.—An *ex parte* order passed under this rule is capable of being reviewed. 21 B. 328. Order appointing Receiver is discretionary with the trial Court—Court of

review is free to exercise its own discretion. 27 L.W. 333=1928 P.C. 49 (P.C.).

COLLUSIVE SUIT—RECEIVER IN.—Even if a suit is collusive, the appointment of a receiver by a Court in that suit cannot be ignored so long as it stands. It is not competent for any person to interfere with the possession of a receiver on the ground that his appointment should not have been made. Persons who feel aggrieved by the order of the Court may take proper course to question its validity but so long as it lasts, it must be respected. 146 I.C. 966=1933 L. 671.

ALIENATION BY HINDU WIDOW—SUIT BY REVERSIONERS—In a suit brought by a reversioner impeaching the alienation made by the widow of a share of the estate, it is legal to appoint a Receiver but under exceptional circumstances only. Where the property is being managed by a third person who has been trying for a long number of years to obtain the property by fair means or foul and who is expected to make as much profit out of the estate as he possibly can, thus prejudicing the rights of the reversioner and waste is proved, a Receiver may be appointed and the third party being an alienee out right of a certain share of the estate from the widow is liable to be ousted just as much as the widow. 1933 A. 138=144 I.C. 33. Where properties of deceased are in the possession of his widow and she is the executrix under the will left by the deceased, a mere claim to such property made by an alleged daughter of the deceased is no ground for appointment of receiver. 1934 R. 153.

EXECUTION PROCEEDINGS.—R. 1 is a general provision relating to appointment of receivers and receiver can be appointed in execution proceedings. 100 I.C. 298=1927 L. 190, 114 I.C. 839=1929 M. 20. S. 51, C.P. Code, prescribes the procedure in execution and lays down that the Court may, on the application of the decree-holder, order execution of the decree by appointing a receiver. No further restrictions have been placed on the power of the Court in this section, nor has the nature of the property been defined of which a receiver can be appointed. This section will therefore evidently be governed by the provisions of O. 40, R. 1. 162 I.C. 861=1936 L. 239. Hence where the judgment-debtor has a theatre and a receiver is appointed in execution of a decree against the judgment-debtor to receive the earnings collected and keep accounts but not to receive money at the doors, the money so earned is property within the meaning of O. 40, R. 1 and as such the order is not *ultra vires*, but is just and convenient (*Ibid.*) A receiver appointed in execution is quite as much as a receiver appointed in a suit, an officer of the Court, and holds moneys collected by him subject to the orders of the Court. All moneys in his hands are not necessarily to be regarded as appropriated towards the satisfaction of the decree. The Court has got

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, management, protection, preservation and

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the power to give directions to him in respect of the disbursements of the moneys and in proper circumstances such directions may also be for the benefit of the judgment-debtor. 1935 M 1046=42 L.W. 615=69 M L.J. 534. An appointment of receiver by way of execution cannot be obtained where the decree-holders can execute the decree in the ordinary manner. (1931 O 307 and 1930 C. 502, Foll.) 1933 S 231. A person applying for appointment of receiver in execution of a decree must make out reasonable ground for the appointment. The mere fact that the judgment-debtor presses the applicant to accept a smaller amount than the sum decreed or applies to Manager, Sind Encumbered Estates, for his aid does not constitute a valid ground for appointing a receiver, more especially when there is no danger of waste or destruction of the property (1928 P.C 49 and 1931 L 668, Foll.) 1933 S. 231. The appointment of a Receiver has often been described as a process of equitable execution. Though it is not always necessary that legal execution should be exhausted before the appointment of a Receiver can be obtained in India where there is no distinction between law and equity, the rule holds good that, under ordinary circumstances, equitable execution ought not to be allowed to be resorted to when there is no impediment to execution being levied in the ordinary way as provided by the Code. The person seeking equitable execution should make out a proper case for it. He must show that he was met by difficulties arising from the nature of the property which prevented his obtaining relief by the usual statutory modes of execution and that it is necessary and advantageous to appoint a Receiver. 57 C. 964. See also 35 C.W.N 1066=1932 C 189=59 C 205. Some of the points to be considered by the Court are (1) Whether in view of the assets the amount due under the decree is likely to be realized within a reasonable time from the profits of the attached property, (2) whether the ordinary remedy by sale in execution is not sufficient. 35 C.W.N. 1066. The mere fact that judgment-debtor might harass decree-holder in recovering his dues on getting into possession is no ground for Receivership. 35 C.W.N 1066. See also 134 I.C. 799=1931 L. 688. A creditor is not generally debarred from proceeding to execution by appointment of Receiver. 23 C.W.N. 952=29 C.L.J. 424. The fact that a judgment-debtor will be reduced to poverty if his properties are allowed to be sold is no ground for the appointment of a Receiver. 28 I.C 505. Right of a person to receive allowance charged on property is attachable but a Receiver cannot be appointed to receive money month by month. 16 C.L.J. 354=17 C.W.N. 662. In execution of a decree against a Ghatwal though the Ghatwali pro-

perty could not be attached whether a Receiver of the rents and profits cannot be appointed so as to apply them in satisfaction of the decree. 39 C. 1010=16 C.W.N. 802. Payment of Chowkidars, Sardars and Government dues in a Ghatwali estate do not belong to the Ghatwal, while the rents and profits belong to the Ghatwal. 5 P.L.T. 34=3 P. 339. If a decree is to be executed against him, these can be collected by a Receiver appointed therefor (*Ibid*) A mere right to maintenance not being liable to attachment and sale, a Court has no power to appoint a Receiver to receive such maintenance and apply it in satisfaction of the decree. 40 M. 302=30 M.L.J. 361. When appointment of a Receiver is the only way to recover the decretal amount and when the interest of both parties can be safeguarded, the appointment is neither unjust nor inconvenient. 13 I.C. 285=11 N.L.R. 113. A Receiver can be appointed to receive rents and profits of non-attachable property (*Ibid*.) Mere convenience on the part of the decree-holder would not justify the appointment of a Receiver. 21 I.C. 283=16 O.C 238. Where the judgment debtors are in possession of the property by virtue of their having furnished the security demanded from them by the Court as a condition of execution being stayed, the decree-holder has not a present right to remove them from possession. The appointment of a receiver over part of that property with a view to the realization of costs awarded to him is barred. 1936 O.W. N 595=1936 Oudh 370.

EXECUTION OF MORTGAGE DECREE.—Order 34 is self-contained and meant to provide for all matters it refers to. Its provisions do not allow of the application provided by O. 40 and a receiver cannot, therefore, be appointed in execution of a mortgage decree. (100 I.C 735. Foll.) 143 I.C. 574=34 P.L.R. 815=1933 L 687.

EXECUTION SALE.—Where a Receiver does not obtain special leave to bid at an execution sale, the sale in his favour is void. 59 C 956=139 I.C. 186=36 C.W.N 125=1932 C 672.

LAND ACQUISITION CASES.—Under R 1, Court has power to appoint a receiver of an estate and to direct him to accept the award of the land acquisition collector on behalf of the claimants. But the acceptance by the receiver of the award, will not take away the right of a claimant to make a reference, when the appointment has been made "without prejudice to the contentions of the parties concerned" as to the inadequacy of the compensation money payable. Even apart from the special direction of the Court under the general law relating to receivers, the right of reference would not be lost, as the appointment does not affect existing contracts or rights of action between the party whose property is placed in the hands of the receiver and others. 60 C.L.J. 184=30 C.W.N 844=1934 C. 758.

improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of

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MISCELLANEOUS PROCEEDINGS.—R. 1 does not restrict the appointment of a Receiver only in the case of suits. Section 141 extends the procedure to all proceedings 43 C 986=20 C.W.N. 1009; 1928 C. 256

PARTITION SUITS.—Receivers in partition suits. 36 A. 19=11 A.L.J. 973. Receiver may be appointed in a partition suit to avoid scramble among co-sharers 139 I.C. 670=1932 M. 542. Practice as to appointment of Receiver in a partition suit relating to joint family property. 55 I.C. 827=22 Bom.L.R. 217; 1923 L. 48; 18 C.L.J. 638=22 I.C. 601=18 C.W.N. 533. In all cases where a property is in the hands of one co-sharer and the share of the profits is withheld from the other, there is sufficient reason for appointing a Receiver 117 I.C. 375=1929 L. 497. In the absence of a finding that the karnavan has been guilty of waste or mismanagement or neglect of duty or that there is an apprehension of such waste or mismanagement or neglect, the Court will not be justified in appointing a receiver of the properties of a Malabar tarwad, merely because some members of the tarwad have filed a suit for partition. 41 L.W. 353=1935 M. 402. It is open to the Court in a suit for removal of the manager of a Malabar tarwad appointed by a karar, to appoint an *interim* receiver when the circumstances require it, but the power of appointing a receiver should be exercised only when the circumstances of the case clearly not only justify, but also require it, as being the only means of protecting the rights of the junior members of the tarwad. Mere charges of mismanagement and fraud would not be sufficient. They must be established *prima facie* before the appointment of an *interim* receiver is made. 44 L.W. 498=1936 M. 817. For such evidence he must be given an opportunity and without it, it would not be proper to dispose of a petition on the materials on record. 44 L.W. 606=1936 M. 966=71 M.L.J. 629.

IN PARTNERSHIP SUIT.—The ordinary rule that no party is appointed as receiver except by consent has been departed from only in exceptional cases, as for instance, in a case of partnership where there are no allegations of fraud and where the carrying on the business depends on the personal credit of one of the members of the firm 148 I.C. 459=1934 C. 444. In all cases of partnership the true rule is that a receiver is generally appointed for realising the assets of the *karbar* with a view to its winding up and for that purpose to carry on the business in so far as is necessary and incidental to such winding up. Court does not take upon itself the management of a partnership except as incidental to winding up. 148 I.C. 459=1934 C. 444. The application of a Receiver to take charge of the partnership assets, does not transfer the ownership therein from the partners to the Receiver.

36 I.C. 980=91 P.R. 1917; 12 C.L.J. 368=7 I. C. 75. Where a dissolution is inevitable and the partners are on bad terms, the usual way of guarding their interests is by appointing a Receiver and ordering the goodwill of the business and the stock-in-trade to be sold, the partners being at liberty to bid at the sale. 8 Bur.L.T. 57=29 I.C. 684, 45 I.C. 224, 11 S. L.R. 115. Guiding principles for appointment of Receiver in partnership suit. 45 I.C. 224=11 S.L.R. 115

PARTIES BEING MINORS OR FEMALES.—Though under the Code, the Court has discretion to appoint a Receiver without security, it should obviously be done only in the most exceptional circumstances. Where all the parties to the suit, except the respondent, were females or minors, the Receiver should generally not be allowed, without giving adequate security, to have unfettered control of money and securities to a large amount. 59 I.A. 311=36 C.W.N. 882=137 I.C. 900=7 Luck. 382=1932 P.C. 191=63 M.L.J. 658 (P.C.)

MAINTENANCE SUITS.—Where under a decree for maintenance decree-holder is entitled only to proceed against a house which has been made a charge for payment of maintenance and the maintenance is allowed to fall in arrears it is highly desirable to appoint a receiver for paying off arrears as well as for ensuring punctual payment of maintenance in future. 146 I.C. 1024=1933 L. 826. Although a Jahagir for maintenance is inalienable and therefore unattachable in execution of the decree, a receiver can be appointed to manage the Jahagir for the benefit of the decree-holders subject to a suitable allowance for the maintenance being made in favour of the judgment-debtor. Executing Court need not fix the suitable allowance when making the order of the appointment of a receiver. It will have to be fixed on the amount of profits which come into the hands of the receiver and not upon any estimated income of the property 1933 N. 266

IN MORTGAGE SUIT.—The Court is entitled to appoint a receiver under O. 40, R. 1 whenever it is deemed just and convenient to do so; for example, in a mortgage suit when interest is in arrear the Court will normally appoint a receiver at the instance of the mortgagee as of course, whether or not the property appears to be of sufficient value to cover the mortgage debt and interest, and whether or not the right of the mortgagee to obtain a personal decree against the mortgagor subsists or has been lost 14 R. 292=1936 R. 290; 12 R. 437=1934 R. 321; 56 M. 915=1933 M. 570=65 M.L.J. 222 (F.B.); 16 L. 366=1935 L. 17, 23 S.L.R. 200=115 I.C. 306=1929 Sind 114; But see *contra*. 1936 A.L.J. 605=1936 A. 495 (F.B.) (Overruling 1933 A.L.J. 51) that in a suit for sale on the basis of a simple mortgage, the Court is not competent to appoint a receiver of the pro-

documents as the owner himself has, or such of those powers as the Court thinks fit.

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party mortgaged pending the decision of an appeal against the mortgage decree

In a suit by a mortgagee without possession, on the application of the plaintiff, defendants, who were subsequent mortgagees without possession but who obtained possession under a lease from mortgagor, were appointed receivers and they were asked to keep an account and also to keep intact the benefits accruing from the property during the pendency of the suit. *Held*, that the order was quite proper [1925 L. 590, 1933 M. 570 (F.B.), *Rel on.*] 1934 L. 717. Where, pending an appeal against the preliminary decree in a mortgage suit, execution has been stayed but it was proved that the mortgagors were going beyond the ordinary course of village management in granting leases, *held*, that a receiver should be appointed to keep the property intact and that it would have a salutary effect if one of the mortgagors was himself appointed receiver with due safeguards. 16 N.L.J. 161=1933 N. 294. But *see contra*. 43 I.C. 533 Whether the mortgagee is or is not entitled to possession, he may ask for a Receiver, if the demands of justice require that the mortgagor should be deprived of possession. 31 C.L.J. 385=47 C. 418, 95 I.C. 632=1926 C. 1006; 52 M. 797=56 M.L.J. 115=1929 M. 138, 1929 L. 780. Mortgage—Floating charge—Appointment of Receiver without going into evidence. 46 I.C. 389, 34 I.C. 405=23 C.L.J. 440, 17 I.C. 202=16 C.W.N. 997. The appointment of a Receiver at the instance of a mortgagee will be made as a matter of course if interest payable under the security is in arrears 17 I.C. 202=16 C.W.N. 997. There may be special reasons, even in such a case, that will make it not 'just and convenient' that a receiver should be appointed, *e.g.*, when the interest has been in arrear for a very short period, or when the interest has been tendered but acceptance of it has been refused; but the fact that the property is more than sufficient to cover the mortgage debt is not a ground upon which the Court ought to refuse to appoint a receiver in such a suit. 14 R. 308=1936 R. 296 (S B) *See* however 1935 R. 525, where it was held that the most important criterion with regard to whether a receiver should or should not be appointed in a mortgage suit is whether the mortgagee, having originally been well secured, finds that the security is likely to be insufficient, either by reason of considerable accumulation of interest or by reason of depreciation of the value of the property itself. The considerations which apply in a suit between the mortgagee and mortgagor as regards the appointment of a receiver differ considerably from the considerations which arise where the interests affected are not of the mortgagor only, but also of the mortgagor's creditors. The appointment of a receiver in the mortgagee's suit will have the

effect of depriving the creditors in the insolvency proceedings of the benefit of the usufruct of mortgaged property although the mortgagee has not yet obtained a final decree in the mortgage suit. Hence the appointment of a receiver in a mortgage suit subsequent to the appointment of receiver in insolvency was set aside 17 P.L.T. 671=1936 P. 357. Considerations for the appointment of a Receiver in a suit on simple mortgage *See* 13 P.L.T. 525=1932 P. 360, 1 R. 1932 L. 650, 34 P.L.R. 950, 16 L. 366=157 I.C. 474 (2)=37 P.L.R. 529=1935 L. 17; 14 R. 308, 12 R. 437, 14 R. 292, 144 I.C. 265=1933 R. 94, in a suit on equitable mortgage. *See* 1 R. 1932 L. 648, 35 C.W.N. 1141 (when Receiver can be appointed in mortgage suit after decree). Receiver may be appointed in a suit by an equitable mortgagee. 54 M. 565=133 I.C. 504=1931 M. 626=61 M.L.J. 111; 133 I.C. 433=1932 L. 82, 23 S.L.R. 200=115 I.C. 306=1929 Sind 114. Receiver can be appointed in a mortgage suit for sale, although a Receiver has been appointed in a prior partition suit. 16 C.W.N. 126=14 C.L.J. 526, 102 I.C. 353=1927 S. 230; 29 M.L.J. 457; 14 B. 431; 47 C. 418; 6 R. 261=1928 R. 176 A Receiver need not be appointed if the mortgagee has obtained a decree for foreclosure, and cannot recover even the costs of the litigation from the mortgagors personally 16 C.W.N. 126=12 I.C. 165=14 C.L.J. 526. Receiver may be appointed even after sale of the mortgaged properties 13 C.L.J. 487=15 C.W.N. 672, 95 I.C. 632=1926 C. 1006 Mortgage suit—Lessee in possession made party—Mortgagee's application for receiver—Lessee depositing in Court annual rent—Execution sale—Mortgagee auction purchaser applying for receiver claiming crops as his on ground of lease being collusive—Appointment of receiver—Propriety 1935 M. 875. Though ordinarily a Receiver is not appointed when mortgagee is in possession, yet when he is in possession through one of the mortgagors who became insolvent then the Court can appoint a Receiver. 32 I.C. 691=1915 M.W.N. 864. A receiver can be appointed for the protection of property in respect of which a mortgage decree has been passed. 158 I.C. 586=1935 O.W.N. 1118=1935 Oudh 497. A mortgagee decree-holder prevented from executing the decree is entitled to have a Receiver appointed if the security is not sufficient to discharge the debt and the interest has not been paid. *Per* Oldfield, J., in 26 I.C. 986=29 M.L.J. 457, 102 I.C. 353=1927 S. 230 An order appointing a Receiver in execution of a mortgage decree is not binding on a person not a party to the suit, and claiming to be in possession in his right as prior mortgagee. 45 I.C. 177 *See also* 9 R. 565. Where a defendant who is entitled to share in mortgaged property is impleaded in mortgage suit for sale, on the ground that mortgage was for his benefit also, and there is no reasonable probability of mort-

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

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gage being binding on his share and where it is certain that if a receiver is not appointed no part of the usufruct would go towards the mortgage debt, it would be just and convenient to appoint a receiver with direction for payment of the mortgagee's share of usufruct into Court. 163 I.C. 166=1936 R. 246. Execution of mortgage decree—Receiver cannot be appointed for other properties not connected in suit. 96 I.C. 194=23 L.W. 650=1926 M. 797. When the mortgage is void *ab initio* it cannot give such mortgagee who has got only a simple money decree, right to the appointment of a Receiver. 1930 R. 271=127 I.C. 176. In a suit for a declaration that the decree for sale obtained by defendant in a mortgage suit is not binding on him, the Court has the power, on application by the plaintiff, to appoint a Receiver 146 I.C. 451=1933 A. 227=1933 A.L.J. 51. A Receiver appointed in a mortgage suit is appointed for the benefit of the mortgagee and all the proceeds from the property realised after his appointment go to the credit of the mortgage debt. Such proceeds also include the proceeds of crops raised before, and harvested after, the appointment of the Receiver. 156 I.C. 67=41 L.W. 495=1935 M. 410. The appointment of a Receiver in a mortgage suit depriving as it does the mortgagor of his right to deal with the income negatives also the right of a Court auction-purchaser in execution of a money-decree to it even though the Receiver himself was made a party to the execution proceedings and leave of Court was granted to execute the decree against him. 56 M. 546=64 M.L.J. 682=1933 M. 293.

PRIVATE RECEIVER.—A private Receiver deriving his power from the appointment of a mortgagee is almost unknown to the Indian people. 40 I.C. 865.

POSSESSORY SUITS.—A *bona fide* possessor of property should not be superseded by a Receiver except on equitable grounds 21 M.L.J. 821=11 I.C. 870. The provisions of R. 1 refer to the case of the removal of a person other than a party to the suit and Court is not debarred from removing one of the parties from possession of the property. (18 C.W.N. 537; 24 M.L.J. 658, *Foll.*) 1922 L. 444; 61 I.C. 605=12 L.W. 254, 119 I.C. 687=1929 N. 283. The words "any person" in R. 1 (2) are not confined to persons who are not parties to the suit. A tenant could not be ousted to be replaced by a Receiver in an interlocutory order. 61 I.C. 605=12 L.W. 254. The possession of the Receiver although in a sense the possession of the Court is also the possession of all the parties to the suit according to their title. 49 I.C. 89=8 L.W. 551. Property in possession of persons with a paramount title—Their rights not affected by appointment of Receiver.

1927 P. 397=104 I.C. 295=8 Pat L.T. 717. During the continuance of Receivership it is incompetent for Receiver to set up a title in himself adverse to that of the parties. (*Ibid.*) Even if Receiver is discharged he would still hold the property on behalf of the rightful owner. (*Ibid.*) The possession of Court through its Receiver does not suspend the operation of adverse possession if the successful party is holding it by adverse possession 40 I.C. 50=32 M.L.J. 85. A property not forming part of the pending litigation cannot be made over to a Receiver appointed by the Court without jurisdiction. 5 P.L.J. 513=1 P.L.T. 653=58 I.C. 405. Where a person refuses to deliver possession to a Receiver appointed by the Court appeal lies under O. 43, R. 1 48 I.C. 779. If plaintiff does not ask for a particular relief, in the plaint, it would be in very rare cases and under exceptional circumstances that Court would feel disposed to grant it. Where the only substantive relief asked for by plaintiff was one for possession and there was no prayer for mesne profits either before the suit or from the date of suit, *held*, that as there were no exceptional circumstances apparent on the face of the record, the appointment of a Receiver in order to have mesne profits safeguarded should not be made, nor an order against defendant for security for mesne profits should be passed. 1933 S. 364.

SCHEME SUIT.—R. 1 (2) is intended to protect third persons and not parties to the suit and does not debar Court from appointing a Receiver in a scheme suit. 20 I.C. 767=24 M.L.J. 658; 41 M.L.J. 545=16 L.W. 927=1923 M. 224. Scheme decree—Power given to District Judge to remove trustees—General control conferred over trustees and their management of the trust—Power to appoint Receiver pending enquiry into conduct of trustees after suspension of trustees 38 Bom.L.R. 1137.

TRUST PROPERTY.—As a trust property can not be sold in execution of a decree against the trustee, the only method by which a judgment-debtor may be compelled to satisfy the claim of the execution creditor is by the appointment of a Receiver. 57 I.C. 70=30 C.L.J. 231. Where a person takes possession of the trust property in direct contravention of the terms of the trust deed which he himself executed and thus deprives the co-trustees of possession of the trust property, his act is entirely illegal. In a suit by him for the removal of the other trustees, it is certainly just and convenient that a receiver should be appointed. It is not necessary for the appointment of a receiver that proof should be forthcoming of any embezzlement or mismanagement on his part 1936 O.W.N. 1134=1936 O. 337.

PROCEEDINGS UNDER TRUST ACT.—Receiver cannot be appointed in proceedings under S. 74 of the Trust Act. 1927 S. 237=103 I.C. 816; where the income of the trust was not

2. [Cf. S. 503, cl. (d).] The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

Remuneration

Loc Am —[Rangoon] R 2 The following shall be substituted, namely:—

The fees to be paid as remuneration for the services of the receiver shall be in accordance with the following scale:—

(a) On rents or outstandings recovered or on the proceeds of the sale of movable or immovable property, unless for special reasons to be recorded, the Court orders the remuneration to be at some other rate—5 per cent

(b) For taking charge of money or of immovable property which is not sold, unless for special reasons it is otherwise ordered by the Court, on the estimated value—1 per cent

(c) For any special work not provided for above, such remuneration as the Court on the application of the receiver shall order to be paid.

3. [S. 503, para 2.] Every receiver so appointed shall—

Duties

(a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(b) submit his accounts at such periods and in such form as the Court directs;

(c) pay the amount due from him as the Court directs, and

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sufficient both to meet the expenses and to pay off debts contracted by its head, a Receiver was directed to be appointed. 54 I A 228 = 50 M 497 = 53 M.L.J. 196 = 1927 P.C. 131 (P.C.).

PROCEEDINGS UNDER GUARDIANS AND WARDS ACT.—R. 1 has no application to a petition under the Guardians and Wards Act 36 B 20 = 11 I.C. 554 = 13 Bom L.R. 417. But see 1929 N 119 = 116 I.C. 642.

O 40, R. 2.—An order increasing remuneration to be paid to a Receiver, is an order made under R 2 and not under cl (d) of R. 1 and is not appealable 22 I.C. 352. Remuneration must not exceed the income of the estate realised by Receiver. 91 I.C. 54 = 1925 N 462. Receiver—Remuneration of—Commission—Order of Court providing for percentage on "gross sales" of business—Commission on "trade discount", packing charges and freight 131 I.C. 655 = 1931 M. 500 = 60 V.L.J. 332.

O. 40, R. 3.—Security not furnished by plaintiff Receiver—Suit if may be dismissed on that ground. 46 C. 70 = 22 C.W.N. 520 The liability of a surety for a Receiver. 28 I.C. 31 = 20 C.L.J. 123. The surety is liable for the payment of interest on balances improperly retained by him as also costs of proceedings (*Ibid*) When the surety satisfies the claim of the plaintiff he will be entitled to stand in place of the Receiver to the extent of the payment made by him and to reimburse himself from the sums to be paid to the Receiver without derogation of his right to sue him (*Ibid*)

LIABILITY OF RECEIVER.—Receiver advanced to an infant more than the amount sanctioned and it was not shown that it was applied for his benefit Held, that a receipt by the infant for the amount was no valid discharge to the Receiver. 28 I.C. 25 = 20 C.L.J. 113. A bribe to the Police Officer to release the minor is

unauthorised and the Receiver cannot claim the amount against the payee. (*Ibid*) The Receiver is bound to furnish details of litigation expenses and he is not entitled to the salary of officers appointed without leave of Court. (*Ibid*.) A succeeding Receiver cannot sue a former Receiver for recovering funds which he should have realized and accounted for. 24 I.C. 768 = 41 C 92. The Receiver must keep his accounts and vouchers ready for examination at any time. At the time of adjustment of accounts Receiver and other interested parties have a right to be heard. 12 I.C. 780 = 14 C.L.J. 445. A Receiver will not be permitted without Court's sanction to incur expenditure seriously diminishing the funds entrusted to him If a Receiver proves that a transaction made by him is beneficial to the parties interested, he must be allowed credit for such transaction. A Receiver should be allowed fees for legal assistance though not previously sanctioned by the Court. The fees will not be allowed where no legal skill is required. Receiver's account filed and vouched before an examiner can be re-opened on the discovery of errors though a Judge's certificate is attached, and the Receiver may be surcharged though he has been discharged. (*Ibid*.) Accounts—Mesne profits—Expenses of litigation when allowed. 22 M.L.J. 253 = 14 I.C. 396 If Receiver had failed to realize rents by taking proper proceedings he will not be exempt from liability. Mistaken proceedings though taken in good faith will not absolve Receiver from liability for rent. (*Ibid*.) Court which has to pass Receiver's accounts. 4 P.L.J. 636 = 54 I.C. 297.

O. 40, R 3 (c)—Scope—Appointment of party to suit as receiver—Order directing payment into Court of money collected prior to appointment—Effect of—Appeal 68 M.L.J. 628

(d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

Enforcement of receiver's duties.

4. Where a receiver—

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or

(c) occasions loss to the property by his wilful default or gross negligence, the Court may direct his property to be attached and may sell such property and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

Loc. Am —[Madras] Substitute the following for R. 4—

"4. (1) If a receiver fails to submit his accounts at such periods and in such form as the Court directs, the Court may order his property to be attached until he duly submits his accounts in the form ordered

(2) The Court may, at the instance of any party to any suit or proceeding in which a receiver has been appointed or of its own motion, at any time make an enquiry as to what amount, if any, is due from the receiver as shown by his accounts or otherwise, or whether any loss to the property has been occasioned by his wilful default or gross negligence and may order the amount found due or amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court. All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry. Notice of the enquiry shall be given by registered post to the surety, if any, for the receiver, but the cost of his appearance shall be borne by the surety himself unless the Court otherwise directs.

Provided that the Court may, where the account is disputed by the parties and is of a complicated nature or where it is alleged that loss has been occasioned to the property by the wilful default or gross negligence of the receiver refer the parties to a suit. In all such cases the Court shall state in writing its reasons for the reference

Notes.

O 40, R. 4—Under this rule the Court is ordinarily bound to deal with all matters relating to the receiver in the proceeding itself in which he was appointed. The proper occasion for making allegations against the receiver is when his accounts are passed, and the Court ought to protect its officers and not to allow parties to pester the receiver with actions. Although under R. 4 as amended, the Court may at its option refer the parties to a separate proceeding, it is bound, when it makes such an order, to record its reasons therefor. 43 L.W. 460=1936 Mad. 321=70 M.L.J. 282. An order passing a Receiver's account is one under R. 4 and is appealable. 45 B. 99=22 Bom L.R. 1126. Appeal from order for accounts is not competent. 1924 N. 53. Order directing the Receiver to pay money in Court is not appealable. 1921 M.W.N. 806=1922 M. 234. Receiver ordered to pay damages—If appealable. 92 I.C. 631=1925 R. 206. See also 62 M.L.J. 199=1931 M. 760. It is competent to the Court in the course of passing the accounts of a receiver, under O. 40, R. 4, to make an order, after holding him liable, to make good the loss caused to the estate through his wilful negligence. A separate suit against the receiver is not necessary for the purpose of establishing his liability or for enforcing it. 40 C.W.N. 479. The proper procedure to bring to sale the

pay into Court amount lost by his negligence is appealable. 1931 M. 760=62 M.L.J. 199. As to what would amount to gross negligence. see *ibid.* "Property" is synonymous with estate and covers income from property. C1 (c) applies to the case of misappropriation also. A Receiver is not liable to account for any period other than that for which he is appointed. 5 Pat L.J. 97=55 I.C. 15. A Receiver who has given up possession of the estate must institute a separate suit for recovery of sums due to him in respect of salary, allowances, etc. 4 P.L.J. 636=54 I.C. 207. An order declaring a Receiver liable in respect of a sum of money is not appealable unless it is accompanied by order of attachment under R. 4 (*ibid.*) Procedure to be adopted in passing Receiver's accounts. See 43 M.L.J. 707=16 L.W. 754; 100 I.C. 996=6 Bur L.J. 15. Order removing Receiver is appealable at the instance of one or other of the parties; but the Receiver himself has no right of appeal. 36 C.W.N. 903. Court which has the power of appointing a Receiver is also invested with the power of dismissal. Order removing Receiver is not appealable by the Receiver. 1931 A. 72=1931 A.L.J. 13. See also 36 C.W.N. 903. If money paid to some one else by the Receiver does not reach its proper destination, Receiver will be compelled to make good the loss unless he can show that he has acted with perfect regularity and

(3) If the receiver fails to pay any amount which he has been ordered to pay under sub-rule (2) of this rule, within the period fixed in the order, the Court may direct such amount to be recovered either from the security (if any) furnished by him under R. 3, or by attachment and sale of his property or if his property has been attached under sub-rule (1) of this rule, by sale of the property so attached, and may apply the proceeds of the sale to make good any amount found due from him or any loss occasioned by him and shall pay the balance (if any) of the sale proceeds to the receiver."

5. [S. 504] Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interest of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

ORDER XLI.

APPEALS FROM ORIGINAL DECREES

1 [S. 541] (1) Every appeal shall be preferred in the form of a

Notes.

O. 40, R. 5.—See 1933 L. 203=14 L. 330.

O. 41, R. 1. APPLICABILITY.—There is a tendency on the part of Subordinate Courts to ignore the provisions of O. 41, and to set aside the decrees of trial Courts in their entirety. Nothing can be clearer than the provisions of O. 41, and Courts must realise that they should not, as far as possible, travel beyond the provisions of the Code and make orders to support which the so-called inherent jurisdiction has to be brought in. 59 Bom. 430=37 Bom. L.R. 241=1935 Bom. 222. O. 41 has no application to appeals from the original side of a High Court. 48 M. 631=48 M. L.J. 384. It applies to an appeal under S. 476-B, Cr. P. Code, against an order of Civil Court. 54 C. 355=100 I.C. 351=1927 C. 284, 134 I.C. 1063=35 C.W.N. 775=1931 C. 604. Also to Letters Patent—Appeals. 50 M.L.J. 190=49 M. 291; 48 C. 480=48 I.A. 76 (P.C.). As to applicability to appeals from proceedings under S. 201, C.P. Land Revenue Code, See 155 I.C. 557=1935 Nag. 125 (1). As to whether copy of order sought to be reviewed should be filed along with application for review, see 157 I.C. 965=16 P.L.T. 595=1935 Pat. 486. The provisions of this rule applies to applications for leave to appeal *in forma pauperis*. 165 I.C. 471=44 L.W. 152=1936 Mad. 600. The provision in R. 1, requiring that the memo. of appeal shall be accompanied by a copy of the decree appealed from must be read to mean that it shall be accompanied by a copy of that part of the decree which is appealed from and against which the grounds of appeal are all directed. Court under its inherent powers under S. 151, can dispense with the production of portions of the decree which are unnecessary for purposes of the appeal before the Court. 40 C.W.N. 1298=1936 C. 751.

RIGHT OF APPEAL.—An order refusing to appoint a Receiver during pendency of a suit is appealable. 33 I.C. 735.

CONSTRUCTION.—R. 1, which is a rule of procedure, should not be construed as would hinder justice and lead to an absurd result. 115 I.C. 67=1929 L. 42.

WHO CAN APPEAL.—Right of appeal is only

to an aggrieved party. 45 I.C. 181=82 P.L.R. 1918.

WHO CANNOT APPEAL.—A party cannot appeal from a decree in his favour merely because of an adverse finding on an unnecessary issue. 120 P.L.R. 1911=9 I.C. 1030. An unconditional adoption and enjoyment of benefits under an order bars the right of appeal. 37 I.C. 804=21 C.W.N. 232. As to parties in appeal, see 34 C.W.N. 642=1930 C. 748.

CONNECTED APPEALS.—Where there are appeals arising out of connected cases each appeal must be accompanied by copies of judgments of all the lower Courts. 14 L.R. 879 (Rev.).

SEPARATE APPEALS.—If there are two distinct orders in two separate execution proceedings, there cannot be a joint appeal in respect of both. 24 I.C. 438. This is so even though they were decided in one judgment. 10 I.C. 415=15 C.W.N. 994. If two separate cases are decided in one judgment, two separate appeals should be filed. 56 I.C. 69=1 L. 368, 3 P.L.J. 96=44 I.C. 418, 96 I.C. 336. Three brothers, X, Y and Z, who owned an estate died childless, leaving behind them only widows, and the Court of Wards assumed charge of the entire estate. The plaintiff obtained a decree declaring that he was Y who was supposed to be dead and that he be put in possession of an undivided one-third share in the properties in suit—the share in enjoyment of the first defendant who was his wife, jointly with the other defendants' possession over the rest. An appeal was filed against this decree and a question was raised whether the first defendant could appeal both as represented by the Court of Wards and also in her individual capacity. Held, that as the decree affected the first defendant both ways, that is to say, both with regard to her estate and also individually, inasmuch as there was a declaration to the effect that the plaintiff was her husband, she was entitled to file appeal and that there was no reason to ask her to file a separate appeal and pay separate Court-fees. 41 C.W.N. 374=65 C.L.J. 127.

PLEADER CAN FILE.—Presentation of appeal by pleader not duly authorised is invalid. 62

Form of appeal.
What to accompany
memorandum.

memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from

Notes.

I.C. 259 But a pleader with a power of attorney to present the same, can validly present it 7 Lah.L.J. 29=86 I.C. 207. Presentation by vakil whose vakalat is not signed by the party at the time but the defect is subsequently rectified is valid. 21 I.C. 444=11 A.L.J. 779 Memorandum of appeal presented only by one of two vakils, who alone has accepted a joint vakalat, is validly presented. 16 M. 285. Vakalat not filled up—Presentation is not proper 1926 A. 252=91 I.C. 865. Appellant executing power of attorney in favour of a certain advocate—Presentation of appeal by another advocate on behalf of latter—Whether proper. 38 P.L.R. 258. Memorandum filed by unauthorised person is no proper appeal. 1930 A.L.J. 394=121 I.C. 546=1930 A. 112, 1936 Lah. 195

NECESSARY CONDITIONS OF A VALID FILING.

—An appeal is barred if the vakalatnama is filed after limitation time 11 I.C. 387=13 C.L.J. 544. An appeal by a legal representative without being recorded as such is not maintainable 45 I.C. 541=16 A.L.J. 394 A mistake in the description of the respondents does not entail dismissal of the appeal, when the defect is a formal one. The appellate Court should allow it to be corrected when brought to its notice. 39 P.L.R. 188=1937 Lah. 60.

SIGNING BY APPELLANT.—Memorandum of appeal should be signed by appellant or his agent. 83 I.C. 543 (1)=1923 L. 484.

MEMORANDUM OF APPEAL TO BE IN ENGLISH.—Even if an accompanying document is in the vernacular. 2 Lah.L.J. 507=55 I.C. 24 An appeal is preferred only when a copy of the decree is filed Without it, it will be rejected as not validly presented 16 A. 77; 30 I.C. 165=42 C. 433; 27 I.C. 447; 4 Lah.L.J. 193=1922 L. 191; 54 I.C. 36, 53 I.C. 137; 10 I.C. 866=7 N.L.R. 67, 1925 N. 52, 96 I.C. 336 If appeal is filed with copy of judgment alone, but the copy of the decree is filed within limitation, there cannot be any objection. 1936 O.W.N. 1008=1937 Oudh 65 The rule is inflexible and the appellate Court has no dispensing power. 11 Lah.L.T. 31. Filing of copy of translation of decree is not sufficient 132 I.C. 3=12 Lah.L.J. 305=32 P.L.R. 127, 38 P.L.R. 288 There is no proper presentation without a copy of the decree even when there is no decree in existence. 69 I.C. 895=1922 L. 170. Where in an appeal from a mortgage decree, certified copies of preliminary judgment and final decree alone were filed and no copy of preliminary decree had been filed and the memorandum purported to be of an appeal from final judgment and decree, *held*, that it could not be regarded as an appeal from the preliminary decree and that the appellant could not impugn the final decree on grounds appropriate

to the preliminary decree. 59 C. 781=36 C.W.N. 420=1932 C. 589 In the case of partition decree, where appeal is only with reference to right of maintenance, the copy of the whole decree including Commissioner's report, maps, etc., is not necessary to be filed. It is sufficient if only copy of that part of the decree which is appealed from and against which grounds of appeal are directed is filed Court may dispense with the filing of the rest of the decree under its inherent powers under S. 151. 40 C.W.N. 1298=1936 C. 751 When after filing an appeal a decree is amended and the amended copy, is permitted to be attached to the appeal the appeal becomes an appeal on the amended decree. 43 I.C. 772 An appeal from an amended decree must be accompanied by a copy of that decree and not the original decree 11 I.C. 8. Non-filing of an award which is both judgment and decree along with memorandum of appeal is fatal to the appeal. 7 L. 539=1927 L. 49=97 I.C. 187 Appeal from award under Land Acquisition Act—Copy of the award to be filed. 94 I.C. 145=1925 L. 438 Copy of decree in cross appeal not necessary. 95 I.C. 256=1926 L. 540.

MEMORANDUM OF APPEAL—FRAME OF—GROUNDS.—How to be set out—Memorandum of appeal or revision to High Court should only contain very briefly and concisely the grounds upon which it is contended Court's decision is wrong To set out legal arguments in the grounds is a gross misuse of the grounds of appeal or revision. 58 M. 771=1935 M. 282=68 M.L.J. 218

WHEN ORDER NOT DRAWN UP.—Copies of both order and judgment are to be filed unless the formal order had not been drawn up, in which case a copy of judgment alone will do 1924 A. 162; 17 I.C. 119=16 C.L.J. 133; 14 I.C. 1006=15 C.L.J. 498; 58 B. 573=36 Bom. L.R. 1064=1934 B. 489, 1933 A.L.J. 1301=1933 A. 762 But see *contra* in 1924 L. 352. Trial Court intended to draw up decree in prescribed form, but it did not strictly comply with requirements of law, as laid down in O. 21, R. 6, and drew up a document which could not be called a proper and correct decree. The memorandum of appeal was accompanied by the judgment and the document and the proper decree was filed after limitation when it was prepared on application by appellant *Held*, that appeal was properly presented and was not barred 147 I.C. 13=1933 L. 938 The proper course is to adjourn the appeal till a copy of decree is obtained. 1924 L. 352; 49 I.C. 573=19 P.R. 1919 In a miscellaneous appeal a copy of the decree cannot be dispensed with 40 A. 12=15 A.L.J. 801. The definition of decree in S. 2, renders an order rejecting a plaint equivalent to a decree and hence eliminates the necessity for preparing a separate decree

and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.

Notes.

sheet. Hence an appeal filed from such order without any decree sheet is correctly presented. 164 I.C. 181=1936 Pesh. 155 Failure to file copy of order, which was a precise copy of the operative part of the judgment, matters little and will not affect the appeal 21 A.L.J. 452=1923 A. 579. Copy of interim order on preliminary issues need not be filed. 103 I.C. 224=1927 L. 629. Filing a vernacular translation of the decree is invalid. 4 Lah. L.J. 381; 2 Lah. L.J. 728. A copy of the judgment too is necessary. If its filing after limitation is not duly explained, appeal may be dismissed 67 I.C. 670=3 Lah. L.J. 255; 63 I.C. 30=2 L. 227; 67 P.R. 1917=41 I.C. 918; 25 I.C. 28. Though appeal is filed without a copy of judgment, when notice is issued, it amounts to dispensing with necessity of filing the same. 90 I.C. 135. Where several persons appeal from same judgment, a copy of judgment should be filed with each memo; but where one appellant files more than one appeal, he may file a copy with one of the many memos. of appeal. 1 P. 670=4 P.L.T. 290, 6 L. 218. Two judgments one on preliminary issue and the other on other issues, both must be filed. 9 L.L.J. 502. Defective memo. admitted—Objection to memo at a later stage is barred 1927 L. 451. See also 104 I.C. 545=1927 L. 449.

SECOND APPEALS.—Copy of decree and judgment. The word "copy" as used in O. 41 and O. 42, means copies duly certified under Evidence Act and thus rendered capable of production before a Court of law for examination. Where appeal was presented with an unattested copy, *held*, that there was no valid presentation. 30 P.L.R. 587=1929 L. 771. Provisions of this rule are imperative and presentation of memo. of second appeal without a copy of decree appealed against is invalid 1930 R. 182, 44 M.L.J. 279; 15 A. 123 (127). But delay can be excused. An *ex parte* order excusing delay can be attacked by respondent. 44 M.L.J. 279=17 L.W. 352. When two decrees are passed in two appeals from the same decree, both of them should be filed in second appeal 3 L. 215=1922 L. 390. See also 33 I.C. 742=84 P.R. 1916. Claim decreed only in part—Both parts appealing—Lower appellate Court dismissing appeal by plaintiff while allowing appeal by defendant—Plaintiff appealing against dismissal of his appeal but filing copy of decree of defendant's appeal in lower Court *Held*, that there was no proper presentation of second appeal as plaintiff should have appealed against a decree dismissing his appeal under R. 1, to the lower Court and should have filed a decree of that appeal. 165 I.C. 137=1936 L. 293. Memo. of appeal not accompanied by

copies of judgments of lower Courts such copies being on record of another appeal by opposite party is no good reason for dispensing with such copies. 104 I.C. 290 (1). A second appeal filed with a copy of decree of lower appellate Court but not with the grounds of appeal in first Court is valid presentation 80 P.R. 1918=43 I.C. 102. See also 1930 L. 935=130 I.C. 519. In a second appeal, a copy of the trial Court's judgment need not be filed. 74 I.C. 330=1923 P. 19. Omission to file judgment of first Court with memorandum of appeal is fatal. 97 I.C. 80 (2)=1926 L. 638 (1). See also 1927 L. 423 (2)=101 I.C. 776. Presentation of appeal with unattested copy of judgment—Proper when attested copy is not available. 94 I.C. 2=1926 L. 404. Non-filing copy of interlocutory order of the Court below referred to in the judgment when filing second appeal, does not affect validity of presentation 4 Lah. L.J. 20=1922 L. 93. See also 115 I.C. 67=1929 L. 42, 30 P.L.R. 236; 10 L. 587=1929 L. 481. Where there was a preliminary and a final judgment in a suit it is sufficient to file final judgment along with memorandum of appeal. (10 L. 587, *Foll.*) 127 I.C. 719=1931 L. 202. See also 59 C. 781; 134 I.C. 300. Four cases were governed by the same judgment of trial Court. Four appeals were filed and copies of four decrees were attached but a copy of the judgment was filed in one case only. In the other cases it was stated in writing on the memo of appeal that a copy of the judgment had not been obtained and time was asked for. *Held*, that the appeals were technically incomplete and the Court should in returning the papers grant time for the defect to be cured 14 R.D. 476. See also 1929 N. 229=25 N.L.R. 183. Order disposing of a preliminary issue need not be filed 10 Lah. L.T. 23.

GROUND OFS OF APPEAL.—In every appeal, the appellant must show some reason why the judgment should be disturbed. 17 N.L.R. 72=63 I.C. 898=25 C.W.N. 866 (P.C.)

RESTORATION.—Court has inherent power to restore to file an appeal dismissed for default, even though pleader could not adduce sufficient cause for default. 15 C.L.J. 334=39 C. 34.

TIME AND PLACE OF RECEIPT.—Appeal can be received by Judge at his residence and out of Court hours 34 A. 482=9 A.L.J. 743.

DELAY.—Under R. 1 (3) as amended in Madras the question of delay is decided beforehand and the appeal is not admitted till that point is decided in appellant's favour 57 M. 741=150 I.C. 71=1934 M. 303=66 M.L.J. 486.

Loc Ams —[Lahore] *Add* the following proviso to sub-rule (1) —

"Provided that when two or more cases are tried together and decided by the same judgment and two or more appeals are filed against the decrees, whether by the same or different appellants the officer appointed in this behalf may, if satisfied that the questions for decisions are analogous in each appeal, dispense with the production of more than one copy of the judgment."

[Madras] (1) *Add* the following sentence to sub-rule (1) of R. 1 of O. 41:—

"The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for, for the purpose of appeal."

(2) *Add* the following as a proviso to sub-rule (1) of R. 1 of O. 41:—

"Provided that in appeals from decrees or orders under any special or local Act to which the provisions of Parts II and III of the Limitation Act (IX of 1908), do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the Memorandum of Appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court."

Add the following sentence to sub-rule (2) of R. 1 of O. 41 —

"The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court-Fees Act."

(2) *Add* the following as sub-rule (3) of R. 1 of O. 41 —

"(3) When an appeal is presented after the period of limitation prescribed therefor, it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under R. 11 of this order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of S. 5 of Act IX of 1908 have been heard."

[Rangoon] The following shall be *substituted* for sub-rule (2):—

"1 (2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from, without any argument or narrative; and such grounds shall be numbered consecutively. When Burmese dates are given, the corresponding English dates shall be added. The memorandum shall also contain—

(i) the full names and addresses of all parties;

(ii) particulars (class, number, year and Court) of the original proceedings, and

(iii) the value of the appeal (a) for Court-fees and (b) for jurisdiction.

Material corrections or alterations shall be authenticated by the initials of the person signing the memorandum."

To O. 41, R. 1, the following shall be *added* as sub-rule (3) —

"(3) The appellant shall present, along with the petition of appeal, as many copies on plain paper of the grounds of appeal as there are respondents."

2. [S. 542.] The appellant shall not, except by leave of the Court, urge or

be heard in support of any ground of objection not set forth in the memorandum of appeal; but the

Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Notes.

O. 41, R. 2 — Grounds not raised in memo. of appeal cannot be urged. 54 I.C. 71. 70 I.C. 653=1923 M. 11; especially, long after period of limitation. 30 I.C. 22=7 P.R. 1916. Ground of attack raised in plaint and not in memo of appeal will not be allowed to be raised, being deemed to have been abandoned. 17 I.C. 247=217 P.L.R. 1912. In appeal new grounds can be traversed with permission of Court, though not specified in grounds of appeal. 57 P.L.R. 1916=30 I.C. 817. See also 1931 R. 314. As to when Courts will prevent it, see 57 I.C. 800=11 L. W. 611. Plea not raised in trial Court cannot be raised in appeal. 19 I.C. 48=6 Bur. L.T. 53; 68 I.C. 227=3 Lah. L.J. 392. A new case

cannot be raised. 17 I.C. 247=190 P.L.R. 1912. A pure question of law which went to the root of the matter was allowed to be raised. 133 I.C. 839=33 Bom. L.R. 590=1931 B. 466. Plea of *res judicata* can be raised for first time in second appeal at its hearing though not in the memo of appeal. 22 I.C. 12. So also an objection to jurisdiction under S. 21. 131 I.C. 603=1931 A. 556.

FILING OF ADDITIONAL GROUNDS.—Additional grounds should not be allowed to be filed at a late stage. 49 P.R. 1914=25 I.C. 443. Where alternative grounds of appeal are raised an appellate Court is not debarred from going into questions which are admitted for the purpose of an alternative argument. 84 I.C. 1039=5 Lah. L.J. 117.

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

3. [S. 543.] (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

Rejection or amendment
of memorandum

Notes.

O. 41, R. 3.—A memorandum of appeal which has not been registered is not to be regarded as an appeal. As long as there are defects in it, Court can under R. 3 return it and give the party a chance of putting it again in a complete form; and any time that it allows for re-presentation is only by way of concession. Hence a continuance or extension of the concession cannot be demanded as a matter of right at any rate after the expiry of the period of limitation. If a party fails to complete the memorandum of appeal even though it was returned to him thrice and sufficient time was allowed each time to represent it, it must be rejected. 144 I.C. 608=1933 M. 358. Where an appeal was filed within limitation but without a copy of judgment of trial Court and it was returned with directions that the copy be produced and the appeal was afterwards presented again with the copy when the limitation period had expired. *Held*, that the appeal was time barred. 1937 Pesh. 50. No duty on Court to add proper parties when the appellant neglects. 18 I.C. 37=59 P.R. 1913. Wrong naming of respondent due to clerical error can be rectified and the mistake is not fatal. 21 C.W.N. 774=27 C.L.J. 129. Where appeal is preferred against a dead person L. Rs. cannot be added after limitation period. 21 I.C. 306. Rejection on account of limitation does not come under this rule but under R. 11. It amounts to a dismissal and is *appealable*. 60 I.C. 493.

O. 41, R. 4: OBJECT AND SCOPE.—This rule gives Court ample powers to make appropriate order in the interests of justice. 30 C.L.J. 417=24 C.W.N. 110. Scope of. *See* 100 I.C. 346=1927 A. 311. The rule is limited to a case of appellants and does not apply to a case where all the respondents are not present on the record as parties to the appeal. 1935 O.W.N. 401=1935 O. 329. 90 I.C. 986=30 C.W.N. 45, 40 L.W. 604=1934 M. 730=67 M.L.J. 681. Object of this rule enunciated in 20 I.C. 952=25 M.L.J. 248. One plaintiff may appeal for the benefit of other plaintiffs only if the co-plaintiffs are made parties to appeal. 106 I.C. 313=1928 L. 43. 157 I.C. 502=1935 Pesh. 106. *See also* 58 C. 134=135 I.C. 797=1932 C. 134 (where the L. Rs. of one of the plaintiff respondents were not impleaded in time). Under R. 4 read with R. 33 of this order one of several defendants can file an appeal without impleading the other defendants as parties, if the decree under appeal proceeds on a ground common to all of them, and appellate Court has power to vary

the decree in favour of the non-appealing defendants also. 61 C. 919, 40 C.W.N. 553=165 I.C. 606. (2)=1936 C. 424. In such a case where one of the defendants-appellants dies during the pendency of the appeal and no one is substituted in his place but the appellate Court passed an order that the appeal had abated so far as the deceased appellant was concerned. *Held*, that the appeal was not incompetent by reason of that fact. 59 C.L.J. 318. Where defendants are advisedly impleaded as respondents, it is competent for one of the defendants to appeal in his own name even though the interests of the other defendants are not inseparable from the interest of the appellant and the success of the appeal enures for the benefit of the appellant as well as his co-respondents. 165 I.C. 66=1936 L. 612. This rule prevents two contrary decisions in the same suit. 35 I.C. 547=1 P.L.J. 143. For the distinction between this rule and R. 33, *see* 30 I.C. 868=22 C.L.J. 61. *Also* 42 C. 451=19 C.W.N. 233, 24 I.C. 924=1 L.W. 376, 160 I.C. 1005=1936 Pesh. 20. Appeal by some of the parties—Power of Court to grant relief in its entirety. 99 I.C. 1041. *See also* 1927 P. 103=98 I.C. 846=8 P.L.T. 316; 106 I.C. 875. (2) As to whether several persons who have obtained leave to institute suit under S. 92, C.P. Code, constitute several plaintiffs, *see* 16 L. 782=1935 L. 251. Although only some of the defendants appeal, the other non-appealing defendants are entitled to take advantage of any decision which has been arrived at in favour of the appealing defendants. 60 C. 733=146 I.C. 671=37 C.W.N. 504=1934 C. 632. Power of Court to reverse decree as against non-appealing party. *See* 57 M.L.J. 789=1930 M. 65; 52 M. 322=1929 M. 230=56 M.L.J. 255. The use of the word "may" shows that appellate Court is given a discretion in the matter. Where some of the parties have not appealed, Court will be justified in refusing them relief. 133 I.C. 556=32 P.L.R. 787. The discretion exercised will not be interfered with in second appeal. 88 I.C. 535=1926 A. 64. Under this rule it is enough if decree proceeds on any ground common to all the parties. Every ground need not be common. 42 C. 451=19 C.W.N. 233; 63 I.C. 973=13 Bur.L.T. 163. *See also* 1933 L. 933. This rule applies where the interests of the appealing party are inseparable from those of the non-appealing parties. But where they are separable the case is different and the rule has no application. 44 I.C. 762=3 P.L.J. 166. *See also* 12 L. 534=

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

Loc. Ams—[Allahabad and Oudh.] *Substitute* the following for R 3 (1).—

"3. (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed or accompanied by the copies mentioned in R. 1 (1), it may be rejected, or where the memorandum of appeal is not drawn up, in the manner prescribed, it may be returned to the appellant for the purposes of being amended within a time to be fixed by the Court or be amended then and there."

Loc. Am—[Bombay.] After R. 3 of O 41, the following rule shall be inserted, namely:—

"3-A. Where an appellant applies for delay to be excused, notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under R 13."

4. [S. 544] Where there are more plaintiffs or more defendants than one

Notes.

32 P L R 798. But *see* 165 I C 66=1936 L. 612 (noted *supra*) It does not apply where there is no common ground of appeal. 40 I C 184=35 P.W.R. 1917, 1926 L 303=94 I C. 557 (1). Nor to parties not appealing and made *pro forma* respondents. They cannot be heard supporting the appeal 34 I C. 714 (F B). Where the sole appellant died his co-defendant who is a *pro forma* respondent cannot apply to continue the appeal after the expiry of 90 days 53 A. 521=131 I C. 877=1931 A. 349. Except under this rule no relief in respect of persons not parties to the appeal can be given. 44 I C 480 Under no provision of law can an appellate Court interfere with a decree in a suit not appealed from. 53 I C 883=116 P R 1919; 1 L W. 169=23 I C. 620; 151 I C. 409; 35 I C 547=1 P L J. 166; 84 I C 68=1925 C. 23 In an appeal by one unsuccessful defendant relief can be given to the non appealing defendants as well, provided their defence was also the same 40 M. 846=41 I C 546, 23 C W N 372; 31 I C. 886; 60 I C. 460; 31 C L J. 75=24 C W N 463. This is left to the discretion of Court 36 A 510=24 I C 439=12 A L J. 883; 139 I C 718=1932 A. 710 But *see contra* 2 P L R 1912=12 I C 605. Even in favour of a non-appealing heir of a deceased defendant. 35 I C. 743=3 O L J. 279. *See also* 57 M L J 719; 56 M L J 255. Where one of two appellants died before hearing of appeal and the fact was not known to counsel or Court, a decree passed in favour of both is valid and the L R of the deceased appellant can be brought on record at the time of passing a final decree 48 M L J. 601=1925 M 235. Where pending an appeal one of the two defendant-appellants died and his heirs did not come forward to be substituted in his place, *held*, that the surviving defendant was competent to rely on all such grounds on which the deceased defendant could have resisted and did resist the plaintiff's claim 56 C. 487=33 C W N. 150=1929 C 263. *See also* 146 I C. 26=1933 M. 655, 146 I C. 511=

1933 A L J 1049=1933 A. 733. (Joint decree for pre-emption—Death of one pending appeal—Legal representative not brought on record—Nonabatement) 15 L 667=151 I C. 784=1934 L. 206 (Suit for accounts—Death of one appellant pending appeal—Legal representative not brought on record—Appeal abates) 61 C. 879=59 C L J 362=38 C W N. 743=1934 C 703 1934 M. 730=67 M L J 681.

WHERE RELIEF IN FAVOUR OF NON-APPEARING PARTY CANNOT BE GIVEN.—Where one of several joint plaintiffs appeal, the others must be made parties 45 A 286=21 A L J. 91 *Also* 53 I C. 548. But *see contra* 25 I C. 91=63 P R 1914. Where a person is a necessary party to the suit, he is a necessary party to the appeal as well Not bringing him as a party to the appeal will entail a dismissal of the appeal 3 P. L. T. 456=66 I C. 780. When relief against non-appealing defendants has been granted in the first appeal, they form necessary parties to the second appeal 22 I C. 90=18 C L J 621. Not bringing on record the L Rs. of deceased co-defendant, during pendency of appeal, only abates the appeal so far as the deceased alone is concerned and does not affect the appeal as a whole. 90 I C. 986=30 C W N 45, 10 I C. 27; 26 I C. 486=88 P R 1914 But *see* 70 I C 168=16 L W. 330=1923 M 58. Where in a suit against two defendants some of whom remained *ex parte* and a joint decree against both was passed, and the contesting defendant alone appealed, the whole suit cannot be dismissed even as against the *ex parte* non-appealing defendant. 24 I C 924=1 L W. 376 Relief against non-appealing defendants as well cannot be given when the appeal is not on the entire decree, but only so far as it affects the appealing defendant. 63 I C 95 Where relief is claimed alternatively against A and B and decreed against B, in the appeal by B, cross-objections against A need not be raised. The rights can be settled by the Court. 42 I C 548.

One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all

in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be.

Stay of proceedings and of execution.

5. [S. 545.] (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by a reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

Notes.

O. 41, R. 5.—The policy underlying the rule, see 38 C 754=15 C.W.N. 475. O. 41, R. 5 does not apply to revision. 117 I.C. 815=1929 L. 167

SCOPE OF.—See 37 I.C. 752; 99 I.C. 763 (1) Where an appeal is properly filed in accordance with R. 1, an application for stay of execution under R. 5 is maintainable, even though the appeal is not registered owing to an adverse report of the Stamp Reporter. 41 C.W.N. 374=65 C.L.J. 127. An undertaking by Court of Wards to hold the income of the estate under its management as a condition for stay of execution of the decree passed in respect of such estate, cannot be enforced as a personal security under S. 145, and its legal validity is also not free from doubt (*Ibid*) The Registrar of Patna High Court has power to receive and dispose of applications for stay of execution proceedings. 59 I.C. 883=2 P.L.T. 70. The words "proceedings under a decree" include the proceedings relating to the passing of final decree in a mortgage suit, and an appeal against a preliminary decree will not operate as a stay of such proceedings. 53 A. 283=1931 A.L.J. 508=1931 A. 386 (F B) The mere fact that an appeal from a preliminary decree is pending in the appellate Court does not preclude the trial Court from passing a final decree. Hence the question of stay of further proceedings after preliminary decree depends upon the particular facts of each case, and unless the conditions of R. 5 are fulfilled (*i.e.*, there must be likelihood of substantial loss to the party applying who must also give full security) stay cannot be ordered. 1933 L. 724, 150 I.C. 59=1934 N. 160 Though R. 5 does not empower Court to impose terms prior to granting stay, yet it prohibits stay except in the circumstances mentioned in sub-cl. (3) of the rule. In the absence of such circumstances, stay order ought not to be passed except with the consent of the decree-holder or *ex parte* in anticipation of such consent and on such conditions as the decree-holder is likely to agree to. 150 I.C. 59=1934 N. 160. See also 41 C.W.N. 374=65 C.L.J. 127 In cases where the Code does not apply High Court has inherent jurisdiction as a Court of appeal to stay

proceedings in a lower Court. 4 P.L.J. 371=52 I.C. 185 High Court has inherent powers to direct stay of execution of final decree pending an appeal from preliminary decree. 54 A. 344=136 I.C. 75=1932 A.L.J. 43=1932 A. 238 The proper procedure in an appeal against a preliminary decree in a mortgage suit is to stay the passing of a final decree. 136 I.C. 729=1932 L. 271; 107 I.C. 486 But see 54 A. 344=1932 A.L.J. 43=1932 A. 238, holding that it is generally expedient that proceedings for the preparation of the final decree should not be stayed as the mere passing of a final decree will not affect the rights of parties. In the absence of any evidence that the proceedings in the lower Court will be of protracted nature or that their continuance will cause any substantial loss, it is unnecessary to stay all further proceedings in the lower Court in pursuance of a preliminary partition decree. If the passing of the final decree however, will cause some loss to the petitioner by obliging her to file another appeal from the final decree the proceedings in the lower Court should continue until the stage of the passing of the final decree is reached, but no final decree should be passed if the petitioner gives adequate security for the income of the property. 149 I.C. 1010=1934 L. 184 See also 1935 L. 181 (1)=37 P.L.R. 259=158 I.C. 894 In cases relating to possession of land it is ordinarily desirable not to disturb the possession of a party unless good ground to the contrary is shown to exist, and the Bench hearing a Letters Patent appeal can grant stay when single Judge has not exercised any discretion and has not given any decision on the merits of the application. 150 I.C. 985 (1)=1934 L. 361 (2) High Court has inherent jurisdiction to grant a stay of execution under an award where the application to set aside an award has been refused and an appeal to High Court is pending therefrom. The analogy of R. 5 may in such a case be followed and the conditions in that rule may be required to be fulfilled. 55 B. 801=133 I.C. 864=33 Bom.L.R. 702=1931 B. 384 High Court can suspend imprisonment under S. 43 of the Provincial Insolvency Act, till the disposal of the appeal from the sentence. 44 B. 673=22 Bom L. R. 322

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the

Stay by Court which passed the decree

execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made,

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

Notes.

Interim order of stay of execution by appellate Court—Receipt of order by lower Court—Anything done in contravention of the order cannot become good by reason of the order of stay being ultimately vacated. 99 I.C. 989=1927 M. 450. *Bona fide* sale held before order of stay is communicated is good and valid sale. 11 L.L.J. 457=1930 L. 17.

Proviso (c).—Under sub-cl (3) of O. 41, R. 5 no stay could be granted unless security had been given by appellant for due performance of such decree or order as may ultimately be binding upon him. 152 I.C. 687 (2)=40 L.W. 650; 84 I.C. 302=1925 R. 5. Proviso (c) does not contemplate a decree or order in a separate proceeding in future by decree-holder. 22 M.L.J. 190=12 I.C. 692. Where a sum of money which is deposited in Court as security is more than sufficient to meet the claim ultimately awarded, the surplus can be applied towards payment of costs. 58 C. 1=133 I.C. 97=1931 C. 474. Mere presentation of appeal or presentation followed by dismissal does not in any way affect the operation of original decree. 46 C. 670=36 M.L.J. 557=50 I.C. 444 (P.C.). Also 63 I.C. 799.

POWERS OF TRIAL COURT.—An appeal having been filed, trial Court cannot oust decree-holder who has been put in possession in execution and put judgment debtor in possession. 35 A. 119=17 I.C. 728. Appellant can before filing an appeal obtain an order for stay from trial Court. 33 I.C. 685=23 C.L.J. 310.

FORUM.—Application for stay should be made in executing Court though an appeal be pending. 11 I.C. 22. When stay of a decree on the original side pending an intended appeal is to be applied for in the original side, it should be made to the Judge who decided the case. 25 C.W.N. 928=48 C. 796. It is left to the discretion of the appellate Court to stay execution. An order passed by an appellate Court should not ordinarily be disturbed, unless it was passed without jurisdiction or with material irregularity or would occasion substantial loss. 1922 L. 185.

WHEN STAY CAN BE ORDERED.—Under cl. (3) no order for stay of execution can be made unless certain conditions are fulfilled, one of which is the furnishing of security.

But no such limitations are imposed when proceedings, as distinct from execution of a decree, are stayed. The difference is that the furnishing of security is compulsory in the one case, but within the discretion of the Court in the other. 31 N.L.R. 72=1935 N. 16=154 I.C. 461. Stay ought to be granted in appeal when decree-holders have sufficient security in the property itself remaining under attachment. 75 I.C. 791=1923 L. 445 (2). See also 31 P.L.R. 268=1930 L. 108. No security is necessary, when the decree itself is secured on the property. 66 I.C. 201=2 L.L.J. 330. Stay of execution pending appeal—Surety for stay of execution—Can be proceeded against before proceeding against the judgment-debtor. 117 I.C. 65. See also 146 I.C. 764=1933 A. 664. In a suitable case appellate Court has power to stay execution of a decree which is under appeal even though decree-holder may not have applied to execute it. 57 B. 202=35 Bom. L.R. 134=144 I.C. 995=1933 B. 118. Stay should be granted when appellant could not recover properties sold in the event of his succeeding in the appeal. 15 I.C. 876=94 P.W.R. 1912. When execution is being taken for costs fixed, but respondent is insolvent, the proper order is to grant stay on payment of costs to respondent's pleaders on the latter's undertaking to return it if appellant succeeds in appeal. 16 L.W. 975=70 I.C. 784=1923 M. 229 (2). See also 4 P.L.J. 642=54 I.C. 222 (Stay in case of directions given to Receiver by lower Court). What constitutes "substantial loss" within the meaning of O. 41, R. 5, cl. (3), see 1927 L. 169=99 I.C. 767.

WHEN STAY CANNOT BE GRANTED.—Without an appeal on the decree on file a stay order is *ultra vires* and a nullity. 43 A. 513=19 A.L.J. 462; 43 A. 198=18 A.L.J. 1121. Under R. 5, no order of stay of execution during pendency of an appeal can be made unless Court is satisfied that substantial loss may result to the applicant and this rule applies to immovable equally with movable property. Where appeal is filed from a decree for possession of land and for mesne profits and the land in dispute is under a permanent lease at a uniform rent and the respondents who own considerable immovable property are prepared to give adequate security for restitution in case the decree in their favour is reversed on appeal, it cannot

(4) Notwithstanding anything contained in sub-rule (3) the Court may

Notes.

be held that the applicant will suffer any substantial and irreparable loss if execution proceedings are not stayed. 35 P.L.R. 727. A bare statement that appellant will suffer substantial loss is not a sufficient ground for granting stay. 61 I.C. 77=2 L 61. The kind of loss must be specified, details must be given, and the conscience of Court must be satisfied that such loss will really ensue. The burden of proof is on the appellant to show that substantial loss may result unless execution is stayed. 150 I.C. 59=1934 N. 1'0. Application for restitution can be made as soon as decree is varied or reversed and it ought not to be stayed under R. 5, because an appeal has been filed. 117 I.C. 288=1929 N 138. Stay cannot be granted by lower Court when no execution application is pending. 63 I.C. 897; 58 I.C. 302. Stay of execution to be granted in an appeal from a pre-emption decree 1927 L 169=99 I.C. 767. Stay cannot be granted on the ground that a claim by a prior mortgagee, is pending. Only amount sufficient to satisfy claim should be retained out of the sale proceeds. 60 I.C. 378=57 P. W.R. 1920. On a mere vague speculation stay cannot be granted, failure to furnish security required cannot give benefit of stay, stay after execution of decree cannot be granted. 58 I.C. 442. A decree for possession should not be stayed unless the three conditions of sub-rule (3) are satisfied. The crucial test is whether substantial loss will result if stay is not granted. 61 I.C. 827; 31 P.L.R. 216. Annoyance of feelings is not a sufficient ground for granting stay. 17 I.C. 219=23 M.L.J. 316. Stay of proceedings for taking accounts will not be allowed, unless irreparable injury will otherwise be caused. 61 I.C. 9. When an appeal against an order refusing to set aside an *ex parte* decree is pending, appellate Court has no power to stay execution, though the lower Court may. 33 I.C. 443. Sufficiency of security must be enquired into by the executing Court when High Court allowed execution on furnishing security. 44 I.C. 156=22 C.W.N. 657. Ordinarily no stay of execution should be granted in a money decree when decree-holder furnishes security for restitution. Ind. Rul. 1932 L 651; also 33 P.L.R. 799 (1). Where after a decree for redemption the mortgagor deposited the decree amount and prayed for possession in execution, the deposit is a sufficient security for mesne profits in case the decree is reversed on appeal and no additional security need be furnished. 11 M.L.T. 248=15 I.C. 383. R. 5 cannot be construed so as to empower High Court to stay the proceedings of a Revenue Court which is not subordinate to it. The rule contemplates proceedings of Court subordinate to the appellate Court which passed the decree. 53 A. 180=1930 A.L.J. 1469=1931 A 57.

WHEN STAY ORDER TAKES EFFECT—Stay order takes effect only after communication. So an attachment order by lower Court after

passing of the stay order by appellate Court, but before the communication is received, is valid. 33 M.L.J. 515=41 M. 151 (F.B.). But see 96 I.C. 137=1926 A. 457. But knowledge of the fact of stay order passed by appellate Court is sufficient to stop execution by lower Court, though the official communication had not been received. 38 M. 766=26 M.L.J. 275. An *ad interim* stay order operates from time of its pronouncement and not when it is communicated. 41 I.C. 752=53 P.W.R. 1917; 96 I.C. 137=1926 A. 457.

SALE IN CONTRAVENTION OF STAY ORDER.—A sale held between the time when an *ex parte* order for stay was passed and the time when the order was set aside, is not void. 43 I.C. 656 (1)=16 A.L.J. 46. Interim stay of sale ordered by appellate Court—Sale held in ignorance of order—Sale not a nullity. 1927 A. 401=102 I.C. 665=50 A. 41 (F.B.). See also 11 Lah L.J. 457=1930 L 17.

SECURITY BOND—FORM OF AND STAMPS FOR.—A security bond under Rr 5 and 6 must be in the form of a bond to some one and not a mere undertaking to the Court. The bond must be addressed to some officer of the Court. The Court is not a juridical person and a bond in favour of the Court, is not one in proper form. 40 C.W.N. 1281. Surety bond under—Hypothecation of properties—Stamp duty—Mortgage deed or security bond. (*Ibid*) This security bond under, in moffussil—Court-fee and stamp duty. 1936 Sind 41.

SECURITY BOND—ACCEPTANCE BY COURT.—A security bond executed by the surety under O. 41, Rr. 5 and 6 does not become operative until and unless it is accepted by the Court. 15 L. 282=149 I.C. 300=1934 L 138 (F.B.).

SECURITY BOND—ENFORCEMENT.—Where security bond creating personal liability and hypothecation of property is executed by the surety to the executing Court under Rr 5 and 6, the decree-holder can move executing Court to enforce the bond as against the surety. 15 L. 282=149 I.C. 300=36 P.L.R. 386=1934 L. 138 (F.B.). In a mortgage suit the property mortgaged is usually security for the decretal amount and no further security need as a rule be taken. But when decree is for sale, with right to a personal decree attached, then if the mortgaged property is insufficient to satisfy the decree Court is bound to order security for the balance. 150 I.C. 59=1934 N. 160. A *consent decree* is not any the less a decree and therefore where a surety undertakes to be bound by such decree or order as may be passed by the Court, he undertakes to be bound by a consent decree as well as by one after contest. If however there is fraud or collusion or any of the matters on which a contract can be set aside, or the decree compromises matters not arising out of the litigation he could claim exemption on those grounds. 31 N.L.R. 172=1935 N. 16=154 I.C. 461.

REALISATION OF SECURITY—When immovable property is given as security, it can be realised by execution and no need for a sepa-

make an *ex parte* order for stay of execution pending the hearing of the application.

Loc. Am.—[Madras.] Substitute the following for the existing sub-rule (1) to R 5 of O. 41—P Ds No 164 of 1932.

"5. (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree and may, when the appeal is against a preliminary decree, stay the making of a final decree in pursuance of the preliminary decree or the execution of any such final decree, if already made."

6. [S. 546.] (1) Where an order is made for the execution of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property

Notes.

rate suit for its realisation 41 M. 327=34 M.L.J. 84. See also 1933 M.W.N. 486=38 L. W. 818.

APPRECIATION OF VALUE OF SECURITIES.—Where judgment-debtor deposited decree amount as condition for stay of execution, and decree-holder was permitted to draw it on furnishing security; and where the decree-holder failed to furnish security and draw it, and the amount was invested in Government securities, on application by judgment-debtor, and where before the appellate court passed its decision the securities became very much appreciated in value. *Held*, that under the decree all that the decree-holder could claim was only the sum found due with interest at the rate awarded and no more and that the profits arising out of the appreciation of the securities in value should go to the judgment-debtor who made the deposit 156 I.C. 244=37 Bom L.R. 200=1935 B 200

LOSS OF SECURITY BOND—PRESUMPTION AS TO ITS TERMS.—Where owing to the loss of the bond and the lapse of time, it is not possible to expect oral evidence of the terms of a security bond executed as per order staying further proceedings, the only reasonable presumption is that the bond must have been executed according to the tenor of the Court's order, and in accordance with the prevailing practice, of which the Court can take judicial notice 31 N.L.R. 172=1935 N. 16=154 I.C. 461.

APPEAL.—An appeal lies from an order staying execution of a decree. I.R. 1932 L. 636; 32 P.L.R. 756=1932 L. 30 (1). No appeal lies from an interlocutory order for furnishing security. 75 I.C. 793=1923 L. 446, or from order accepting security as sufficient 3 R. 255=1925 R. 225. See also 32 P.L.R. 806=1932 L. 120=136 I.C. 792

COSTS.—In absence of special circumstances the general rule is that costs of an application for stay of execution pending an appeal should be costs in the appeal. 56 B. 276=1932 B. 127 (F.B.).

PRACTICE—EXTENSION OF TIME.—In an execution petition an order was passed staying delivery of possession conditional on the judgment-debtor paying the kist and rent by a certain year itself but the Court granted extension of time. *Held*, that the order of stay was not under R. 5 (3) but one under S. 151, that though the order was under S. 151 still it was one allowed by the Code and that S. 148 applied by which extension of time could be given. 143 I.C. 903=38 L. W. 201=1933 M. 563=65 M.L.J. 538

O. 41, R. 6. SCOPE.—The inherent powers given to appellate Courts under R. 5 regarding stay of execution are not restricted or cut down by the special and emergent powers given to executing Courts under sub-r. (2). 41 M. 813=34 M.L.J. 470 (dissenting from 17 I.C. 763=23 M.L.J. 677). See also 1930 L. 108; 138 I.C. 847=1932 A. 551. Where properties (subject of mortgage decree) are deteriorating in value and not insured and are capable of being destroyed by fire, earthquake or other similar causes it is only fair that before sale is stayed J.D. should be ordered to give security for any deficiency that may occur in recovery of the amount due to decree-holder under the decree on sale of the mortgaged property 148 I.C. 941=1934 L. 117.

Sub-rule (2): SCOPE.—Court cannot dismiss summarily an application for stay of sale of immovable property, pending appeal 161 I.C. 936=1936 P. 443. When an appeal is pending executing Court has power to stay the sale though the Court can make it a condition of the order that the decree amount should be deposited in cash. 9 I.C. 323=15 C.W.N. 432. See also 1929 L. 68. But such an order is against the spirit of the rule 1925 L. 69. Under R. 6 (2), Court has jurisdiction to make it a condition that the stay would be given only on judgment-debtor depositing the decree amount in Court. The words "on such terms as to giving security or otherwise" mean that terms may be either giving

in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

7. [S. 547.] (*Omitted*).¹

Exercise of powers in appeal from order made in execution of decree

8. The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred not from the decree but from an order made in execution of such decree.

Procedure on admission of appeal.

9 [S. 548.] (1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of memorandum of appeal.

Register of appeals

(2) Such book shall be called the Register of Appeals.

[Madras.] *Substitute* the following rule:—

"Registers in accordance with Forms Nos 22, 23, 24 and 25 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of suits specified therein."

10. [S. 549.] (1) The Appellate Court may in its discretion, either before

Leg. Ref.

¹ This rule has been omitted by the Government of India (Adaptation of Indian Laws) Order, 1937; and the omitted section ran as follows:—"No such security as is mentioned in rules 5 and 6 shall be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity."

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security or any other term, such as the deposit of the decree amount in the Court ordering stay. 40 L.W. 704=1934 M. 709=67 M.L.J. 656 A person who has stood as surety for costs and against whom a decree for costs has been consequently made is a judgment-debtor within the meaning of S. 2 (10) and is entitled to apply for stay of execution of the decree pending an appeal therefrom. 58 B. 485=36 Bom L.R. 499=1934 B. 252. Final decree passed pending appeal from preliminary decree for sale in mortgage suit—Application for execution of final decree Court can only stay, and not dismiss. 1933 A. 732.

APPLICABILITY.—This rule applies only to cases where appeal is against the decree which is to be executed. So, it has no application in case where an appeal is preferred on a decree in claim suit. In this case the remedy is an injunction under O. 39 4 L.L.J. 188=1922 L. 518. Where after a decree in High Court in appeal, there was an appeal to the P.C. the proper Court which could demand security from the decree-holder who had taken possession is not the trial Court under this rule, but the High Court has to be moved under R. 13. 13 R. 158=4 Bur.L.J. 50. A surety under this rule is not discharged on the death of judgment-debtor. 32 I.C. 807.

No arrangement between decree-holder and surety can bind J.D.'s interest on reversal of decree. 32 I.C. 807 An order under R. 6 directing stay of sale of immovable property does not bar decree-holder from proceeding against movables of the J.D. 93 I.C. 897 (2)=1926 L. 463 See also 117 I.C. 88=1929 L. 552

REVISION.—Order for security to stay sale pending appeal passed without enquiry as to value can be set aside in revision. 6 L.L.J. 510=1925 L. 256.

APPEAL.—Order under O. 41 is appealable—S. 47, applies. 102 I.C. 25=9 L.L.J. 189=28 Punj.L.R. 617 See also 58 B. 485=36 Bom L.R. 499=1934 B. 252

O. 41, R. 8.—The Registrar of Patna High Court has no power under the High Court Rules, to hear an application under this rule. 138 I.C. 334=1932 P. 217 As to his powers under R. 5, see 59 I.C. 833, cited under that rule

O. 41, R. 9—An appeal filed out of time should not be registered without Court deciding the question as to extension of time under S. 5 of the Limitation Act. 59 C. 388=138 I.C. 643=1932 C. 482

O. 41, R. 10. **SCOPE.**—The rule applies to Letters Patent Appeal. The provision regarding rejection is mandatory 48 C. 481=48 I.A. 76=40 M.L.J. 308 (P.C.) also 25 Bom L.R. 468=73 I.C. 474; 6 I.C. 306=2 L.L.J. 391, 61 M.L.J. 688=34 L.W. 783. R. 10, is concerned with costs incurred up to and in the appellate Court and has no bearing whatever in costs which may be dependent upon something occurring in the Privy Council. 101 I.C. 551=1927 A. 522 (2). It applies to appeals from the Original Side of High Court 21 L.W. 662=1925 M. 1132. Also to appeals from an order of High Court in its insolvency jurisdiction 43 C. 243=20 C.W.N. 140, but does not apply to pauper appeals.

Appellate Court may require appellant to furnish security for costs

the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both:

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is

Where appellant resides out of British India.

not possessed of any sufficient immovable property within British India other than the property (if any)

to which the appeal relates.

(2) Where such security is not furnished within such time as the Court orders the Court shall reject the appeal.

Loc. Am.—[Allahabad.] Add this as a proviso to O. 41, R. 10 (1):—

"Provided also that in case of every appeal other than a pauper appeal from any decree or order passed in appeal by any Court subordinate to the High Court confirming the decree or order of the Court below or modifying it only in favour of the appellant or in respect of costs, the appellant shall, within two weeks of the admission of the appeal, or within such time as the Court may for special reasons allow, deposit in the appellate Court security, for the costs of the appeal and for all costs ordered by the Courts below to be paid by him, which remain unpaid."

Rule 10 (2) In the second proviso to clause (1) of this rule

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and security cannot be demanded of a pauper appellant. 42 B 5=19 Bom.L.R. 771, 48 I.C. 971; 3 L. 30=67 I.C. 256; 149 I.C. 453 (1). But see *contra* 43 M. 902=58 I.C. 794. Security for costs of guardian *ad litem* of a minor respondent can be demanded under this rule. 47 I.C. 928. "Applications for security for costs should be made promptly without delay. 20 P.L.R. 1918=44 I.C. 23; 1930 C. 520; 45 L.W. 232=1937 M. 285; 1931 M.W.N. 1157. (Delay by itself is no ground for refusing to direct security). Application for correcting clerical error in security bond filed, should be allowed. 86 I.C. 752=1925 O. 402. No power is given under the rule to order appellant to pay the entire decree amount and not costs alone. 139 I.C. 866=1932 A.L.J. 722=1932 A. 511 (F.B.). R. 10 empowers appellate Court to demand security for costs from appellant, and the appeal Court is final authority for deciding upon sufficiency or otherwise of security offered. The mere fact that for reasons of convenience it had delegated to Subordinate Judge the duty of taking security does not prevent the appeal Court from satisfying itself that the security taken was sufficient or that the security was taken after proper inquiry. 148 I.C. 1140=35 Bom.L.R. 1114=1934 B. 13.

SECURITY FOR COSTS OF APPEAL—Security bond not properly executed—Dismissal of appeal forthwith—Propriety. 47 C.L.J. 328=107 I.C. 349 (2) (P.C.). See also 1930 M. 355.

WHEN TO BE ORDERED.—The power to demand security must be exercised according to well-known principles for which, see 25 Bom.L.R. 468=73 I.C. 474. See also 45 L.W. 232=1937 M. 285; 34 C.W.N. 495=1931 C. 40. 58 C. 117 (collusive suit). Court is not bound, as a matter of law, to order security to be furnished. It is a matter absolutely discretionary. In special circumstances, Court may direct the furnishing of security but where highly penal consequences will entail upon the appellant by the order, Court would not be bound to make the order for

security. 121 I.C. 61=1930 N. 28. Where appellant has been allowed to prosecute his appeal as a pauper, the order implies the case is fit to be placed outside the purview of R. 10. In the absence of special circumstances showing that the pauper is a mere creature in the hands of persons well able to find security an order directing the pauper to furnish security would be improper and inconsistent with the order granting him leave to appeal. 121 I.C. 61=1930 N. 28. (47 B. 104, 3 M. 66; 17 M.L.J. 583, Ref.) See also 1931 M.W.N. 1157, 56 M. 323=64 M.L.J. 433, 13 R. 511. Such circumstances are where appellant has suppressed a material document in his possession, 1933 M.W.N. 263, where a Court on a perusal of judgment of lower Court finds that there is no chance of appellant's success. 56 M. 323=37 L.W. 425=144 I.C. 940=1933 M. 519=64 M.L.J. 433. The mere fact that an appellant has not paid in full or in part the costs of the original suit is no ground for calling upon him to furnish security unless his conduct has been shown to be vexatious, that is, such as indicates a wilful determination on his part not to obey the order of Court in respect of costs. 31 P.L.R. 950=130 I.C. 771=1931 L. 70. Court has a discretion in demanding security—Poverty of the appellant is not sufficient—Each case stands on its own facts—In many cases at least security for costs of appeal alone, may be justly ordered. 25 Bom.L.R. 195=1923 B. 264; 17 L.W. 26=70 I.C. 586; 1 P.L.T. 114=55 I.C. 835; 114 I.C. 708=11 L.J. 157; 114 I.C. 708=1930 L. 384 (1); 123 I.C. 538=1930 L. 382; 1930 L. 629 (2)=129 I.C. 121; 17 P.L.T. 187=1936 P. 433; 14 R. 289=1936 R. 294. If appeal is not vexatious, poverty of appellant and existence of relations who can pay is not sufficient ground. 28 I.C. 598=19 C.W.N. 446. Even though appellant is a public servant who is defended by Government, security from the Secretary of State can be ordered when the amount of costs is very high. 13 I.C. 335=16 C.W.N. 119. Court-fee due to Government by pauper plaintiff or appellant is not "costs of the

"costs of the appeal" means advocate's fee calculated on the valuation of the appeal, together with a sum of Rs. 2 for court-fee on Vakalatnama to be filed by the respondent, Re. 1 inspection fee, and in case of second of appeals outside the jurisdiction of a single Judge a further sum of Rs. 10 for printing charges payable by respondent.

Re-number existing sub-rule (2) as sub-rule (3).

11. [S. 551.] (1) The Appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respon-

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appeal or of the original suit" within the meaning of R. 10. Hence this rule cannot be utilised for the benefit of Government in order to enable it to collect the Court-fee due. 45 L.W. 186=1937 M. 267 No extension of time can be granted after dismissal of appeal. 67 I.C. 883=1923 C. 417, 7 R. 445=1929 R. 289 But see 42 A. 626=18 A.L.J. 838. See also 1932 M.W.N. 655

REVISION.—A rejected appeal under sub-rule (2) can be restored and further time for furnishing security may be given in revision though there is no explicit provision to that effect. 42 A. 626=18 A.L.J. 838; 3 L. 30; 40 I.C. 234=28 O.L.J. 163. Notice to the respondent is necessary when re-admitting a rejected appeal. 40 I.C. 234. No appeal lies from an order under this rule. 62 I.C. 751, 3 L. 30. No appeal or revision lies from an order setting aside an order rejecting an appeal under sub-rule (2). 42 A. 626=18 A.C. 5. 838. Nor against an order rejecting an appeal under sub-rule (2). 161 I.C. 233=1936 R. 109. Sureties are discharged when appeal is allowed and cannot again be made liable, when the appellate order is reversed 38 C.L.J. 190=76 I.C. 510.

RESTORATION.—Power of Court to restore appeal dismissed for failure to furnish security within time. See 117 I.C. 791. Application for restoration is governed by Art 168 of the limitation Act. 61 M.L.J. 688

O. 41, R. 11. SCOPE.—A dismissal of an appeal under this rule is not equivalent to confirmation of decree under R. 32. When appeal is against a mortgage decree the dismissal of appeal under this rule does not extend time for payment fixed in the decree. 47 B. 950=25 Bom.L.R. 990. See also 24 C.L.J. 517=21 C.W.N. 430. Summary dismissal by District Judge of an appeal under S. 476 (8), Cr. P. Code, is wrong in law and R. 11 has no application 51 C.L.J. 45=1930 C. 282=127 I.C. 265. Collector's case—Appeal—Dismissal for default—Refusal to restore — Revision to Governor-in-Council from order of Deputy Commissioner—If open 19 N.L.J. 314.

JUDGMENT NECESSARY.—Court must write a formal judgment in dismissing appeal. 37 B. 610=15 Bom.L.R. 765 (over-ruling 36 B. 116=12 I.C. 564=13 Bom.L.R. 1002); 27 C.W.N. 501=1923 C. 558 Appeal dismissed under R. 11—Writing judgment is not obligatory though advisable. 25 N.L.R. 55=115 I.C. 168=1929 N. 68. See also 13 P. 540=150 I.C. 817=15 P.L.T. 293=1934 P. 331. Appellate Court dis-

missing appeal should generally record reasons and must write judgment according to O. 41, R. 31. 4 R. 66=1927 R. 208=103 I.C. 766; 4 R. 18=95 I.C. 521=1926 R. 129=67 I.C. 471 approved.) See also 1926 C. 992=96 I.C. 136=43 C.L.J. 499; 53 A. 528=132 I.C. 200=1931 A. 589, 1931 A.L.J. 875=1931 A. 597 (F.B.). This should be done specially when the order summarily dismissing an appeal is itself subject to an appeal. 147 I.C. 194=59 C.L.J. 293=1934 C. 26. The dismissal of an appeal under R. 11, is a decree and the expression of opinion dismissing the appeal is judgment. 30 C.W.N. 334=1926 C. 638=93 I.C. 939 (2). Where an appeal is dismissed under the rule, the decree remains the decree of the lower Court and not of the appellate Court. So it is the lower Court that can entertain an application for amendment of the decree. 11 P. 409=138 I.C. 903=1932 P. 238=142 I.C. 143=1933 N. 117. The discretion given by this rule is not an arbitrary discretion but a judicial discretion 33 I.C. 666 Where the case is a fairly arguable one and there is a reasonable prospect of success Court has to order notice to issue and not to impose conditions on appellant. An order for notice conditional on the appellant depositing the entire decretal amount is bad in law. 139 I.C. 866=1932 A.L.J. 722=1932 A. 511 (F.B.). The appellate Court is bound to fix a date for hearing the appellant. The date of hearing is the one to be fixed by the Court and not the one fixed by any ministerial officer. An appellant had a right to be heard unless he is guilty of miss conduct or gross negligence 18 N.L.J. 157. It is imperative to hear appellant before passing final order on appeal 11 Lah.L. T. 32 When appeal is against a condition fixing period of payment, and the period elapsed during pendency of appeal, the appeal ought not to be dismissed on the ground that payment was not made within the period fixed 17 I.C. 868=10 A.L.J. 421

ADMISSION OF APPEAL IN PART.—It is open to the appellate Court under R. 11 to dismiss an appeal in part and to admit it in part, if appeal is severable. 152 I.C. 418=36 P.L.R. 417=1935 L. 34; but not to admit it and at the same time to restrict the grounds on which the appeal is to be heard 58 B. 397=36 Bom.L.R. 451=1934 B. 207 (F.B.).

RE-ADMISSION.—Any order restricting grounds of appeal to be heard, at the time of re-admission, is *ultra vires* 15 C.W.N. 921=14 C.L.J. 146. No review when a second appeal is dismissed under this rule. Discovery of new evidence is not sufficient

dent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

Day for hearing appeal 12. [S. 552.] (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day

Appellate Court to give notice to Court whose decree appealed from. 13. [S. 550.] (1) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court

Copies of exhibits in Court whose decree appealed from. (3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made; and copies of such papers shall be made at the expense of, and given to, the applicant.

14. [S. 553] (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause notice to be served on the respondent or on his pleader under the provisions above referred to.

Loc Ams.—[Allahabad.] “(3) Notwithstanding anything in sub-rule (1) it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent, other than a person impleaded for the first time in the Appellate Court, unless he has appeared and filed an address for service either in the trial Court or in the case of a second appeal, in the lower appellate Court or has appeared in the appeal.”

[Calcutta.] Insert the following clause as clause (3):—“(3) It shall be in the discretion of the Appellate Court to make an order, at any stage of the appeal whether on its own motion, or *ex parte*, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of or at any

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ground for review. 50 I.C. 431=27 CWN 918 When once admitted on review without notice to respondents, succeeding Judge cannot question the order subsequently. 50 I.C. 431.

APPEAL AND REVISION.—An order under sub-rule (1) is a “decree” and therefore appealable. But if no decree is drawn up, the appeal may be treated as an application for revision. 191 P.L.R. 1914=23 I.C. 90 Order refusing to take action against receiver

under O. 40, R. 4—Appeal—Maintainability. 150 I.C. 750 (1)=1934 A 907.

O. 41, R. 14.—A Judge cannot decide appeal *ex parte* when notice of appeal does not specify the date of hearing of appeal. 31 I.C. 624. The duty of furnishing correct address of respondent lies on appellant, and not on respondent. When notice has not been duly served, presumption of knowledge of date of hearing could not be raised. 41 I.C. 819=136 P.L.R. 1917 Where a minor is represented by a guardian *ad litem* notice

proceeding subsequent to the decree of that Court or on the legal representatives of any such respondent.

Provided that—

(a) The Court may require notice of the appeal to be published in the newspaper or newspapers as it may direct.

(b) No such order shall preclude any such respondent or legal representatives from appearing to contest the appeal.

[Madras] Add the following proviso—

"Provided that the Appellate Court may dispense with service of notice on respondents against whom the suit has proceeded *ex parte* in the Court from whose decree the appeal is preferred.

[Nagpur.] Rule 14.—To R. 14 the following sub-rule shall be added—

"(3) The Appellate Court may in its discretion dispense with notice to any respondent against whom the suit was heard *ex parte*."

[N.-W.F.P.] Add the following proviso to sub-rule (1):—

"Provided that with the permission of the Court no notice need be served upon a respondent who was a *pro forma* defendant in a suit which was decided *ex parte* against him."

[Oudh] "(3) Provided that in a case where a respondent has not appeared either during the hearing of the case in the Court from whose decree or order the appeal is preferred or at any proceeding subsequent to that decree, it shall only be necessary for the Court to make one attempt to effect personal service on such respondent or, if such respondent is dead, on his legal representative; and, thereafter, service may be effected by affixing a notice in some conspicuous place in the Court-house of the District Judge within whose jurisdiction the suit or proceeding was instituted along with one or other of the following methods, namely, publishing the notice in a newspaper or affixing it to the wall or door of the chaulpal of the village where the respondent last resided or any other method as the Court may direct."

[Patna] Add the following as R. 14-A in O. 41—

14-A The Appellate Court may, in its discretion, dispense with the service of notice herebefore required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal.

[Rangoon] Add the following sub-rule—

(3) Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on or to the legal representative of any such opposite party or respondent if deceased.

[Sind.] Add the following as sub-rule (3)—

"(3) The appellate Court may, however, in its discretion, dispense with the service of notice of the appeal or interlocutory application therein, on a respondent or opponent who has made no appearance at the trial Court."

Add the following as Rule 14-A—

"14-A Subject to the leave of the appellate Court nothing in these Rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent, where such opposite party or respondent did not appear, either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court."

15. [S. 554.] The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*.

Contents of notice

Loc Am.—[Central Provinces] In O. 41, insert the following as R. 15-A

"15-A Where, after admission of an appeal in the High Court, the rules of the High Court require the appellant to take any steps in the prosecution of the appeal before a fixed date, and where, after due service of a notice intimating the steps to be taken and the date before which they must be taken, the appellant fails to take such steps within the prescribed time, the Court may direct the appeal to be dismissed for want of prosecution or may pass such other order as it thinks fit

Procedure on hearing.

16. [S. 555.] (1) On the day fixed, or on any other day to which the

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need not be served on minor himself. 1926 C 1106=30 C W N. 949=97 I C. 614.

O. 41, R. 15.—Adequate time must be

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allowed from date of the service and the hearing of appeal 136 I C. 258=1932 I L. 248.

O 41, R 16—Council for one party could

Right to begin.

hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

17. [S. 556.] (1) Where on the day fixed, or on any other day to which

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not be heard after the case had been closed and in absence of the Counsel for the other party, and a judgment based on such hearing is not valid. 63 I.C. 945. Right of respondent to put in appearance on date of hearing. See 96 I.C. 326=1926 B 424=28 Bom L.R. 738. All that R. 16, compels Court to do is to hear arguments if any addressed and not to permit written argument 115 I. C. 173=1929 N. 89.

O. 41, R. 17, SCOPE.—R. 17 and 19 are exhaustive in respect of cases where appellant makes default in appearance in appeal 28 Punj L.R. 554=103 I.C. 425=1927 L. 622. If appellant fails to intimate any change of address and a notice sent to him by Court to the address specified in the memorandum of appeal is returned unserved on the ground that he has left the place and taken up residence elsewhere, Court will not postpone hearing of appeal for benefit of appellant; and if appellant is absent at the hearing, the appeal is liable to be dismissed 1936 R.D. 448 (1). If the discretion to dismiss is not exercised, the appeal must be adjourned and cannot be disposed of on merits. 1925 R. 96. An order dismissing an appeal for default is not a decree, and lower Court's decree is not superseded. Therefore first Court can set aside *ex parte* decree. 39 A. 393=15 A.L.J. 289.

DEFAULT—WHAT IS.—Where materials essential for progress of suit are wanting owing to appellant's default, an appeal may be dismissed, for default. 47 I.C. 691. When appellant is present in Court and states that his pleader is engaged elsewhere the presence of the appellant is not an appearance within this rule 5 Pat L.J. 17=54 I.C. 715. Mere unpreparedness of appellant's counsel to argue appeal is no ground for Court to dismiss it for default. 115 I.C. 173=1929 N. 89. R. 17 does not contemplate that Court should decide an appeal on merits in the absence of appellant. The law contemplates that appellate Court should hear both parties to the appeal and then decide it according to its judgment. 56 C. 412=119 I.C. 129=1929 C. 475; 1925 R. 96; 11 Lah.L.T. 136. Appearance by pleader who is instructed only to apply for adjournment is no appearance. 62 I.C. 57. Appearance of appellant at Court to ask time to get pleader is not appearance within the meaning of the Code. 30 I.C. 878=22 C.L.J. 72; 51 M.L.J. 654. When appellant was not present, and pleader asked for adjournment and when it was refused reported no instructions, this amounted to default, and appeal should not have been disposed of on the merits, but dismissed for default. 28 O. C. 166=1925 O. 549; 43 M.L.J. 317=45 M.

882; 74 I.C. 947, 1923 P. 536=5 Pat L.T. 46, 51 I.C. 46=42 M. 451=36 M.L.J. 222. See *contra* 83 I.C. 257=1925 N. 236 (1). Remand for further enquiry and report on a fixed date—Appellant absenting on date fixed for enquiry—Appeal cannot be dismissed for default before date fixed for report 96 I.C. 308=1926 L. 574.

DEFAULT—WHAT IS NOT.—When appellant alone is present without pleader and could not argue the appeal, the appeal should be decided on the merits considering the grounds of appeal 35 A. 105=11 A.L.J. 18, 39 P.L.R. 34. There is no default when pleader is present but is prevented from physical disability from arguing. 9 I.C. 857. Pleadors or counsel should be sent for. No doubt peon's calling out at the door of the Court very often proves sufficient, but when there are pleaders, the ordinary practice of sending for them should not be discontinued. In appeals especially, it is not absolutely necessary that parties should be present in person when there are constituted agents in the shape of counsel in Court and so it is conducive to good work that they should be sent for. 52 A. 536=1930 A.L.J. 632=1930 A. 217. The clerk of Court has no power to fix a date in the absence of the Judge, and the failure of the appellant to appear on a date so fixed does not justify dismissal in default 36 P.L.R. 63=1934 Lah. 984.

RESTORATION.—Court has an inherent power of restoration of an appeal dismissed for default. 47 M. 171=45 M.L.J. 813. Non-appearance, because no date of hearing was fixed, is not default; a dismissal for default is without jurisdiction. 69 I.C. 618=1924 L. 279. There is sufficient cause for restoration, when, due to want of notice of the fact of transfer of appeal from one Sub-Court to another, the appellant was not present at the latter Court. 46 I.C. 881. When, within a month from date of dismissal for default, both parties apply for restoration and file a petition of compromise, it ought to be restored and a compromise decree passed. 68 I.C. 448=1923 C. 319. An appeal dismissed for default when the appellant was present to ask for time to get his pleader should generally be restored. 30 I.C. 878 (1)=22 C.L.J. 72. Appeal may be restored when appellant himself has shown all possible diligence towards causing appearance to be made, but there was default due to negligence of pleader. 14 I.C. 823=22 M.L.J. 284. Restoration should be refused when vakil's conduct amounts to gross negligence. 35 I. C. 429=1 Pat.L.J. 65. Summary rejection for application for restoration of appeal dismissed for default is invalid. 104 I.C. 347 (2)=1927 C. 888.

APPEAL AND REVISION.—Against an order

Dismissal of appeal for appellant's default.

the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

Hearing appeal *ex parte*.

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.

18. [S. 557.] Where on the day fixed, or on any other day to which the hearing may be adjourned, it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit, within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

the appeal be dismissed:

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

Lôc. Am.—[Madras.] In O. 41, R. 18, after the words "cost of serving the notice" insert the words "or if the notice is returned unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice."

19. [S. 558.] Where an appeal is dismissed under rule 11, sub-rule (2),

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of dismissal for default, when it should have been disposed of on merits no appeal lies but it is revisable. 83 I.C. 257=1925 N 236 (1); 28 O.C. 166=1925 O 449. See also 53 C. 827=1927 C. 98=99 I.C. 124.

O. 41, R. 18—Applicability. 52 I.C. 179=169 P.R. 1919. Appeal cannot be dismissed, because appellant failed to provide a person to identify respondent. 65 I.C. 49=3 Pat.L. T. 498. A dismissal under this rule is wrong, when the *Talabnama* has been deposited but notice to the respondent for the issue of process has not been filed. 15 C.L.J. 683=13 I.C. 694=16 C.W.N. 498. No appeal lies from an order under this rule. 52 I.C. 179=169 P.R. 1919. Appeal dismissed against respondent who is necessary party and order not appealed against—Whole appeal abates—Appeal being imperfectly constituted—Court cannot make contradictory decrees. 1930 C. 346=133 I.C. 813. Dismissal of appeal for failure to serve notice on some of the respondents—Appeal—Maintainability—Application under R. 19 not the only remedy. See 9 P. 408=10 Pat.L.T. 589=1929 Pat. 609.

O. 41, R. 19. SCOPE.—The rule is not exhaustive of the power of Appellate Court in the matter of restoration. 20 Bom.L.R. 110=45 B. 648. But see 103 I.C. 425=1927 L. 622. The rule does not take away other remedies of the appellant if any. 2 P. 739=4 Pat.L.T. 405. Dismissal of appeal in the absence of appellant permits only restoration. 1925 R. 96. Dismissal of appeal for not depositing printing charges—Remedy. 4 P. 704; 134 I.C. 1169=1931 S. 153. Appeal dismissed for default—Restoration on condition that appellant pays a certain amount by a certain date—Power of Court to extend time. 1935 O.W.N. 706. Appellant unable to argue case and applying for adjournment—Refusal of adjournment and dismissal for want of prosecution—If one for default—Remedy of

appellant—Application for restoration or second appeal. 1937 A.W.R. 122=1937 A. 284. Jurisdiction under—Nature of—If appellate jurisdiction—Order refusing to restore second appeal dismissed for default—Letters Patent appeal—Certificate—Necessity for. 156 I.C. 454=1935 L. 815.

WRONG DISMISSAL.—It is wrong to dismiss an appeal when appellants have not been served and though pleaders are present, they have no instructions. 30 I.C. 199=2 O.L.J. 198. Notice of date fixed for hearing should be sent to next friend of minor appellants. Otherwise dismissal for default could not be sustained. 53 I.C. 333.

SUFFICIENT CAUSE.—Applicant should be given an opportunity to prove sufficient cause for default. 57 I.C. 762, 52 I.C. 926=59 P.L.R. 1919; 1925 C. 269=82 I.C. 330. Where an application is made for restoring a suit dismissed for default of appearance Court should give the party an opportunity to substantiate his plea. 31 Punj.L.R. 969. See also 120 I.C. 791=1930 L. 112=157 I.C. 171=1935 Pesh. 110 (1). There is sufficient cause when the order of postponement of the appeal was not communicated to the parties, resulting in non-appearance of appellant. 32 I.C. 936. Proof that appellant had no knowledge of the date fixed for hearing of appeal is sufficient cause under R. 19. 101 I.C. 203=1927 L. 365, 97 I.C. 687=1926 M. 1210. There is a good cause for non-appearance when no notice of transfer of case from one Court to another was given. 3 Pat.L.J. 218=43 I.C. 925 (F.B.); 1925 C. 500. It is the duty of the counsel to enquire what cases he has on a particular day and his failure to do so is not sufficient excuse. 1933 L. 1043 (1)=147 I.C. 698. Laches of an advocate or careless mistake of his clerk is not a sufficient cause. 3 R. 488=1926 R. 50; 145 I.C. 528=34 P.L.R. 831=1933 L. 642 (1). Pleadings mistake in noting a wrong date though not a sufficient

Re-admission of appeal dismissed for default.

or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

Loc Ams.—[Madras.] Re-number R 19 in O. 41 as R. 19 (1) and add the following as—

(2) The provisions of S. 5, Limitation Act, 1908, shall apply to applications under sub-rule (1).

[Central Provinces] In R 19, O 41, after the words and figures "R 11, sub-rule (2)" insert the words and figures "or R. 15-A" followed by a comma

20. [S. 559.] Where it appears to the Court at the hearing that any person

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cause, yet being a *bona fide* and unintentional error, appeal may be restored 51 I.C. 607=53 P.R. 1919; 1933 P. 128=142 I.C. 576. Non-appearance of pleader due to engagement in another Court is not sufficient cause. 24 I.C. 826; 68 I.C. 785=1923 L. 97 (1), 1925 O. 234, 96 I.C. 377 (1)=1926 C. 1132; 1926 C. 1231=97 I.C. 573. But see 1937 M.W.N. 195=(1937) 1 M.L.J. 632; 1936 N. 85. Absence of pleader for an hour, because five appeals above his could not be expected to be disposed of in an hour is a sufficient cause 89 I.C. 795=1925 L. 617; 4 R. 18=95 I.C. 521=1926 R. 109. See also 134 I.C. 120=1932 L. 65 (1). Where the case which was last in the list was called earlier in order and the time given to call counsel who was absent in another Court was too short, the appeal should have been restored 138 I.C. 702=1912 L. 387. See also 11 Lah.L.T. 26. (The Counsel came half an hour late in a Revenue Court and applied for restoration of appeal on the same day) Whether restoration may be ordered when pleader's absence was unintentional, see 5 Lah.L.J. 89. Want of notice to the appellant's counsel when the case is put down lower in the list is not a sufficient cause. No notice is necessary. 71 I.C. 813=1924 L. 189. Where a notice of appeal mentions the date of hearing wrongly the appeal cannot be dismissed for default on the parties being absent on the day fixed. Another appeal filed against the same decree on exactly the same grounds and within the limitation is maintainable 14 L.R. 362 (Rev.)=17 R.D. 568. No notice is necessary for restoring when dismissal was occasioned by the absence of both parties 17 I.C. 292=10 A.L.J. 399. Notice before restoration must issue on default in not making good the stamp in sufficient time, the opposite party has the right to a hearing even in second appeal 63 I.C. 99=1921 P. 337.

O. 41, R. 20. SCOPE.—R 20 is not intended to override the provisions of O 22 5 P. 755=1927 P. 23, 105 I.C. 569=28 Punj.L.R. 468. See also 26 S.L.R. 362=1932 S. 220, 1935 O.W.N. 401=1933 O. 329. It is left to the discretion of Court to add a party as respondent even after appeal time has expired 66 I.C. 365, 25 I.C. 480=3 P.R. 1915; 38 C. 913=16 C.W.N. 49; 27 I.C. 609=18 O.C. 90; 75 I.C. 90=1923 L. 503; 16 I.C. 771; 54 C. 430=1927 C. 394; 14 R.D. 442. See contra 79 P.R.

1914=25 I.C. 549; 2 R. 541=3 Bur.L.J. 259=157 I.C. 502=1935 Pesh. 106 18 L. 136=1937 L. 180, 1937 A.L.J. 436=1937 A. 243. The Law of Limitation has no application when action is taken under R. 20 97 I.C. 174=1926 L. 679. (25 I.C. 549, 25 I.C. 480, Foll.) 105 I.C. 569; 103 I.C. 223. But see 9 R. 624=135 I.C. 645=1932 R. 16 and 140 I.C. 483=1932 O. 288. (The defendant should not be deprived of the valuable right he has acquired under the decree by adding him as party after appeal time is over) See also 1932 A. 120=1931 A.L.J. 1004, 6 R. 29 (P.C.), 58 C. 923=1931 C. 738. Section 151 is circumscribed by this rule and in exceptional cases only should it be resorted to 73 I.C. 136=1923 L. 490. Only parties to suit and not strangers can be made parties in appeal 73 I.C. 136=1923 L. 490, 47 A. 853=23 A.L.J. 757=1925 A. 768, 105 I.C. 569=1928 L. 202. "Party to the suit" includes legal representatives of a party. 29 I.C. 490. Where a party to the suit was not impleaded in appeal but it appeared that the omission was due to an oversight and that the party whose name was omitted was not a contesting party in the suit, held, that the proper procedure for Court was not to dismiss the suit on a technical ground but to exercise the powers vested in it under this rule 11 Lah.L.J. 523=1930 L. 295; 1935 L. 802. (Omission to implead auction-purchaser in appeal from order refusing to set aside sale.) See also 15 R.D. 217; 15 R.D. 286=12 L.R. 56 (Rev.), 15 R.D. 291=12 L.R. 96 (Rev). There were three appeals against one order. Two were rejected on the ground that a necessary party was not made a respondent. The third was accepted on merits; Court refused to condone the omission in the first two appeals. The points in all appeals were similar. Held, that the Court should have exercised its discretion under R. 20 and condoned the omission. 146 I.C. 148=1933 L. 304. Rule 20 is permissive and it is in no way binding on a Court to act on that rule in order to bring in a necessary party against whom an appeal is already time-barred. 14 R.D. 88. See also 1929 M.W.N. 381=1929 M. 479. An appellate Court has no power to implead persons who were not parties to the suit. The provisions of S. 107, C.P. Code, cannot be invoked in this respect because they are subject to R. 20 53 B. 598=119 I.C. 654=1929 B. 353. This rule does not apply to the case where the heirs of a deceased respondent were not parties in the Court from

Power to adjourn hearing and direct persons appearing interested to be made respondents

such person be made a respondent.

who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that

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whose decree the appeal is preferred A party against whom an order of abatement has been passed cannot get over that order under cover of R. 20. 1935 O.W.N. 401=1935 O. 329 A person against whom an appeal has abated is not a party interested in the result of the appeal within the meaning of R. 20 and Court has no jurisdiction to add him as a party to the appeal. Nor can the Court act under O 41, R. 33 which is very special power to be used in special circumstances. 1935 M.W.N. 398=41 L.W. 111=1935 M. 175 Appellant whether bound to implead unnecessary party—Plaintiff not added as party respondent—No relief asked against him—Parties not claiming under him—Plea of non-joinder—Sustainability. 7 R. 398=1929 R. 265. Where omission to implead proper and necessary parties in second appeal was not due to any natural mistake but was a piece of gross carelessness, the discretion given by this rule cannot be invoked 1936 R.D. 450 (2) The appellate Court informed the appellant that a wrong respondent had been impleaded and that he was given 15 days' time to implead the right person who was specially made a party in the trial Court to the knowledge of the appellant The appellant failed to bring the right person on record within the stated time *Held*, that it was neither a case for the application of O 41, R. 20, C.P. Code, nor was there a sufficient cause within S. 5, Limitation Act, and the appeal was time-barred 164 I.C. 154 (1)=1936 L. 793 Persons who were parties to the suit but not to the first appeal can be made parties in second appeal. 59 I.C. 798, 115 I.C. 305=1929 S. 120. But *see* 1926 L. 499=97 I.C. 338, 1934 P. 589 The appellate Court can even add parties who were struck off in the suit before decree 27 I.C. 423. Where in a suit for profits a finding was given that first defendant was not liable and subsequently on plaintiff's own application, name of first defendant was struck off from plaint, (without any permission of Court reserving plaintiff's right against him) he cannot be made a respondent under R. 20 in the appeal by plaintiff 1933 N. 66=143 I.C. 88 Under this rule an unnecessary party cannot be added and cross-objections raised against him. 11 M.L.T. 157=13 I.C. 906, 53 C. 270=91 I.C. 649=1926 C. 533. A formal defendant need not be added as a party in appeal 1925 L. 87. The plaintiffs sued for a declaration that they and defendants 2 to 7 were the owners of certain plots and of the cattle market held thereon, and that the first defendant had no right to any part of the profits accruing from that market. The suit was contested by defendant No. 1 only, and de-

fendants 2 to 7 who were described in the plaint as *pro forma* defendants were absent throughout. Decree in favour of plaintiff against defendant 1—Appeal by latter without impleading defendants 2 to 7—Court adding them as respondents after limitation for appeal. *Held* (Per Sulaiman, C. J. *Niamatullah J. Smith J. contra*), that in the special circumstances of the case, there being in strictness no decree in favour of defendants 2 to 7, the appellate Court had jurisdiction to implead them as respondents, so that they might be bound by the final order. 1937 A.L.J. 424=1937 A. 82 (S.B.). Nor defendants claiming paramount title in a suit on a mortgage 144 I.C. 267=15 N.L.J. 173. The assignee of a decree is not a necessary party who will be bound by the decree in appeal by judgment-debtor. 38 M. 36=23 M. L.J. 513.

APPLICATION OF THE RULE.—The discretionary power of an appellate Court under Rr. 20 and 33, however ample it may be, cannot be exercised to the detriment or prejudice of any party against whom the suit has been dismissed by the trial Court and against whom no appeal has been preferred. While it is, therefore, open to appellate Court to vary the decree in favour of plaintiffs who have not joined in the appeal filed by a co-plaintiff, it is not open to that Court to pass or modify any decree to the detriment of a person who is not a party to the appeal before it 152 I.C. 304=11 O.W.N. 1263=1934 O. 496=15 P. 219. The Court can add the defendants whose names were omitted by mistake in the appeal 63 I.C. 352 *See also* 117 I.C. 796=1929 M. 343=56 M.L.J. 315, 97 I.C. 223=1926 L. 689 (2), 104 I.C. 400 (1), 1928 L. 43=106 I.C. 313 Under certain circumstances the Court may well refuse to add representatives of a deceased respondent, when the appellant has not done so in time, which he might have 90 I.C. 986=36 C.W. N. 45; 24 C.W.N. 44=30 C.L.J. 217 The power to add parties will not be exercised in cases of extreme negligence. 79 P.R. 1914=25 I.C. 549. A third party cannot appeal on behalf of co-sharers who are interested in the appeal against a co-sharer If they are not made parties in time, appeal will be dismissed 75 I.C. 90=1923 L. 503 If plaintiff in second appeal failed to implead necessary respondent, the power to add him could not be exercised The case being on a joint footing against all respondents the appeal abated *in toto* 57 I.C. 259=2 Lah L.J. 5. *See also* 9 R. 624=135 I.C. 645=1932 R. 16, 112 I.C. 605 A respondent can make another a co-respondent and proceed against him by way of cross-objections. 56 I.C. 612=11 L.W. 602 *See also* 1937 N. 105. As to limitation period for filing cross-objections by

21. [S 550.] Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and, if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

Re-hearing, on application of respondent against whom *ex parte* decree made.

Loc. Am.—[Nagpur.] Rule 21—In R. 21 of O. 41—

(a) Existing R. 21 shall be re-numbered as sub-rule (1), and (b) after sub-rule (1) so re-numbered the following shall be inserted as sub-rule (2), namely.—

"(2) The provisions of S. 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-rule (1)."

22. [S 561.] (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate

Upon hearing respondent may object to decree as if he had preferred separate appeal

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party added under this rule, see 1937 N. 105. A defendant not joined in appeal against other defendants is not interested in the result of the appeal. 1927 P.C. 252=54 M.L.J. 88=6 R. 29=55 I.A. 7 (P.C.), 58 C. 923=133 I.C. 177=1931 C. 738, 1932 A. 120=1931 A.L.J. 1004. In view of the above principle in a case where a declaration has been made jointly in favour of some persons who had claimed the right, title and interest in dispute and one of them was not impleaded in appeal until after the limitation for the appeal had expired, the appeal could not proceed against the other respondents inasmuch as the declaratory decree had become final in favour of the person omitted. 18 L. 136=1937 L. 180 See also 1937 A.W.R. 27=1937 A.L.J. 436=1937 A. 243 (Joint decree for possession.) Where names of certain persons are not included in the appeal, Board of Revenue can direct the names of the parties omitted to be added and appeal reheard 18 R.D. 45.

O. 41, R. 21: SCOPE.—Conditions necessary for rehearing 1933 L. 882. A second appeal by a co-respondent dismissed under R. 11 does not take away the jurisdiction of first appellate Court, when it had been moved by an absent respondent under this rule. 14 C.L.J. 42=15 C.W.N. 798, 43 I.C. 902=14 N.L.R. 30 What is sufficient cause must depend on facts of each case. 63 I.C. 737=19 A.L.J. 54. If interval between date of service of notice and hearing of the appeal is only one day, it is obviously inadequate and may be "sufficient cause". 136 I.C. 258=1932 L. 248 It is open to respondent to show that he was not duly served in the sense that knowledge of the opponent's claim was not brought home to him, even though the formalities of substituted service were carried through. 61 M.L.J. 813=134 I.C. 1202=1931 M. 813. Where service of summons to father was effected on his son in the father's absence but the son was not residing with the father. Held, that the summons was not duly served on the father and that the appeal should be reheard (1932 P. 150 and 43 C. 447, Ref.) 146 I.C. 474 (2)=34 P.L.R. 963=1933 L. 797. A principal will

be bound by his agent's default. Agent's negligence is not sufficient cause. 15 A.L.J. 413=39 I.C. 636=39 A. 348; 17 Pat.L.T. 261=1936 P. 128. Suit for contribution—Decree passed against several defendants—One of them preferring appeal—Decree modified to the detriment of the rest—Legality—Propriety of acting under R. 21. See 23 C.W.N. 221. On this rule, see also 26 Punj L.R. 314 (withdrawal of application by guardian).

O. 41, R. 22—R. 22 applies to appeals from the original side of High Court and in such appeals it is competent for a respondent to file a memo. of objections 49 M. 291=93 I.C. 293=50 M.L.J. 190 (F.B.). The object of the rule is to allow a respondent content with a decree in his favour an opportunity of contesting findings against him in case his opponent appeals. 5 P.L.J. 328=56 I.C. 262; 112 I.C. 689=1929 L. 161 Where a compromise is effected between the parties to a suit in which some defendants are minors and it is obtained by fraud or under some other circumstances as to render it invalid, the remedy of the minors is not by filing cross-objections in an appeal by one of the defendants. 114 I.C. 101=1929 S. 32. Memo of objections in pauper appeal—Time limit. See 10 Pat.L.T. 387=119 I.C. 900=1929 P. 31 Cross-objections regarding costs—*Ad valorem* Court-fee payable on amount claimed. See 10 Pat.L.T. 224. Decree passed by lower appellate Court—Aggrieved person not preferring appeal to High Court—Same whether can be raised by way of cross-objections in second appeal. See 1929 O. 41=111 I.C. 843 Where in the lower Court defendant filed an appeal and plaintiff filed a memorandum of cross-objections and lower Court dismissed both of them, it is not competent in the appeal filed by plaintiff against the dismissal of cross-objections for defendant by way of objections to attack the rejection by the lower Court of his appeal. The proper course for him is to file an independent appeal against the dismissal or rejection of his appeal. 130 I.C. 657=1931 M. 133 But see contra 1935 A.L.J. 418=1935 A. 404. A *pro forma* respondent in an appeal is not entitled to raise a memorandum of

Court within one month from the date of service on him or his pleader of notice

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cross-objections to the decree appealed against under O 41, R 22. 118 I.C. 867=1929 N. 361, 107 I.C. 569 As to meaning of the word 'respondent', see 107 I.C. 569=1929 A. 195.

SCOPE.—This rule does not control R 33 62 I.C. 623. A respondent is entitled to support a decree under the provisions of this rule. 41 C.L.J. 31=86 I.C. 6. Objection not put as cross-objection cannot be taken if it is not in support of the decree 84 I.C. 124=1925 C. 94. See also 144 I.C. 16 =38 L.W. 263=1933 M. 465; 144 I.C. 1007=1933 R. 120 Trial Court's decree in favour of the appellant should not be interfered with under R 33 in the absence of cross-objections by the respondent 461 C. 142=22 C. W.N. 526, 57 I.C. 555=23 O.C. 110 Where only one plaintiff-respondent claims a particular relief in his memo. of objection, the relief could be granted to all the respondents when the basis of the claim is common to all of them. 15 I.C. 409. The rule does not apply to Letters Patent Appeals. 1922 A. 55; 32 C.L.J. 48=24 C.W.N. 1016

RIGHT TO SUPPORT DECREE.—A decree can be supported without filing cross-objections by traversing any ground which that Court may have found against him 41 C.L.J. 31=86 I.C. 62, 50 C.L.J. 260=123 I.C. 444=57 C. 289=1930 C. 165, 4 I.C. 68; 45 I.C. 232=125 P.L.R. 1918; 103 P.L.R. 1917=40 I.C. 237; 39 I.C. 153=4 O.L.J. 101, 50 M. 866=26 I.W. 125=53 M.L.J. 189, 51 I.C. 981=1919 P.H.C. 393; 12 I.C. 20=4 Bur L.T. 209 A contention that a ground on which the lower Court has decided against the respondent should have been decided in his favour and therefore the lower Court should not have passed the decree under appeal is not a ground which supports the decree but is one which attacks the decree and therefore cannot be urged by the respondent under this order. 131 I.C. 833=1931 M. 513 See also 1929 L. 684. The words "support the decree" do not merely mean "support the decision" and it is open to the respondent who has not filed any cross-appeal or objection against the decree of the lower Court awarding compensation in land acquisition proceedings to urge in bar of further enhancement a ground which has been decided against him in the lower Court and which, if accepted in entirety, would have resulted in the dismissal of the plaintiff's suit. 12 Pat.L.T. 659. But see *contra* 146 I.C. 152=1933 N. 310 The word "decree" means the decision by the Court below 50 M. 866=53 M.L.J. 189=104 I.C. 472=1927 M. 801 Where a suit is dismissed on one finding it cannot be reversed in appeal without considering the defendant's objection to other findings 11 I.C. 41=202 P.L.R. 1911. Although no cross-objections had been filed by him 166 I.C. 1007 (Cal.) In such a case the filing of cross-objection is superfluous 1936 O.W.N. 1069=1937 O. 159 The same is the case where plaintiff has obtained a decree in part. 1936 A.W.R. 1216=1936 A. 717 A decree cannot be supported on an entirely new

ground, not decided against respondent, not in issue and not made subject of adjudication. 5 Pat.L.J. 239=55 I.C. 214, 38 I.C. 536=21 C.W.N. 423 But see *contra* in 31 I.C. 740=45 P.R. 1916

CROSS-OBJECTION—WHEN CAN BE RAISED.—Petition to support decree on other grounds does not amount to cross-objections 68 I.C. 861=44 A. 577. Time expired appeal may be treated as memorandum of objections. 67 I.C. 478=1922 L. 423, 1925 L. 57=79 I.C. 132. A defendant who has been placed *ex parte* can impugn the decree in appeal by way of cross-objections on the ground that he was wrongly made *ex parte*, provided he has not moved the trial Court under O. 9, R. 13. 45 M.L.J. 805=1924 M. 107. Cross-objections could be entertained only against a party to the appeal 54 I.C. 971. See also 39 I.C. 662=2 P.L.J. 162; 53 C. 270=1926 C. 533. As to whether an exonerated defendant can be made a party to the memo of objections when not a party to the appeal, see 31 I.C. 978 A memo. of objections may be filed against the whole or any part of a decree, even though that part may not be the subject-matter of the appeal 35 M.L.J. 83=48 I.C. 1003 See *contra* 39 M. 365=28 M.L.J. 285. An appeal was filed by two out of 96 defendants and the plaintiff filed cross-objections The Court refused to entertain them on the ground that in any case the decree would remain intact as against the 94 defendants who had not appealed Held, that the procedure was not warranted by law and that they should be considered on merits 151 I.C. 530=11 O.W.N. 258 (2)=1934 O. 131 (2). A defendant-respondent whose set off has not been decreed, or has not been referred to in the decree, may make this ground of cross-objections in appeal. The defendant-respondent under R. 22 is entitled to take "any cross-objection" to the decree which he could have taken by way of appeal 150 I.C. 433=1934 A. 543 Cross-objection must relate to decree appealed against and not any other although arising out of the single decree of the trial Court. 96 I.C. 67=1926 A. 582 See also 1930 M.W.N. 1236=1931 M. 133=130 I.C. 657

WHEN CANNOT BE RAISED.—Cross-objection cannot be filed against a person who is not a party to the appeal. 144 I.C. 226=29 N.L.R. 173=1933 N. 186 Nor where the decree itself is merely a decree dismissing plaintiff's suit. 1923 P. 690. Nor with reference to any point in respect of which he could not have filed an appeal himself. 1933 R. 377. If a party fails to make a cross-objection in the manner and within the period of limitation and prefers an appeal which is held to be time-barred, he cannot contend that the appeal was in time because the objection could be raised by way of cross-objection 14 L.R. 927 (Rev.)=11 O.W.N. 46. Respondents in revision petition cannot file cross objections 14 I.C. 562=160 P.L.R. 1912. Respondent having appealed cannot file cross-objections. 1925 L. 2=79 I.C. 670. Where the objector did present an appeal and raised a certain objection he is debarred

of the day fixed for hearing the appeal or within such further time as the Appellate Court may see fit to allow.

Form of objection and provisions applicable thereto.

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

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from putting other objections which he could have taken in appeal but which he did not. 1936 Pesh. 214 Cross-objections as to costs in the Courts below cannot be considered on second appeal 5 Lah.L.J. 108. Cross-objections regarding want of jurisdiction to attach in executing Court, cannot be taken when appeal is against an order refusing to set aside a prohibitory order 75 I.C. 419=1923 L. 514. Cross-objections which tends to obtain a distinct relief which could have been granted by lower Court if asked for, or by appellate Court if a claim was raised in appeal, should not be allowed. 34 I.C. 916=24 P.R. 1916 It should not be allowed where the question raised thereby is entirely distinct from and in no way related to the question in controversy in appeal 48 I.C. 78=28 C.L.J. 123. Cross-objections cannot be filed after withdrawal of appeal. Pendency of appeal is a condition precedent to the filing of cross-objections 39 I.C. 947. Cross-objections filed before the date of receipt of notice would not be cross-objections at all in the strict legal sense of the word. 162 I.C. 336=1936 L. 362 The use of the word "within" would fix two limits; an anterior limit starting from the date of receipt of the notice and a posterior limit of one month after that date (*Ibid*) New grounds not set forth in objections cannot be raised at the time of hearing. 19 I.C. 98=15 Bom L.R. 130

CROSS OBJECTIONS AGAINST CO-RESPONDENT—WHEN ALLOWED—A cross-objection can be entertained at the discretion of Court by one respondent against co respondents. 16 A.L.J. 587=40 A. 536; 12 A.L.J. 192=36 A. 505, 15 C.L.J. 61=16 C.W.N. 612; 5 Lah.L.J. 92=69 I.C. 330; 38 M.705=27 I.C. 223=27 M.I. J. 740 (F.B). Only in exceptional cases could cross-objections against a co-respondent be raised. 13 P. 200=15 P.L.T. 42=1934 P. 134; 25 O.C. 280=70 I.C. 79=1923 O. 108, 37 B. 511=15 Bom L.R. 781, 31 Bom L.R. 1179, 23 C.L.J. 26=20 C.W.N. 370=43 C. 790 Also 29 I.C. 610=(1915) 2 U.B.R. 58. Cross-objection indicates that it should be directed against the appellant, but it may be also taken against another respondent if there is community of interest between the appellant and the latter But where the cross-objections are directed solely against a co-respondent whose case has nothing in common with that of the appellant but proceeds on the same grounds as those on which the appeal does, they are not maintainable. A cross-objection by one respondent against another cannot be permitted under R. 22, where the effect of the same, if successful, cannot be adverse to the appellant to any extent. 57 A. 580=1935 A. L.J. 145=1935 A. 134. It is the settled practice of the Calcutta High Court not to

permit a cross objection raising a question as between two respondents *inter se* in which the appellant is not concerned or interested. Such a question can only be raised in a substantive appeal by the respondent 59 C. 667=138 I.C. 852=36 C.W.N. 263=1932 C. 524, 158 I.C. 708=1935 O.W.N. 1139 A cross-objection by one respondent seeking costs of the lower Court from another respondent does not lie under O. 41, R. 22, C.P. Code. 15 P. 510=17 Pat.L.T. 279=1936 P. 513 Where the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened as between co-respondents, it is an exceptional case, which may be allowed under special circumstances. 56 I.C. 469=2 Lah.L.J. 747; 5 Pat.L.J. 328=50 I.C. 252 Suit against obstructors of pathway—Decree against all defendants except one—Cross appeal—Decree against remaining defendant also—Correctness of (28 C.L.J. 123, Foll.) 150 I.C. 364=58 C.L.J. 534=1934 C. 345. It can be allowed when the Court cannot do complete justice between the parties without opening the whole case. 53 I.C. 659=6 O.L.J. 495 Plaintiff-respondent can raise cross-objections against a defendant who is not an appellant 38 I.C. 641 It can be raised in a case where the interest of the objector was really adverse to that of the appellant and other co-respondents and though the appellant took the same objections unnecessarily in his ground of appeal 29 C.W.N. 784=88 I.C. 866=1925 C. 973. But a cross objection under R. 22 is not maintainable where the objector-respondent has no community of interest with the appellant and where the cross-objection is nothing more than an old appeal which was dismissed as being out of time R. 33 does not allow an objection of this kind to be made, but, merely places the Court in a position of doing justice between the parties 165 I.C. 936=1936 P. 604

WHEN NOT TO BE ALLOWED—Cross-objections by one co-respondent against another should not be permitted when they could be raised by an appeal 37 B. 511=15 Bom L.R. 781 See also 61 I.C. 48=19 A.L.J. 155 It should not be allowed when he has allowed the period of appealing to elapse. 66 I.C. 642=8 O.L.J. 358 But see 5 Pat.L.J. 328=56 I.C. 253. No Court-fee is payable when the decree of the lower Court is supported in cross-objections. 68 I.C. 861=44 A. 577, 39 I.C. 176=15 A.L.J. 325. As to valuation of cross-objections. See 25 O.C. 275=70 I.C. 286=1923 O. 44 (1); 52 I.C. 1002.

CROSS-OBJECTIONS IN APPEAL UNDER S. 12, OUDH COURTS ACT.—The words "from appellate decrees" in O. 42, R. 1, refer only to second appeals under S. 100, and do not cover appeals filed under S. 12 (2) of the Oudh Courts Act. A respondent in an appeal

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where, in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

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under S. 12 (2) is not therefore entitled as of right to file a memorandum of cross-objection under R. 22, without applying for and getting the leave of the Court under S. 12 (2), 1935 R.D. 12=16 L.R. 177 (Rev.)=153 I. C. 371=1935 O.W.N. 8=1935 Oudh 88

LIMIT OF ONE MONTH.—The principle of calculation of a month is that it shall be taken to extend up to and including the day before the corresponding date of the next month, and there is no authority for any special rule as regards February-March. 30 I.C. 832 (1)=29 M.L.J. 182 Where notice of an appeal was affixed by affixation and it was uncertain when he got the notice *Held*, that a delay of 4 or 5 days in filing the memorandum of cross-objections could be condoned. 15 L.R. 69 (Rev.)=18 R.D. 56. He can claim 30 days from the date of serving of notice for hearing. The 30 days is not 30 days from the date of serving of notice of appearance. 22 L.W. 792. A transfer by a respondent pending the hearing of an appeal will not extend the period of 30 days for filing of cross-objections. 1931 A.L.J. 606 Nor does any subsequent devolution of interest of the respondent to another give the latter a fresh starting point from the date of notice to him for being impleaded in the place of the former. 159 I.C. 257=1935 L. 653 In such a case, the respondent remains the same, though his description is changed and the substitute inherits all those disabilities which have already been incurred by his predecessors. If therefore time has run out against the predecessor it cannot revive in the case of the successor, the principle of law being well recognized that if once time begins to run, no subsequent disability stops it (*Ibid*). Cross-objections, if can be received even after a month, even during the argument of the appeal. 66 I.C. 217=1922 N. 213 It is not necessary that further time ought to have been granted before objections are actually filed. 39 I.C. 125 Hearing of appeal ought not be advanced so as to deprive respondent the benefit of filing objections in a month. 38 I.C. 522=1917 P.H.C.C. 103

SUB-RULE (3)—Under Cl. (3) the respondent should file with cross objection a written acknowledgment of notice from the party who may be affected by such objection. But where, though no such acknowledgment was filed, the party against whom the objections had been filed appeared and contested, it is only an irregularity which

cannot stand in the way of the objections being allowed 150 I.C. 364=58 C.L.J. 534=1934 C. 345.

SUB-RULE (4).—The right to be heard provided for by sub-rule (4) is not available when the appeal abates. 44 M. 828=41 M.L.J. 304=62 I.C. 757, 10 L. 208. 151 I.C. 387=1934 L. 136 (2) Cross-objections cannot be proceeded with when appeal is dismissed under R. 10 in presence of the respondent without any objection on his part. 25 O.C. 280=70 I.C. 79. But *see contra* 50 I.C. 729=4 Pat.L.J. 164. Rejection of appeal as insufficiently stamped is not a dismissal for default, and cross-objections cannot be heard when appeal is rejected. 59 I.C. 795=46 P.W.R. 1921 *See also* 10 I.C. 207=11 P.R. 1912; 56 M.L.J. 476; 8 R. 538=129 I.C. 500=1931 R. 38, 137 I.C. 156=1932 N. 41 But *see* 1930 M.W.N. 1236=130 I.C. 657=1931 M. 133 The word "default" occurring in the rule includes any default made by appellant which would amount to non-prosecution of the appeal 130 I.C. 657=1931 M. 133=1930 M.W.N. 1236 Objections can be dealt with even though appeal is dismissed for default. 9 I.C. 572=9 M.L.T. 217, 48 M. 631=48 M.L.J. 384, 25 I.C. 916=1 O.L.J. 485 Cross-objections may be filed even when appeal is unsustainable 34 A. 140=13 I.C. 19. Cross-objections can be heard even when the appellant admits the appeal to be incompetent and is dismissed. 54 I.C. 506=10 L.W. 605. Objections filed in an appeal which is dismissed as out of time cannot be heard. The right of filing objection stands or falls with the right of appeal 4 L. 140=5 Lah.L.J. 345, 41 M. 904=35 M.L.J. 236 (F.B.) *Cf.* 39 I.C. 947 But *see contra* 3 L.W. 109=32 I.C. 579. *Also* 30 I.C. 832=1915 M.W.N. 792. If appeal which is withdrawn has not been validly filed, the memorandum of objections should not be heard. 55 M. 975=139 I.C. 457=1932 M. 722=63 M.I.J. 845.

SUB-RULE (5).—Pauper respondents are entitled to present objections without payment of stamp duty (1 N.L.R. 33, Overr.) 144 I.C. 217=29 N.L.R. 225=1933 N. 158. Leave can be granted to file a cross-objection *in forma pauperis* on grounds which are not entirely the same as those which it is necessary to put forward in seeking leave to appeal *in forma pauperis* which is refused 168 I.C. 407=1937 R. 81 Leave to appeal *in forma pauperis* refused—Appeal by other party—Leave to file cross-objection *in forma*

23. [S 562.] *Whence the Court from whose decree an appeal is preferred***Notes.**

pauperis or different grounds can be granted. (*Ibid.*).

PRACTICE AND PROCEDURE—Where a memorandum of cross-objections is preferred out of time and an application is made to the Court to extend the time for preferring the cross-objection, it is not the proper procedure to allow the application subject to any just objection being taken at the time of the hearing. Application of this kind should be dealt with at the time when they are made and should not be left over for determination till the hearing of the appeal. 40 C.W.N. 1237.

O. 41, R. 23. SCOPE.—The appellate Court has inherent powers to remand a case irrespective of the provisions of this rule. 1927 M. 335=52 M.L.J. 90=100 I.C. 135, 37 C.L.J. 491=1923 C. 606; 122 I.C. 485, 119 I.C. 466; 1929 L. 83 112 I.C. 736=10 L. 360, 73 I.C. 915=1924 L. 245, 1922 C. 279, 64 I.C. 436; 44 C. 129=21 C.W.N. 877 (F.B.), 43 C. 100=20 C.W.N. 1192; 74 I.C. 497=1924 L. 36, 76 I.C. 496=5 L.L.J. 384=1924 L. 362; 37 M.L.J. 536=53 I.C. 417; 32 C.W.N. 101; 9 I.C. 790=9 M.L.T. 373, 101 I.C. 281=1927 N. 192. *See contra* 38 I.C. 196; 33 I.C. 329=43 C. 148; 41 C. 108=20 I.C. 39=18 C.L.J. 613. Merely because an order of remand is not one under R. 25, it does not follow that it should necessarily be one under R. 23, for there may be remand orders passed under inherent power of Court and not under either of the two rules. 1933 P. 706. Inherent power should be invoked only if necessary for ends of justice and must be exercised with care. 46 I.C. 333=27 C.L.J. 596, 44 C. 929=21 C.W.N. 877=41 I.C. 598 (F.B.), 64 I.C. 599; 3 Pat.L.J. 253=43 I.C. 959; 11 L.L.J. 507, comparison of the provisions of the old and new Code as to the exercise of the Court's inherent power of remand. 117 I.C. 280=1929 N. 63, 26 N. L.R. 44. The Court has no inherent power to disregard a method of procedure enjoined or provided by the Code and adopt a different one unless it is really necessary in the interests of justice. 156 I.C. 381=37 Bom. L.R. 203=1935 B. 216. Where an order of remand purporting to be made under the inherent powers contravenes an express provision in O. 41, R. 23, the High Court will interfere in revision under S 115 and set it aside (*Ibid.*). The inherent power of remand cannot be invoked in a case for which a specific provision is made in the Code, *e.g.*, Rr. 25, 27 and 28 of O. 41. 133 I.C. 205=1931 M. 791=60 M.L.J. 475. Where a suit is disposed of on merits by trial Court and on appeal lower appellate Court remands the case for re-trial after amendment of plaint, the order of remand is one made under the inherent powers of the Court even though the appellate Court orders refund of Court-fee paid on the memo. of appeal and the order is not appealable. 141 I.C. 400=34 P.L.R. 270=1933 L. 135. *See also* 1936 P. 491 (where it was disposed of both on merits and on preliminary point.) Court of appeal when it remands a suit to trial Court for fresh dis-

posal should make it quite clear whether the order of the remand is made under R. 23 or independently of that provision. 119 I.C. 705=1929 M. 205. 'Remand' made in an appeal from an order returning a plaint for presentation to proper Court is without jurisdiction as such an order is not a decree within S. 2. 87 I.C. 172=1925 O. 393. Remand means return for decision and not for finding. 92 I.C. 370=1925 O. 303. Appellate Court can pass an order of remand by consent of parties in excess of its powers under the Code. 22 I.C. 41=1914 M.W.N. 90. High Court has ample power to make a remand in order that a point which has not been considered by the lower Court may be considered by it. (44 C. 929, Ref.) 1934 R. 168. Where the procedure adopted by the lower Court in disallowing question in cross-examination was wholly unjustifiable regard being had to the nature of the issues raised in the suit, and the Judge's manner of dealing the points arising for consideration in the case on the pleadings of the parties and on the issues raised for determination in the suit was wholly unsatisfactory, the High Court, on appeal remanded the case for retrial in accordance with law. 162 I.C. 697=1936 C. 195. When an order of remand is made, the presumption is that it is made under this rule. 20 A.L.J. 321, 44 A. 492. As for distinction between this rule and R. 25, *see* 25 O.C. 189=69 I.C. 730, 43 C. L.J. 194=102 I.C. 384=1927 C. 401. The rule applies where the whole suit is disposed of on a preliminary point, 57 I.C. 830=11 L.W. 611, *also* 26 O.C. 10=73 I.C. 591=1923 O. 177; 101 I.C. 89 (1); 1930 L. 639, 123 I.C. 542=1930 L. 181. And not when a portion of it has been disposed of on a preliminary point. 136 I.C. 559=1932 L. 219. As to meaning of preliminary point, *see* 13 L.W. 54=61 I.C. 829, 99 I.C. 974, 1928 M. 991=1928 M.W.N. 164; 1930 N. 295; 1930 M. 1017=60 M.L.J. 72 decided upon the whole evidence and upon all the issues raised. 55 I.C. 484=1 P.L.T. 509, 92 I.C. 1045=1926 M.W.N. 48; 91 I.C. 351=1926 L. 184, 6 P. 381; 96 I.C. 786, 103 I.C. 537=1927 L. 618, 1927 L. 42=98 I.C. 906. Where trial Court gives its findings on all issues and appellate Court remands the case, the remand should be taken to be under R. 25 or under S 151 and not under R. 23. 139 I.C. 126=1932 L. 443. This rule will not apply where an order is not on a preliminary point. 73 I.C. 915=1924 L. 245; 101 I.C. 89 (1), 1927 L. 618=103 I.C. 537, 6 P. 380=103 I.C. 722=1927 P. 296. *See also* 117 I.C. 280=1929 N. 63. (Case-law reviewed.) Except under this rule no case shall be remanded for a second decision which can be disposed of finally by the first appellate Court. 36 I.C. 241=12 N.L.R. 126. Suit to enforce compromise—Deed of compromise not registered and consequently inadmissible—Fresh suit for specific performance barred by limitation—Remand to lower Court to permit plaintiff to amend plaint so as to include prayer for specific performance—Order as to costs. 27 A.L.J. 487=116 I.C. 871. Preliminary point is not necessarily a point of law

Remand of case by Appellate Court

has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case,

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upon which the whole case is disposed of nor is it necessarily a point of fact on which the case is disposed of. It is any point the decision of which avoids the necessity for the full hearing of the suit. 1935 P. 49=154 I.C. 859.

WHAT IS DISPOSAL ON A PRELIMINARY POINT—A "Preliminary point" within the meaning of the rule is any point the decision of which avoids the necessity for the full hearing of the suit (45 M 900 F.B. Foll.), 151 I.C. 947=1934 P. 93. The words "preliminary point" are not confined to such legal points only as will be applied as a bar in suit but comprehends all such points as may have prevented the Court from disposing of the case on the merits whether such points are pure questions of fact or law. The test for determining whether the decision of an issue was on a preliminary point is to see whether the decision of that issue prevented the decision of other issues. Decision as to question of jurisdiction held not to be on a preliminary point. 1933 R. 413, 57 C.L.J. 473. During the pendency of a suit instituted on the original side of High Court (Rangoon) claiming damages for a conspiracy between the defendants to ruin the plaintiffs' credit and reputation and to destroy their business the plaintiffs were adjudged insolvents. The trial judge held that the cause of action thereupon vested in the Official Assignee and the latter declining to proceed with the suit a decree was passed dismissing the suit. On appeal by plaintiffs, the Appellate Bench held that the claim for damages did not vest in the Official Assignee and that the plaintiffs were therefore entitled to continue the suit in their own names. The suit was accordingly remanded to the original Court for trial on the merits. *Held*, that the judgment of the Appellate Court was not a decree but an order passed under R. 23. *Held further* that the order though it decided an important and a vital issue in the case did not finally dispose of the rights of the parties; on the contrary, it left the suit alive and provided for its trial on the merits in the ordinary way. It was not, therefore, a final order under S. 109 (a) and was not appealable. Test of finality laid down. 60 I.A. 76=11 R. 58=1933 P.C. 58=64 M.L.J. 307 (P.C.), 39 A. 165=37 I.C. 383=15 A.L.J. 30. Where in a redemption suit, defendant pleaded that in foreclosure proceedings there was a sale in his favour, a disposal on this contention is a disposal on a preliminary point. 57 P.L.R. 1916=30 I.C. 817. Where certain evidence was considered irrelevant by trial Court, and the appellate Court considered the excluded evidence as relevant, held the reversal was on a preliminary point. Also as to instances of preliminary point. See 43 M.L.J. 345=45 M. 900 (F.B.). It is competent to an appellate Court to remand a case under R. 23, where the Court of first instance, having framed

issues and recorded all the evidence has decided the case with reference to its findings on one or two issues—leaving the other issues undecided. 1933 R. 413. In such a case the appellant is entitled to a refund of Court-fees. 151 I.C. 721 (2)=1934 M. 643. Where Court goes into evidence and records findings on all issues but dismisses the suit as not maintainable, the disposal is on a preliminary point. 4 P.L.J. 645=52 I.C. 125. A preliminary point must be decided as such and at the earliest stage of the suit. It is not proper that a preliminary point should be decided along with the points involved in the merits of the case. 1930 A. 863=128 I.C. 827.

WHAT IS NOT DISPOSAL ON A PRELIMINARY POINT—"The decision on a preliminary point" means a determination not affecting the merits of the case. A reversal of a judgment with a direction to admit evidence said to have been excluded is not a disposal on a preliminary point. 37 M.L.J. 536=53 I.C. 417=10 L.W. 359. Disposal on an important issue relative to the merits of the case is not a disposal on a preliminary point. 9 M.L.T. 373=9 I.C. 790. It cannot be said that a Court has disposed of a suit on a preliminary point if it has disposed of it as it stands before it without dealing with further issues which might have arisen if the suit had been framed otherwise or if an amendment of the pleadings had been allowed. 60 M.L.J. 713=132 I.C. 311=1931 M. 1. When appellate Court decides the main point and remands for disposal of the remaining issues the decision is not on a preliminary point. 60 I.C. 609=12 L.W. 667. An order of remand for re-hearing after amending the plaint is not an order under this rule. 73 I.C. 915=1924 L. 245. Dismissal for default is not a disposal on a preliminary point. 14 A.L.J. 347=38 A. 357. The rule does not apply to a case where the plaintiff's suit has been dismissed by the Court proceeding under O. 17, R. 3. 1935 R. 123. Where the appellate Court decides some issues and leaves the others to be determined by the trial Court, a remand order is not under this rule but under R. 25. 40 I.C. 58. See also 9 I.C. 224=15 C.W.N. 575. Appellate Court framing additional issue and remanding the case reversing the decree instead of calling for a finding retaining the case on its file. Order of remand is not appealable either under O. 43, R. 1 (a) or under S. 100 as it is not a decree within S. 2. See also 103 I.C. 119=1927 L. 386, 55 C. 219=103 I.C. 864=1927 C. 850.

WHERE REMAND SHOULD NOT BE ORDERED—Except under R. 23, no case should be remanded for second decision by the trial Court which can be finally disposed of by the first appellate Court. It is only where owing to a failure to implead a necessary party or the like a trial is radically bad, so that the correction of its omissions and defects in the appellate Court is not reasonably practicable that remand for retrial is permissible. (12

and may further direct what issue or issues shall be tried in the case so remanded

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N.L.R. 126, Folio 31 N.L.R. (Supp.) 72=160 I.C. 202=1936 N. 8

SUFFICIENT EVIDENCE ON RECORD.—The appellate Court should dispose of the case if there is sufficient evidence and should not put the parties to unnecessary expense. 37 B. 289=14 Bom L.R. 1154; 41 I.C. 735 It is unusual to remand a case after argument in appeal, which ought *prima facie* to be decided upon materials on record 34 M.L.J. 545=22 C.W.N. 697=45 C. 748=45 I.A. 94 (P.C.). Remand for findings on fresh additional issues cannot be made when they were covered by the issues determined. 43 I.C. 815. A case can be decided on the evidence on record after excluding irrelevant and unsatisfactory portions, without a remand 50 I.C. 301 An order of remand cannot be made under R. 23, where the decision of the trial Court is not based in any sense on a preliminary point. 1927 B. 111=100 I.C. 578=29 Bom.L.R. 56, 96 I.C. 44. No remand can be made when materials on record are sufficient to decide the case. 180 P.L.R. 1912=16 I.C. 847. *See also* 45 M. 449=42 M.L.J. 372 Nor where appellate Court comes to a different conclusion on some portion. 20 A.L.J. 258=66 I.C. 866=1922 A. 192.

COMPLETE EVIDENCE ON RECORD.—When lower Court has decided all issues it is not proper to remand for trial on merits. 35 I.C. 239, 27 C.W.N. 1025=1924 C. 148; 50 I.C. 984 When appellate Court comes to a different conclusion on merits and on evidence on record, no remand could be ordered on the ground that the evidence was not properly directed. 70 I.C. 655=1923 M. 113. Ordinarily if an appellate Court disagrees with the lower Court and is not satisfied with that Court's opinion its duty is to come to a proper conclusion for itself. In such cases especially after the recent amendment of the Code it is not proper for the appellate Court to direct a *de novo* trial. The practice of delivering a lecture on points of law to the trial Court and sending a case for *de novo* trial to that Court is especially bad when there is no reason to think that either party had not an opportunity of producing all the evidence that it had. 33 C.W. N. 121=1930 C. 235. Where the Judge of an appellate Court allows an appeal on a preliminary point of law which necessitates the remand of the suit for further trial or retrial of the suit he should refrain from making any remarks in his judgment concerning the merits of the claim, as by so doing, he must necessarily prejudice the further trial or new trial on remand 163 I. C. 397 (2)=1936 R. 251. Because there was a finding on evidence recorded, but without an issue raised, a remand cannot be made. 46 I.C. 659=137 P.W.R. 1918. No remand in second appeal for rehearing upon an issue raised and determined by Courts below. 67 I.C. 494=1922 P. 575. *See also* 56 C. 15=49 C.L.J. 1=114 I.C. 409=1929 C. 546; 119 I.C. 2, 31 Bom.L.R. 208, 26 N.L.R. 44; 116 I.C.

586=1929 Sind 159. When full trial has taken place though the case has been disposed of on a preliminary point a remand ought not to be ordered. 66 I.C. 922=1923 C. 323; 29 C.W.N. 614=52 C. 783.

INSUFFICIENT EVIDENCE.—A case should not be remanded for fresh evidence 2 Pat. L.J. 61=38 I.C. 797. A case should not be remanded for local investigation, when it had not been asked for in the first Court 43 I.C. 815. Case should not be remanded for additional evidence on the ground that evidence adduced by defendant was not satisfactory and sufficient 39 I.C. 886=25 C.L.J. 473, 46 I.C. 659=137 P.W.R. 1918 Where there is no reason to think that the parties did not get an opportunity of producing all the evidence that they desired to produce before the trial Court. 167 I.C. 922=1937 O. W.N. 377. Case cannot be remanded because necessary evidence was not let in by oversight 53 I.C. 562. *But see also* 1930 P. 7; 1930 R. 188. A remand in order to enable plaintiff-appellant to ascertain whether or not a demand was made within three years of the institution of the suit which would save limitation, was refused. 1923 L. 645. Remand of the case could not be ordered because the appellate Court considered the appointment of an experienced Commissioner essential to value the property. 46 I.C. 750. An appeal against an *ex parte* order without seeking to set it aside should not be remanded but be decided on the merits by the appellate Court. 24 P.L.R. 1917=39 I.C. 749. *See contra* 26 O.C. 10=73 I.C. 591. Following 30 M. 64 (F.B.). *See also* 56 I.C. 255=(1919) 3 U.B.R. 198; 1929 C. 636=121 I.C. 409, 1930 A. 863=128 I.C. 827.

CASE OF EXCLUSION OF EVIDENCE.—When evidence which ought to have been taken was refused to be recorded the suit cannot be remanded for trial *ab initio* but additional evidence can be directed to be recorded. 45 I.C. 832=5 O.L.J. 139. *See also* 1930 A. 220. The case need not be remanded because the lower Court based its decision on inadmissible evidence, when there is sufficient evidence on record to support the decision 71 I.C. 300=1924 C. 370, but *see* 41 I.C. 71. Remand should not be made when necessities of the case are specifically provided for by the Code. 1925 C. 274. On this point *see also* 120 I.C. 460=1929 C. 492

WHAT IT SHOULD BE UNDER RULE 25.—When all evidence was taken but certain issues were not decided, the proper order is to call for findings under R. 25 38 A. 520=14 A.L.J. 754; 7 Lah L.J. 351=1925 L. 480; 1925 M. 171, 100 I.C. 578=1927 B. 111, 1927 L. 618=103 I.C. 537. Where case has been decided by lower court wholly on merits and not on any preliminary point, the appellate court may remand under R. 25 and not under this rule. 151 I.C. 490=36 P.L.R. 269=1934 L. 576; 60 C. 733=37 C.W.N. 504=1933 C. 632 In appeal from a decree an objection was taken by the appellants that some of the defendants had died during the pendency of

and shall send a copy of its judgment and order to the Court from whose

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the suit in the trial Court. The factum of the death was not admitted and the District Judge set aside the judgment of the trial Court and passed an order under R. 23. Held that the District Judge should have remanded an issue under R. 25, on the question of the factum of the death and should not have acted under R. 23 which was not applicable, 146 I.C. 517=1933 L. 224. In a suit for possession and damages where appellate Court differed from trial Court, the whole suit cannot be remanded but only so far as the issue on damages was concerned. 45 A. 565=21 A. L.J. 538. Where lower appellate Court reversed the decree of Court below, modified one of the issues, and remanded the case for a *de novo* trial on the modified issue held the procedure was wrong. 35 C.L.J. 345=70 I.C. 547. Where the appellate Court thinks that the investigation is wrong, and that further investigation and evidence were necessary, such may be ordered retaining the appeal on file and remand ought not to be ordered. 24 C.W.N. 708=31 C.L.J. 300. In case of defective pleadings and a finding on evidence which was sufficient, and which the appellant had not the opportunity of meeting, the proper course would be to remit an issue on the point. 15 I.C. 3. When it comes to the notice of appellate Court from the evidence on record that the consideration for the suit transaction is of an illegal and immoral character, but no issue on that point has been framed by trial Court nor has defendant raised any objection to that effect, the appellate Court should remand the case for a finding on that point. 145 I.C. 599=1933 M. 187. When an important issue was not raised the case should be remanded only for a finding on that issue and the decree could not be set aside entirely and the whole case remanded for re-trial. 38 I.C. 641. 23 A.L.J. 880=1926 A. 65; 1925 M. 169; 145 I.C. 299 (1)=1933 L. 659 (1).

NEW PLEA—NO REMAND—Only in exceptional cases and on good cause shown should a case be remanded for re-hearing on a new plea not raised in pleadings nor even suggested. 43 C. 1104=43 I.A. 172=31 M.L.J. 745 (P.C.). Where a remand would involve taking of fresh evidence on a point not raised before, it would not be granted. 11 I.C. 84, 2 P.L.J. 8=38 I.C. 509. When a claim for a right of way was originally based on immemorial usage, he cannot obtain a remand for re-trial on issues of implied grant or easement of necessity. 55 I.C. 435. A remand ought not to be ordered permitting plaintiff to supplement his case, when at the time he came to Court he was unequipped. 71 I.C. 28=1914 C. 396. A party is not entitled to remand on a new case set up in appeal when he failed to establish the case he set up on trial. 54 I.C. 645.

WHEN REMAND COULD BE ORDERED—Powers of remand are much wider in the new Code than in the old. Remand can be ordered

though the case had not been disposed of on a preliminary point. Want of proper trial, and disallowance of important questions not giving opportunity to parties to adduce proper evidence are sufficient reasons for remand. 12 I.C. 684=15 C.L.J. 258; 36 M. 492=24 M.L.J. 512. An appellate Court adding a new party can remand for re-trial. 31 I.C. 263=2 L.W. 1034. When the plaint is amended in appeal under O. 6, Rr. 17 and 18 and a defendant desires to traverse the facts stated in the amendment, the case can be remanded. 32 I.C. 906; 43 C. 938=32 I.C. 791=20 C.W.N. 547; 1927 M. 859=103 I.C. 670, 48 M. 713; 1927 L. 196=100 I.C. 49. Where inadmissible evidence was admitted, the case should not be remanded, for a fresh adjudication excluding that evidence. 55 I.C. 922=1 P.L.T. 224. An order of remand can be made when the ground on which the appellate Court declares a document inadmissible, has arisen subsequent to the disposal of the suit by the lower Court. 10 I.C. 675=9 M.L.T. 317. Where an appeal was decided on the basis of an inadmissible document, the appeal can be remanded in second appeal. 57 I.C. 561=5 P.L.J. 410. A case could be remanded when decision was based on a report of a commissioner who was superseded and whose report therefore could not be admitted in evidence. 39 I.C. 951.

CRIMINAL CASES.—There are no provisions in the Code of Criminal Procedure analogous to Rr. 23 and 25, of this Code, and an appellate Court which allows an appeal against an order by a magistrate under S. 476, Cr. P. Code, has no power to remand the case. 10 Luck. 335=1935 O. 59.

FRESH EVIDENCE.—Where the decision is on pleadings and not on evidence, there ought to be a remand for taking evidence. 67 I.C. 710=1923 P. 174. Case can be remanded when trial Court refused to grant time for production of certified copies of material documents and decided with materials on record only. 43 I.C. 57. Remand could be ordered where appellate Court is satisfied that but for some grave error on the part of the pleader, necessary evidence could have been adduced in lower Court. 39 B. 352=17 Bom. L.R. 187. A case is to be remanded where tenancy rights were pleaded as bar to a suit for possession and was not adjudicated upon. 42 I.C. 550. Where an important issue was not raised by the trial Court, the case can be remanded with the issue raised. 51 I.C. 712=64 P.R. 1919, 223 P.L.R. 1911=12 I.C. 53. When a case was decided on a piece of evidence not placed on record, it could be remanded for taking of such evidence. 36 M. 492=24 M.L.J. 512. Where the trial Court dismissed the suit on the legal issue and the appellate Court decides that the decision of the trial Court is wrong on the legal issue, it should remand the case for trial on the remaining issues and it should not decide the issues of fact itself when the appellant had not led

decree the appeal is preferred, with directions to re-admit the suit under its

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evidence tincton. 155 I.C. 997=1935 R. 34. Where first appellate Court decides only on technical grounds, second appellate Court can remand it for disposal on merits. 32 I. C. 387=2 O.L.J. 562 Where a book was used by lower Court to establish certain facts which a party had no opportunity of meeting and which he desired to rebut, the admission of the book in appellate Court might involve a remand. 66 I.C. 287=34 C. L.J. 205 Appellate Court can remand for determination of question of title, when the tenant had pleaded title of a third person, in a rent suit 11 I.C. 183=15 C.L.J. 6

ERROR OF JUDGMENT.—In an appeal from an order of remand, findings of fact cannot be examined by second appellate Court. But it could remand the case to lower appellate Court for rehearing when there has been a misappreciation of the true controversy between the parties. 73 I.C. 756=1923 L. 206; 87 I.C. 950=1925 O. 692. Appellant is entitled to have the opinion of appellate Court on an issue of fact, and if such Court fails to determine the point. High Court will remand the case for a re-decision of the appeal. 55 I.C. 233. A case can be remanded where lower Court overlooked a provision of law 35 A. 533=35 I.C. 41=14 A.L.J. 734. Where the effect of an admission by a pleader was not realised, the appeal might be remanded to lower appellate Court for a fresh hearing on the footing that the admission was in fact made. 44 I.C. 18. If a case is decided on a wrong view of burden of proof, it should be remanded as a case of wrong disposal on a preliminary point. 57 I.C. 525=22 Bom.L.R. 771. Cf. 40 M. 654=30 M.L.J. 514 But *see contra* 34 A. 612=10 A.L.J. 190; 58 I.C. 982=1 L. 429.

EFFECT OF ORDER.—The policy of legislature is in favour of finality of orders of remand. A remand order made on second appeal is, unless a review of it be obtained, a conclusive determination of the points of law involved in it and cannot be questioned in a subsequent second appeal. 72 I.C. 588=1923 C. 385 Also 4 P.L.J. 645=52 I.C. 125. Where High Court in second appeal differs from lower Court on an issue of law and remands the case to Court below, the order is binding upon that Court and cannot be questioned in an appeal from the final decree after remand. 4 P.L.T. 35=1923 P. 226. Jurisdiction to try a remanded case depends on the order of appellate Court. 44 M.L.J. 238=1923 M. 351. A remand order to find whether a person has title includes enquiry as to whether he has lost it or is barred from relying upon it. 31 I.C. 987=20 C.W.N. 149. In the absence of any limitation put by High Court, the whole case on remand is open for decision of lower appellate Court and it is bound to hear the appeal upon the judgment of the Court of first instance. 32 I.C. 240=20 C.W.N. 584. When in an appeal by some defendants who did not

join in a reference to arbitration, the case was remanded on the ground that the award did not bind them, the whole case is reopened, even in respect of those who did not appeal 62 I.C. 569=37 M.L.J. 100. Where a case is referred to District Judge on objections being raised to the award of the land acquisition officer, and the case on appeal to High Court by some of objectors is again remanded to District Court, an objector who has not taken part in the proceedings before District Judge and those who have not appealed from order of District Judge, are not entitled to intervene as objectors on remand 1933 L. 648 A Court can come to a different and contrary conclusion after remand 56 I.C. 1001, 13 I.C. 813=14 O.C. 321. When a case is remanded to the sub-Court, the sub Judge can form his own conclusions irrespective of any finding arrived at by his predecessor in respect of matters which were not touched by the High Court 7 Luck. 454=137 I.C. 102=1932 O. 123. The lower appellate Court after remand cannot consider arguments abandoned or not raised in second appeal or come to fresh findings on points decided by the order of remand. 61 I.C. 575; 35 I.C. 571 As to validity of proceedings taken under a remand order, when the remand order is held to be wrong, *see* 44 A. 211=20 A.L.J. 44. Where an order of remand is passed under R. 23, if a party protests against the order of remand and refuses to take part in the proceeding subsequent to the order of remand, he should not be deprived of the right to appeal from the order of remand within the time allowed by law even if the case has in the meantime been disposed of by the Court of first instance. And if the order remand if found to be bad and is set aside, the decree of the lower Court will automatically go inasmuch as that Judge has derived his jurisdiction to hear the case from the order of remand But if the party not only does not object to exercise of jurisdiction by the lower Court, but also takes part in the proceeding hoping to win the case ultimately, he should not be allowed to repudiate the whole proceeding as being null and void when he loses the case 1933 R. 413. Another Judge or Bench differently constituted may consider the propriety of the issues framed by its predecessor and remitted to the lower Court, and if of different opinion may ignore the findings. 43 A. 377=19 A.L.J. 139.

FINALITY OF ORDER.—An order of remand is interlocutory, it can be final if it decides some cardinal point in the suit. But an order of remand which merely decides that the suit is maintainable in the form in which it is brought is not final 60 I.C. 522=2 L. 106. An adjudication by a remanding Judge would bind him and his successor at the final hearing, when it amounts to a preliminary decree, until it is duly set aside or amended. 32 I.C. 866=20 C.W.N. 43; 53 I.C. 677=1919 M.W.N. 662; 1 P. 246=65 I.C. 175. *See also*

original number in the register of civil suits, and proceed to determine the suit;

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1932 A.L.J. 615=138 I.C. 406=1932 A. 603 The mere fact that the appellate Judge in the first instance remanded the case for taking additional evidence will not deprive him of his jurisdiction to dismiss the appeal at a later stage if it was found to be competent 34 C.W.N. 839 Issues decided by order of remand cannot be reopened at any subsequent stage of the litigation 25 O.C. 245=70 I.C. 983. Where a District Judge remands a suit to the trial Court and the suit is ultimately dismissed by the trial Judge and an appeal is preferred again to the successor of the District Judge who had remanded the case, it is competent for him to go behind the finding of his predecessor. This, however, is a matter entirely at his discretion and cannot be raised on second appeal. 38 P.L.R. 567=1936 L. 708

REMAND TO ANOTHER COURT.—A case can be remanded to another Court; only when the appellate Court has power to transfer a case from one Court to another 66 I.C. 113=1922 L. 239; 158 P.W.R. 1913=20 I.C. 788 A case may be remanded to another Court for hearing, when the appellate Court illegally received document very late without assigning any reasons 35 I.C. 698=24 C.L.J. 457 Where the chief Court remanded a case to lower appellate Court for further enquiry, it does not mean that the lower appellate Court cannot direct the trial Court for recording any additional evidence if necessary. 44 I.C. 907=147 P.L.R. 1917. See also 1935 L. 161.

COSTS.—Respondent must be paid the costs of appeal when the appeal and remand were consequent on the appellant not setting forth his case properly. 18 M.L.T. 247=30 I.C. 785

NOTICE.—No notice of remand is given in C.P. 1925 N. 31.

WHEN APPEAL LIES.—An appeal lies against an order under this rule 44 A 176=19 A.L.J. 971; 20 A.L.J. 321=44 A. 492; 24 C.W.N. 708=56 I.C. 516=31 C.L.J. 360, 42 C.L.J. 22=30 C.W.N. 41; 51 B. 43=100 I.C. 1004 (2)=1927 B. 129=29 Bom L.R. 97. Where appellate Court remands the case to Court of first instance giving some directions in its judgment as to the way in which the assessment of the rent in kind should be made order is really a decree because it is not an order of pure remand but contained a determination of the principle on which the assessment was to be made. 143 I.C. 828=37 C.W.N. 1084=1933 C. 416. The right of appeal is determined by what Court purports to do and not by what Court should have done—Where a Court purports to pass a remand order under R. 23, though really the remand is under S. 151, the order of remand is appealable. 107 I.C. 284 (1); 38 P.L.R. 1154, 31 N.L.R. (Supp.) 72=160 I.C. 202=1936 N. 8. But see 1933 S. 279=146 I.C. 777 (F.B.) (*contra*). Construction of remand order, (*ibid*), 1933 O. 569 See also 1936 N. 8 (noted *infra*) Order of remand by appellate Court without stating provision of law—The

remand should be deemed to have been under R. 23 and not under S. 151, 106 I.C. 442=9 L.L.J. 543. But when it is perfectly clear that R. 23, has no application it should not be assumed that the Court thought it was acting under R. 23, unless it is quite clear that it did in fact so act. 31 N.L.R. (Supp.) 72=160 I.C. 202=1936 N. 8. An appeal can be filed and heard even if remand order is carried out by first Court 15 I.C. 191=15 O.C. 43. When a person has not been adversely affected by an order of remand, it is doubtful if he can appeal from that order 132 I.C. 78=1931 O. 242 An appeal lies against an order ordering re-trial on merits because it was held that the suit was not barred by reason of *res judicata* 21 L.W. 318=48 M.L.J. 100 An appeal lies on all orders of remand even though the suit has not been disposed of on a preliminary point 1922 C. 279 See *contra*. 4 Bur L.J. 159=3 R. 490=1925 R. 320. A final decision which effectually disposes of the appeal before High Court amounts to a judgment whether it amounts to a decree or not If it does not amount to a decree, it would amount to an order The word "judgment" in Cl 10 (Letters Patent, Ali.) should not be read in a restricted sense and an appeal lies against an order of remand passed by a single Judge under O. 41, R. 23 55 A. 326=1933 A.L.J. 127=1933 A. 262 (F.B.).

WHEN NO APPEAL LIES.—When the order of remand is not under this rule no appeal lies. 1927 M. 335=52 M.L.J. 90; 112 I.C. 710; 48 M. 713=47 M.L.J. 552, 3 P.L.J. 253=43 I.C. 959; 37 M.L.J. 536=53 I.C. 417, 31 M. L.T. 182=69 I.C. 826, 73 I.C. 915=1924 L. 245 Cf 4 L.L.J. 359=3 L. 218; 138 I.C. 62=1932 L. 538, 1933 L. 155, 97 I.C. 1=1926 P. 514; 96 I.C. 440 (1)=1926 P. 516, 31 C.W.N. 878=1927 C. 642=104 I.C. 422; 1928 M.W.N. 164, 26 I.C. 519=85 P.W.R. 1915, 60 I.C. 609=12 L.W. 667, 15 I.C. 367=22 M.L.J. 409 But see *contra* 119 I.C. 330=30 Punj L.R. 645 A distinction has to be drawn between an order of remand under R. 23, and an order under R. 25, remitting issues for decision An order under R. 25 does not amount to an order remanding a case, within the meaning of O. 43, R. 1 (w), and is not therefore appealable 1935 O.W.N. 352=1935 O. 333. An order of an appellate Court setting aside an order rejecting the plaint is not an order under this rule and is not appealable. 131 I.C. 750=1931 L. 497; 133 P.L.R. 1915=26 I.C. 519 There can be no appeal from an order of remand where the question involved is one of custom 5 L.L.J. 392=73 I.C. 650. No appeal lies against an order of remand passed by the first appellate Court in a suit of a nature cognizable by a Court of Small Causes 36 I.C. 396. Under the Agra Tenancy Act an order of remand under this rule is not appealable. 14 I.C. 175, 35 I.C. 105.

REVISION.—An order of remand not appealable is not open to revision either. 13 I.C. 855=140 P.L.R. 1912 A remand order pass-

and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

Loc Ams—[Madras] O. 41, R. 23. *Substitute* the following for R. 23—

"23. Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interests of justice to remand the case, the appellate Court may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand

[**Oudh.**] For the words "Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court" *substitute* the following words—

"Where an appellate Court has reversed a decree and all questions arising in the case have not been decided it,"

24. [S. 565.] Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

Where evidence on record sufficient, Appellate Court may determine case finally.

25. [S. 566.] Where the Court from whose decree the appeal is preferred

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ed by an appellate Court which it was not competent to pass can be set aside in revision. 1925 M. 171=79 I.C. 157. See also 52 M.L.J. 90, 138 I.C. 62=1932 L. 538, 128 I.C. 827=1930 A. 863. Where a suit is dismissed by the trial Court on a plea that the matter was *res judicata* in view of a previous decision and on appeal the appellate Judge remands the case for decision on merits under R. 23, such order does not decide case and no revision lies from the remand order. 1933 Pesh. 48 Where an order of remand purporting to be made under the inherent powers, contravenes an express provision in R. 23, the High Court will interfere in revision. 37 Bom. L.R. 203=156 I.C. 381=1935 B. 216.

O. 41, Rr. 23 and 24.—Where the trial Court dismissed the suit on the legal issue and the appellate Court decides that the decision of the trial Court is wrong on the legal issue, it should remand the case for trial on the remaining issues and it should not decide the issues of fact itself when the appellant had not let evidence thereon. 1935 R. 34.

O. 41, Rr. 23-25.—Remand with issue reframed with directions to take additional evidence—Legality. 1935 L. 161

O. 41, Rr. 23 and 26.—R. 23, O. 41, contemplates a position in which the appellate Court does not retain seisin of the case. The remand under it is for a 'determination of the suit', and after remand the appellate Court has nothing more to do with the matter unless it comes back to it by way of a fresh appeal. But when the appellate Court retains seisin of the case when remanding for a finding on issue. R. 26 or 27 is more nearly applicable. I.L.R. 1936 N. 188=1936 N. 140

O. 41, R. 24.—When it is not a question of "re-settling" issues but framing new issues requiring additional evidence, Court should act under the next rule and not under the present one. 40 I.C. 411=25 C.L.J. 527. Absence of specific issue does not debar decision and disposal on a point raised in pleadings, provided it does not prejudice the other side. 6 Bur.L.T. 134=20 I.C. 674. When an alternative case is pleaded in appellate Court, it will not act under this rule, unless the case arises on the facts stated in plaint and defendant is not taken by surprise. 36 I.C. 890=20 C.W.N. 773. Where plaint was returned for presentation to proper Court and an appeal was filed against the order returning, it was held that appellate Court had no power to decide the case on the merits. 102 I.C. 467=1927 O. 218 Appellate Court can on evidence on record decide any issue left undetermined by lower Court. 10 I.C. 225. Where trial Court records the whole evidence, but decides the case on facts without considering some evidence as being inadmissible, but appellate Court treats such evidence as admissible and, without remanding the case, affirms the decree on facts after considering the whole evidence under R. 24, the procedure is quite proper. 1933 R. 35=142 I.C. 829 (2). High Court in second appeal has jurisdiction to record its finding on a question of fact left undetermined though it arises from admitted facts. 36 B. 183=13 Bom.L.R. 1183. When judgment is reversed in second appeal on a point of law, High Court is competent to decide the case on the merits. 108 P.W.R. 1914=25 I.C. 144.

O. 41, R. 25: SCOPE.—Where a case has been decided by lower Court wholly on merits and not on any preliminary point, the case must be remanded by appellate Court under

Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.

has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required :

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R. 25 and not under R. 23. 151 I.C. 490=36 P.L.R. 269=1934 L. 576. Rule does not contemplate an order for trial of issues already tried and decided upon 48 I.C. 959; 22 I.C. 128. Unless issue is material remand should not be ordered 1925 O. 97. Where first appellate Court fails to take into consideration an important piece of evidence in deciding the case, the case should be remanded for fresh hearing. 146 I.C. 375=14 Pat.L.T. 683=1933 P. 472 Under O. 41, when Court is of opinion that certain findings of fact are necessary for the proper disposal of an appeal and that evidence should be led on those points the proper procedure is under R. 25 by which the appellate Court may frame issues and refer them for trial to the lower Court. Findings should then be returned to the appellate Court which must re-hear the appeal so far as is necessary and so dispose of it. It is not open to appellate Court to act under R. 23 in such a case. 53 B. 335=31 Bom.L.R. 208=118 I.C. 790=1929 B. 175 On this Rule, *see also* 145 I.C. 599=1933 M. 187; 1935 O. 59=11 O.W.N. 1469 In cases in which it is possible to deal with the matter effectively under this rule, the decree of lower Court should not be set aside and a retrial ordered. 1933 P. 706 For construction of a remand order, *see* 1933 Oudh 560 Where an issue is sent down by the appellate Court, it is the duty of the trial Court to return a finding on it, whether it considers the issue material or not. 1936 A.M.L.J. 128 Applicability—Order of magistrate under S. 476, Cr.P. Code—Appeal—Power of remand. 11 O.W.N. 1469=1935 Oudh 59.

TRANSFER OF APPEAL.—An appeal cannot be transferred by District Judge from his file to his subordinate, after a remand order, but before receipt of findings. 15 I.C. 862=10 A.L.J. 89.

EFFECT OF ORDER OF REMAND.—An order under this rule is not a final order. Court before which the case ultimately comes up can disregard the remand order and the findings under it. The responsibility for the final decree rests mainly with the Court which passes it. 74 I.C. 1014=1923 A. 384. Cf. 37 C.L.J. 122=74 I.C. 392=1923 C. 521. *See also* 64 M.L.J. 307=1933 P.C. 58=11 R. 58=60 I.A. 76. Appellate Court is not bound to reconsider any opinion definitely expressed before remand, neither is it bound by the opinion expressed before or in remand order. 15 I.C. 39=17 C.W.N. 462; 46 I.C. 922, 25 O. C. 41=68 I.C. 242. Though in some cases it is open to the same Judge or his successor to rectify the mistakes made by the former either on review or under S. 152 of the Code,

where the previous District Judge had heard the parties at length and given well-considered and final decisions on the points involved and it was in consequence thereof a remand was considered necessary, the findings and conclusions arrived at the former occasion are binding on the succeeding District Judge to whom the case was remanded by High Court and on High Court in second appeal. 144 I.C. 973=34 P.L.R. 215=1933 L. 423 When only one of the defendants appealed and appellate Court remanded the case for fresh disposal as regards the appellant, the decree against the non-appealing defendants is not affected. 22 P.L.R. 1918=44 I.C. 135=4 P.W.R. 1918.

POWER AND DUTY OF APPELLATE COURT.—Even after the return of the findings, the entire appeal is open for consideration at the final hearing. 24 C.W.N. 145=30 C.L.J. 428; 21 I.C. 760=18 C.L.J. 181 Findings on issues sent to trial Court, ought to be scrutinized by appellate Court, before deciding the appeal, even though objections have not been preferred on those findings by the party affected. 71 I.C. 444=1923 A. 417 (1), 37 C.L.J. 122=74 I.C. 392; 21 I.C. 79=18 C.L.J. 354; 28 I.C. 597 Appellate Court finding certain additional issue necessary—Proper course is to frame the issue and refer it for trial to lower Court. 95 I.C. 123 (2)=1926 C. 954; 44 C.L.J. 101=95 I.C. 203=1926 C. 976, 95 I.C. 170 (1)=1926 C. 912

POWER OF SECOND APPELLATE COURT.—High Court in second appeal cannot interfere with findings of fact by lower appellate Court. 40 I.C. 128; 85 I.C. 92 And it is immaterial whether the first Court takes the evidence or the lower appellate Court. I.L.R. 1936 N. 188=1936 N. 140. Finding of lower appellate Court on a question of fact not put in issue can be contested even in second appeal. 5 Lah.L.J. 49=85 I.C. 52 High Court can frame necessary issues and remit them for trial, when lower appellate Court has failed to do so. 38 M.L.J. 476=43 M. 67=47 I.A. 76 (P.C.). High Court can remand even on a point not taken in grounds of appeal. 5 Lah.L.J. 49=85 I.C. 92 High Court has power in second appeal to frame issues and refer them for trial to the first Court. 1934 N. 207 (1)

REMAND.—New issue when can be raised by High Court 1926 B. 577=95 I.C. 297, 98 I.C. 536=1926 M.W.N. 921; 51 M.L.J. 641=1927 M. 85, 28 Bom.L.R. 1090=1926 B. 577.

APPLICATION OF THE RULE—ADDITIONAL EVIDENCE.—When a case is remanded it is discretionary with appellate Court not to direct lower Court to take further evidence. 15 I.C. 670. To assume that the order of

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

Findings and evidence to be put on record. Objections to finding.

26. [S. 567.] (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

Determination of appeal.

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remand does not contemplate taking additional evidence is not wrong. When there are sufficient materials on record, it would be wrong to take more evidence. 20 I.C. 35. Appellate Court cannot define the particular kind of evidence required for the determination of a remand issue. 22 I.C. 128. Opportunity must, in a proper case, be given to both parties for adducing evidence on a remanded issue. 19 A.L.J. 79=62 I.C. 447. A second appeal cannot be remanded for hearing in order that record of right published after the decision of the first Court may be taken into consideration. 43 I.C. 750=2 P.L.J. 564. An appellate Court should not ordinarily frame an issue not raised in the pleadings or even suggested in trial Court. It ought to be done only in exceptional cases after good cause shown and on payment of costs. 66 I.C. 640=34 C.L.J. 319; 28 Bom.L.R. 1090. Fresh opportunity cannot be given to prove one's case by an order of remand. 50 I.C. 933=29 Bom.L.R. 147=100 I.C. 993 (2)=1927 B. 155. Where a definite case was set up in pleadings but no issue was raised or evidence taken, appellate Court should frame the issue and decide it before disposal of appeal, when it is material. 49 I.C. 475. Case can be remanded for findings on issues framed on points though not raised in the pleadings, yet had governed the case from the first. 10 I.C. 922=4 Bur. L. T. 118. New issues can be raised and the case remanded for trial, when the parties failed to grasp the essential questions arising in the case and to adduce proper evidence. 66 I.C. 833. Appellate Court cannot make a new case for a party and remand the suit for trial of a newly framed issue on such point. 146 I.C. 981=14 L.R. 670 (Rev.)=1933 A. 829.

DELEGATION OF POWER.—When certain issues were remanded to lower appellate Court for trial, they cannot be sent to trial Court for taking evidence. Delegation of duties is wrong. 71 I.C. 896=1924 L. 354, 102 I.C. 273 (1); 19 I.C. 970=105 P.R. 1913. But see 32 I.C. 634=9 S.L.R. 148. (It may be sent to trial Court for recording evidence but the finding must be by first appellate Court. Where the District Judge sent the case with consent of parties to the trial Judge for record of evidence, it is not open to the respondent to contend that the report of the District Judge based on the evidence

so recorded is invalid on the ground that the order of remand did not permit him to send the case to the trial Judge to record evidence. 39 P.L.R. 14.

APPEAL.—No appeal against an order under this rule. 76 I.C. 816=1924 R. 131. See also 34 C.L.J. 319; 35 C.L.J. 345, 37 C.W.N. 190, 64 M.L.J. 307=1933 P.C. 58=60 I.A. 76=11 R. 58, 4 A.W.R. 1120=1935 A. 140; 145 I.C. 183=37 C.W.N. 190=1933 C. 496. Order calling for a finding, if appealable under Cl. 13 of Letters Patent. 25 L.W. 95. An order remanding a case under R. 25 to Court of first instance for determination of certain issues is not appealable. The alteration made by the Oudh Chief Court and High Court at Allahabad in the language of Cl. (4) of R. 1, O. 43, was intended to and does cover by its language such orders of remand also as are not specifically made under R. 23, but may fall to be made by a Court in the exercise of its inherent jurisdiction *ex debito justitiæ* or under the provisions of S. 151. The alteration in question does not cover a remand under R. 25. 10 O.W.N. 664=1933 O. 350. High Court in an interlocutory judgment having set aside the conclusions but not the decrees of lower Court sent down an issue for a finding. On receipt of the finding it passed a decree. Held, that the order sending down the issue for finding was one under R. 25, that it was not a final order and that an application for leave to appeal to the P.C. against the said order could be made within 90 days from the final decree. 17 I.C. 258=35 Bom.L.R. 415=1933 B. 251.

REVISION.—Powers of revision should be exercised only in exceptional cases on orders under this rule. 67 I.C. 269=2 Lah. L.J. 662.

O. 41, R. 26.—Court can go behind findings even though no objections are filed. 28 I.C. 597, 40 I.C. 405. Omission to fix a time for finding of objections is a mere irregularity and may be ignored if no party is affected. 26 I.C. 736=1 O.L.J. 681. Where no objections to a finding are filed, Court may refuse to hear them at the time of hearing. 67 I.C. 846=3 Lah.L.J. 230. A memorandum of objections under R. 25 does not require any Court-fee. 105 I.C. 108=9 P.L.T. 19. See also 160 I.C. 38 (1)=1936 O.W.N. 113.

Production of additional evidence in Appellate Court.

27. [S. 568] (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if—

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O. 41, R. 27: ADMISSION OF EVIDENCE—DISCRETIONARY.—O. 41, R. 27, is intended to obtain additional evidence and cannot be used to test the evidence of witness. 155 I.C. 511=1935 Rang 39 The provisions of S 107 as elucidated by R. 27 are clearly not intended to allow a litigant who has been unsuccessful in lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. Under Cl. (1) (b) of R. 27, additional evidence can be admitted only where the appellate Court *requires it, i.e.* finds it needful, to enable the Court to pronounce judgment, or for any other substantial cause. In either case it must be the Court that requires the additional evidence. The legitimate occasion for exercise of this discretion by appellate Court is not whenever before the appeal is heard a party applies to adduce fresh evidence, but on examining the evidence as it stands, some inherent lacuna or defect becomes apparent. The defect may be pointed out by a party or a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands. 58 I.A. 254=10 P. 654=1931 P.C. 143=61 M.L.J. 489 (P.C.). See also 1935 R. 21, 13 I.C. 131=9 A.L.J. 59, 1930 L. 750; 49 I.C. 868, 120 I.C. 746=1930 M. 343; 64 M.L.J. 449; 42 C. 675, 132 I.C. 259=1931 O. 298; 89 I.C. 721, 89 I.C. 997, 85 I.C. 385=1925 M. 181=48 M.L.J. 32; 24 S.L.R. 15=1930 S. 105 (F.B.), 1935 R. 21; 1933 M. 407=142 I.C. 646=37 L.W. 471=64 M.L.J. 449, 38 C.W.N. 763=1934 C. 707, 147 I.C. 339=1934 A. 175, 150 I.C. 788=1934 P. 60, 61 C. 412=152 I.C. 130=1934 C. 627, 38 P.L.R. 511=162 I.C. 152=1936 Lah. 933, 38 P.L.R. 748=165 I.C. 626=1936 Lah. 37. This power should be very sparingly exercised and one requirement at least of any new evidence to be adduced is that it should have a direct and important bearing on a main issue in the case. 10 P. 654=58 I.A. 254=61 M.L.J. 489 (P.C.); 18 R.D. 665, 16 Pat.L.T. 49. See also 132 I.C. 259=1931 O. 298; 50 C. 276=36 C.L.J. 345, 102 I.C. 27; 120 I.C. 746=1930 M. 343, 6 O.W.N. 1060=13 R.D. 834; 119 I.C. 561=1929 A. 375, 138 I.C. 513=1932 O. 227; 1932 M. 709, 1933 L. 1024. Still more so in second appeal. 18 R.D. 665=16 L.R. 135 (Rev.). Admission of evidence in appeal is a matter of discretion within certain limits prescribed by this rule. 75 I.C. 331=26 O.C. 66; 38 I.C. 669=15 A.L.J. 21; 85 I.C. 459=1925 P. 504, 98 I.C. 129=1927 C. 140; 138 I.C. 253 (L.). It is not a matter of right. 8 A.L.J. 175=33 A. 379, 1923 C. 285; 131 I.C. 228=1931 L. 506. O. 41, R. 27 should be strictly interpreted. Where a document was not 30 years old but purported to be a recently made copy and no grounds for admitting secondary evidence were proved. *Held*, that the document could not be admitted in evidence in appeal. 148 I.C. 820=1934 L. 529. Court

should not take a narrow view of the rules of procedure. In order to do justice between the parties, Court should allow additional evidence to be adduced in appropriate cases. 132 I.C. 363=1931 P. 181. Where the documents sought to be adduced in evidence were not in the possession of the party but were in the possession of a Court and the party had to take the help of the trial Court in order to have those documents before the Court, but under such circumstances the trial Court refused to admit those documents. *Held*, that the party wanting to produce them did not have a fair chance to put up his case, and so the appellate Court should remand the case to get those documents filed. 1936 Pat. 631. A Court of second appeal should not interfere with discretion exercised by the lower appellate Court. 75 I.C. 331=26 O.C. 66, 27 I.C. 827, 1923 L. 30; 42 M. 737=37 M.L.J. 125; 20 L.W. 840=48 M.L.J. 32, 49 C.L.J. 478=1929 C. 492, 131 I.C. 228=1931 L. 506; 32 P.L.R. 813, 16 P.L.T. 702, unless it were improperly exercised. 129 P.R. 1916=36 I.C. 282. See also 30 Punj L.R. 693. Rule not intended to enable an appellate Court to re-examine before it, witnesses already examined and cross-examined in the Court of first instance. 38 A. 191=14 A.L.J. 121. Procedure prescribed in this rule must be strictly followed, especially that in Cl. (2) regarding record of reasons. 31 I.C. 873. It is extremely desirable that when the Court exercises its power under R. 27, it should make a direct reference to the rule, giving its reasons in such a form that there is no room for doubt that the Court has realised the exceptional nature of the powers that it is exercising. 13 I.C. 204=34 Bom. L.R. 372=1932 B. 230 [61 M.L.J. 489 (P.C.), *Foll.*]. The requirements of Rr 27 and 29 are so carefully framed to ensure that such exceptional procedure shall be resorted to only in special circumstances and with adequate safeguards. High Court had examined a witness at the hearing of the appeal but there was no record of the order, if any, requiring the examination of that witness, no record of the reason for the admission of this evidence, no specification of the points to which his evidence was to be confined. Further the witness was called at the outset of the hearing in High Court and not after the Court had satisfied itself on examining the evidence taken in the lower Court that there were matters to which his evidence was essential to enable them to do justice between the parties. *Held*, the introduction of the evidence was under the circumstances highly irregular and it must be entirely discarded. 134 I.C. 669=33 Bom. L.R. 1251=35 C.W.N. 925=1931 P.C. 175 (P.C.). Where the appellate Court summons additional evidence of its own motion, not after examining the record of the case at the hearing and in the presence of the pleader for the parties, but after reading the judg-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

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ment of the trial Court in the privacy of its chamber, and further does not record any reasons whatsoever for admitting fresh evidence as required by R. 27 (2) or fulfil the requirements of R. 29, the additional evidence is admitted contrary to law and must be discarded 38 P.L.R. 511=162 I.C. 152=1936 Loh. 933. The provisions of this rule are mandatory 47 I.C. 12=150 P.W.R. 1918. See *contra* 64 I.C. 238. A preliminary application to admit fresh evidence before the appeal is heard is not warranted by this rule. 42 C. 675=19 C.W.N. 401; 158 I.C. 656=1935 C. 641 [31 B. 381 (P.C.); 58 I.A. 254=61 M.L.J. 489 (P.C.)]. [Foll.] Oral evidence to prove documents should be allowed when the latter are admitted. 20 I.C. 542. Rule 27 (1) (b) cannot apply to the issue of a commission for local investigation by an appellate Court as it is not the production of a document nor is it the examination of a witness. 135 I.C. 243=1932 A. 270. The appellate Court has power to issue such a commission under Ss. 107 and 75 and the Court is not bound to record its reasons (*Ibid.*) R. 27 is intended to obtain additional evidence and cannot be used to test the evidence of witness. 1935 R. 39.

PROCEDURE—When additional evidence is admitted, sufficient opportunity must be given to tender rebutting evidence. 36 I.C. 955, 1923 C. 300; 25 P.L.R. 1915=28 I.C. 14; 43 I.C. 320=1917 P.H.C.C. 269, 20 L.W. 840=48 M.L.J. 32; 41 C.L.J. 194=1925 C. 671; 98 I.C. 129=1927 C. 140; 1935 R. D. 319. But see 56 C.L.J. 246. When appellant raises a new plea, not pressed in Courts below, the other side should be allowed to meet it by additional evidence. 72 I.C. 239=2 P. 607. When documents are admitted, opportunity must be given for objections to its admissibility 1924 C. 403. Where a party relies upon any documentary evidence or *risay-i-am* in support of a custom pleaded by him, for the first time in appeal, then before he can be allowed to do so the opposite party must be given an opportunity of rebutting presumption raised by it in favour of the party relying 1934 L. 462. Additional evidence which impeaches the testimony of a witness examined in the Court below, should not be allowed, at least without that witness being called and given an opportunity to contradict the additional evidence. 36 A. 93=41 I.A. 76=26 M.L.J. 153=18 C.W.N. 521 (P.C.) The only function of a Court of facts is to do complete justice between the parties. Court should not reject documents as to the genuineness of which there could possibly be no room for doubt on such technical grounds as that they were produced at a last stage, etc. 10 Pat.L.T. 356=1929 P. 324. See also 1930 P. 105. Courts should refrain from sending for the records in an informal manner for the purpose of looking into documents which had

never been legally tendered in evidence. 1930 L. 750. In a case governed by the specific directions contained in Rr. 27 and 28, an order of remand purporting to be passed by the Court in the exercise of its inherent power is vitiated by material irregularity 133 I.C. 205=1931 M. 791=60 M.L.J. 475. See also 59 B. 430=37 Bom.L.R. 241=1935 B. 222.

RECORD OF REASONS.—Reasons for admitting additional evidence should be recorded 38 B. 665=16 Bom.L.R. 641=68 I.C. 719; 19 I.C. 572; 50 I.C. 805, 15 I.C. 250=15 O.C. 253, 41 C.L.J. 194=86 I.C. 646=1925 C. 671; 118 I.C. 315; 1931 P.C. 175=35 C.W.N. 925; 9 O.W.N. 379=1932 O. 227, 64 M.L.J. 449=1933 M. 407. Omission to record reasons renders the order without jurisdiction and the consent of the parties cannot validate such an order. 49 I.C. 510. See *contra* 51 I.C. 50, 64 I.C. 38; 90 I.C. 756. Admission without recording reasons is illegal 32 I.C. 826=3 L.W. 163; 71 I.C. 289=1924 A. 303. Reasons for admission could be recorded in the judgment. 85 I.C. 676 (2)=1925 A. 752. When the reasons are apparent in the judgment, they need not be separately recorded. 22 M.L.J. 14=12 I.C. 673. Non-record of reasons is an irregularity and a fresh trial may be ordered in certain circumstances 1922 C. 48=77 I.C. 556. But see 98 I.C. 137=1927 C. 126; 14 L.R. 366 (Rev.)=17 R.D. 507. No reasons given—Objections not raised—Effect. 90 I.C. 756=1926 C. 369. The mere examination of the defendant by appellate Court on certain points which are apparently obscure as regards the execution of a receipt does not amount to taking additional evidence specially when the judgment of lower Court is not influenced by such Court; and hence the finding arrived at by lower Court is not vitiated even though no reasons are recorded for taking the additional evidence 144 I.C. 92 (1)=34 P.L.R. 99=1933 L. 328. When appellate Court issued a commission and on the report of the commissioner gave a finding, without recording reasons for admitting additional evidence, the finding is not binding being based on the report of the commissioner which is inadmissible without record of reasons 1923 A. 413; 1 L.W. 771=28 I.C. 11, 1927 A. 175. See *contra* 48 I.C. 137=111 P.W.R. 1918. "The peculiar circumstances of the case" is no reason. 19 I.C. 572.

SUBSTANTIAL CAUSE—WHAT IS—Additional evidence may be taken on substantial causes, other than those particularly specified and necessary to meet ends of justice 2 P. 676=30 I.A. 186=45 M.L.J. 578 (P.C.), 1923 L. 584; 30 I.C. 402=38 M. 414; 22 M.L.J. 14=12 I.C. 673; 14 I.C. 140=36 M. 477. What is substantial cause will depend on the facts of each case 32 I.C. 908. Where on almost every important point there is an inherent *lacuna* on the record and it is not possible for appellate Court to come to a satisfactory finding on the question in issue, the only proper course is to remit the case to

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other

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trial Court for further enquiry under R. 27, C. P. Code. 35 P.L.R. 779=1934 L. 664 (2). See also 14 P. 595=16 P.L.T. 613=1935 P. 178. Discovery of fresh evidence and inability to produce it through no fault or negligence of the party is substantial cause 28 I.C. 694=28 M.L.J. 334; 47 A. 412=23 A. L.J. 193. See *contra* 86 I.C. 505=1925 N. 284. Discovery of fresh evidence under such circumstances as would warrant an application for review under O. 47, R. 1 may be brought under "any other substantial cause." 88 I.C. 586=1925 A. 808. See *contra* 84 I.C. 74 (2)=1924 B. 227, 61 C.L.J. 373. Additional evidence can be allowed when there has been a wrongful refusal to grant an adjournment by lower Court. 23 Bom.L.R. 769=46 B. 184. Appellate Court can examine any parties if for the sake of doing justice and for the purpose of making sure of facts, it is considered necessary. 42 A. 48=17 A.L.J. 945. Further evidence can be advanced in appeal when a party has been prevented by the action of trial Court from adducing all the evidence he could 37 M. 455=22 M.L.J. 217; 90 I.C. 630. Where as a result of a misapprehension of the ruling of trial Court as to burden of proof and as to who should lead evidence, a party to the suit refuses or is not permitted to adduce evidence, it is necessary that appellate Court should interfere with the decree and allow the party an opportunity to adduce evidence in support of the case, as that is necessary in the ends of justice. 40 L.W. 848=67 M.L.J. 831. Additional evidence can be allowed if there has been failure of justice by reason of absence of proof on a technical aspect of the case. 21 L.W. 210=86 I.C. 576=1925 M. 444. Case where sufficient cause was held to exist. 1934 A. 948=4 A.W.R. 127=153 I.C. 674.

SUBSTANTIAL CAUSE—WHAT IS NOT.—That evidence already adduced is unsatisfactory and insufficient, is not a substantial cause 39 I.C. 886=25 C.L.J. 473. See also 136 I.C. 17=1932 L. 135. Where a party has had plenty of opportunity to examine a person as witness but fails to do so appellate Court may refuse to permit his examination as witness for the first time. 12 P. 359=14 Pat.L.T. (Supp.) 1=1933 P. 306. Nor negligence of pleader in not tendering evidence at proper time 125 I.C. 33, 33 Bom.L.R. 608=125 I.C. 423=1930 B. 272, 32 P.L.R. 813. As to negligence of guardian, see 1929 L. 21. Nor the mere fact that a litigant was not aware of the existence of documentary evidence at the time of trial. 68 I.C. 334. There is no sufficient cause to admit additional evidence when a point is sufficiently covered by an issue and the parties had every opportunity of producing evidence on it. 49 I.C. 115=5 O.L.J. 768, 102 I.C. 27. See also 139 I.C. 444=1932 M. 709. The mere fact that plaintiff might have been better advised to supply for a commission at the trial of the suit would not by itself warrant the issuing of a com-

mission by appellate Court. Far less could it be held to justify appellate Court in issuing a general order for the admission of such additional evidence as either of the parties might wish to produce. 148 I.C. 962=15 Pat.L.T. 142=1934 P. 284.

TIME OF ADMISSION.—The legitimate occasion for admitting additional evidence is when on examining records there is an inherent defect. 40 C. 402=17 C.W.N. 615; 10 I.C. 332; 31 B. 381 (P.C.); 66 I.C. 370; 31 M. 114; 42 C. 675=19 C.W.N. 401; 4 Pat.L.T. 418=71 I.C. 881; 53 I.C. 567; 55 I.C. 226. See also 58 I.A. 254=10 P. 654=61 M.L.J. 489 (P.C.) and other cases cited in the commencement of the notes under the rule. Ordinarily it is not desirable to hear an application for further evidence until appellate Court has heard the appeal and considered the evidence already on record. 120 I.C. 746=1930 M. 343. See also 1931 P.C. 175=134 I.C. 669 (P.C.). A preliminary application to admit fresh evidence before the appeal is heard is not warranted by this rule 42 C. 675=19 C.W.N. 401. Appellate Court cannot admit documents after arguments are closed without recording reasons therefor. 63 I.C. 423=19 A.L.J. 402, 1924 C. 403; 35 I.C. 698=24 C.L.J. 457, or in the absence of the opposite party 37 P.L.R. 563.

WHEN ADDITIONAL EVIDENCE COULD BE ADMITTED—ILLUSTRATIVE CASES.—Admitting fresh evidence is not confined to cases where the Court *suo motu* desires to call for fresh evidence. 12 I.C. 332=14 O.C. 327. Whether additional evidence should be admitted should be decided when appeal is actually heard 98 I.C. 129=1927 C. 140. Additional evidence can be admitted when party through no fault of his was unable to produce it at the trial. 12 I.C. 332=14 O.C. 327. Applicant must show exercise of due diligence and care in search for documents 11 L.L.J. 172=1930 L. 1004; 10 Pat.L.T. 10=115 I.C. 674=1929 P. 98. An appellate Court can issue a commission for examining accounts and remedying mistakes and omissions made by the previous Commissioner. 3 L. 382=1923 L. 115. Appellate Court can refer to statements not on record but referred to by trial Court and contained in the record of a connected case. 32 I.C. 312=193 P.L.R. 1915. Where a document proving the final publication of a record-of-rights is admitted in evidence by appellate Court without any objection, the document being simply a report mentioned in an order-sheet of a Revenue Officer exhibited in trial Court—the report not having been put in before trial Court—and appellate Court takes the report as additional evidence in order to enable it to pronounce the judgment in the case, the reception of the additional evidence is not illegal or unwarranted under R. 27 40 C.W. N. 821. Admission is to be with a view to enable the Court to pass judgment in favour of one party, but it is to be only when the original one is defective 57 I.C. 843, 47 I.C.

substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

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141. Fresh evidence on question of fact not admissible. 95 I.C. 300 (2)=1926 C. 941. An application for being adjudicated an insolvent was dismissed by District Judge on the ground that appellant had failed to prove that he was unable to pay debts and that the squares which were part of his assets were worth much more than what appellant had represented them to be and that he had made no attempt to sell them or to obtain the permission of the Deputy Commissioner. He appealed to High Court and along with the memorandum of appeal filed a copy of a subsequent order of the Deputy Commissioner rejecting his application for permission to sell the squares for a certain price. *Held*, that even if this appeal were to be dismissed as it was competent to the appellant to file a fresh application for adjudication before District Judge, and in the proceedings on that application to prove the fact that the Deputy Commissioner had refused to grant him sanction to sell the squares, this was a fit case in which High Court should exercise its powers under R. 27 and admit the copy of the order of the Deputy Commissioner. 1933 L. 823=147 I.C. 190

WHEN EVIDENCE COULD NOT BE ADMITTED.—ILLUSTRATIVE CASES.—If evidence, which was either in the possession of parties at the time of the trial or which might with proper diligence have been obtained, is either not produced or has not been procured, and the case is decided adversely to the party to whom such evidence was available, no opportunity for producing or using that evidence in appeal ought to be given to that party. 39 C.W.N. 322. More especially in the absence of special circumstances explaining such non-production at the proper time 42 L.W. 658=69 M.L.J. 707. And also where he is unable to tell the Court what the documents are or what their relevancy is. 17 Pat L.T. 709=1936 P. 600. An appellate Court should not, in the absence of sufficient explanation, admit a document as a matter of course in appeal, when no attempt was made to produce it in the trial Court. 1936 O.W.N. 722. Or when there is nothing to show that the trial Court refused to receive the same when tendered, or where there is no inherent lacuna or defect in the evidence as it stands 39 C.W.N. 668=62 C.L.J. 251; 43 L.W. 722=1936 M. 385=70 M.L.J. 400. Much more so when the party was given an opportunity in the original Court for producing it. 1935 R. 21. In the absence of any lacuna in the evidence as it stands on the record, the appellate Court will be going out of its way if it summons additional evidence in an appeal for the sole purpose of comparison of handwriting and signature in documents. 156 I.C. 253=1935 L. 555.

DISCOVERY OF EVIDENCE.—Original document which was supposed to be lost, of which secondary evidence was given, could be

admitted in appeal. 32 I.C. 711. When fresh evidence was available only long after disposal of suit, it can be admitted in appeal 71 I.C. 453=37 C.L.J. 491. *See contra* 53 I.C. 567. Discovery of fresh evidence is no ground for admission of it. 97 I.C. 369=1927 L. 11 (34 I.A. 115, Foll)

EXCLUDED EVIDENCE.—Evidence improperly excluded by the trial Court, can be admitted in appeal. 34 C.L.J. 160=26 C.W.N. 1022, 27 I.C. 516. This does not amount to taking additional evidence. 52 I.C. 327. Additional evidence can be admitted when the omission was due to inadvertence or mistake, especially when it consists of documents, the genuineness of which cannot be impeached. 14 P.R. 1916=33 I.C. 813

SUBSEQUENT EVENTS.—Where pending an appeal from a decree in a rent suit, a decree is passed in favour of the appellant in a title suit, the latter should be admitted in evidence 64 I.C. 721. *See also* 88 I.C. 553=1925 P. 612. When subsequent events make the relief granted inappropriate, additional evidence can be taken 48 I.C. 137=111 P.W. R. 1918. Public documents coming into existence after the filing of second appeals may be admitted by the High Court. 4 Pat. L.J. 312=50 I.C. 857. *Rivraj-i-amin* which was prepared after the appeal was filed was admitted in evidence in appeal 132 I.C. 6=31 P.L.R. 1012. Statements of witness in proceedings under Lunacy Act commenced after dismissal of suit between same parties were admitted at appellate stage. 1927 P.C. 123=101 I.C. 363 (2)=2. L.W. 94=31 C.W.N. 1087 (P.C.).

WAIVER OF OBJECTION.—A party cannot object to a portion of evidence admitted on appeal and at the same time rely on another portion 1922 N. 119. Where a party fails to object to the reception of additional evidence, at the time of hearing of the appeal, he cannot raise the objection in second appeal. 159 I.C. 460=1936 P. 57 (public documents), 17 Pat.L.T. 709=1936 P. 600 (objection to secondary evidence on ground of irrelevancy and inaccuracy).

WHAT COULD NOT BE ADMITTED.—Evidence tendered at the time of argument in trial Court and rejected should not be admitted in appeal 4 L.L.J. 371. Appellate Court should not examine an attesting witness who by inadvertence had not been called in first Court 5 P.L.J. 263=56 I.C. 983; for an exceptional case, *see* 11 A.L.J. 371=21 I.C. 619=35 A. 353.

NEGLECTANCE.—A litigant is not entitled to indulgence of being allowed to adduce additional evidence if he was negligent in the Courts below. 47 C. 662=47 I.A. 11=38 M.L.J. 424 (P.C.); 56 I.C. 983=1 Pat.L.T. 701. Additional evidence cannot be allowed when the party had deliberately declared in the lower Court that he had no evidence 25 I.C. 587=16 M.L.T. 301.

DISCOVERY OF EVIDENCE.—Evidence could

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

Loc. Am —[Allahabad] O. 41, R. 27 (1).

(1) *Insert* the following as clause (b):

"(b) the evidence sought to be adduced by a party to the appeal, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made, or"

(2) Convert the existing clause "(b)" into clause "(c)".

28. [S. 569.] Wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

Mode of taking additional evidence.

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not be admitted in appeal on the ground that it was discovered after the filing of the appeal 9 I C 251=9 M L T. 323, 1926 O 74.

PUBLIC DOCUMENTS—It is not proper to admit a judgment which is not *inter partes* nor conclusive and is simply an addition of a disputable point to the already existing evidence 50 I C 119=23 C W N 242 Settlement papers cannot be admitted after first Court's decision 29 I C 219. Documents in possession of a party cannot be allowed in evidence in second appeal 103 I C 215=1927 L. 574. See also 39 C W N 322.

EXPERT EVIDENCE—Where in a suit on a promissory note appellate Court being unable to believe evidence on either side acted upon the report of the thumb impression bureau, to whom it sent the document, *held*, that the procedure was unwarranted by law. 28 I C 321. In a suit on a handnote the defendant pleaded alterations in the note. The suit was decreed. In appeal Court obtained a written opinion as to the date of stamp affixed and used it for giving judgment in favour of defendant. *Held*, that the opinion not having been formally proved and the plaintiff not having been given an opportunity of cross-examining the person giving the opinion thereon ought not to have been taken in evidence, and the finding of the Judge based upon the opinion contained in that letter must be discarded 11 P 782=1932 P 352 When no application was made to appellate Court to admit a document excluded by trial Court, appellate Court might refuse to consider the document 28 I C. 378=28 M L J 115

SECOND APPEAL—High Court in second appeal can admit fresh evidence, if necessary, for the disposal of the appeal. 52 I C. 625=1919 M W N 455 Evidence improperly admitted in appeal will not be considered in second appeal. 40 C 402=17 C W N 615; 129 P R. 1916=36 I C. 382, 1930 I 750 (1921 L 279, Foll.), 10 Pat L T 10=115 I C 674=1929 P. 98. See also 16 Pat L T. 49, 81 I C 999=31 C L J 261=1925 C 98 Findings based on evidence admitted in appeal will not be interfered with in second appeal 16 Pat L T. 49=1935 P 105 (2); 40 C W N. 821 Waiver of objection, what amounts to 55 I C 226. Effect of waiver of objection to admit evi-

dence. 36 C. 833=13 C W N. 830 (P.C.). When judgment of an appellate Court was delivered in ignorance of the judgment of High Court delivered the prior day in a connected suit, the judgment of High Court could not be admitted in second appeal, but the proper course would be to apply for review or revision. 51 I C 652=29 C L J. 313 See *contra* 52 I C 625=1919 M W N 455 See also 49 C L J 478=1929 C 492.

APPEAL—An order by an appellate Court refusing to admit fresh evidence under R. 27 is not appealable 18 R D 665=16 L R 135 (Rev)

REVISION—The order of the Court permitting additional evidence is discretionary and it could not be set aside in revision. 137 I C. 513=33 P L R 330. Where the lower appellate Court wrongly remands a case under its inherent power without adopting the procedure laid down in R 27, High Court can interfere in revision. 59 B. 430=37 Bom L R. 241=1935 B 222

REVIEW—The ordinary way of bringing new and important matter to the notice of the Court which was not within party's knowledge at the time of decree, is by way of review. 47 B. 674=25 Bom L R 310 See also 51 I C. 652=29 C L J. 313, 52 I C. 625=1919 M W N. 455

O. 41, R. 27 (1) (b) (as altered by Allahabad High Court).—Under the new sub-r. (1) (b) of R. 27 introduced by the Allahabad High Court, the question of admission of new evidence does not depend on the requirements of the appellate Court, and a party has a right if he satisfies the Court that he exercised due diligence and the new evidence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made 159 I C. 202=1935 A.W.R. 1263.

O. 41, R. 28.—Documents should be exhibited. 38 B 665 On remand lower appellate Court can appoint Commissioner to examine witnesses. 1925 L 39. Lower appellate Court calling for revised findings on the ground of evidence being shut out—Trial Court's decree set aside—Validity of order. 106 I C. 498=1927 M 1065.

29 [S. 570.] Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified.

Points to be defined and recorded

Judgment in appeal.

30. [S. 571.] The Appellate Court, after hearing the parties or their pleaders and referring to any part of the proceedings, whether on appeal or in the Court from whose decree the appeal is preferred to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.

Judgment when and where pronounced.

Contents, date and signature of judgment.

31. [S. 574.] The judgment of the Appellate Court shall be in writing and shall state—

Notes.

O 41, R. 30.—An appellate Court is not entitled to dismiss an appeal for want of prosecution merely because the appellant or his pleader is for any reason, unable to argue the appeal. The Court, if it thinks fit to refuse an adjournment applied for by the appellant or his pleader on the ground of inability to argue the case, must, after such refusal, proceed in the manner laid down by Rr 30 and 31. It is bound to decide the appeal before it, to pronounce judgment in open Court containing the points for determination, its decision thereon and the reasons for that decision. 1937 A.L.J. 174=1937 A. 284. A Court is justified in dismissing the appeal for want of prosecution only where a party is bound to do something and has failed to do it. The law gives an absolute right to the appellant to be heard; this right cannot be converted into a duty. The appellant may or may not avail himself of this right, and merely because he does not avail himself of his right to argue his appeal, he cannot be said to be guilty of "want of prosecution" of his appeal. The dismissal of the appeal in such a case for want of prosecution is not justified and is liable to be set aside (*Ibid.*) Judgment was not pronounced in open Court and a party had notice of the date of its pronouncement—Limitation for appeal See 51 I.C. 219=27 P.R. 1919 See also 124 I.C. 346=1930 L. 152 Where an appeal is dismissed under R. 11 the provisions of Rr 30 and 31 relating to judgment and R 35 relating to decree have no application and the Court which passed the decree appealed from has jurisdiction to entertain an application for amendment of the decree 142 I.C. 143=1933 N. 117

O. 41, R. 31: SCOPE.—Appellate Court must conform strictly to the provisions of this rule 31 I.C. 895=9 Bur.L.T. 59; 95 I.C. 925=1927 O. 95=1 Luck. 458. Even if the judgment is delivered on hearing an appeal under O. 41, R. 11. Compliance with the provisions of this rule is necessary. 1931 A.L.J. 875=1931 A. 597 (F.B.); 53 A. 528=132 I.C. 200=1931 A. 589. But see 142 I.C. 143=1933 N. 117. But if there is substantial compliance, the judgment is not vitiated. 1931 A.L.J. 875=1931 A. 597 (F.B.). The provisions of this rule are manda-

tory. 9 I.C. 804, 21 A.L.J. 567=1924 A. 100. But see 59 I.C. 673=14 S.L.R. 132. A judgment which does not comply with the provisions of R. 31 is no judgment in law. 144 I.C. 306 (1)=34 P.L.R. 199=1933 L. 332 A judgment of an appellate Court which is merely a judgment of approval, referring to practically no document and to no evidence, and which merely says the trial Court had done very well in deciding the suit is not a proper judgment (20 Bom.L.R. 461; 108 P.L.R. 1916; 2 O.L.J. 50 and 1928 L. 655, Rel. on) 1930 L. 152. See also 117 I.C. 471, 112 I.C. 845, 112 I.C. 673, 112 I.C. 698. Appellate Court need not examine trial Court's finding of fact not objected to. 23 A.L.J. 653=89 I.C. 374=1925 A. 585 A suit contesting an alienation ought not to be dismissed on the ground that it referred to a small plot of useless land 87 P.L.R. 1917=42 I.C. 244. As to the applicability of the rule to a case under S 476, Cr P Code, see 143 I.C. 672=35 C.W.N. 660=1931 C. 454 There is no authority which lays down that the appellate Court before recording a finding of fact should refer to each and every document or piece of evidence on the record while recording its finding. It should be assumed that all the relevant evidence was brought to the notice of the Judge and he had it in his mind when he delivered his judgment. 164 I.C. 252=1936 L. 543. Where, in a single judgment, a Judge disposes of four appeals, each of which raises a question quite distinct from that raised in the other three and the parties are also not the same, and the Judge has not given proper consideration to the points for decision in the appeals, in none of the four appeals can the so-called judgment be regarded as a judgment within the meaning of O 41, R. 31. 163 I.C. 604=1936 R. 262.

CONTENTS OF JUDGMENT.—A judgment in appeal must set out the evidence on which it is based 63 I.C. 436. Appealable judgments must contain findings on all important points. 1925 C 316. The matters in dispute between the parties must be fully set forth with the findings in the judgment. 35 I.C. 237; 65 I.C. 479; 11 I.C. 915=4 Bur.L.T. 201 Judgment must state reasons for decision on all the points for determination, and on independent consideration, and must show that the Judge did not rely *en bloc* on the reasoning

- (a) the points for determination;
- (b) the decision thereon;
- (c) the reasons for the decision; and
- (d) where the decree appealed from is reversed or varied, the relief to

which the appellant is entitled, and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein.

Loc Am.—[Madras] *Substitute the following for O. 41, R. 31*—

"31 The judgment of the Appellate Court shall be in writing and shall state—(a) the points for determination, (b) the decision thereon; (c) the reasons for the decision, (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein. Provided that where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand-writer in open Court, the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge."

Notes.

of the trial Court. 46 I.C. 161=20 Bom.L.R. 461, 28 I.C. 354, 1923 L. 658 An appellate judgment should contain a statement of the case as would show that the Court has understood the real issues, tried them and considered the evidence. 25 I.C. 596=1 O.L.J. 334. The judgment should be self-contained in every respect so as to give a clear indication to High Court that the Judge has applied his mind to the facts of the case and has arrived at an independent decision on the matters in controversy. This is all the more important as the finding of fact arrived at by lower appellate Court are binding upon High Court in second appeal. To refer merely to trial Court for the facts of the case is a wholly erroneous procedure. 36 P.L.R. 253=1934 L. 1009 All points raised in first Court and not abandoned in second Court must be considered. 26 B. 379=14 Bom.L.R. 418; 42 I.C. 838=3 P.L.J. 701 Where the appellate Court decides the appeal on a preliminary issue it is desirable that it should decide the case on the merits as well so as to obviate an order of remand if the decision should be set aside by High Court in appeal. 34 C.W.N. 836 In a suit for confirmation of possession and declaration of title, the appellate Court's finding merely that title was not proved, is a partial view of the case. 46 I.C. 328 A cursory judgment, not showing that the evidence on record has been fully weighed, is liable to be set aside. 27 I.C. 561=36 P.L.R. 1915. But see L.R. 3 A. 454. A judgment based on an indefinite conclusion "there is much force in the contention" is not in accordance with law. 54 I.C. 672=1 P.L.T. 27. Lower appellate court's judgment containing no points nor decision thereon and no reasons—It is not a valid judgment. 1928 M. 16.

CONTENTS OF AFFIRMING JUDGMENT—An affirming judgment must show that the mind of the appellate Court has been brought to bear sufficiently upon the aspects of the case requiring his decision. 49 I.C. 504=1919 P. H.C. 88. Where the lower Court's judgment is well written and exhaustive, an appellate Court may simply express concurrence but there should be enough to show that the Court of appeal has considered it

fully and formed its own opinion. 13 I.C. 194, 97 I.C. 760=1927 C. 323 Full reasons must be given when affirming lower Court's decree. 84 I.C. 946=1925 L. 246. Where judgment of first Court was full, and appellate Court appreciated the main facts but has dismissed the appeal in a short judgment, it is not irregular. 1923 C. 113; 91 I.C. 478=1926 C. 545. A general statement that the records were carefully considered, and no reason was found to interfere with trial Court's conclusion is not a judgment. 46 I.C. 56=21 O.C. 309, 51 I.C. 46, 38 I.C. 509=2 P.L.J. 8, 95 I.C. 925 Where the judgment stated that the findings of lower Court were accepted but without dealing with or stating certain objections against the findings, *held*, it was not a judgment. 16 I.C. 354 and 382; 6 Bur L.J. 82

CONTENTS OF REVERSING JUDGMENT—Law imposes on the Court of appeal an imperative duty and obligation of giving an adequate and satisfactory judgment when reversing a judgment. 43 I.C. 973 Full reasons for reversing a judgment should be given. 56 I.C. 816, 1926 N. 435 The aggrieved party can demand a consideration of the points on which the lower Court relied when a judgment is one of reversal. 34 I.C. 185. A reversing judgment of the appellate Court should discuss the matters fully, but where it fails to do so but has taken into account all evidence in arriving at the conclusion the second appellate Court will not interfere. 150 I.C. 1137=1934 M. 169=66 M.L.J. 342.

CONSIDERATION OF EVIDENCE ON RECORD—It is the duty of appellate Court to consider the evidence on record. 51 I.C. 751. The judgment must show that the evidence on record and the grounds of appeal have been considered. 108 P.L.R. 1916=36 I.C. 6, 38 I.C. 814=1 P.L.W. 193 Failure to weigh all evidence before the appellate Court, vitiates its judgment. 51 I.C. 11, 17 I.C. 898=5 Bur. L. 269 Omission to consider an important piece of evidence, vitiates the judgment. 49 I.C. 832. Non-mention of an obviously important document in judgment of an appellate Court is proof that it was not considered. 22 O.C. 312=54 I.C. 353 A Judge should not quote the judgment of another Court as his own, but should show his own apprecia-

— 32. [S. 577.] The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, or, it may be for setting aside the decree from which the appeal is preferred, or for making any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Appellate Court in any case in which an appeal is preferred, and in any case in which an appeal is preferred, and in any case in which an appeal is preferred.

33. The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Appellate Court in any case in which an appeal is preferred, and in any case in which an appeal is preferred, and in any case in which an appeal is preferred.

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tion of the evidence on record giving reasons for his findings 37 I.C. 435=3 O.L.J. 620, 49 I.C. 733.

O. 41, R. 33. OBJECT OF RULE.—The object of this rule is, speaking generally, to enable appellate Court where its decision interferes with, modifies or extends the decision of lower Court to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of trial Court. 4 P. 37=1925 P. 285, 97 I.C. 65, 1928 A. 77. Power to set matters right. 91 I.C. 519=1926 M. 631. See also 6 O.W.N. 644=119 I.C. 462=1930 O. 13. The rule was intended to further the ends of justice and not to favour one party over another. Relief was refused on the ground that if granted it would defeat the bar of limitation which had accrued. 14 P.L.T. 113, 1934 P. 589; 12 P. 261=1933 P. 224, 18 R.D. 618=16 L.R. 26 (Rev.).

SCOPE OF.—O. 6, R. 7 clearly empowers the Court to grant any relief that it may think just to the same extent as if it had been asked for. Similarly R. 33, O. 41 confers on the appellate Court very wide powers to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require. 158 I.C. 71=1935 L. 378. R. 33 is no doubt expressed in wide terms and must be applied with caution, so as not to enable a litigant to avoid the provisions of other statutes such as the Limitation Act or the Court-Fees Act. A test of its application is whether the questions which arise between the several sets of parties are so connected that one of them ought not to be allowed to re-open matters so far as he is concerned without opportunity allowed, in the interests of justice, to another to protect himself by urging his objections, even though they may be directed, not against the appellant but against a co-respondent. But there is nothing to restrict the applicability of the rule to cases where the grounds of the judgment below are left undisturbed. 13 P. 200=15 P.L.T. 42=1934 P. 134. See also 34 A. 32; 1929 M.W.N. 112; 24 I.C. 208; 14 N.L.R. 56; 50 M. 614=52 M.L.J. 612=1927 M. 620; 105 I.C. 600=1927 C. 831; 1926 C. 1042=96 I.C. 474; 97 I.C. 346=1927 M. 974, 1928 M.W.N. 74, 1928 A. 77. Construction of rule. See 113 I.C. 32. The appellate Court can under R. 33 record the compromise and give a decree in terms of it. 15 L.R. 14 (Rev.).

APPLICABILITY.—It is applicable to all cases where an appeal is heard under the Act. 34 A. 32, 40 M. 846, 34 M.L.J. 361. Rule applies to all classes of suits including a suit for partition. 49 C. 379=69 I.C. 981. See also 1930 R. 190. The provision of this rule should be cautiously applied and only to cases where but for recourse to it the ends of justice would be defeated. 89 I.C. 24; 56 C.L.J. 285. See also 34 A. 32, 51 A. 63; 1929 C. 28; 116 I.C. 824, 1930 R. 190. And where success of the appeal filed would render it just that relief should be granted against a party who had not appealed: (e.g.) where the suit was against two defendants in the alternative. 29 N.L.R. 173=144 I.C. 226=1933 N. 186. Where in a suit for a declaration that certain proceedings taken against plaintiffs were *ultra vires* the Court passed an order of mandamus under S. 45, Specific Relief Act, the appellate Court could pass a decree for declaration as originally prayed for if it was of opinion that no order of mandamus could be granted. 10 R. 412=139 I.C. 566=1932 R. 123 (F.B.). Court will not apply, without strong reasons, this rule in favour of party who has appealed or lodged cross-objections and failed. 1925 L. 2. R. 33 ought not to be applied to cases where there has been a distinct and separate decree against defendants who have not chosen to appeal. 150 I.C. 784=1934 P. 524. Where the decree though in form one single decree, really amounts in effect to two distinct decrees against two different persons on two separate causes of action or transactions, the Court of appeal is not justified in interfering with the part not appealed against, although the questions of fact and law involved in both of them are to some extent the same. 16 P. 45=17 P.L.T. 780=1937 P. 40. See also 1935 L. 889. Appeal from part of the decree and by some parties only enables the Court to exercise its power under this rule. 1925 P. 40. Appellate Court can in appeal against a portion of decree set aside whole decree in absence of cross-appeal or objections by respondents due to sufficient reasons. 85 I.C. 312=1925 M. 266; 123 I.C. 381. Some defendants were *ex parte* at the trial. The suit against all the defendants having been based on the document held to be not genuine, it would be illogical and unjust to hold that while the suit had been dismissed against defendants 2 to 6 the decree against defendants 1 and 7 should be allowed to stand. 145 I.C. 289=37 L.W. 798=1933 M. 529=65 M.L.J. 15. A.

exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or

Notes.

mortgage-debt belonging to a Mohomedan mother (A) and her minor daughter (B) was assigned by A in favour of C. C sued to recover the debt and obtained a decree. The property was purchased in execution by D; B brought a suit against C and D for the recovery of her share of the mortgage-debt which had been assigned by A by the sale of the hypotheca in the possession of D and in the alternative for payment to her of the amount by C and D. The suit was dismissed *in toto*, on appeal it was decreed as against D and dismissed as against C. D appealed; B did not appeal or prefer cross-objections against the dismissal of the suit as against C. Subsequently B applied to the Court to add C as a co-respondent in the second appeal. *Held*, that the application ought to be granted, the case being covered by the illustration to O. 40, R. 33. 38 L.W. 539=1933 M. 806=65 M.L.J. 548. The provisions of R. 33 are wide enough to justify an appellate Court while dismissing a cross-objection in ordering that the entry in the record of rights should follow the entry in the *khata khewat*. 15 L.R. 69 (Rev.)=18 R.D. 56. In a suit for ejectment under S. 44, Agra Tenancy Act, if the Board of Revenue finds in second appeal that the defendant is not a "trespasser" liable to ejectment under the section, R. 33, confers wide powers on the Board of Revenue to pass a decree for ejecting him as a non-occupancy tenant, as if the suit has been brought under Ss. 86 and 92 of the Agra Tenancy Act. 18 R.D. 618=16 L.R. 26 (Rev.). Where in a suit by the tenant under S. 106, B.T. Act a decree is passed and one of the co-sharer landlords prefers an appeal impleading the others as respondents and during the pendency of the appeal one of the respondents and his representatives are not impleaded in time. *Held*, that entire suit abates and that O. 41, R. 33 had no application to the facts. 146 I.C. 831 (2)=37 C.W.N. 756=58 C.L.J. 29=1933 C. 787. Court cannot act under this rule implead a person against whom appeal had abated. 41 L.W. 111=1935 M.W.N. 398=1935 M. 175; 13 L.L.T. 22. Or against whom it has become barred by limitation. 159 I.C. 186=1935 R. 364 (6 R. 29; 1931 C. 738 *Rel. on*).

POWER OF COURT.—Under O. 41, R. 33 the appellate Court has power to deal with a case in such a manner as to adjust the rights of all the parties concerned. 59 C.L.J. 318. Power under this rule compared with that under R. 4. 160 I.C. 1005=1936 Pesh. 20. The Court may make any order to meet ends of justice. 38 I.C. 721. *See also* 13 L.L.T. 22; 18 R.D. 618=16 L.R. 26 (Rev.); 37 P.L.R. 85. Even in the absence of a respondent an appellate Court has the power to vary the decree in his favour. 101 I.C. 255=1926 N. 196; 94 I.C. 315=1926 A. 425. This rule gives the Court power to pass a decree in favour of a person who is not a party before it, but was

a party in the lower Court. 12 O.L.J. 571. *See also* 8 M.L.T. 377; 8 I.C. 377; 25 I.C. 273; 91 I.C. 583. Appellate Court is entitled to grant relief to a defendant who could have appealed but has not appealed. (1927 A. 37, Foll., 34 A. 32, Dist.) 117 I.C. 111 (2)=1929 A. 334. *See also* 131 I.C. 833=1931 M. 513, 116 I.C. 824; 1929 C. 315, 33 C.W.N. 221, 49 C.L.J. 83=115 I.C. 180=1929 C. 28; 51 A. 63, 1929 C. 123=56 C. 598. Where two appeals were filed against the same decree, one by the plaintiff and the other by the second defendant and the plaintiff having died, his legal representatives came on record in his appeal but were not impleaded in the second defendant's appeal which consequently abated, it was still open to the second defendant who was a respondent in the other appeal to ask the appellate Court to exercise its powers under this rule. 130 I.C. 764=1931 M. 277=60 M.L.J. 267. But *see* 1935 L. 889. The word "parties" means parties to the suit in which the decree under appeal was made; they are still parties to the suit notwithstanding the *ex parte* decree against them and their consequent inability to appear and file objections in the appeal. 145 I.C. 289=1933 M. 529=65 M.L.J. 15. The word is intended to connote persons other than those who have been arrayed as appellants or respondents in the appeal. A decree can, therefore, be passed *in favour* but not *against* a person who is no party to the appeal (1928 A. 746, Doubtful); 51 A. 575=27 A.L.J. 344=116 I.C. 436=1929 A. 243; 61 C. 919. But *see* 1934 L. 684, where a decree was passed for an injunction and some of the defendants alone preferred an appeal, and it was held, that the appellate Court had no jurisdiction to set aside the decree as against the non-appealing defendants. The powers of the Court, however ample they may be, within the ambit of O. 41, Rr. 20 and 33, cannot be used to the detriment or prejudice of the person against whom no appeal had been preferred in the lower appellate Court. 58 C. 923=138 I.C. 177=1931 C. 738. Court can give decree in favour of all plaintiffs when only one of them has appealed. 34 P.L.R. 1912=36 P.W.R. 1912. *See also* 140 I.C. 22 (L.). Appellate Court's power to pass decree in favour of those not made parties to the appeal—Adjustment of shares. *See* 20 C.W.N. 872. *See also* 1930 R. 190. Where certain defendants were not parties to an appeal modification of the decree in their favour is not authorised by this rule. 88 I.C. 803. O. 41, R. 22 does not enable a respondent as a matter of right to urge cross-objections against another respondent, though the very wide discretion given by R. 33 will entitle the Court, in exceptional case where justice requires it, to entertain objections by one respondent against another. Case-law discussed. 13 P. 200=15 Pat. L.T. 42=1934 P. 134. The discretion allowed to the Judge by O. 7, R. 7 and this rule is wide and covers the granting

parties, although such respondents or parties may not have filed any appeal or objection:

Notes.

of a declaratory decree in a suit for possession where alternative relief is claimed 85 I.C. 94=1923 L. 422. R. 33 gives appellate Court ample power to substitute for the decree granted in favour of respondents such decree as ought to have been granted in their favour. 1931 A.L.J. 601=133 I.C. 536. It is open to an appellate Court to grant to a party relief by way of a perpetual injunction, which has been refused by the trial Court although there is no appeal or cross-objection by that party on the point. 63 C. 1008=63 C.L.J. 210=40 C.W.N. 916. Suit for arrears of annuity charged on land—Decree disallowing charge but directing recovery of arrears against assets of grantor in the hands of defendant—Appeal by defendant alone—Decree exonerating defendant from personal liability—Decree declaring charge—*Held*, that it was competent to the appellate Court to grant a decree declaring a charge under O. 41, R. 33, C.P. Code, although the plaintiff had not preferred an appeal or cross-objections against the disallowance of the charge. 40 C.W.N. 1397. In a suit for enhancement of rent, the trial Court allowed to the landlord 25 per cent. of the net profit in one case and 50 per cent. in other cases. The tenants appealed, but the landlord did not file any cross-objections challenging the amount of enhancement granted. The lower appellate Court, however varied the decree by allowing 60 per cent. of the net profit to the landlord. *Held*, in second appeal that the lower appellate Court had no jurisdiction under R. 33, to award the further enhancement to the landlord in the absence of any appeal or cross-objection by him claiming such enhancement. 39 C.W.N. 420=1935 C. 458. Joint decree for possession—Appeal therefrom—Death of one of the plaintiffs—Respondent's legal representatives were not brought on record in time—Whether they can be brought on record as parties 90 I.C. 986=30 C.W.N. 45; 1926 L. 564; 1926 C. 335; 1927 P.C. 252 (P.C.). A decree was passed to the effect that certain plots were included in a tenure in which the plaintiffs had a four annas share and the principal defendants a twelve annas share. A second appeal was preferred by those defendants and pending that appeal, another defendant in whose favour there was no decree and who had also been impleaded as a respondent died. An application to bring his legal representatives on record was dismissed as out of time. *Held*, that the appeal did not abate and that appellate Court was competent to pass a decree in favour of the deceased respondent also. 61 C. 302=151 I.C. 749 (2)=38 C.W.N. 268=1934 C. 488. On reversal of decree for one relief alternative relief should be granted if justice requires it 1925 L. 155. Suit against a number of co-sharers—Decree against one only—Appeal by the defendant—If decree can be passed against all. *See* 23 A.L.J. 501=47 A. 597, 52 M.L.J. 135=1927

M. 349; 48 A. 551=24 A.L.J. 586=94 I.C. 347; 6 R. 29, 27 L.W. 1=54 M.L.J. 88=107 I.C. 237. Plaintiffs sued the principal and agent for the price of goods supplied and obtained a decree against the principal. In appeal filed by the latter, impleading the agent also the appellate Court could reverse the decree against him and give a decree against the agent under this rule 130 I.C. 774=1931 L. 370; 35 C.W.N. 1079, 132 I.C. 459=1931 N. 97. *See* the illustration to the rule. Appellate Court has power to declare not only that the appeal had abated but also that the suit has abated (41 A. 283, Dist.; 1926 L. 607, Not foll.; 1928 L. 359, Expl. and Not foll.) 118 I.C. 437=1929 L. 256. *See also* 1935 M. 175. Where a decree is confirmed on appeal any order to amend the decree so as to make it agree with the judgment should be passed by the appellate Court. Omission on the part of party to file a memo of objections praying for the amendment of the decree when appellate Court has cognizance of the case, will not have the effect of taking away the party's inherent right to have a decree in accordance with the judgment passed in his favour. 1925 M. 735=49 M.L.J. 385. *See also* 22 L.W. 376=48 M.L.J. 577. Plaintiff's claim decreed in part only—Appeal by defendant only—Plaintiff's suit dismissed *in toto*—appeal by plaintiff for whole claim sustainable. 4 R. 110=1926 R. 172. *See also* 49 M. 435=94 I.C. 767=51 M.L.J. 570 (P.C.). As to power of appellate Court to reverse mortgage decree and pass money decree only, *see* 112 I.C. 893. Power of Court to vary decree in pre-emption suit 27 A.L.J. 589=1929 A. 398. High Court can increase the rate of alimony payable to a wife even though she has not preferred an appeal to the Court for that purpose. 1929 M.W.N. 831=31 L.W. 97=1930 M. 154; 54 M. 774=133 I.C. 716=33 Bom. L.R. 1402=1931 P.C. 234=61 M.L.J. 367 (P.C.). *See also* 32 Bom. L.R. 436 (Execution sale). Appellate Court can give relief to respondent although no cross-objections filed 49 A. 224=1927 A. 453=97 I.C. 65 (34 A. 32, Foll.) *See also* 49 C.L.J. 83=115 I.C. 180=1929 C. 28, 53 M. 881=59 M.L.J. 634=1930 M. 801 (F.B.), 1930 R. 237=8 R. 480. This rule does not enable a cross-objection being maintained where the objector-respondent has no community of interest with the appellant and where the cross-objection is nothing more than an old appeal which was dismissed as being out of time 165 I.C. 936=1936 P. 604. Where a party has a right to invoke the assistance of Court either by filing an appeal or cross-objections and has failed to avail himself of such right, Court will very rarely and then only for very cogent reasons interfere with the decree of trial Court which is attacked by the opposite party by means of an appeal. (50 M. 866; 51 A. 63, Rel. on.) 145 I.C. 432=34 P.L.R. 844=1933 L. 682. Court of appeal can vary a decree under appeal not only for error, but also on grounds which have come into existence

[Provided that the Appellate Court shall not make any order under section 35-A in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order.]¹

Illustration.

A claims a sum of money as due to him from X or Y and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.

34. [S. 576.] Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

Decree in appeal.

35. [S. 579.] (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

(2) The decree shall contain the number of the appeal, the names and description of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it:

Judge dissenting from judgment need not sign decree. *Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.*

Loc Ams.—[Lahore] Add the following as a proviso to O. 41, R. 35 (4).—

"Provided also in the case of the High Court, that in the absence of a Judge who passed a decree, or one or more of the Judges who passed a decree, either the Registrar or the Deputy Registrar of the Court shall sign the decree on behalf of such absent Judge or Judges, but that neither the Registrar nor the Deputy Registrar shall sign such decree on behalf of a Judge who dissented from the judgment of the Court."

[Madras.] O. 41, R. 35 (2). The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, *then addresses for service* and a clear specification of the relief granted on other adjudication made.

Substituted by B O C No 3299—B. I of 1930.

36. [S. 580.] Certified copies of the judgment and of the decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense

37. [S. 581.] A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

Loc Ams.—[Allahabad.] O. 41, R. 37.

Leg. Ref.

¹ Proviso was inserted by Act IX of 1922

Notes.

since it was passed. 133 I.C. 244=33 Bom. L.R. 266=1931 B. 280. See also 32 Bom. L.R. 1252; 1927 B. 128=28 Bom. L.R. 627.

SECOND APPEAL.—Even if lower appellate Court does not exercise its discretion properly in utilising the rule, High Court

will not interfere with its order in second appeal. 130 I.C. 774=1931 L. 370

SECOND APPEAL—WHO CAN PREFER.—Where a person was a party in the first Court, but not in appeal, he has no right to prefer a second appeal. To permit such an appeal would really amount in effect to permitting an appeal against the decree of trial Judge. 132 I.C. 205=1931 A.L.J. 271=1931 A. 766

Delete the words "and shall be filed with the original proceedings in the suit" in lines 4 and 5 of the rule; and

Add a new paragraph as follows:—

"Where the appellate Court is the High Court, the copies aforesaid shall be filed with the original proceedings in the suit"

[Allahabad, N.-W.F.P. and Oudh.] Add the following rule to O. 41:—

"38. (1) An address for service filed under O. 7, R. 19, or O. 8, R. 11, or subsequently altered under O. 7, R. 24 (in Oudh read 26 for 24 and in N.-W.F.P., read 22 for 24) or O. 8, R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

(3) Rr 21, 22, 23 and 24 (in N.-W.F.P. omit 23 and 24) of O. 7 shall apply so far as may be, to appellate proceedings."

[Bombay and Sind] "38. (1) An address for service filed under O. 7, R. 19, or O. 8, R. 11, subsequently altered under O. 7, R. 24, or O. 8, R. 12 shall hold good during all appellate proceedings arising out of the original suit or petition, subject to any alteration under sub-rule (3).

(2) Every memorandum of appeal shall state the addresses for services given by the opposite parties in the Court below and notices and processes shall issue from the appellate Court to such addresses

(3) Rules 22, 23 and 24 of O. 7 shall apply, so far as may be, to appellate proceedings."

[Lahore.] Add the following rule —

"38. (1) An address for service filed under O. 7, R. 19 or O. 8, R. 11, or subsequently altered under O. 7, R. 24 or O. 8, R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the address for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

(3) Rr 21, 22, 23, 24 and 25 of O. 7 shall apply so far as may be, to appellate proceedings."

[Madras.] Add the following.—O. 41-A.

"XLI-A.

Appeals to the High Court from original decrees of subordinate Courts.

1. The rules contained in O. 41 shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

2. (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and receipt of the accountant of the Court for the sum prescribed by the rules of Court.

(2) Notwithstanding anything contained in R. 22 of O. 41 the period prescribed for entry of appearance by the respondent and filing by him of Memorandum of cross-objections, if any, shall, unless otherwise ordered, be thirty days from the service of notice upon him.

3. (1) If the respondent intends to appear and defend the appeal he shall, within the period specified in the notice of appeal, enter an appearance by filing in Court a memorandum of appearance.

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub-rule above, he shall not be allowed to translate, or print any part of the record:

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

4. (1) The memorandum of appeal and memorandum of appearance shall state an address for service within the city of Madras at which service of any notice, order or process may be made on the party filing such memorandum.

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred: Provided that if such party subsequently appears by a pleader, he shall state in the Vakalat an address for service within the city of Madras, and shall give notice thereof to each party who has appeared.

(3) If a party appears by a pleader, his address for service shall be that of his pleader, and all notices to the party shall be served on his pleader at that address.

5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and

addresses to the address for service of the party to be served which has been filed by him in the lower Court: Provided that, after a party has given notice of an address, for service in accordance with R. 4, service of any notice or process shall be made at such address.

6. All notices and process, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 A.M. and 5 P.M. at the address for service of the party to be served.

7. Notices which may be served by a party or his pleader under R. 6, or which are sent from the office of the Registrar may, unless the Court otherwise directs be sent by registered post, and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof and the posting thereof shall be a sufficient service.

8. If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately.

9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered.

10. (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such orders as it thinks fit.

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers.

11. When costs are awarded, unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court shall be Rs. 15 and the costs of appearing when the appeal is in the daily cause-list for final hearing and is adjourned shall be Rs. 30. At the request of any party the Registrar shall cause the order to be drawn up and the said costs to be inserted therein.

Memorandum of Objections.

12. (1) If the acknowledgment mentioned in R. 22 (3) of O. 41 is not filed, the respondent shall together with the memorandum of objections file so many copies thereof as there are parties affected thereby.

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar.

13. If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in R. 22 (3) of O. 41, the respondent may file an affidavit stating the facts and the Registrar may dispense with the service of the copies mentioned in R. 12 (1).

14. R. 31 of O. 41 shall not apply to the High Court. If judgment is given orally a shorthand note thereof shall be taken by an officer of the Court and transcript made by him shall be signed or initialed by the Judge or Judges concurring therein after making such corrections as may be considered necessary.

Letters Patent Appeals

Order 41-B.

"1. The rules of O. 41-A shall apply, so far as may be, to appeals to the High Court of Madras under clause 15 of the Letters Patent of the said Court.

Provided that it shall not be necessary to file copies of the judgment and decree appealed from.

2. Notice of the appeal shall be given in manner prescribed by O. 41-A, R. 6, or if the party to be served has appeared in person, in manner prescribed by R. 5 of the said order."

[Patna] R. 38 (1) An address for service filed under O. 7, R. 19, or O. 8, R. 11 or subsequently altered under O. 7, R. 22 or O. 7, R. 12, shall hold good for all notices of appeals and all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rr. 21 and 22 of O. 7 shall apply, so far as may be, to appellate proceedings.

ORDER XLII.

APPEALS FROM APPELLATE DECREES.

1. [S. 587.] The Rules of Order 41 shall apply, so far as may be, to appeals from appellate decrees.

Procedure.

Notes.

O. 42, R. 1.—Where High Court in second appeal transposes parties from category of appellant to that of respondent no question of limitation for presenting the appeal arises. 99 I.C. 687=52 M.L.J. 33=1927 M. 204 Under this rule every second appeal must be

accompanied by copy of decree of lower appellate Court. 100 I.C. 810. Failure to file copy of first Court judgment along with memorandum of second appeal is fatal. But delay in filing copies of trial Court judgment because copies were supplied only late should be excused under S. 5 of Limitation Act. 7 L.

Loc Ams —[Allahabad] Revised R. 1 in O. 42:—

"1. The rules of O. 41 shall apply, so far as may be, to appeals from appellate decrees, subject to the following provisions:—It should not be necessary for an appellant in a second appeal to produce a copy of the judgment of the Court of first instance or any

judgment other than the judgment on which the decree appealed against may be founded, and the record of the case shall be sent for at the expense of the appellant."

[Lahore.] Add the following as R. 2 —

"2. In addition to the copies specified in O. 41, R. 1, the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance unless the appellate Court dispenses therewith.

[Madras] Substitute the following for the existing O. 42.—

Appeals from Appellate Decrees.

1. The rules of O. 41 and O. 41-A shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this order —

Provided that in appeals from appellate decrees the memorandum of appeal shall be accompanied by a copy of the decree appealed from the four printed copies of the judgment on which it is founded, one of them being a certified copy; and also four printed copies of the judgment of the Court of first instance, one of them being a certified copy.

2. (1) The memorandum of appeal shall be printed or typewritten and shall be accompanied by the following papers:—

One certified copy of the decrees of Court of first instance and of the appellate Court; and four printed copies of each of the judgments of the said Courts; one copy of each judgment being a certified copy.

(2) If any ground of appeal is based upon the construction of a document, a printed or typewritten copy of such document shall be presented with the memorandum of appeal. Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader, to be a correct translation shall be presented.

(3) If the appellant fails to comply with this rule, the appeal may be dismissed.

ORDER XLIII.

APPEALS FROM ORDERS.

1. [S. 588.] An appeal shall lie from the following orders under the provisions of section 104, namely:—

(a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court;

Notes.

447=1926 L. 458; 97 I.C. 773=1926 L. 626; 105 I.C. 689 (1). See also 161 I.C. 708=1936 Pesh. 77. Where trial Court gave a preliminary judgment on legal issues and the final judgment subsequently, it is enough if the copy of the final judgment was filed in second appeal. 103 I.C. 73=1927 L. 640 High Court has power in second appeals to frame issues and refer them for trial to the first Court 1934 N. 307 Order for restitution passed under inherent powers of Court—Appealability. 11 P.L.T. 156. As to whether appeals under S. 12 (2), Oudh Courts Act, are "appeals from appellate decrees" See 1935 O.W.N. 8=1935 O. 88

O. 43, R. 1—Orders appealable under R. 1 are not decrees, though coming under S. 47 or under the definition of 'decree' in S. 2. 17 I.C. 884=8 N.L.R. 177. Appeal—Formalities of—Revenue Court 34 I.C. 706=3 O. L.J. 209. Decree for specific performance—Power of Courts to extend time—Order extending time whether appealable. 6 Bur. L.J. 216. An order directing the drawing up of a final decree in a mortgage suit is not a decree nor appealable order within the meaning of O. 43. 57 M. 437=148 I.C. 134=39 L.W. 185=1934 M. 198=66 M.L.J. 178. Order on application under S. 34, Trusts Act.

if appeal lies against. 11 O.W.N. 1533=1935 O. 72 The right of appeal is a creature of statute, and when no such right is expressly conferred by the statute, there is no right of appeal. The right of appeal against decrees and orders in rent suits for agricultural lands has been conferred by the provision of the Code, and S. 153 of the Bengal Tenancy Act restricts that right so conferred by the Code in certain cases 63 C.L.J. 277=40 C. W.N. 992=1936 C. 485

Cl. (a)—An order of appellate Court returning a plaint for want of jurisdiction in the Court in which the suit is brought is appealable. 19 A.L.J. 305=62 I.C. 399; 125 I.C. 581. See also 1931 A.L.J. 893=1931 A. 192. No appeal lies from an order of appellate Court returning a memorandum of appeal to be presented to proper Court 31 Punj L.R. 536=1930 L. 832. See also 12 A. L.J. 21=36 A. 58, 52 I.C. 801=46 C. 738, 16 A.L.J. 633=40 A. 659. But see also 56 I.C. 865=2 L.L.J. 366. Nor against an appellate order confirming the order of trial Court returning a plaint for presentation to proper Court. 46 I.C. 99=16 A.L.J. 535; 27 Bom.L.R. 635=1925 B. 431. The fact that, in the exercise of his jurisdiction, Judge commits an error does not give any right of revision of the order. 46 I.C. 99. The word "plaint"

(b) an order under rule 10 of Order VIII pronouncing judgment against a party,

(c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;

(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*;

Notes.

in R 1 (a) does not include a memo. of appeal 56 I.C. 865=2 L.L.J. 366 Order returning or rejecting application for leave to sue *in forma pauperis* on ground of want of jurisdiction does not come under this clause and is not appealable. 42 L.W. 647=1935 M. 1043 Plaintiff does not lose his right to appeal against order of a Munsif returning the plaint, by electing to file the plaint in the Court to which he is directed. 34 M.L.J. 397=41 M. 721; 53 I.C. 1001=23 C. W.N. 942. An order rejecting a plaint under O. 7, R. 11 is not appealable when such order is based on a question of valuation pure and simple 49 I.C. 442=4 P.L.J. 57.

O 43, R. 1 (a) (All).—Under this clause as amended by the Allahabad High Court only those orders are appealable where the entire case has been transferred from the appellate to the trial Court and not where only certain issues have been remitted. Hence no appeal lies from an order by which the appellate Court has framed certain issues and referred them for trial to the first Court 147 I.C. 437=1934 A. 455 R. 1 is applicable only in part to cases under Agra Tenancy Act 53 A. 516=1931 A.L.J. 854=1931 A. 533.

Cl (b).—See 31 P.L.R. 946, 1930 O. 366. R. 1 (b) merely gives a right of appeal if a judgment has been pronounced against a party. Where no judgment is pronounced there is no right of appeal. 131 I.C. 129=1931 L. 77.

Cl (c). CASES WHERE APPEAL LIES.—Appeal lies from order of dismissal of application under O. 9, R. 9 on ground of previous dismissal under O. 17, R. 3. 4 P.L.T. 46=73 I.C. 373=1923 P. 223. See also 20 C.W.N. 1203, 20 C.W.N. 594=43 C. 857 An appeal lies against an order of dismissal of an application for restoration of the application dismissed in default 19 N.L.R. 119=75 I.C. 589; 168 I.C. 47=1937 O.W.N. 372. See also 1936 A.L.J. 305. But see *contra* 58 M. 814=1935 M. 609=69 M.L.J. 99, where it was held that no appeal lay under O. 43, R. 1 (c) and that S. 141, did not avail to confer a right of appeal, as it dealt only with procedure, while a right of appeal was substantive right, and that S. 104 conferred a right of appeal only in respect of orders specified in that section or in O. 43, R. 1 A dismissal of suit for default is under O. 9, R. 8 and the dismissal of application for restoration is appealable under O. 43, R. 1 (c). 57 I.C. 245 Although an order rejecting an application under O. 9, R. 9, is open to appeal under O. 43, R. 1 (c), an order allowing such an application is not open to appeal. An order of the latter class should be sparingly interfered with. 152 I.C. 110=11 O.W.N. 1373=1934 O. 491. Where an application for restoration is

returned for presentation to proper Court owing to want of jurisdiction the order is one rejecting the application and is appealable. 16 I.C. 34=10 A.L.J. 41 An order setting aside an *ex parte* decree passed in a resumption suit, although not appealable under R. 1 is however appealable in view of the provisions of the Oudh Rent Act. 3 O. L.J. 229=34 I.C. 702

CASES WHERE NO APPEAL LIES.—Where Court dismissed an application for execution for want of prosecution and subsequently refused to restore the application, there is no appeal from the order refusing to restore the application 45 A. 148=21 A.L.J. 135, 100 I.C. 343=45 C.L.J. 60; 31 C. 207. An order of appellate Court setting aside the order of first Court dismissing the suit for default of appearance of parties is not appealable 11 A.L.J. 615=35 A. 427. See also 139 I.C. 296=1932 N. 101 Application to set aside dismissal for default—No appeal lies. 36 C.L.J. 184=1922 C. 572; 43 I.C. 54=2 P.L.J. 720 See also 139 I.C. 296=1932 N. 101. Nor from an order rejecting an application to restore a suit dismissed for default of both parties 19 I.C. 97=9 N.L.R. 33 See also 139 I.C. 296=1932 N. 101. Nor against an order dismissing for default an application under O. 21, R. 90. 97 I.C. 704=45 C.L.J. 557

Cl (d).—The words of O. 43, R. 1 (d) are perfectly general. The words "in a case open to appeal" have no reference to the appeal against the decree actually passed. If there could be no appeal against a decree that could be passed in the suit or proceeding under any circumstances, there would be no appeal against an order refusing to set aside an *ex parte* decree passed in such a suit or proceeding. A case is not open to appeal within the meaning of O. 43, R. 1 (d) when no appeal would lie against a decree under any circumstances 40 C.W.N. 992=63 C.L.J. 277=1936 C. 485. An appeal against a decree in a simple rent suit (when the proviso to S. 153, B. T. Act, does not come into play) valued at Rs. 50 or less would be incompetent only under one circumstance, namely, when the Munsif trying the suit has been vested with final jurisdiction, and would lie under all other circumstances. (*Ibid*) Order granting an application under O. 9, R. 13 is not appealable. 52 I.C. 901=17 A.L.J. 1052, 14 A.L.J. 332=38 A. 297. Nor an order purporting to be made under O. 9, R. 13 dismissing an application for restoration of an application to set aside an *ex parte* decree. 49 I.C. 745, 48 A. 175=1925 A. 610 But see 6 P. 474=101 I.C. 753=1927 P. 240. See also 149 I.C. 777=1934 R. 202, 10 P.L.T. 211. An order dismissing for default an application to set aside an *ex parte* decree is appeal-

- (e) an order under rule 4 of O. X pronouncing judgment against a party;
- (f) an order under rule 21 of Order XI;
- (g) an order under rule 10 of O. XVI for the attachment of property;
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party;
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement;
- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;
- (k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;

Notes.

able 30 I.C. 798; 30 I.C. 45=21 C.L.J. 628. See also 56 C. 21, 10 Pat.L.T. 589. The words "rejecting an application" signify an immediate rejection and not a conditional or prospective rejection. 6 L.W. 757=43 I.C. 1. No appeal lies against an order refusing to set aside a dismissal of a suit under O. 9, R. 4. 43 I.C. 374=27 C.L.J. 117. Nor against an order rejecting an application under O. 9, R. 9 for revival of an application for reversal of a sale, which had been dismissed for default of appearance of the judgment-debtor. 27 I.C. 492=19 C.W.N. 25. Order dismissing application to set aside *ex parte* decree because the conditions which were lawfully imposed on the defendants were not complied with—Appeal lies. 1927 B. 1=28 Bom.L.R. 1246=51 B. 67. But see 28 Bom.L.R. 578=50 B. 326=96 I.C. 321.

O. 43, R. 1 (f).—An order refusing to strike out a defence is one under O. 11, R. 21 and that it is appealable under O. 43, R. 1 (f). 34 C.W.N. 220=1930 C. 426.

Cl. (j) —Scope of cl. (j). See 11 Lah.L.J. 546. An order confirming the sale amounts to a refusal to set aside the sale and hence is appealable. 141 I.C. 421=34 P.L.R. 233=1933 L. 210. An order refusing leave to a decree-holder to bid under O. 21, R. 72 is not appealable. 38 C. 717=15 C.W.N. 862 (P.C.). An appeal does not lie when no objection has been specifically allowed or dismissed by executing Court. 1929 A. 671. If an order is itself appealable, an appeal will lie from that part of the order which relates to costs. 44 A. 209=20 A.L.J. 11. An appeal lies against an order on an application under O. 21, R. 90 to set aside a sale, which is dismissed for default. 38 I.C. 598=25 C.L.J. 163; 104 I.C. 759=55 C. 616. See also 56 C. 969=33 C.W.N. 392; 7 R. 37=117 I.C. 253=1929 R. 148. But no appeal lies against an order under S. 90 dismissing an application to set aside the dismissal. (*Ibid.*) But see 38 I.C. 63. An auction-purchaser can appeal against an order setting aside the sale on the ground of irregularity even if decree-holder has compromised his claim with judgment-debtor. 13 C.L.J. 535=15 C.W.N. 685. As to second appeal, see 3 L.L.J. 463; 1929 L. 778. There is no second appeal against an order setting aside a sale on the ground of fraud under O. 21, R. 92. 168 P.R. 1919=54 I.C. 941. An order confirming the sale amounts to a refusal to set aside the sale and hence is appealable. 141 I.C. 421=1933 L. 210. An appeal lies against an order

passed by an executing Court refusing to receive the amount of decree and costs from a mortgagee under O. 21, R. 89. 12 I.C. 733=178 P.W.R. 1911. An appeal lies from order in execution of small cause decree transferred to the original side for execution. 10 L.W. 556=53 I.C. 958. An appeal lies from an order refusing to set aside a sale under O. 21, R. 89 whether the purchaser is the decree-holder or stranger. 14 I.C. 326=1912 M.W.N. 756. See also 131 I.C. 533=1933 P. 97. Joint application by judgment-debtor and decree-holder purchaser for setting aside sale, on payment of certain amount on a particular date, and for confirmation on default—Order on application, if appealable. 17 Pat.L.T. 940 (S.B.). No appeal lies from an order under O. 21, R. 101. Such an order may, however, be the subject of revision. 16 R.D. 160. In an appeal from an order refusing to set aside sale, the auction-purchaser is a necessary party. 35 P.L.R. 658=1934 L. 592 (2). Order setting aside sale under S. 227, Orissa Tenancy Act—Whether appeal lies. 15 P. 375.

Cl. (k).—"Suit" does not include "appeal". 33 C.W.N. 881=49 C.L.J. 538=1929 C. 532; 121 I.C. 564. An order declaring that the suit had abated because the legal representative of the deceased defendant had not been brought on the record in time is a decree and appealable as such though no formal decree dismissing the suit had been drawn up. 10 P. 471=133 I.C. 767=1931 P. 353. An application to bring on the record the legal representatives of a deceased party after the expiry of the time fixed for this purpose must be deemed to be an application to set aside the abatement and an order refusing to set aside an abatement is appealable. 147 I.C. 699 (1)=1934 L. 315. When no application to bring the representatives of a deceased plaintiff is made within time the suit abates; and an application for substitution made afterwards ought necessarily to be considered on an application under O. 22, R. 9 (2), to set aside the abatement. 74 I.C. 17=1924 L. 424. Appeal lies from a finding that a suit has abated; but such an appeal is one against the decree in the suit. 26 S.L.R. 81. Though no second appeal lies from an order of abatement, it may be questioned in second appeal if it "affects the decision of the case". 1933 A. 294=144 I.C. 133=1933 A.L.J. 561. No appeal lies if there has been no application to set aside an abatement. An order of

- (l) an order under rule 10 of Order XXII giving or refusing to give leave,
 (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction;
 (n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;
 (o) an order [under rule 2, rule 4 or rule 7] of Order XXXIV refusing to extend the time for the payment of mortgage money;
 (p) orders in interpleader suits under rule 3, rule 4 or rule 6 of Order XXXV,
 (q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII;

Leg. Ref.

¹ Substituted by Act XVI of 1930.

Notes.

abatement cannot be interfered with in revision if a person fails to set it aside. 95 P.R. 1911=13 I.C. 963 No appeal lies from an order adding legal representative. 39 M. 488=28 M.L.J. 491. An order under O. 22, R. 3 is not open to appeal. 73 I.C. 230=1924 O. 114; 44 I.C. 145. Refusal to set aside abatement of appeal—Appealable. 1925 P. 162=85 I.C. 1010.

O. 43, R. 1 (1).—An application by a mortgagee to be added as a party to a partition suit is an application under O. 22, R. 10 and an order granting or refusing it is appealable 134 I.C. 307=35 C.W.N. 296=1931 C. 594 (49 I.A. 220, Expl.) Court of Wards assuming superintendence of plaintiff's estate during pendency of suit—Order granting leave to Deputy Commissioner to continue suit—Right of plaintiffs to appeal. 156 I.C. 990=1935 O. 486 Insolvency of plaintiff—Receiver neglecting to continue suit—Application by assignee from receiver for leave to continue suit—Rejection—Appeal. 157 I.C. 900. Whether second appeal lies from order of appellate Court under this clause. See 156 I.C. 152=1935 M. 423

Cl. (m).—Order recording compromise—Appeal, if barred by S. 96 (3). 1936 S. 59. This clause does not contain any restrictive words, and hence an appeal would not be incompetent even when there has been no dispute as to the factum of compromise. 43 L.W. 386=1936 M. 347=70 M.L.J. 471. The remedy of a party dissatisfied with the order of a Court refusing to record a petition of compromise is to appeal from the order so refusing, not from the judgment given by Court on the merits. 42 I.C. 192; 104 I.C. 561. Order refusing to record compromise on the ground of its invalidity is appealable. 103 I.C. 80=1927 L. 546 (2). Also when refused on ground that no compromise has been made. 1936 A.L.J. 336=1936 A. 433. An appeal from an order under O. 23, R. 3 is competent even though before the appeal is presented a decree has been passed in terms of the compromise. 36 C.W.N. 1013 It is not necessary for the aggrieved party to appeal both from the decree and the order. 36 C.W.N. 1013 (29 C.W.N. 928, Cons.). A consent decree passed without order for recording a compromise is liable to be set aside on appeal

notwithstanding the bar under S. 96 (3) 33 I.C. 769=43 C. 85. Order holding no compromise has been proved is not appealable. 73 I.C. 177=1924 L. 248 An order allowing the plaintiffs to withdraw their suit as against certain of the defendants is not appealable. 1930 A. 863=128 I.C. 827. See also 137 I.C. 804=33 P.L.R. 391. The right of appeal under this rule against an order recording a compromise under O. 23, R. 3, is not lost because the decree involved in the order is not appealed against. It would be more correct to appeal against the decree, but if the order is set aside on appeal, the decree must go with it. 61 C. 910=59 C.L.J. 421=1934 C. 846; 43 L.W. 722=1936 M. 385=70 M.L.J. 400. Appeal lies even though at the time when the compromise was recorded there was no contest before the Court, and though the order recording the compromise has ripened into a decree and no appeal has been preferred against the decree itself (*Ibid*) No separate order recording compromise—Appeal from decree—Plea of no compromise—No finding given by appellate Court—Revision. 1936 L. 963.

RIGHT OF SUIT.—Where a pleader enters into a compromise on behalf of his client without authority, and the client is not present when the compromise is drawn up and filed, the client cannot be regarded as a party to the compromise, and a decree passed on the basis of that compromise is wholly incompetent. A separate suit to set aside the compromise and decree will lie, and R. 1 (m) is no bar to the suit. 150 I.C. 838=11 O.W. N. 1030=1934 O. 417.

Cl. (o).—Where the Judge on the original side directed that the Registrar might be at liberty to sell the mortgaged properties without reserve, *held*, that the order was not appealable. 60 C. 506=145 I.C. 318=1933 C. 534.

Cl. (q).—When an application for attachment before judgment is dismissed by Court of first instance after hearing defendants, no appeal lies against that order. 33 I.C. 689=23 C.L.J. 392 Nor against an order rejecting an application for attachment under O. 38, R. 6, when there has been no conditional order of attachment under R. 5 (3) of O. 38. 14 P. 1=16 Pat. L.T. 291=1935 P. 219. Where in response to a notice issued to the defendant under O. 38, R. 5, defendant appears in Court, and shows cause why no order for furnishing security for costs should be passed against him and why no order should be passed directing the attachment of this

- (r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX;
 (s) an order under rule 1 or rule 4 of Order XL;

Notes.

property, the order of the Court accepting the contention of defendant is an order which falls under O 38, R. 6 (2) and from such an order an appeal lies 140 I.C. 95 = 1932 A.L.J. 228 = 1932 A. 269 Application for attachment before judgment—Court ordering application closed on respondent undertaking not to alienate properties—Order is one under O. 38, R. 6—Appealability from the order 1928 M.W.N. 125 An order under R 5 of O 38 is not appealable while an order under R. 6 is appealable Where the Court passed an unconditional order of attachment before judgment purporting to act under R 5 of O. 38, the order is appealable 107 I.C. 276 (L.).

O. 43, R. 1 (q) and (r)—Both injunction and attachment are intended to give prompt relief from immediate or impending danger of injury which will be irreparable, and Court ought not to admit appeals from orders refusing injunction or attachment, except in cases of serious misdirection in law or fact, when special directions might be given for expedition Such orders are discretionary and appellate Court ought not to interfere with the exercise of a Judge's discretion unless satisfied that it was not judiciously exercised, i.e., that the Judge acted on wrong principles. The mere fact that appellate Court might take a different view is not a sufficient ground for interference. If lower Court rightly appreciate the facts, and applies to those facts the true principles, that is a sound exercise of judicial discretion. 61 C. 814 = 38 C.W.N. 771 = 1934 C. 694

Cl. (r).—An appeal lies from an order granting as well as from an order refusing to grant an injunction under O 39, R. 1 11 A.L.J. 613 = 35 A. 425. Also from an order refusing to discharge an injunction issued under O. 39, R. 2. 1933 L. 203 = 34 P. L.R. 975 = 14 L. 330 An order for the issue of an injunction subject to a condition is appealable, but there is only one appeal against it. 66 I.C. 509 = 1922 A. 441. An order of Court refusing to attach property for disobedience of an interim injunction is open to appeal (27 I.C. 131, F.), 66 I.C. 9 = 1922 L. 347. The appellate Court has jurisdiction to pass an order of imprisonment in appeal 27 I.C. 131. Disobedience of an injunction order is an act independent of the suit and calls for a separate punishment 27 I.C. 131. Breach of undertaking not to alienate property pending suit—Contempt of Court—Order refusing to commit for such contempt is appealable. 33 Bom.L.R. 1109 = 134 I.C. 1165 = 1931 B. 509. An appeal lies from the refusal of a Judge of the original side of the High Court to grant an interim injunction, but what the Court of appeal has to consider is simply whether or not the Judge who dealt with the matter properly exercised the discretion which he undoubtedly possessed. 152 I.C. 563 = 1934 C. 713.

Cl (s) —An order for the appointment

of a receiver without actually appointing any one to that office is appealable. 18 A.L.J. 212 = 44 A. 227 (40 M. 18, Diss.; 13 A.L.J. 79, 13 C.L.J. 157; 17 Bom.L.R. 510, F.) But see 1932 P. 360, *contra*. An order merely declaring that a receiver should be appointed is appealable, though nobody is named as receiver 13 Pat.L.T. 525 = 1932 P. 360. Order appointing receiver provisionally if open to appeal. 27 I.C. 646 = 13 A.L.J. 79. Appeal lies against *ad interim* appointment of receiver. 1936 L. 102. Order declaring that receiver should be appointed is open to appeal 69 I.C. 929 = 1 P. 625. An order removing a receiver is one falling under R. 1 (a) and is appealable. 92 I.C. 940 = 53 C. 319 = 1926 C. 593 But see 1931 A.L.J. 13 = 1931 A. 72 = 134 I.C. 454, *contra* (1903 A. W.N. 67, Foll., 53 C. 319, Diss. from) An order refusing to appoint a receiver is an order under O 40 and is appealable. 1926 C. 1006 = 95 I.C. 632 An interlocutory order for the appointment of a receiver in the terms "the property in suit will be better managed if a receiver is appointed" is not appealable. It is only the final order that is appealable. 9 I.C. 582 = 13 C.L.J. 157. See also 148 I.C. 184 = 1934 N. 64. Order appointing receiver subject to security being furnished—Security not furnished—Appeal does not lie till security is furnished and appointment finally approved. 100 I.C. 140 = 1927 C. 253. But see also 40 M. 18. An order merely directing that a proper person should be appointed as a receiver is not appealable. (9 I.C. 582, F.); 29 I.C. 504 = 17 Bom.L.R. 510. Nor orders of Court in passing receiver's accounts 12 I.C. 780 = 14 C.L.J. 445. See also 69 I.C. 203 = 43 M.L.J. 707. An order of Court directing receiver appointed in the suit to pay money to a person pending disposal of the suit is appealable. 14 I.C. 277 = 11 M.L.T. 383. Receiver ordered to pay damages—No appeal lies from such order 92 I.C. 631 = 1925 R. 266. Order directing receiver to pay into Court amount lost by his negligence is appealable. 62 M.L.J. 199 = 1931 M. 760. Order granting leave to sue a receiver is not appealable. 22 Bom.L.R. 1126 = 45 B. 99 Dispossession by receiver of third party—Appeal lies. 16 L.W. 833 = 69 I.C. 393. Where a receiver is appointed in execution of a mortgage decree overruling the objections of a third party, the latter has no right of appeal but he can prefer a revision to High Court. 4 P.L.W. 414 = 45 I.C. 177 = 1918 P.H.C.C. 138. An order construing an order of appointment does not fall under either R. 1 or R. 4 of O 40 and is not appealable 5 P.L.J. 97 = 1920 P.H.C.C. 121. Order removing a receiver is appealable at the instance of the parties but not at the instance of the receiver himself. 57 C.L.J. 408 = 36 C.W.N. 903 = 1933 C. 52 = 60 C. 162

LETTERS PATENT.—The Code does not control the provisions of the Letters Patent. The judgment of a single Judge of the High Court in an appeal under O. 43, R. 1 (s) is appealable under Cl. 15 of the Letters

(t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal;

(u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the appellate Court;

(v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV;

Notes.

Patent. (22 M. 68 and 13 M.L.J. 497, Foll.) 56 M. 915=145 I C. 449=1933 M. 770=65 M. L.J. 222 (F.B.).

O 43, R. 1 (t).—An appeal does not lie against order refusing to restore application to set aside an appellate decree dismissed for default. But where there has been a serious miscarriage of justice, revision lies. 40 I C. 336. An appeal lies to High Court from order refusing to re-hear an appeal dismissed for default. 28 C.L.J. 155=45 C. 638 "Suit" includes the appellate stage and also includes the execution proceedings and an application to re-hear an appeal heard *ex parte* is an application in the suit. 19 C.L.J. 310=19 C. W.N. 359. An order of lower appellate Court rejecting an application for review of an appeal dismissed for default and a memo. of cross-objections allowed *ex parte*, is not appealable. 53 I.C. 333. An order rejecting an appeal for failure to furnish security for costs is not appealable. 9 I.C. 748=14 O C 40. On this sub-clause, see also 1929 P. 609=10 P.L.T. 589, 120 I C. 791=1930 L. 112, 1936 R. 109.

Cl. (u) GENERAL.—When an appeal is remanded without any provision of law being stated, the presumption is that the order is made under O. 41, R. 23. 20 A.L.J. 321=44 A 492; 87 I.C. 575=1925 C. 1157. The power of remand should be exercised with very great caution. 3 P.L.J. 253=43 I C 959; 12 L.W. 667=39 M.L.J. 536. On this point, see also 60 M.L.J. 713. An appeal under R. 1 is one from the order granting an application for review and not one from the final decree in the suit. 3 L.L.J. 100=60 I.C. 259.

CASES WHERE APPEAL LIES.—An appeal to the Chief Court against the order of remand is competent under R. 1 (u) if it involves point of law. 8 P.R. 1915=28 I C 441. See also 1935 P 49. An appeal lies from an order of remand in a case where if the appellate Court, which passed that order, had passed instead a decree reversing that of the lower Court, an appeal would lie from such decree. 23 I C. 817=85 P.L.R. 1914, 3 L. 218=1922 L. 178 (F.B.), 2 L.L.J. 587. Where a question affecting the final result of the case has been decided against a party and the suit is remanded, the order of remand is appealable. 20 I.C. 788=279 P.L.R. 1913. See also 1930 N. 295, 1930 M.W.N. 1021, 1934 L. 907; 38 C.W.N. 1202, 4 A.W.R. 1120, 145 I.C. 183=37 C.W.N. 190=1933 C. 496, 10 O.W.N. 664=1933 O. 350; 14 L.R. 501 (Rev)=17 R. D. 605. An order of remand passed initially under O. 41, R. 23 but by a clerical mistake purporting to be under O. 41, R. 25 is ap-

pealable. 9 I.C. 431. An order of an appellate Court setting aside an order rejecting a plaint is not appealable. 131 I C. 750=1931 L. 497. See also 152 I C 241=1931 Pesh. 88. When an order dismissing an application to set aside an *ex parte* decree is set aside and Court of first instance is directed to proceed with the suit, the order is not an order of 'remand' within the meaning of R 1 (u) and the order of the appellate Court is not appealable. 53 A 519.

CASES WHERE NO APPEAL LIES.—No appeal lies against an order passed by an appellate Court remanding a case otherwise than under O 41, R. 23. 31 C.L.J. 357=23 C.W.N. 1049. See also 59 I.C. 909, 6 P. 381; 31 C.W.N. 878, 1925 R. 320, 100 I.C. 135=1927 M. 335=52 M.L.J. 90, 103 I.C. 670, 6 P. 160. See also 37 C.W.N. 190; 132 I C. 311=1931 M 1=60 M.L.J. 713. Remand—Suit as originally framed entirely disposed of—Amendment of plaint not allowed—Suit cannot be said to be disposed of on a preliminary point. (*Ibid*) (45 M. 900, Dist.) There is no appeal against an order of remand passed by a special Judge under the provisions of the Bengal Tenancy Act 72 I C 1013=37 C.L.J. 314. There is no appeal for an order of remand under the inherent powers of an appellate Court, and not falling under O. 41, R. 23 and under O 43, R 1 (a). 69 I.C. 826=16 L.W. 515, 97 I.C. 105=1926 P. 457. See also 1935 P 49. No appeal lies where the order of remand is made under O 41, R 25. 37 C.W.N. 190, 1935 O.W.N. 352=154 I.C. 676=1935 O 333. Where a party has himself asked for a remand and obtained an order of remand, he cannot appeal merely because the ground covered by the order of remand is not so wide as that which he himself desired. 116 I C 55=1929 O 398. Remand for fresh trial with the addition of a necessary party—No appeal lies against the order. 3 R. 490. O 41, R. 23, does not contemplate a case decided upon the whole evidence and upon all the issues which were raised. 55 I C 484=1 Pat L T 500. Where the appellate Court decides the main point in a case and remands the case for disposal of remaining issues, the order is not appealable. 60 I.C. 609. A general order of remand by the lower appellate Court on the ground of mishandling of the trial in the First Court is not appealable. 63 I.C. 858, 1927 M. 385. An appellate Court has inherent power under S. 151 to remand a case for retrial. No appeal lies against such an order. 3 P.L.J. 253=43 I.C. 959, 39 M.L.J. 536=12 L.W. 667. See also 44 A. 176=19 A.L.J. 971, 25 L.W. 198=52 M.L.J. 90. An order of remand made on an appeal from an order setting aside or refusing to set aside an

(w) an order under rule 4 of Order XLVII granting an application for review.

Loc. Ams.—[Allahabad, Oudh and Sind.] In R. 1 (u) for the words "an order under R. 23 of O. 41" read "any order".

Notes.

execution sale is final under S. 104 and no appeal lies therefrom 50 I.C. 610=29 P.L.R. 1919. Findings of fact cannot be disturbed in an appeal against an order remanding a case under O. 41, R. 23. 48 I.C. 379=109 P.R. 1918.

PARTIAL AND TOTAL REMAND—No distinction between—No distinction seems to be recognized in R. 1 (u), between a partial and a total remand of the case. Hence an appeal is competent from an order remanding a case even though the whole of the remand order is not challenged but only certain findings which have gone against the appellant. 146 I.C. 939=1933 L. 615.

SECOND APPEAL.—Where there is no second appeal from the decree of the appellate Court, there is also no second appeal from the order of remand. 19 A.L.J. 72=43 A. 403. There is no second appeal in a suit of a small cause nature of the value below Rs. 500 and an order of remand in such a suit is not open to appeal. 18 A.L.J. 167=42 A. 200, 21 I.C. 638=11 A.L.J. 599.

REVIEW.—See 1935 C. 153.

PRACTICE AND PROCEDURE.—On an appeal from an order of remand, High Court is bound by the finding of fact of the lower appellate Court. 65 I.C. 376=8 O.L.J. 624, 2 L. 25=59 I.C. 715=31 P.W.R. 1921.

COURT-FEE.—Where an appeal is directed against the order of remand it should be filed as a miscellaneous appeal under R. 1 (w), and a Court-fee of Rs. 2 is payable as on a Civil Miscellaneous Appeal. 144 I.C. 967=10 O.W.N. 143=1933 O. 191. An appeal against the order of remand by the lower appellate Court not made under O. 41, R. 23 is a second appeal and *ad valorem* Court-fee should be paid thereon. 50 I.C. 367.

O. 43, R. 1 (w).—Cl (w) has to be read along with O. 47, R. 7. 8 L. 617=1927 L. 435 (2); 146 I.C. 530=37 C.W.N. 705=1933 C. 727, 131 I.C. 518=1931 A. 329; 8 O.W.N. 1267; 140 I.C. 409=1932 N. 177 (see also Notes under O. 47, R. 7, *infra*), 35 Bom.L.R. 280=1933 B. 183. Appeal lies from order granting review. 41 I.C. 886=15 A.L.J. 505, 66 I.C. 909=25 C.W.N. 884; 52 I.C. 29=30 C.L.J. 250; 47 I.C. 850, 112 I.C. 518; 117 I.C. 849; 116 I.C. 221=1929 L. 26. See also 9 I.C. 238=250 P.W.R. 1911; 94 I.C. 591=1926 B. 121. [N.B.—As to law in Bombay, see 31 Bom.L.R. 137.] A right of appeal against an order granting a review is restricted in its scope by O. 47, R. 7. 45 C. 60=21 C.W.N. 1076, 25 I.C. 903=41 C. 746, 22 I.C. 773, 49 I.C. 57; 31 M.L.J. 827=38 I.C. 373, 37 I.C. 229=21 M.L.T. 297; 24 M.L.J. 93=18 I.C. 549; 42 A. 626=18 A.L.J. 838, 47 A. 881. See also 148 I.C. 1126=1934 L. 617. Although an appeal lies against an order granting a review application that appeal can only be entertained on one of the grounds set forth in R. 7, O. 47, R. 7 R.

187=118 I.C. 120=1929 R. 105. See also 25 N.L.R. 104=116 I.C. 645=1929 N. 73, 122 I.C. 184=1930 A. 126. An appeal against an order granting review lies only in the cases mentioned in O. 47, R. 7. O. 47 contains rules specifically framed to govern procedure in regard to applications for review, and it modifies the provisions of O. 43. (1926 B. 121, Ref., 1926 A. 492 and 1920 A. 112, Rel on) 146 I.C. 231=1933 A. 778. An appeal against a decree passed on an application for review of judgment is appealable on the ground that the Court which admitted the application for review had no jurisdiction to do so. 11 I.C. 343=14 O.C. 108. See also 11 O.W.N. 1287=1934 O. 445. There can be no appeal against an order granting a review merely for sufficient grounds. 35 I.C. 15=1 P.L.J. 193. Where trial Court granted review and decreed party's claim and appellate Court, finding that there was not "other sufficient reason" (O. 47, R. 1), for admitting the application for review, dismissed the plaintiff's suit. Held, that the order was clearly wrong for the "other sufficient reason" could not be questioned in appeal under O. 47, Rr. 4 and 7. (1929 R. 105 and 27 A. 695); 1935 R. 501. There is no second appeal against an order granting a review. 64 I.C. 568=1922 B. 292. Application for final decree in mortgage suit—Dismissal for default—Subsequent application after limitation—Order reviving prior application—Appealability. 18 N.L.J. 72. No appeal lies to the District Court against the order of a Revenue Court granting a review in a summary suit. 26 I.C. 831=2 L.W. 62. Where an order of the Assistant Collector reviewing an order passed by him under S. 111 (1) (c) of the U.P. Land Revenue Act is appealed against, the appeal must fail if it is not based on any of the grounds mentioned in O. 47, R. 7 (1), C.P. Code. 1936 O.W.N. 836=1936 O. 409. Effect of deletion of clause in Bombay High Court Rules. 29 Bom.L.R. 1355, 31 Bom.L.R. 131.

COURT-FEE.—Where once a Judge has granted the application for review, on whatever grounds he has granted it, the appeal against it can only be made under the conditions laid down in O. 47, R. 7 and as the question of the application for review being insufficiently stamped is not one of the grounds mentioned in O. 47, R. 7 as being a proper ground for an objection, the appellate Court cannot go into the question of whether the Court-fee paid was sufficient or not. 35 Bom.L.R. 280=1933 B. 183=148 I.C. 728.

MISCELLANEOUS.—An order dismissing an application under S. 34, Trusts Act, is not appealable. There is no provision in the Trust Act for an appeal. Nor is the order a "decree" under S. 2 (2), or an order appealable under O. 43, R. 1. 11 O.W.N. 1533.

[Bombay.] Rule 1 (w) of O. 43 shall be *deleted*.

[Calcutta] Insert the following *after* clause (s), R. 1, O. 43 —

(u) "an order under R. 57 of O. 21, directing that an attachment shall cease or directing or omitting to direct that an attachment shall continue"

[Madras.] Substitute the following for R. 1 (d) of O. 43 of the Code of Civil Procedure —

(d) an order under R. 13 or R. 15 of O. 9 rejecting an application (in a case open to appeal) for an order to set aside a decree *or order* passed *ex parte*."

(Fort St. George Gazette, Part II, p. 313, dated 14th March, 1933.)

Substitute the following for sub-rule (s) of R. 1, O. 43.

(s) An order under R. 1, of O. 40, except an order under the proviso to sub-rule (2) of R. 4

[Rangoon] Add the following clause *after* clause (s), R. 1.—

(u) "a garnishee order under R. 63-C, or R. 63-E, and an order as to costs in garnishee proceedings under R. 63-G of O. 21"

Procedure.

2. [S. 590] The rules of Order XLI shall apply, so far as may be, to appeals from orders.

Loc Ams.—[Allahabad and Oudh.] Add the following as R. 3 of O. 43 —

"3 In every appeal under R. 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid." [See 119 I.C. 4=1929 All 858]

[Madras.] (1) In O. 43, substitute the following for R. 2:—

"2. The Rules of O. 41 and of O. 41-A shall apply, so far as may be, to appeals from the orders specified in R. 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law

Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court"

Add the following as R. 3 of O. 43 —

"3. (1) The provisions of O. 42 shall apply, so far as may be, to appeals from appellate orders.

(2) A memorandum of appeal from an appellate Court order shall be accompanied by a certified copy of the judgment and of the order of the Court of first instance, and by a certified copy of the judgment and of the order of the appellate Court.

(3) If any ground of appeal is based upon the construction of a document, a printed or type-written copy of such document shall be presented with the memorandum of appeal:

Provided that, if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented."

ORDER XLIV.

PAUPER APPEALS.

1. [S. 592.] Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper,

Who may appeal as pauper.

Notes.

O. 43, R. 2.—Second appeal—Order on preliminary issues not filed along with main judgment—No valid presentation 105 I.C. 593 (1)=28 Punj L.R. 537. On this rule, *see also* 1930 S. 252; 41 L.W. 192

O. 44, R. 1.—As to whether application under this rule is governed by O. 44, R. 1, C.P. Code, *see* 1936 M. 600. A person can file a petition to appeal *in forma pauperis* only against a decree as a whole, and not against any order which is not a decree and which does not dispose of a case finally. 163 I.C. 366=38 P.L.R. 1119=1936 L. 406. Under R. 1 it is unnecessary for appellate Court to

arrive at a definite and final conclusion that the decree complained against is contrary to law or is otherwise erroneous or unjust, before granting leave to appeal *in forma pauperis*, it is enough if Court finds that the appeal raises a substantial question of law and that the appellant has a *prima facie* good case. 53 M. 245=31 L.W. 76=122 I.C. 337 (1)=58 M.L.J. 195 But *see* 55 M. 323 *contra* cited *infra*. The order is mandatory and only contemplates a perusal of the application, the judgment and the decree and nothing else; and unless in the opinion of Court the decree is contrary to law or otherwise erroneous or unjust, Court is

subject, in all matters, including the presentation of such application, to the

Notes.

bound to dismiss the application. Rule 1 does not say that if the appeal raises a substantial question of law or the appellant has *prima facie* a good case the application should be allowed 56 M. 323=64 M.L.J. 433=1933 M 519. (53 M. 245, Diss. from.) There is a difference between an application for leave to sue as a pauper and an application for leave to appeal as a pauper. In the former case, apart from the question of pauperism, the only test applied is whether there is a cause of action shown; but when the appellate stage is reached, a more severe test has to be applied 56 M. 323=64 M.L.J. 433. When leave to appeal *in forma pauperis* is granted, the reasons of the Court for granting such leave should be briefly stated. (*Ibid*) Ordinarily where an appellant has been allowed to appeal as a pauper there should be reasons other than poverty justifying an order being made upon him to furnish security and the fact that leave has been granted to him to appeal *in forma pauperis* should of itself be sufficient to show that the judgment appealed against upon a perusal of it appears to be contrary to law or otherwise erroneous or unjust. On the question of security where leave to appeal has been granted, it is permissible for Court to peruse the judgment appealed against and to see whether there are circumstances which would justify an order for security for costs. And the chance of the appellant's success is such a circumstance. 56 M. 323=64 M.L.J. 433. Upon hearing of the rule under R. 1 after notice to the opposite party and the Government pleader, the question of whether the judgment is contrary to law or not can be considered by Court. Notwithstanding the fact that Court while dealing with the application *ex parte* did not think that any one of the grounds mentioned in the rule existed for rejecting the application, that does not debar Court from reopening the question when the other side appears after notice, and the opposite party is entitled to show that the judgment and decree appealed from are not contrary to law or to some usage having the force of law. The enquiry by Court is not confined to pauperism of the applicant. 10 P. 606=132 I.C. 361=1931 P 183. See also 54 A 394, 140 I.C. 439=1932 L 654; 1933 L 256=141 I.C. 649=34 P.L.R. 516, 133 I.C. 125. When once notice has been issued Court may enquire into the question of pauperism of applicant but it cannot fall back on the proviso to R. 1 which relates only to summary rejection upon a perusal of the judgment and decree appealed from. 54 A 394. It is open to an appellate Court even after an application for leave to appeal *in forma pauperis* has been admitted and it has ordered notice to be served on the other party to consider whether the decree is contrary to law or some usage having the force of law or is otherwise erroneous or unjust 140 I.C. 439=1932 L. 654. When notice has been ordered to the

respondent and the Government on an application under R. 1, the respondent is expected to appear and show cause against whole application. It is open to Court to consider the question whether the decree appealed from is contrary to law or to some usage having the force of law or is otherwise erroneous or unjust, and Court is not precluded from determining such question merely because notices to the respondent and the Government Advocate have been issued previously 4 A.W.R. 749=1934 A.L.J. 961=1934 A. 1004 (F.B.) See also 98 I.C. 624. Court need not issue notice to the respondent before granting leave. The practice of the Madras High Court has been not to issue such notice 55 M. 982=139 I.C. 652=1932 M. 523=63 M.L.J. 28. There is no reason why every ground should be discussed in an order rejecting an application to file appeal *in forma pauperis* 1935 Pesh 22. Persons who do not pay the costs of their appeal are entitled to be heard only if the Judge after reading the judgment and decree is of opinion that on the face of it the judgment is wrong. Where judge after reading the judgment refuses the application to file an appeal *in forma pauperis* the mere fact that his order was brief does not constitute any material irregularity 1932 A.L.J. 860=1932 A. 712. Court must reject an application for leave to appeal *in forma pauperis* where the appellant has entered into any agreement with reference to the subject-matter of the appeal under which any other person has obtained an interest in such subject-matter, even though such agreement was entered into after the commencement of the suit 122 I.C. 831. Order refusing leave to appeal *in forma pauperis* can be revised. 120 I.C. 413=1920 N. 53 (1924 N 44, Rel on). But High Court has no power to interfere on the merits of the order refusing leave to appeal *in forma pauperis* 120 I.C. 413=1930 N 53. Order 44, R. 1 does not require reasons for rejecting leave to appeal *in forma pauperis* to be stated and the absence of them does not vitiate the trial 120 I.C. 413=1930 N 53. Held, that having regard to the fact that the appellant was a *pardanashin* lady and was living with her parents in a different province there was sufficient cause for not filing her appeal by presenting it in person within the period allowed by law and that the representation of the papers by the appellant in person after the expiry of the period was sufficient 11 L.L.J. 226. "Authorised agent", meaning of—*Pardanashin* lady—Husband presenting appeal on behalf of—Validity. 10 Pat L.T. 46=114 I.C. 210=1929 P 27. Under R. 1, a respondent is not precluded from attacking an *ex parte* order granting leave to appeal *in forma pauperis* and showing that the case does not fulfil the requirements of the law as enacted by the rule. It is competent for the Court to consider the question whether the condition laid down by R.1 has been satisfied. 114 I.C. 325=1929 L 514. Leave to appeal *in forma pauperis*—Refund of—Applicant if

provisions relating to suits by paupers, in so far as those provisions are applicable:

Notes.

entitled to prosecute appeal for payment of Court-fee. 40 A. 381=16 A.L.J. 309 Appeal *in forma pauperis*—Limitation Act, Art. 170. See 29 I.C. 1003=13 A.L.J. 635. High Court cannot grant leave to prosecute an appeal to Privy Council *in forma pauperis*. The petitioner must apply in England. 18 I.C. 129=17 C.L.J. 381, 42 M. 32=35 M.L.J. 258. See also 44 I.C. 731=3 Pat.L.J. 179, Foll.; 161 I.C. 192=1936 Pesh. 36. When the subject-matter is of the value of Rs. 10,000 or upwards, it is advisable to apply for leave to appeal as a pauper to Bench of two Judges under S. 8 (c) of the Oudh Courts Act 38 I.C. 541. Leave to appeal *in forma pauperis*—Dismissal of application does not involve dismissal of appeal 3 L. 35=65 I.C. 741. But where application for leave and memorandum of appeal are not accompanied by copies of decree and judgment, the rejection of the application puts an end to the whole proceeding. 157 I.C. 347=1935 A.L.J. 681=1935 A.W.R. 743=1935 A. 620 (2) (F.B.) Appeal filed along with application for leave to appeal as pauper—Rejection of application—Subsequent payment of Court-fee—Appeal whether presented in time—C.P. Code, S. 149 15 I.C. 678. Appeal when to be continued *in forma pauperis*. 38 M.L.J. 146=54 I.C. 761. Dismissal of application for leave to appeal as pauper—Effect on memo of appeal. 31 M.L.J. 269=40 M. 687, 1926 O. 13. An applicant applying for permission to appeal as a pauper is not entitled as of right to be heard either in person or by pleader before Court exercises its power to allow or reject the application. 28 I.C. 957. Application for leave to appeal *in forma pauperis*—Notice ordered—Effect. 1924 P. 791=8 Pat.L.T. 119.

Proviso.—The proviso to R. 1 is mandatory and appellate Court has no option except to reject the application, unless it is satisfied that the decree sought to be appealed against is contrary to law or otherwise erroneous or unjust 114 I.C. 80=1929 L. 539. There must be some material, either upon the application or upon the judgment and decree from which Court could reasonably form the opinion that the case falls within the proviso. 9 R. 92=132 I.C. 707=1931 R. 131. Any order which has been passed behind the back of the party should not operate to the prejudice of that party. Where therefore the order issuing notices is passed in the absence of the respondents they cannot be precluded, as a result of the order, from arguing before Court that the decree sought to be appealed against was not contrary to law or to some usage having the force of law nor was otherwise erroneous or unjust 15 L. 132=152 I.C. 171=1934 L. 72; 1937 N. 150; 1937 O.W.N. 14=1937 O. 222 (F.B.). Application for leave to appeal *in forma pauperis*—Issue of notice—Effect—Presumption as to conditions of notice being satisfied 10 Pat.L.T. 46=114 I.C. 210=1929 P. 27. Even after issue of

notice it is still open to the Court under the proviso to that rule to reject the application unless, upon a perusal thereof, and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. 1937 O. 222 (F.B.) noted *supra*. (165 I.C. 276=1936 O. W.N. 875, Overr.; 1933 A. 11; 6 P. 687 and 7 P. 825 Not Foll.) Memorandum of cross-objections filed in pauper appeals—Notice ordered—Presumption as to conditions being satisfied. 10 Pat.L.T. 387=119 I.C. 900=1929 P. 31. See also on this rule. 4 P. 67; 7 L.L.J. 214=1925 L. 391. Admission of an application for permission to file an appeal *in forma pauperis* is not a final disposal of the application and such admission does not preclude the opposite party from contesting the application. [7 P. 825, held overruled by 10 P. 606 (F.B.).] 141 I.C. 649=1933 L. 256.

ASSETS.—SUBJECT-MATTER OF APPEAL TO BE EXCLUDED.—A decree for partition and separate possession obtained by a pauper plaintiff, subject to his liability for debts, against which he seeks to appeal as a pauper, contesting his liability for the debts, should be excluded in considering his application for leave to appeal as pauper. In considering whether a person is "pauper" the subject-matter of the suit should be excluded. 152 I.C. 135 (1)=40 L.W. 783=1934 M. 653 (1)=67 M.L.J. 581.

NOTICE TO GOVERNMENT PLEADER.—DUTY OF COURT.—On receipt of an application to appeal as a pauper, Court has first to consider whether *prima facie* there is any ground for its rejection. If it is rejected, the matter ends. But if it is not rejected, a notice though not compulsory should be issued to the Government Pleader and the respondent and on hearing them, Court has to decide whether the applicant is in a position to pay Court-fees and further whether the decree is one which is contrary to law or is otherwise erroneous or unjust. Refusal to hear Government Pleader is revisable. 148 I.C. 624=1934 A.L.J. 827=1934 A. 421. See also 1934 A.L.J. 961=1934 A. 1004 (F.B.).

APPEAL FROM DECREE OF COURT IN AGENCY TRACTS.—R. 1 applies to appeals sought to be preferred *in forma pauperis* from decrees of Court in the Agency tracts, although there is no corresponding provision in the Agency Rules. Though many of the provisions of O. 33 and O. 44, are not reproduced in the Agency Rules, it does not follow that an appeal must be admitted as a matter of course without leave of the Court 58 M. 298=153 I.C. 476 (2)=40 L.W. 862=1935 M. 51=68 M.L.J. 51.

COURT-FEE.—An application for leave to appeal *in forma pauperis* accompanied with a memorandum of appeal was filed on 4th April. The application was rejected on 11th April. On 20th July the Court-fee stamp was paid. Between the two dates, the scale

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is

Procedure on application for admission of appeal.

contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

Notes.

of Court-fees had been increased. *Held*, that the Court-fee payable was only according to the scale in force when the memorandum of appeal was filed, *viz.*, 4th April. 140 I.C. 190=1932 O. 343. *See also* 1933 A. 308=1933 A.L.J. 585=144 I.C. 79. Application under this rule—Court ordering Court-fees to be paid by certain date and rejecting appeal on default—*If ultra vires* 1936 Pesh. 69. On rejecting an application to appeal *in forma pauperis* the Court is not bound to give time for the payment of Court-fee on the appeal. 154 I.C. 943=1935 Pesh. 22, 13 R. 50=159 I.C. 468=1935 R. 336. (1922 L. 225; 40 I.C. 611=32 M.L.J. 434 Diss.) The High Court can, after rejecting a petition for revision against an order of the District Judge rejecting an application to appeal as a pauper, extend the time fixed by the District Judge for paying the requisite Court-fees, even though such time had already expired and the appeal had been dismissed. 38 P.L.R. 374=1936 L. 909.

PRACTICE AND PROCEDURE.—Admission of an application for permission to file an appeal *in forma pauperis* is not a final disposal of the application and such admission does not preclude the opposite party from contesting the application. [7 P. 825, held overruled by 10 P. 606 (F.B.).] 141 I.C. 649=34 P.L.R. 516=1933 L. 256. Where the appellate Court issues notice to parties after a perusal of the application and the judgment and decree appealed from, it becomes *functus officio* as regards a summary dismissal of the application. The Court is bound to hear the parties before it does any thing further (54 A. 394, Ref.). 1933 A.L.J. 1467=1933 A. 925. On an application for leave to appeal as a pauper notice should not go as a matter of routine to the respondent. The practice of the Madras High Court is that when such an application is presented, as a condition precedent to the issue of notice, the Court has to have reason to think that the decree is contrary to law, etc. If the Court, after a perusal of the judgment, has not got reason to think so, then the Court is bound to reject the application, and it is only when that condition is satisfied that any notice goes at all to the respondent, and that is the notice on the question of pauperism and upon nothing else. Unless the order directing notice to go is qualified by some observations showing that the respondent is to be heard on the question of law, the ordinary rule is that the issue of notice means nothing more than that the question of pauperism is to be gone into, the Court being satisfied that on the face of the record it does satisfy the requirements of the proviso to O. 44, R. 1. 163 I.C. 755=1936 M. 661. When a Judge without considering this

question issues notice to the respondent to show cause why the appellant should not be allowed to appeal *in forma pauperis*, he is entitled to correct the error and rescind his previous order issuing the notice and then consider whether there is any substance in the appeal. 44 L.W. 425=1936 M. 842=71 M.L.J. 497 Application under—If to be verified as a plaint. 1937 N. 108 There is no reason why every ground should be discussed in an order rejecting an application to file appeal *in forma pauperis*. 154 I.C. 943=1935 Pesh. 22 An appellate Court cannot be said to act illegally if it disposes of an application for leave to appeal *in forma pauperis* in chambers in a summary manner without hearing the applicant and without giving time for payment of the deficient Court-fee. Though the procedure is contrary to the prevailing practice, it is not illegal, for the usual practice is not sufficient to make it law. 159 I.C. 718=42 L.W. 831=69 M.L.J. 781. The respondent has no right to be heard on application for leave to appeal *in forma pauperis* under R. 1. But the Court is always justified in hearing the respondent or his pleader and there is nothing wrong in the Court hearing the respondent. 44 L.W. 425=1936 M. 842=71 M.L.J. 497. Court will not be justified in issuing notice in order to make up its mind whether so to reject the application. Where a Judge dealing with the application directs the issue of notice he may be taken to have decided not to reject the application. It is not open to his successor to reconsider the matter and come to a contrary conclusion, he should take up the application at the stage where it had been dropped by his predecessor and continue the proceeding 145 I.C. 831=1933 M. 658=65 M.L.J. 362

LIMITATION.—An application for leave to appeal *in forma pauperis* was rejected as not being presented within the time prescribed by Art. 170, Limitation Act. The applicant put in an application under S. 5, Limitation Act. *Held*, that the order rejecting the application was an order rejecting a motion to present an application passed at a preliminary stage and not an order rejecting the application itself after judicially considering it under R. 1, that with the rejection of the application there was no appeal pending before the Court and as such application under S. 5, Limitation Act, was not maintainable. *Held, further*, that the order of rejection had no effect whatever on the question of whether appeal can be successfully presented or not and that an appeal may be presented with the proper Court-fee paid accompanied by an application under S. 5, Limitation Act 144 I.C. 79=1933 A.L.J. 585=1933 A. 308. A single Judge of the High Court has no jurisdiction

Loc. Am.—[Allahabad.] O. 44, R. 1.

To rule 1 add another proviso as follows:

"Provided further that no application under this rule shall be allowed unless a notice of the application has been given to the proposed respondents."

2. [S. 593.] The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the orders of the Appellate Court by the Court from whose decision the appeal is preferred:

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry.

ORDER XLV.

APPEALS TO THE KING IN COUNCIL.

1. [S. 594.] In this Order, unless there is something repugnant in the subject or context, the expression "decree" shall include a final order.

"Decree" defined.

Application to Court whose decree complained of.

2. [S. 598.] Whoever desires to appeal to His Majesty in Council shall apply by petition to the Court whose decree is complained of.

3. [S. 600.] (1) Every petition shall state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

Certificate as to value or fitness.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

Loc. Ams —[Bombay] In sub-rule (2) of R. 3 of O. 45, after the words "to show cause why the said certificate should not be granted" the following words shall be inserted, namely—"unless it thinks fit to refuse the certificate".

Notes.

to dismiss an application for leave to appeal *in forma pauperis* on the ground that it is barred by limitation, if the valuation of the appeal is such that it is beyond his pecuniary jurisdiction 1935 A.L.J. 681=1935 A. 620 (2) (F.B.).

APPEAL—See 8 Luck 477=144 I.C. 978=1933 O 207.

REVISION—Unless a lower appellate Court acts with illegality or irregularity its order rejecting an application for leave to appeal as a pauper cannot be revised by the High Court 30 I.C. 86 In appropriate cases revision would be allowed 9 R. 92=132 I.C. 707=1931 R. 131 (32 A 623, Diss.)

O. 44, R. 2—The appeal is said to be filed on the day on which application for leave to appeal as pauper is made though Court-fee is paid before the end of inquiry [2 A 241 (P.C.), Foll.] 32 I.C. 630=9 Bur L T 69

O. 45, R. 1.—High Court has no power under O 45 to add parties pending appeal to the Privy Council. 3 R. 474; 92 I.C. 122=1926 R. 9. Application for leave to appeal to Privy Council—Review petition successful—Reversal in appeal—Effect on original application 4 I. 445=77 I.C. 869. "Final order"—Meaning of—Order of remand in appeal directing admission of docu-

ment excluded by lower Court from evidence—Appeal to Privy Council. 154 I.C. 942.

O. 45, R. 3.—A certificate issued under O. 45 must clearly show whether it fulfils the conditions of S. 110 or is otherwise a case fit for appeal to Privy Council under S. 109 44 M. 293=48 I.A. 31=40 M.L.J. 229 (P.C.). Where many important and wide reaching questions of law are involved in a decision sought to be appealed against, the case is "otherwise a fit one for appeal to His Majesty in Council" within R. 3, 22 I.C. 390; 1914 M. W. N. 162 See also 6 O. W. N. 211=1929 O 243. Where the applicant for leave to appeal to Privy Council, knowing full well that the requirements of S. 110, are not fulfilled, omits to say and is unwilling to say explicitly how his case is a fit one for appeal, the petition deserves to be summarily dismissed on that sole ground 1936 R.D. 120

O. 45, Rr. 3 and 4.—There is no provision of law authorising one application for leave to appeal in two separate suits and appeals. Where one such application is filed it is not open to the party to file another application out of time. It is however open to him to amend the application by confining the prayer for certificate to one of the cases. 140 I.C. 70=1932 L. 441.

[Nagpur.] For sub-rule (2) of R. 3 of O. 45, the following sub-rules shall be substituted, namely—

"(2) Upon receipt of such petition, the Court, after sending for the record, and after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, may dismiss the petition.

(3) Unless the Court dismisses the petition under sub-rule (2), it shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted."

4. For the purposes of pecuniary valuation, suits involving substantially the same questions for determination and decided by

Consolidation of suits. the same judgment may be consolidated; but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination.

5. In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit in the Court of first instance, or as to the amount or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last-mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

Effect of refusal of certificate. 6. [S. 601.] Where such certificate is refused, the petition shall be dismissed.

7. [S. 602.] (1) Where the certificate is granted, the applicant shall,

Notes.

O. 45, R. 4.—Under R. 4 consolidation for purposes of valuation for leave to appeal to the Privy Council is admissible only when the suits in question involve substantially the same questions for determination and have been decided by the same judgment. 44 M.L.J. 424=1923 M. 602. R. 4 allows consolidation but only to make good a defect of pecuniary valuation and not a defect of any other kind. 69 I. C. 525=1923 N. 198, 70 I.C. 782, 6 P.L.J. 97=2 P.L.T. 157; 3 P.L.J. 446=45 I.C. 551, 50 B. 753. The word "judgment" refers to the judgment appealed against (*i.e.*, the judgment of High Court) and not the judgment of the Court below. Even where the judgments delivered were separate, if one is merely a copy of the other except for a few alterations, the two should be regarded as the same judgment. 34 L.W. 817=61 M.L.J. 692 (50 B. 753, Foll.)

O. 45, R. 5.—A defendant who had consistently acquiesced in a finding as to valuation and Court-fee cannot re-open it to enable him to prefer an appeal to Privy Council. 42 B. 609=20 Bom L.R. 418; 30 I.C. 204=2 O.L.J. 208. When a reference is made under this order to a Court of first instance, the Court must carry it out itself; it should not remit the investigation to some other officer. 34 I.C. 203=43 C. 225. Where an application for leave to appeal to Privy Council against an order of High Court dismissing on appeal his petition for adjudication of the respondent states that he has no information as to the assets and liabilities of the respondent, High Court will decline to refer the question of the value of the subject-matter of the appeal to the Court of first instance under R. 5. 12 R. 355=1934 R. 292.

O. 45, R. 7: TIME FOR FURNISHING SECURITY—POWER OF COURT TO EXTEND TIME—CONFLICT OF RULINGS. —Per King, J. (*Obiter*)—In order to avoid a conflict between R. 7 and S. 148, it must be held that R. 7 must prevail, both on the principle "*generalia specialibus non derogant*" and on the principle that the general discretion given by S. 148 is a judicial discretion which can only be exercised according to law and not in contravention of law. 1933 A.L.J. 207=1933 A. 241=55 A. 432=143 I.C. 559 (F.B.).

Per Mukerji, Ag. C.J. and King, J. (*Niamatullah, J.*, dissenting).—Court has no discretion to extend the time beyond 150 days from the date of decree or order appealed against as the language of Privy Council Rules, R. 9, even though very wide, cannot override O. 45, R. 7. R. 9 was never intended to sanction the allowance of any further period, and O. 45, R. 7 and the Privy Council Rule should be taken as parts of the same legislative scheme and should be construed so as to avoid any inconsistency. 1933 A.L.J. 207=1933 A. 241=55 A. 432=143 I.C. 559 (F.B.). (55 M. 835, Foll., 51 B. 430, Diss.) 39 C.W.N. 651; 159 I.C. 232=1935 L. 733. There is no inconsistency between the provisions of O. 45, R. 7 and R. 9 of the Privy Council Rules. The latter does not refer to orders which may be passed by the Court previous to the cancellation of the certificate but is intended to cover merely incidental orders necessitated by the cancellation of the certificate. 159 I.C. 232=1935 L. 733. Time for furnishing security and deposit cannot be extended by more than six weeks. 44 A. 216=20 A.L.J. 13, 44 A. 242=20 A.L.J. 51, 4 R. 216=1927 R. 20. Period of six weeks from date of certificate cannot be extended. 105

Security and deposit required on grant of certificate.

within [ninety days or such further period not exceeding sixty days, as the Court may upon cause shown allow] from the date of the decree complained of, or within six weeks from the date of the

grant of the certificate, whichever is the later date,—

(a) furnish security² [in cash or in Government securities] for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing, and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

Leg. Ref.

¹ Substituted for words 'six months' by Act XXVI of 1920.

² Inserted by *ibid*.

Notes.

I.C. 585=1927 P. 330, 1929 P. 431. Decree amended on review—Leave to appeal to Privy Council—Limitation 4 L. 185=75 I.C. 520. The High Court has no power to extend time or excuse delay in the matter of furnishing security for the costs of the respondents in an appeal to His Majesty in Council beyond the period given by S. 1 of Act XXVI of 1920 18 L.W. 29=74 I.C. 703 (1)=1924 M. 44; 70 I.C. 937=25 O.C. 254. See also 55 M. 835=138 I.C. 663=1932 M. 484=62 M.L.J. 665 [18 L.W. 29, Foll.; 51 B. 430 (F.B.). Diss.]; 7 Luck. 528=136 I.C. 336, 132 I.C. 438=33 Bom.L.R. 487=1931 B. 278. Both under this rule and under R. 9 of the Privy Council Rules, the Court has the power not only to extend the time for making the deposit and for furnishing the security, but also to change the form of the security. [51 B. 430 (F.B.), Rel. on.] 132 I.C. 438=33 Bom.L.R. 487=1931 B. 278. The mere inability of a party to raise the requisite funds is not a sufficient ground to justify an extension of time for furnishing security. 55 M. 835=1932 M. 484=62 M.L.J. 665. But see next case *contra*. The High Court can extend time for furnishing security but it should not do so without cogent reasons. 6 O.L.J. 149=50 I.C. 907; 65 I.C. 450; 49 I.C. 892; 10 C. 67; 1926 R. 44=94 I.C. 590; 103 I.C. 213 (1)=1927 P. 332; 51 B. 430=1927 B. 217 (P.C.). See also 1929 P. 431. In a case to which O. 45, R. 4, does not in terms apply as when the appeals arise out of one and the same suit and not out of two separate suits, the High Court has no inherent power for consolidating appeals to the Privy Council for the purpose of security for costs. 1936 A.L.J. 1025=1936 A. 832. When two appeals are consolidated for valuation, and a joint certificate is granted, both the appeals will be stayed if security for costs is not deposited in any of them. Security has to be furnished in respect of each appeal though consolidated. 4 P.L.J. 198=1919 P.H.C.C. 139. Security must be in cash or Government security. 66 I.C. 548. Application to furnish security in form other than cash or Government security must be made at the time of granting the certificate. 1929 P. 431. A deposit of Government Promissory Notes by way of secu-

rity within the time allowed by the Court is valid even though the endorsement in favour of the Registrar was made beyond the time prescribed for furnishing security. The Allahabad High Court Rules do not say that the notes should be endorsed, though no doubt the endorsement is the proper form of furnishing security. 1933 A.L.J. 276=145 I.C. 582=1933 A. 410. Where the applicant was asked to furnish security for costs of the respondent and also to deposit the translation and printing charges, the deposit of the costs only and not the translation and printing charges is not valid 1933 A.L.J. 207=1933 A. 241=55 A. 432=143 I.C. 559 (F.B.).

O. 45, R. 7 (1) (b)—Where judgment-debtor appealed to the Privy Council and deposited necessary sum and decree-holder made an application to attach so much of the deposit as would eventually be found not to be required for the purpose for which it was entrusted to Court but did not put any figures to suggest that there was any likelihood of there being any surplus, the application has absolutely no substance and even if the application contains such figures it would be wholly premature. 119 I.C. 5=1929 A. 794. Security for costs furnished by insolvent—Attachment subject to appeal—Permissibility. See 9 Pat. L. T. 969. Judgment-debtor appealed to the Privy Council and deposited a sum for the costs of the Privy Council and for printing charges. Decree-holder applied to attach the amount in execution of the decree which he had obtained from High Court. The idea underlying the application was that the decree-holder would attach and obtain the amount deposited and would then claim to be in a position to contend that the judgment-debtor had not in deposit the money he was required to deposit and to ask that the appeal should be therefore dismissed. *Held*, that the manoeuvre was grossly improper and an offence to the Court and the nature of the application was such as to make it desirable to consider whether the Court has inherent power in suitable case to make counsel pay the costs of litigation. 119 I.C. 5=1929 A. 794. An application that immovable property may be accepted as security should be made at or before the making of an order granting the certificate. 48 M. 559=48 M.L.J. 134. Proprietary interest of surety is not extinguished *Per Sulaiman, Banerji and Sen, JJ.*—When either immovable or movable property is offered as security the proprietary interest of the surety is

(i) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being;

(ii) papers which the parties agree to exclude;

(iii) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and

(iv) such other documents as the High Court may direct to be excluded;

[Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished:

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security.]

(2) Where the applicant prefers to print in India the copy of the record Page 1110.

Loc. Am [Madras.] O. XLV, r. 7. Re-number the present sub-r. (2) of r. 7 of O XLV as sub-1. (3) and insert the following as sub-1. (2) —

“No such security as is mentioned in r. 7 (1), cl. (a), shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an Act, purporting to be done by him in his official capacity.”

(Part II of the Fort St George Gazette dated 3rd March 1936 page 295.)

~~understand the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.”~~

8. [S. 603.] Where such security has been furnished and deposit made to the satisfaction of the Court, the Court shall—

(a) declare the appeal admitted,

(b) give notice thereof to the respondent,

(c) transmit to His Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and

(d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

9. [S. 604.] At any time before the admission of the appeal the Court

Revocation of acceptance may, upon cause shown, revoke the acceptance of any of security. such security, and make further directions thereon.

Leg. Ref.

¹ Inserted by Act XXVI of 1920.

Notes.

not automatically extinguished and merely a first charge is created on the security which will have to be available in the first instance for the purpose for which it has been offered. Although the depositor cannot defeat that purpose, his power of disposal of his security subject to that charge will subsist, and his interest in the surplus which may remain over is both transferable and attachable. It is not only permissible to a decree-holder to attach the security but he has a right to do so subject always of course to the first charge created and the Court has no discretion to refuse his prayer. The only condition which the Court issuing an order for attachment must impose is that the previous charge created in the property is no way to be affect-

ed O. 21, R. 52, is specially applicable to attachment of property in the custody of any Court or public officer. 1930 A.L.J. 402 = 1930 A. 225 (F.B.). See also 148 I.C. 864 = 11 O.W.N. 376 = 1934 O. 139 = 9 Luck. 534.

O. 45, R. 8.—A deposit made out of time is not one made to the satisfaction of Court within R. 8. The periods both for security and deposit are identical. 1923 A. 572 = 84 I. C. 535. Omission to give notice to the respondents of the admission of an appeal to Privy Council is no sufficient ground for rehearing provided the respondents in fact knew of the admission 22 Bom.L.R. 550 = 59 I.C. 7 (P.C.).

O. 45, Rr 9 and 10.—An application for the enhancement of the amount of security for costs furnished by an appellant to the Privy Council can, after the admission of the appeal, be made under R. 10 only and not under R. 9. 49 I.C. 893.

1[9-A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such

Power to dispense with notices in case of deceased parties.

opposite party or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court:

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct.]

Loc. Am —[Rangoon.] *Substitute the following for R. 9-A. —*

"9-A. Nothing in these rules requiring any notice to be served on or given to opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court, or on or to the legal representative of any such opposite party or respondent if deceased:

Provided that notices under sub-rule (2) of R. 3 and under R. 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct "

10. [S. 605.] Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate,

Power to order further security or payment

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time the required payment.

Effect of failure to comply with order.

11. [S. 606.] Where the appellant fails to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime execution of the decree appealed from shall not be stayed.

12. [S. 607.] When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7.

Refund of balance deposited.

13. [S. 608.] (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

Powers of Court pending appeal.

Leg. Ref.

¹ Rule 9 A was inserted by Act XXVI of 1920.

Notes.

O. 45, R. 13.—High Court has power to stay execution of a decree notwithstanding that an appeal from such decree has been admitted by special leave of His Majesty in Council. 38 C. 335=13 C.L.J. 529=38 I.A. 74 (P.C.); 57 I.C. 382=24 C.W.N. 265. High Court has *inherent power* to stay execution

in view of an intended appeal to Privy Council. 40 C 955=16 C.L.J. 508. *See also* 150 I.C. 446=1934 A.L.J. 1191=1934 A. 585. Apart from R. 13, under which High Court has powers to stay further proceedings in the suit, as distinguished from proceedings in execution, it is well settled that High Court has abundant inherent power to stay such proceedings in a suitable case, pending appeal to Privy Council. 59 C.L.J. 440=38 C.W.N. 795=1934 C. 823. Stay of execution—Grounds for. 15 I.C. 187=234 P.L.R. 1912.

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(a) impound any moveable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.

14. [S. 609.] (1) Where at any time during the pendency of the appeal the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

Increase of security found inadequate.

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security;

(b) if the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were, when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

15. [S. 610.] (1) Whoever desires to obtain execution of any order of

Notes.

A subordinate Judge has no jurisdiction to stay execution of a decree of the High Court. The only Court which can stay execution is the High Court. 3 P.L.J. 40=42 I.C. 835. Decree of High Court executed—Appeal thereafter to Privy Council—High Court has power to demand security from the respondent. 96 I.C. 245 (2)=50 B. 453=1925 B. 425. The word "Court" in the first para. of R. 13 means a High Court. (*Ibid*) An application for stay of execution under R. 13 cannot be entertained by the Court till the certificate for appeal to the Privy Council is granted. The presentation of a petition under O. 45, Rr. 2 and 3 is not an appeal. 16 I.C. 845; 18 A.L.J. 142=54 I.C. 561=42 A. 170. O. 45, R. 13 has no application where the party applied for the stay of proceedings in the Court below as distinct from the stay of execution of a decree. 150 I.C. 446=1934 A.L.J. 1191=1934 A. 585. Appeal to Privy Council from mortgage decree—Stay of execution on security and appointment of receiver—Dismissal of appeal—Liability of sureties—Extent of. 150 I.C. 177=1934 P. 176.

O. 45, R. 13 (2) (d)—It is competent to the High Court to appoint a receiver to an estate which is the subject-matter of an appeal for which special leave has been granted by the Privy Council. (38 C. 335, Foll.; 10 C.L.J. 326 and 27 C. 1, Ref.) 52 I.C. 407=4 P.L.J. 482. See also 150 I.C. 177=1934 P. 176. Suit for enhancement of

maintenance—Trial Court holding suit to be maintainable—Appellate Court refusing to entertain appeal—Appeal to Privy Council—Stay of suit refused. 30 Bom.L.R. 126. Where a mortgage suit was directed to be reheard by the High Court and during the pendency of an appeal to the Privy Council against that order one of the parties applied for stay, held, that High Court had power under R. 13 to stay the proceeding pending disposal of the appeal. 34 C.W.N. 631=1931 C. 79.

O. 45, R. 15.—The provisions of R. 15 are mandatory. Where a decree for pre-emption passed by the Chief Court on appeal was reversed by the Privy Council, and the trial Court passed, at the request of the pre-emptor, an order by way of restitution directing payment to his creditors out of the pre-emption money deposited by him, before the order of His Majesty in Council had been transmitted to it from the Chief Court under R. 15, the order of the trial Court made in violation of its provisions is quite irregular if not altogether without jurisdiction. 160 I.C. 814=1936 O.W.N. 262=1936 O. 185. "Execution", meaning of. 37 A. 567=13 A.L.J. 769; 64 I.C. 152. Right of person not a party to Privy Council appeal to apply for restitution. 32 M.L.T. 249 (H.C.); 75 I.C. 219=1924 M. 95. R. 15 should not be construed as restricting the only possible evidence of an order in Council to the certified copy. It is intended to ensure that proper information on the subject of an

Procedure to enforce orders of King in Council. His Majesty in Council shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(4) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order [* * *]¹ for the adjustment of financial transactions between the Imperial and the Indian Governments.

[(4) Unless His Majesty in Council is pleased otherwise to direct, no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place.]²

Loc. Am.—[Allahabad.] Rule 15 (1). *Substitute the following rule.*—

(1) Whoever desires to obtain:—

Leg. Ref.

¹ The words 'by the Secretary of State for India in Council with the concurrence of the Lords Commissioners of His Majesty's Treasury' have been omitted by the Government of India (Adaptation of Indian Laws) Orders, 1937.

² Sub-rule (4) inserted by Act XXVI of 1920.

Notes.

order in Council should be supplied to the Courts in India. 33 M.L.J. 300=41 I.C. 629 High Court when it acts under R. 15 cannot consider or discuss the effect of the order in Council. 31 P.L.R. 182=123 I.C. 277. Order of His Majesty in Council—Transmission of—Power to impose conditions. 56 I.C. 982=1922 O. 34. Where the order of the Privy Council has been transmitted to the lower Court at the instance of one of the successful parties it is not necessary that any person interested in the execution of the decree should obtain a separate transmission order. 55 M. 856=137 I.C. 645=1932 M. 440=62 M.L.J. 698. Under O. 21, R. 15 some of the decree-holders who have obtained permission under O. 45, R. 15 can execute the Privy Council decree on behalf of all the decree-holders though some were dead at the time of the Privy Council decree. 58 I.C. 212=1 P.L.T. 426. Where the appellants had obtained leave to appeal to the Privy Council but before the transcript record had been sent to England the parties settled their disputes by a compromise and applied to the High Court for amendment of the decree in accordance with the terms of the compromise,

held, that the decree could be so amended and that O. 45, R. 13 was not bar to the same 116 I.C. 459 (1)=1929 L. 427 The High Court at Patna has no jurisdiction to execute an order in Council passed in an appeal from the Calcutta High Court on appeal from a Subordinate Court in Behar. An application for the execution of such an order should be to the High Court at Calcutta. 2 P.L.J. 684=43 I.C. 457. Where party with order in Council is delaying or refusing to lodge the order, opponent can move High Court with certified copy 5 P. 461=94 I.C. 813=51 M.L.J. 586=1926 P.C. 31 (P.C.) Applicability of rule to proceedings under S. 144, C.P. Code. See 6 P. 252

O. 45, R. 15, sub-R. (2).—The mandamus of R. 15, sub-R. (2) is clear and obligatory on a Sub-Court. The Court is bound to execute the decree of the Privy Council and neither the Sub-Court nor even the High Court has the power to stay execution or adjourn an application for execution on the ground that an application for revision of the Privy Council decree sought to be executed was pending before the Privy Council 12 Pat.L. T. 145=132 I.C. 359=1931 P. 203. Where Privy Council directs that the costs, incurred by the successful appellant in the Judicial Commissioner's Court, should be paid by the respondent, such costs include the printing charges and other expenses incurred by the appellant in the Judicial Commissioner's Court for presentation of the appeal to the Privy Council, and the appellant is also entitled to the costs of the execution. 167 I.C. 879=1937 Pesh. 3.

(a) execution of any order of His Majesty in Council or,

(b) where an appeal has been dismissed by His Majesty in Council for want of prosecution, an order of the Court from which the appeal to His Majesty was preferred terminating proceedings and determining the costs, shall apply to the said Court by a petition, accompanied by a certified copy of decree passed or order made by His Majesty in Council of which execution is desired or to which effect is to be given and a memorandum of all costs incurred in India that are claimed in pursuance thereof.

16. [S. 611.] The order made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

Appeal from order relating to execution.

117.—(New.) Where a certificate has been given under section 205 (1) of the Government of India Act, 1935, the provisions of this order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and references in this Order to His Majesty in Council and to any Order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court:—

Provided that

(a) rule 3 of this Order shall have effect as if at the end of sub-rule (1) thereof there were inserted the words “apart from any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder.”

(b) where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Government of India Act, 1935, or any Order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in rule 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent.

ORDER XLVI.

REFERENCE.

1. [S. 617.] Where, before or on the hearing of a suit or on appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the

Reference of question to High Court.

Leg. Ref.

¹ This rule has been newly inserted by the Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

O. 46, R. 1.—No reference lies to the High Court of the N. W. Provinces where the question involved is one of fact and not of law. 11 I.C. 671. Under R. 1, a reference to the High Court on a question of law is only permissible when the Court trying the suit or appeal or executing the decree entertains a reasonable doubt; but where the Court had no doubt about the matter but was faced with the problem of having to decide between law and equity, it is for the Court to decide the question for itself and a reference is incompetent. 34 P.L.R. 544=141 I.C. 572=1933 L. 402. A reference is incompetent where the order or decree is appealable 10 P. 471=133 I.C. 766=1931 P. 253. It is not the object of R. 1 that subordinate Courts should be enabled to relieve themselves of the necessity of deciding difficult questions arising before

them and to make a reference to High Court calling upon it to do what could have been done by the subordinate Courts. 55 A. 648=1933 A.L.J. 1468=1933 A. 597. Reference—Distinction between right of reference and right of appeal—Reference to be limited to cases of reasonable doubts as to question of law. 50 A. 839=115 I.C. 630. An error of law is included in the second category of R. 1 but the error must be apparent on the face of the record. There cannot be such an error where the question is highly difficult and controversial and the Court has arrived at a decision after consideration of all the points. Where, however, the judgment was delivered without notice to the parties and by reason of the fact that the Judge ceased to hold office subsequently, the aggrieved person lost a right to apply for leave to appeal under cl. (13) of the Letters Patent, *held*, that there was an error of procedure apparent on the face of the record and that it was a fit case for reversing the entire judgment on that ground. 6 R. 794=114 I.C. 687=1929 R. 70. Section 113 read with R. 1 permits reference

Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

Court may pass decree contingent upon decision of High Court.

2. [S. 618.] The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the

point referred;

but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

3. [S. 619.] The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

Costs of reference to High Court.

4. [S. 620.] The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.

5. [S. 621.] Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit

Power to alter, etc., decree of Court making reference.

6. [S. 646-A.] (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the

nature of the suit.

(2) On receiving the record and statement, the High Court may order

Notes.

to High Court of only such cases as do not admit of further appeal. 130 P.R. 1916=37 I.C. 227. Subordinate Courts in the Punjab are bound to follow the decisions of Chief Court and cannot make a reference on a question of law, already decided by Chief Court, unless such decision is questioned by a judgment of the Privy Council. 20 I.C. 194=8 P.R. 1914. Where no appeal lies to an appellate Court, Court has no jurisdiction to make a reference to High Court under R. 1. 18 I.C. 314=61 P.R. 1913. No reference can under R. 1, be made in suits or appeals in which the decrees are subject to an appeal. 54 M.L.J. 66. Where the referring Court has no reasonable doubt on the question of law referred, no reference can be made. (*Ibid.*) The word "Court" means Court of Civil Judicature. 54 I.C. 564=22 O.C. 319. The functions of a Collector in execution of a decree do not make him such a Court as to empower him to make a reference. (*Ibid.*) Reference cannot be made to High Court on the mere ground that there are conflicting rulings on any particular matter of law. 18 I.C. 977=15 O.C.

380 Where a Court entertains a reasonable doubt regarding a question of law a reference to High Court can be made. 48 A. 188=93 I.C. 24=1926 A. 204; 50 A. 839=115 I.C. 630. A reference can only be made in a suit or an appeal and not in proceedings under S. 93 of the Bengal Tenancy Act which are in the nature of an application. 151 I.C. 721 (1)=38 C.W.N. 499=1934 C 566.

O. 46, R. 5—Rule 5 is wide enough to enable High Court to quash the order of reference made by a Subordinate Judge under R. 1. 30 Bom L.R. 1627; 118 I.C. 692, 1929 B. 30. When High Court hears a reference, it acts like a Court of Appeal quite as much as it undoubtedly does when it hears an application for revision. 25 C.W.N. 81=32 C.L.J. 433. But a power of reference is not a modified form of appellate jurisdiction. A Court to which a reference can be made is not necessarily authorised to hear appeals from the Court making a reference. 47 A. 513=23 A.L.J. 385=1925 A. 380 (F.B.)

O. 46, Rr. 6 and 7.—See 121 C.W.N. 784=27 C.L.J. 96.

the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

7. [S. 646-B.] (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested the District Court may, and if required by a party shall, submit the record to the High Court with

Power to district Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstances appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule.

Loc Ams.—[Allahabad, Bombay, Oudh and Sind] Add after R. 7 to O. 46.—

8. R. 38 of O. 41, shall apply, so far as may be, to proceedings under this Order.

ORDER XLVII.

REVIEW.

Application for review of judgment.

1. [S. 623.] (1) Any person considering himself aggrieved—

Notes.

O. 46, R. 7.—Under R. 7, District Judge is bound, if required by a party to submit the record to High Court with a statement of his reasons. For that purpose, it is immaterial whether the order forming the subject matter is that of a Small Cause Court or a Sub-Judge. 28 N.L.R. 54=137 I.C. 88=1932 N. 70. When two Courts, namely, a Sub-Court and a Court of Small Causes, make contradictory orders as to jurisdiction to receive a plaint, it is the duty of the appellate Court to make a reference to High Court whether the party asks for it or not. 17 N.L.J. 169=1934 N. 257. A plaint was filed in Court of the Second Class Subordinate Judge. That Court considered that the case was cognizable by the Court of Small Causes and returned the plaint for presentation to appropriate Court. The latter Court however held that the suit was not triable by it and returned the plaint to the applicant. The applicant applied in revision asking High Court to determine which Court had jurisdiction to entertain the suit. Held, that the correct procedure would have been to make an application to the District Judge under the provisions of R. 7. (1932 N. 70, Ref.) 145 I.C. 261=1933 N. 221

O. 47: APPLICABILITY.—Recourse to inherent powers of Court is not permissible to justify the Court in granting a review which is specifically provided for by R. 1. 141 I.C. 188=1933 L. 169. The provisions of O. 47 are applicable to an insolvency Court. 1927 M. 175=94 I.C. 351=51 M.L.J. 60. As to whether R. 1 controls S. 8 (1) of the Presidency Towns Insolvency Act, see 7 R. 201 *Obiter*.—The Company law does not affect the power

of review which is otherwise vested in the Judge especially when by S. 141, the provisions of that Code are to be followed in all proceedings in any Court of civil jurisdiction. 1937 L. 82. The provisions of O. 47 would apply to review applications in appeals preferred under Letters Patent 29 Bom.L.R. 371=101 I.C. 766=1927 B. 232. In order to set aside a consent decree on the ground of fraud, a separate suit should be instituted. The decree cannot be set aside under O. 47. 144 I.C. 82. Time for review application. 115 I.C. 314=1929 S. 38. Order disallowing review application is revisable. 115 I.C. 314=1929 S. 38. The discretionary powers of revision vested in High Court by S. 115 are not in any way controlled by the provisions of O. 47; such powers are intended to apply even to orders disallowing a review application. (26 A. 572, Diss. from; 29 A. 468 and 31 A. 610, Rel. on.) 115 I.C. 314=1929 S. 38. An application for review of an order under R. 1, if found to be barred by limitation, may under appropriate circumstances be treated as an application under S. 151 if the Court is satisfied that there has been a flagrant abuse of its own process and it is also open to the appellate Court under similar circumstances to treat a barred application for review, made to the first Court, as one made under S. 151 in order to remove an apparent injustice done to the applicant and to prevent an abuse of the process of the Court. 116 I.C. 427=1929 N. 185. Execution case dismissed for default—Review or application to restore under S. 151—Remedy. 1935 R.D. 318. Non-service of notice of proceedings—Aggrieved party—Remedy, if by review or appeal. 1936

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

Notes.

R.D. 449. Judgment of Small Cause Court—Revision dismissed—Subsequent application for review is maintainable. 1935 A.L.J. 436=1935 A. 435. As to application for refund of Court-fee, in view of appellate decree, see 1935 A.W.R. 368=1935 A. 455.

O. 47, R. 1: GROUNDS FOR REVIEW.—The grounds on which a review is competent are different from those on which an appeal under Cl. 10 of the Letters Patent (Lahore) will lie. Consequently, when a petition for leave to appeal under Cl. 10 is refused, it cannot be treated as an application for review of judgment. 16 L. 602=1935 L. 330 (1). Under R. 1 a party has a right to apply for a review of judgment to the Court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specifically set forth in R. 1, 2 P. 676=50 I.A. 183=45 M.L.J. 578 (P.C.). In a review application, Court should confine only to the matter for which it has been filed, and where Court does so decide about other matters, there is an illegality or material irregularity in the proceedings. 145 I.C. 158=1933 R. 151. S. 114 has to be read with R. 1 which prescribes the grounds upon which an application for review may be made, and unless the case can be shown to be within the terms of this rule, a review ought not to be granted. R. 1 must be read as in itself definitive of the limits within which review is permitted and the words "any other sufficient reason" may be taken as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. (49 I.A. 144, Foll.) 151 I.C. 41=1934 P.C. 213=67 M.L.J. 608 (P.C.). Accordingly no review lies against an order dismissing a suit for default. 1935 O. W. N. 446=1935 O. 405. So also in the case of appeal dismissed for default 21 A.L.J. 416=74 I.C. 528, 101 I.C. 766=1927 B. 232=29 Bom L.R. 371. No application for review lies against a decision in appeal under the Letters Patent. 134 I.C. 630=12 Pat L.T. 652. (1931 A.L.J. 187 and 40 M. 651, Foll.) A Commissioner in order to take accounts may in his discretion and on proper grounds re-open the enquiry into any one or more of the items before his report is made. Until then he decides nothing that is final and conclusive. 47 B. 593=25 Bom.L. R. 280. Revenue Court has no power to review a judgment 138 I.C. 465=1932 A.L.J. 437. Review under Agra Tenancy Act—Change of law subsequent to decision, if sufficient reason. 18 R.D. 658. Where an order under S. 44, Presidency Towns Insolvency Act, was made by Registrar in Insolvency, an application for review of his order must be made to the Registrar and not to the Court. Larger powers are conferred on the insolvency Court under S. (1) of Presidency Towns Insolvency Act in reviewing, rescinding or varying its orders than in proceedings

which fall exclusively under R. 1. That the order was made without jurisdiction is sufficient reason for reviewing the order. 139 I.C. 587=34 Bom L.R. 1175=1932 B. 569, 27 C.W.N. 916=1924 C. 83. Misapprehension by both parties and the Judge as to the nature of the jurisdiction exercised by Court is a sufficient ground for review. (46 M. 955, Ref.) 14 L. 453=142 I.C. 640=34 P.L.R. 400=1933 L. 476. Where the decision is based on an obvious misapprehension of the nature of attachment it is sufficient reason for review. 163 I.C. 374=1936 L. 486. Fraud practised upon a party in connection with a petition of compromise upon which a decree was made, is a good ground for review. A remedy by suit is an alternative and a more appropriate remedy. 64 I.C. 259. Power of making interlocutory orders is not a suitable subject for review. 55 I.A. 131=54 M.L.J. 423=1928 P.C. 49 (P.C.). Interlocutory orders made in chambers—Inherent jurisdiction to review. 32 Bom L.R. 665. Recourse to the inherent powers of Court is not permissible to justify Court in granting a review which is specifically provided for by R. 1. 141 I.C. 188=34 P.L.R. 88=1933 L. 169. See also 1936 P. 506. If the party to the appeal presents his case to the Court of Appeal by way of cross-objections or otherwise, it is manifest that an application for review by him is incompetent. 35 I.C. 529. An applicant in a review application must confine himself to the grounds on which the application is admitted. 73 P.R. 191=11 I.C. 427. The ground for review must be something which existed at the date of the decree. 43 M.L.J. 33=70 I.C. 741=1922 M. 227. See also 73 I.C. 4=1923 N. 70, 1926 N. 10 (1). Point not raised at trial cannot be raised in review. 47 A. 881. Where lower Court had decided a case following the decision of High Court in a connected case which was subsequently reversed on appeal by Privy Council the reversal of High Court's judgment is not a ground for review of lower Court's judgment. 43 M.L.J. 33=70 I.C. 741=1922 M. 227. See also 11 O.W.N. 1287=1934 O. 445; 73 I.C. 4=1923 N. 70=161 I.C. 324=1936 S. 34. It is not competent under O. 47 to obtain a review of a consent decree on the ground that the consent decree was obtained by fraud (4 P.L.J. 205, Foll.) 33 C.W.N. 833=1929 C. 470=57 C. 154. Also 26 S.L.R. 395. Consent decree can be set aside only by means of a separate suit. (1922 P.C. 112, Foll. 1929 C. 470, Rel. on.) 164 I.C. 785 (2)=1936 R. 389. Decree on the basis of agreement between parties as to abiding by decision in another suit. Decision in another suit subsequently set aside—Original decree can be reviewed. 5 R. 261=103 I.C. 258=1927 R. 189; 138 I.C. 121=1932 M. 223. But see 104 I.C. 136=31 C.W.N. 822. Plaintiff can apply for review when his suit has been dismissed for default under O. 9, R. 8 and he has not applied under O. 9, R. 9 to set the order

(b) by a decree or order from which no appeal is allowed, or

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aside. Where a plaint is rejected for non-compliance with the order for payment of Court-fee a review of that order is permissible and the Court has discretion to restore the suit. 17 Pat.L.T. 766=1936 P. 310. See also 62 C. 61; but not where plaintiff was granted time therefor again and again, and he failed to pay in spite of that. 59 M. 975=1936 M. 503=70 M.L.J. 491. If at all review is granted in such a case it is necessary to give the defendant notice and an opportunity at the earliest possible moment of contesting the propriety of the review. (*Ibid*) 50 I.C. 327=37 M.L.J. 59; 56 C. 21. Where the order is an *ex parte* order issued without hearing the opposite party, it cannot operate as *res judicata* and can be reviewed by the successor of the Judge who made such *ex parte* order. 116 I.C. 101=1929 S. 110. An inferior Court has no power of review unless such power is granted by statute. 34 I.C. 503. It is not a sufficient reason for granting a review that if another opportunity is given to the applicant he would satisfy the Court that its previous order was wrong. 57 I.C. 145. Where the question decided is one of right between the parties and when the matter is one of general importance review is justified. 1926 M. 764=50 M.L.J. 493. A wrong decision on a question of law, is not a sufficient ground for review. 24 O.C. 154=63 I.C. 344. See also 141 I.C. 188=34 P.L.R. 88=1933 L. 169; 145 I.C. 993=38 L.W. 604=1933 M. 662=65 M.L.J. 387, 113 I.C. 896; 112 I.C. 277; 112 I.C. 653=1929 N. 58. It is not a sufficient ground to order a review that the decision of the Court was based on a view of the law which had been overruled by a Full Bench decision. 3 P. 134=5 Pat.L.T. 52. Exposition of law by a superior Court contrary to that applied after the judgment is no ground for review. 19 S.L.R. 30=1927 S. 53. Because there is a subsequent decision of superior Court of binding authority on a question of law, the prior judgment passed on a different view of law is not liable as a matter of course to be reviewed. 1930 M. 579. See also 18 R.D. 658. High Court in dismissing an appeal on the ground of limitation, remarked that in case the view of law taken by the High Court were overruled by the Privy Council in an appeal then pending before that tribunal, the appellant might apply for a review of judgment. Subsequently Privy Council reversed the view of High Court in that appeal and thereupon they applied for a review. Held, that the application should be granted, because the decision of the Privy Council subsequent to the dismissal of the appeal should, in the special circumstances of the case, be treated as a sufficient reason *ejusdem generis* with the discovery of new and important matter, which should be deemed to be a ground which was in contemplation at the date of the decree. 11 O.W.N. 1287=1934 O. 445. A mistake or error is hardly apparent if, in order to discover it, it is

necessary to have recourse to the pleadings and the evidence. Reliance on a wrong authority that had been overruled is no ground for review. 141 I.C. 427=34 P.L.R. 254=1933 L. 223. See also 145 I.C. 810=1933 P. 433; 1929 N. 251 (F.B.); 1922 P.C. 112; 1925 N. 206. Where a Court by taking too stringent a view of the title of the suit and its prayer overlooks the substantial rights of the party in its judgment which were sufficiently made clear in the pleadings and evidence, there is a good ground for review. 1930 R. 162. An erroneous view of evidence or of law is no ground for review. Also, grounds, which might be good grounds for appeal, would not support an application for review. 34 C.W.N. 696. The mere omission to raise a point of law, which had it been raised might and probably would have brought about a different result, is not necessarily a "mistake or error apparent on the face of the record" for which a review can be claimed. 13 C. 62, 20 C.W.N. 1099, 1 P.L.J. 625=57 I.C. 11. Wrongly applying law is no ground for review. 102 I.C. 6=1927 N. 252. Judge failing to consider a decision—No review is permissible. 1927 M. 998=106 I.C. 514. A Court can review an order as to costs if the order is not a proper one. 6 Pat. L.J. 284=3 P.L.T. 67. The production of an authority which was not brought to the notice of the judge at the first hearing and which lays down a view of the law contrary to that taken by the Judge is not a sufficient ground for granting a review. 57 I.C. 147=1 P.L.T. 561=1921 Pat.H.C.C. 152. The Court has no jurisdiction to grant a review on a reconsideration of the case on exactly the same materials. 37 P.L.R. 387. A Court has jurisdiction to review its own order erroneously made directing delivery of possession and the High Court has no power to interfere in revision. 3 P.L.J. 571=48 I.C. 129. New case not to be set up on review. 38 I.C. 196. Point not raised at the hearing, cannot be raised, subsequently in an application for review. 100 I.C. 429=13 O.L.J. 507. The mere fact that another Judge is inclined to take a different view of the case is no ground for review. 4 U.B.R. (1921) 27=64 I.C. 895. A Court hearing an application for review of decree on appeal has no jurisdiction to order a review because it is of opinion that a different conclusion of law should have been arrived at. 7 O.W.N. 741=126 I.C. 677=1930 O. 392, 32 Bom.L.R. 610=1930 B. 317.

MISTAKE OR ERROR.—A decree can be reviewed on such grounds only as if tenable, would justify an alteration or cancellation of the decree. 36 A. 277=12 A.L.J. 382. See also 10 L. 184=112 I.C. 540. As to "error apparent on the face of the record". See 30 Punj L.R. 593=118 I.C. 396=1929 L. 424; 117 I.C. 712=1929 M. 209; 4 Luck. 76; 113 I.C. 483; 116 I.C. 427=1929 N. 185. Error of fact apparent on face of the record. 36 C.W.N. 40=1932 C. 171. Where High Court gave two inconsistent judgments in the same case one before and another after remand,

(c) by a decision on a reference from a Court of Small Causes,

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and the error was apparent on the face of it a review lies 13 I.C. 646. An application for review of a decree based on an award, on the ground of an evident mistake in the award, is maintainable. 52 I.C. 696. A mere mistake of law is not, in itself a sufficient mistake or error apparent on the face of the record so as to form a ground for review of judgment. 44 I.C. 161. See also 1932 M.W. N. 153 (F.B.); 141 I.C. 188=34 P.L.R. 88=1933 L. 169, 133 I.C. 206=1931 M. 608. Where the mistake arises from the negligent conduct of the applicant for review the mistake cannot even be pleaded 44 I.C. 161. It is doubtful whether an erroneous admission of fact made by Counsel can be considered to be a good ground for review 161 I.C. 444=1936 L. 48. It is wrong procedure for a lower Court to review its former order merely on the ground that a ruling of the High Court had not been brought to its notice on the previous occasion. 132 I.C. 815=1931 A.L.J. 889. As to want of jurisdiction see 21 C.W.N. 1109=27 C.L.J. 594, 14 L. 453=142 I.C. 640=34 P.L.R. 400=1933 L. 476. An order under O. 45 rejecting an application to grant leave to appeal may be reviewed by the Court which made the order. 39 C. 1037=16 C.W.N. 1089. Erroneous view as to cognizability of a suit by a Court is a sufficient cause for review. 11 I.C. 15=195 P.L. R. 1911. Where a Court passes a personal decree where it ought not to have done so, and the same is found out by the party aggrieved only when it is sought to be executed, his remedy is not by way of amendment but by way of review 18 L.W. 876=76 I.C. 786=1924 M. 225. See also 11 P. 519=132 I. C. 533=1932 P. 275. The mere fact that an application to set aside the decree is headed as made under S. 151 (which is clearly inapplicable to the case) does not preclude the Court from dealing with the application as one for review 43 M.L.J. 290=70 I.C. 425=1922 M. 446. The Court has jurisdiction to review its judgment on the ground that the previous finding was wrong, 9 I.C. 273=9 M.L.T. 361=36 I.C. 83=3 O.L.J. 267; 1 P.L. T. 561=57 I.C. 147. Where there is no mistake in computing the period of notice but only an error in law, there is no sufficient ground for review. 1922 P. 308. Error of law apparent on the face of judgment—Review lies. 105 I.C. 710=5 R. 610. See also 1935 R. 32; 930 A. 621; 28 N.L.R. 295.

O. 1 "ERROR APPARENT ON FACE OF RECORD"—MEANING—The meaning of "an error apparent on the face of the record" is an error which can be seen by a mere perusal of the record without reference to any other matter. A failure to consider a precedent bearing upon the case and binding upon Court is not a mistake or an error apparent on face of the record, but is really discovery of a new and important matter by the party who ought to have brought this precedent to the notice of Court, and therefore he cannot apply for review of judgment and decree on this

ground unless he can show that his failure to bring it to notice was excusable. 13 R. 220=154 I.C. 590=1935 R. 32. See also 1934 N. 111=148 I.C. 718; 1937 O.W.N. 342. The error has got to be patent, and an ordinary error of law, a mere failure to interpret the law correctly when the point of law is complicated, is not necessarily an error of law apparent on the face of the judgment. 167 I. C. 449=1937 R. 56. That the meaning of proviso to O. 44, P. 1 is not as understood by the Court is no ground for review of an order rejecting the application to appeal in *forma pauperis*. 1935 Pesh. 22. An *ex parte* order of ejectment was passed against the applicant, but finally the Board of Revenue restored him to possession in revision by an order dated 9-6-32, which had the effect of cancelling the order of ejectment. Meanwhile the landholder sued applicant and obtained an *ex parte* decree for ejectment on 3-2-1932. Held, that the Board's order of 9-6-1932 gave the applicant sufficient cause for filing an application for review of the *ex parte* decree for ejectment, because the latter might nullify the Board's order. 18 R.D. 586=16 L.R. 9 (Rev.). An error of law which could be established only after argument and reference to authorities is not one "apparent on the face of the record" so as to justify an application for review. [3 L. 127 (P.C.). Foll.] 1933 A.L.J. 75=55 A. 196=146 I.C. 756=1933 A. 274. A clerical error not affecting the decision of the case is not an error apparent on the face of the record which will justify a review; nor can there be an error apparent on the face of the record when considerable research would be necessary to establish them if at all 19 N.L.J. 276. See also 31 N.L.R. 372=1935 N. 245. The going into evidence in a second appeal is not an error apparent on the face of the record within the meaning of R. 1. 145 I.C. 810 (2)=14 Pat.L.T. 234=1933 P. 433. See also 141 I.C. 427=1933 L. 223. The trial Court found that it had no jurisdiction to try the suit as against defendant 2. The suit was accordingly dismissed as against defendant 2. On appeal by defendant 1 the question of jurisdiction did not arise in the appellate Court and was not discussed but the Court passed a decree against defendant 2. Held, that no decree could be passed against defendant 2 and as this was a defect apparent on the face of the record review should be allowed. 1935 C. 153 (1). Where two judgments constitute the "judgment" of one single Court, if one is vitiated by mistake or error apparent on the face of the record, that one cannot be a valid material on which a decree can be founded. The necessary consequence of the situation is that the other judgment, though not vitiated by such mistake or error, cannot by itself constitute the proper basis of the decree of the Court, for either one conjoint judgment or two concurring judgments are needed as the basis of the decree of the Court and hence application

and who, from the discovery of new and important matter or evidence which,

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for review should be granted. 167 I.C. 449=1937 R. 50

NEW EVIDENCE.—The discovery of a reasonable ground for adjournment by Court at a later stage is a good ground for granting review. 140 I.C. 226=1932 M. W.N. 1262 High Court cannot, in a second appeal, entertain review, based on the ground that since the disposal of the appeal, new documentary evidence has been discovered. 45 A 458=21 A.L.J. 377. The consideration that, if due diligence had been exercised, the evidence subsequently discovered, or not then within knowledge of the party, would have been found, is not the test for judging if the case falls under R 1. Each case must be judged on the peculiar circumstances of that case. 1930 P. 63. See also 146 I.C. 830=10 O.W.N. 454=1933 O. 328; 31 Bom L.R. 436. Newly discovered evidence must be conclusive. 119 I.C. 99=1929 A 545; 156 I.C. 733=1935 R. 184. Application for review will next lie on the ground of the discovery of a new and effective argument arising from a document which was before the Court and the terms of which were put in issue and were perfectly well known to the parties. 141 I.C. 881=1933 M. 290. Fresh documentary evidence cannot be admitted in review, unless and until it is shown that the evidence in question could not be produced at the trial for the reasons given in R 1. 146 I.C. 830=10 O.W.N. 454=1933 O. 328. The applicant praying for review of judgment on the ground of discovery of new evidence must prove his inability to produce it during trial in spite of due diligence. 38 A 280=14 A.L.J. 204; 19 N.L.J. 276. Review on the sole allegation that new evidence had been discovered which was not within the applicant's knowledge cannot be granted without strict proof of such allegation. 9 I.C. 26. High Court will not accept a review of a judgment in a second appeal dismissed under O 41, R 11 on the ground that new evidence to prove a fact has been discovered. 36 C.L.J. 76=27 C.W.N. 918. The new important matter alleged to have been discovered must have existed at the date of the decree. (24 M 1; 50 I.C. 119. Foll. 51 I.C. 625, Dist.) 64 I.C. 324, 144 I.C. 103=1933 M. 485. The greatest care ought to be exercised in granting a review when it is asked for on the ground of discovery of fresh evidence after judgment. 45 C. 60=21 C.W.N. 1076=42 I.C. 484, 64 I.C. 324; 47 C. 508=31 C.L.J. 134; 50 I.C. 119=23 C.W.N. 242, 26 I.C. 281=41 C. 809. The application should be rejected when the applicant has not filed an affidavit or mentioned any relevant dates to support his theory that the new piece of evidence only came to his notice after the decision sought to be reviewed, especially when he is not even ready with any proof. 1936 R.D. 486 (1). The new evidence must be such as would entitle the Court to modify or cancel the decree. 38 I.C. 142. An application to

receive fresh evidence discovered out of Court by the parties to an appeal comes under O 47, R. 1, and not under O 41, R. 27. 19 C.W.N. 401=42 C. 675. Discovery of document after judgment containing an admission of liability by defendant is a good ground for review. 11 I.C. 15=195 P.L.R. 1911; 135 P.L.R. 1916=35 I.C. 342. Discovery of new and important matter—Plaintiff failing to produce papers called for by defendant on false pretext—Subsequent tracing of papers by defendant after decree—Right to apply for review, after disposal of suit by High Court in Second Appeal. 15 P. 295=17 P.L.T. 575=1936 P. 595. Where a suit for restitution of conjugal rights was decreed and, subsequently, the wife filed a petition to the Ecclesiastical Court for a decree for nullity and the Ecclesiastical Court found out the relation between the parties to be that of cousins and upon this finding gave a decree for nullity *Held*, that the matter which came to light by reason of investigation of the Ecclesiastical Court was a matter of evidence which after the exercise of due diligence was not within the wife's knowledge and, therefore, a valid ground for reviewing the decree for restitution of conjugal rights. 120 I.C. 465. Fraud practised upon the Court or upon the party may be discovered after the order complained of is made and may be new and important matter which could not be within the knowledge of the applicant at the time when the decree was passed or the order made and an application for review on the ground of such fraud must be considered on merits. A decree vitiated by fraud may be set aside by (i) suit, and (ii) by review of judgment, the latter being the more regular procedure. 33 C.W.N. 572; 19 I.C. 371=1929 C. 513. Though the case of a *purdanashin* lady is neglected by her agents, she cannot apply for re-hearing of the case in review. 42 I.C. 970, 40 I.C. 79. Review—Duty whether confined to the evidence on the basis of which review was granted. 53 C. 856=31 C.W.N. 1035=1927 C. 21=97 I.C. 731.

BURDEN OF PROOF.—In an application for review on the ground that evidence was overlooked by excusable misfortune, the burden lies heavily upon the applicant to prove that this misfortune is excusable, and that the evidence which he now seeks to adduce could not be produced at the proper time after the exercise of due diligence as laid down by the provisions of R 1. 143 I.C. 720=1933 S. 110. When a tenant who is served with a notice under S 81 of the Agra Tenancy Act does not pay up the arrears or contest the claim for ejectment within the period allowed by law, and allows an order of ejectment to be passed against him, it is for him to explain, if he seeks a review of that order, why he did not exercise the options given to him by the law within the period allowed by the law; 1936 R.D. 466.

OTHER SUFFICIENT REASON.—Rule 1 must

after the exercise of due diligence, was not within his knowledge or could not

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be read as defining the limits within which review is under the new Code, permitted, and reference to practice under former and different statutes is misleading. 43 M.L.J. 332=3 L. 127=49 I.A. 144=1922 P.C. 112 (P.C.); 13 L. 546=138 I.C. 379=1932 L. 596 So construing, the words, "any other sufficient reason", are to be interpreted as meaning a reason sufficient on grounds at least analogous to those specified immediately previously. (*Ibid*); 49 B. 839; 4 R. 266=1927 R. 20, 96 I.C. 832=1926 L. 665, 92 I.C. 1013; 5 R. 675; 146 I.C. 231=1933 A. 778; 100 I.C. 30, 104 I.C. 136=31 C.W.N. 822; 11 L. 158=123 I.C. 845=1930 L. 37; 113 I.C. 887; 33 C.W.N. 883=1929 C. 470, 11 P. 519=139 I.C. 533. The negligence on the part of a party or his agent is not any sufficient reason analogous to those mentioned in R. 1 (1). Where therefore through negligence, the agent or pleader of a party has certified full satisfaction of decree, the executing Court has no power to review the order striking off the execution as fully satisfied. 150 I.C. 44=1934 N. 143 The "discovery of new and important evidence" in R. 1 would refer only to a discovery made since the order sought to be reviewed was passed. 66 I.C. 558=1922 A. 366 Review is not to be granted on the ground that if the Court allowed the applicants another opportunity of producing evidence they might persuade the Judge that the view taken by him on the previous occasion was erroneous. 37 A. 440=13 A.L.J. 673, 57 I.C. 145, 14 I.C. 837 The mere fact that the party seeking a review desires to have a fresh sifting of the evidence is clearly not a sufficient reason for review. 19 N.L.J. 276 Where a judgment is based on the decision of the Revenue Court, the reversing of the Revenue Court's decision in appeal is a good ground for granting a review of the judgment. 33 A. 566=8 A.L.J. 584, 19 I.C. 689 That the meaning of proviso to O. 44, R. 1 is not as understood by the Court is no ground for review of an order rejecting the application to appeal *in forma pauperis*. 154 I.C. 943=1935 Pesh. 22. The omission of the Court and the pleaders to notice certain provisions of the Code which apply to a case is a sufficient reason within O. 47, R. 1, for granting a review. 52 I.C. 29=30 C.L.J. 200. The expression "where the ground of such appeal is common to the applicant and the appellant" refers to a case where the grounds of appeal and review are the same and does not refer to a comparison between the actual appeal by a party and a possible appeal by the applicant for review. 24 C.L.J. 517=21 C.W.N. 430 An application for restoration of an appeal rejected under O. 41, R. 10 (2) may be treated as an application for review of the order rejecting appeal. 32 I.C. 86 The discovery of the ruling of the High Court contrary to another ruling of equal authority of the same High Court on which the Court has passed an order is not a sufficient

cause for review. 18 I.C. 275=17 C.L.J. 416; 1927 M. 998, 1926 M. 764=50 M.L.J. 493. An application for review of judgment can be granted in part. 11 I.C. 102=15 C.L.J. 339 See also 28 N.L.R. 245=140 I.C. 21. A Court can review its order, which was passed on the alleged consent of both parties on an application by one of the parties that he never consented to it. 15 C.L.J. 408=17 C.W.N. 631. A review of the decree, which was right when it was made on the ground of the happening of some subsequent event is not justified. 48 I.C. 157=111 P.W.R. 1918; 104 I.C. 136=31 C.W.N. 822. A review cannot be granted on ground other than those enumerated in O. 47. 22 I.C. 785=197 P.L.R. 1914 A Court can entertain review of an order of dismissal for default even in cases where no application for restoration of the suit is made within time. 109 P.R. 1913=191. C. 481; 4 P. 704 (dismissal for non-payment of printing fees). See also 37 C.W.N. 1045; 1933 P. 557. Default of appearance is not a reason contemplated by R. 1, nor is it analogous to any such reason. 52 M.L.J. 123=1927 M. 355=99 I.C. 954, 37 C.W.N. 1045 Where Court refused to grant adjournment because appellant's counsel was unprepared to argue, and did not permit the appellant to file a written argument, and further its judgment did not state that it considered certain aspects of the question of limitation a review was not granted. 115 I.C. 173=1929 N. 89 No application for review will lie on the ground of the discovery of a new and effective argument arising from a document which was before the Court and the terms of which were put in issue and were perfectly well known to the parties [13 L. 127 (P.C.), Appl.] 141 I.C. 381=1933 M. 290 A party can only ask for a review on the ground of other 'sufficient cause' if he can show the judgment to be incorrect. 13 I.C. 318=131 P.W.R. 1912; 17 L.W. 254=1923 M. 392 The words "for any other sufficient reason" in R. 1 mean a reason sufficient on grounds at least analogous to those specified immediately previous to discovery of new and important matter or mistake or error apparent on the face of the record. A deliberate order passed by a Bench of the High Court with a view to obtain a just decision of the dispute between the parties does not constitute a reason for review analogous to discovery of fresh evidence or a manifest mistake on the record. A review cannot therefore be granted against an order deliberately passed by a bench for the benefit of the parties in order to meet the circumstances of a particular case. 7 O.W.N. 741=126 I.C. 677=1930 O. 392. See also 1934 R. 233. The general body of creditors should not be allowed to suffer by the *bona fide* mistake of the Official Receiver in allowing an order of discharge to be passed *ex parte*. That is a sufficient cause for the Court to review or set aside the order. 61 M.L.J. 719. A misconception

be produced by him at the time when the decree was passed or order made, or

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on the part of the pleader in consequence of which the evidence on a certain point had been shut out and the issue found against the party is a matter of considerable importance and would come under the words "for any sufficient reason" 1931 S. 3. Where a decision is erroneous owing to the fact that a decision of High Court binding upon the Court was not referred to it, the Court can grant a review. 26 I.C. 366=1915 M.W.N. 22. But see 1926 M. 764=50 M.L.J. 493, 1927 M. 998=106 I.C. 514. Where a Judge who heard the case issues notice on an application for review, his successor is not prohibited from disposing of it. (*Ibid*) Review—Notice to the opposite side. See 92 I.C. 800=1926 M. 133 (2). The phrase "*or for any other sufficient reason*" means that the reason must be one sufficient to satisfy the Court. 62 I.C. 253=4 N.L.J. 16, 11 L. 158=123 I.C. 845=1930 L. 37. The mere fact of failing to produce evidence on account of wrong advice of counsel is no ground for re-hearing the case. 48 I.C. 918=4 O.L.J. 695. For review there should be more than simple non-reference by the Judge to evidence in favour of either party. 2 P. 765. A point of law which could have been raised but was not raised does not justify grant of review. 5 P.L.J. 344=57 I.C. 11. An order rejecting a memorandum of appeal, as being insufficiently stamped is open to review. 55 I.C. 502. Where appeal was summarily rejected as out of time, when it was within time in accordance with the practice prevailing regarding the supply of copy stamps, and this was overlooked in rejecting the appeal, review would lie. 1936 L. 650. Wrong information given by the copying department in copy of judgment regarding dates, may be 'sufficient cause' to review an order summarily rejecting on appeal as having been filed out of time. 155 I.C. 88=1935 N. 109. The fact that the judgment as it stood was open to misconstruction and that the points raised involved questions of importance and of frequent occurrence and that it was desirable to have the views of the appellate Court declared are good grounds for review. 19 I.C. 363=6 S.L.R. 127. See on this point 139 I.C. 788=1932 R. 129. Where the mistake though apparent is only of a clerical nature and does not affect the actual decision of the case it is no ground for review. 148 I.C. 718=1934 N. 111. Where the recital in a document was found to be false and collusive and the Court gave its judgment based on this finding, *held* that even if the document was genuine the judgment could not be reviewed on that ground. 161 I.C. 501=1936 S. 7.

NOTICE.—A Judge is not justified in passing an order reviewing his prior order without giving notice to the person affected by the order. 116 I.C. 714. See also 146 I.C. 458=1933 P. 643. Under O. 47 the Court should re-hear the case on the merits after the review is granted. But where the review

relates to the correction of an error apparent on the face of the decree all that the Court has to do is to decide after notice to the party whether or not to make correction. 1930 M. W.N. 166.

MISCELLANEOUS. APPEAL AND REVIEW.—Effect of filing appeal—Review—Duty and power of appellate Court. 2 P. 676=45 M.L.J. 578=50 I.A. 183 (P.C.). Rules of procedure are not made for the purpose of hindering justice. (*Ibid*) R. 1 of O. 47 is intended to provide against action in two Courts simultaneously. Where a person prefers an appeal and then applies to the lower Court for review the order of the lower Court on the review application is invalid and its illegality is not affected by the subsequent withdrawal of the appeal. 33 Bom.L.R. 378, 14 R.D. 294 (1). The fact that the party could have appealed from an order which on the face of it is erroneous is no bar to an application for review. 14 L. 55=143 I.C. 768=34 P.L.R. 273=1933 L. 226. R. 1 does not apply where after filing an application for review the opposite party prefers an appeal. 63 I.C. 841. When an appeal is withdrawn, it must be treated as if it had never been "presented" within the meaning of O. 47, R. 1. 43 A. 288=19 A.L.J. 24. A Court can entertain an application for review and dispose of it on the merits even though subsequently an appeal is filed against the decree originally passed. 18 A.L.J. 135=42 A. 317; 17 A.L.J. 1021=42 A. 79. See also 148 I.C. 496=1934 A. 250. The application for review is not maintainable after preferring an appeal against the same decree. 35 I.C. 867; 1927 B. 232=29 Bom.L.R. 371=101 I.C. 766, 30 C.W.N. 968. On the withdrawal of the appeal the original Court has jurisdiction to entertain an application for review of its judgment. 14 I.C. 327. Where an appeal against judgment by the High Court is dismissed under O. 41, R. 11, the District Court cannot deal with an application for review of the same judgment. 23 Bom.L.R. 597=46 B. 1. If an application for review is made and also an appeal is preferred, the Court to which the review application is made, can still entertain the application for review. 38 B. 416=23 I.C. 513=16 Bom.L.R. 189; 41 I.C. 497=44 C. 1011. Where a surety against whom execution has been ordered applied for review of the order on the ground that the Court had no jurisdiction to do so without calling upon him to show cause why execution could not be ordered, *held*, as the surety had a right of appeal, it was not open to him to invoke the remedies by way of review or revision. 1931 M.W.N. 963. An appeal may be preferred even after an application for review, the Court in such a case can proceed with application for review, but the hearing of the appeal must be stayed. 57 I.C. 785; 65 I.C. 125. A lower Court cannot review its order after it has been confirmed on appeal. 40 P. R. 1918=45 I.C. 84. It is illegal for an inferior Court to review the judgment of a

on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other

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superior Court 50 I.C. 910. An application for review can be continued after the filing of appeal from the decree. If the review succeeds then the appeal becomes incompetent and cannot be heard. 50 I.C. 329=15 N.L.R. 65, 31 Bom.L.R. 137=11b I.C. 227=1929 B. 183. But see 11 I.C. 343=14 O.C. 108; 24 O.C. 280=66 I.C. 205. Every order in which in granting a review a Court fails to observe the terms of O. 47 should not be interfered with in revision. 104 I.C. 746. Appeal against original decree—Supersession of the decree on review appeal cannot be heard. 30 C.W.N. 738=96 I.C. 384=1926 C. 943. Appeal—Right of—No appeal lies from an order rejecting an application for review. Where the appellate Court entertains the appeal, its order is liable to be set aside by a superior tribunal. 14 R.D. 294 (2). But an appeal lies from an order granting the review. 138 I.C. 713=36 C.W.N. 212=1932 C. 552. While there is a right of appeal, if the provisions of R. 4 of O. 47 are contravened, there is none if R. 1 of O. 47 is contravened. 116 I.C. 221=1929 L. 26. In appealable cases the review application should be filed before the appeal is lodged. 36 C.W.N. 40=1932 C. 171. When the lower appellate Court has postponed the consideration of an application for review, there is no appeal as the order cannot be construed as a final order. Again such an order is not included in the list of appealable orders in O. 47, R. 1. Hence the only remedy is revision under S. 115. 119 I.C. 561=1929 A. 375. There is nothing in R. 1 or in other provisions of the Code which would justify Courts in refusing to entertain an application for review merely on the ground that, subsequent to the making of the application, an appeal has been filed. The policy of the Code appears to be that a person cannot, after filing a second appeal, be allowed to obtain a review of judgment in lower Court which should have the effect of altering the judgment and decree from which he has appealed. 119 I.C. 561=1929 A. 375. *Court-fee*—Review application relating only to a portion of reliefs in plaint—Court-fee. See 57 C. 679.

ORDER ACCEPTING REVIEW—REVISION.—Where trial Court had jurisdiction to decide whether any irregularities were committed, and if so, whether those irregularities amounted to an error apparent on the face of the record within the purview of R. 1, even if that point had been wrongly decided, it could not be said that it had assumed jurisdiction which it did not possess or that it had lost it on account of an erroneous decision on a question of law and therefore such a decision is not open to revision. 152 I.C. 620

=35 P.L.R. 670=1934 L. 825. See also 141 I.C. 188=34 P.L.R. 88=1933 L. 169; 1934 A. 971.

PRACTICE AND PROCEDURE.—If a judge wants to review his own order, he should follow the provisions of R. 1. He should direct the pleader of the party who wants such review to advise his clients to file an application for review on which notice should be issued to the opposite party and the judge should then in their presence determine whether a review ought to be granted and the case reopened or not. But he cannot without notice to opposite party cancel his previous order and re-open the case. 146 I.C. 458=1933 P. 643 (2). The Court which can review its judgment is the Court which has pronounced it and not the appellate Court before which the appeal is pending. The only remedy open to a party who has discovered new and important matter, which could not with due diligence have been found before, is to move the Court for a review of the judgment. 147 I.C. 339=3 A.W.R. 198=1934 A. 175. An application under O. 47, R. 1 designed merely to escape the consequences of the law of limitation, maintainable. 1933 P. 557=147 I.C. 179. If an application for review of judgment is presented on the original side of the High Court before an appeal is preferred, the Court is not deprived of its jurisdiction to entertain the application for review, on the ground that, when the application comes on to be dealt with, an appeal is pending under Rr. 2, 3 and 34 of the Rules and Orders of the High Court, Original Side Chapter 32, the application for review must be held to be presented when the memorandum of review is filed and not when it is urged in Court. The person who files a memorandum of review takes a step which initiates proceedings for review, and by so doing applies for review of judgment within the meaning of O. 47, R. 1. 41 C.W.N. 129.

O. 47, R. 1 (2).—The word "party" in this sub-rule is properly used in its context. It pre-supposes that the person to whom it refers is a party to the decree. 159 I.C. 186=1935 R. 364. Persons who have never been parties to a suit or to an appeal at all, need neither file a suit to set aside the original decree or the appellate decree, nor need they file an application for review. 159 I.C. 186=1935 R. 364. Father and son were defendants in mortgage suit and a mortgage decree was passed against both. In an appeal filed by the father alone, the son was not impleaded but the Court substituted decree ordering the son to pay the whole amount out of his pocket and the decree was sought to be executed by arresting

party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

2. [Ss. 624, 626, cl. (c).] An application for review of a decree or order

To whom applications for review may be made.

of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor.

Form of applications for review.

3. [S. 625.] The provisions as to the form of preferring appeals shall apply, *mutatis mutandis*, to applications for review.

Application where rejected.

4. [S. 624.] (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

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him. *Held*, that the appellate Court had no power to do so nor was the son bound to apply for review of the appellate decree as he was no party to the appeal. (*Ibid*) Irrespective of the time when a person aggrieved by a decree discovers material evidence, *viz.*, whether before or after an appeal is filed, he has no right to apply for a review if he has already preferred an appeal. He being incompetent to apply for a review, his application is invalid and the Court will have no jurisdiction to inquire into the application. The subsequent withdrawal of the appeal cannot validate the application for a review which was initially void so as to confer on the Court a jurisdiction which it had none when the application was filed. 157 I.C. 366=31 N. L.R. 418=1935 N. 174. Application for review—Subsequent presentation of appeal—Competency—Grant of review—Effect. 43 L. W. 542.

O. 47, R. 2.—Review cannot be granted where applicant has mismanaged his case and wishes to secure a re-hearing thereof. 23 I.C. 394. R. 2 would prevent an application for review being filed against the order of a deceased Judge, if the Judge were a Judge of a Court not being a High Court, upon a ground other than the discovery of new and important matter or evidence or the existence of a clerical or arithmetical mistake or error on the face of the decree. 6 O.W.N. 707=13 R.D. 624. On this section, *see also* 18 C.W.N. 22; 17 C.W.N. 403, 5 C. 86. It would be a contravention of R. 4 to grant an application for review on the discovery of new matter alleged not to have been within the applicant's knowledge without strict proof of such allegation. "Strict proof" means formal proof. Where the applicant for review supports his application with an affidavit, the requirement as to "strict proof" is satisfied and review should be granted. 1933 M. 217=145 I.C. 766; 11 O.W.N. 249=18 R.D. 150. Review by Judge who signed decree but not passed it—If competent. *See* 32 I.C.

101=20 C.W.N. 391. As to effect of transfer of Judge, *see* 47 A. 751=1925 A. 804. A review petition on the ground of an accidental slip in the decree is entertainable before the successor of the Judge who disposed of the case. 24 L.W. 447=97 I.C. 545=1926 M. 1083. *See also* 100 I.C. 425=1927 O. 131. A member of the Board of Revenue to whom an application for review on the ground of new evidence being discovered was made left a note that the application might be admitted if certain enquiries resulted in a particular manner. The succeeding member admitted the application in pursuance of the note. *Held*, the admission was valid. 12 L.R. 63 (Rev.)=15 R.D. 204. An application for review based on an error apparent on the face of the decree can be presented to the successor of the Judge who passed the decree, but one based on an error apparent on the face of the record but not on the face of the decree, can only be made to the Judge who passed the decree. 1937 O.W.N. 80=1937 O. 267. An error on the part of the Judge in allowing interest on a certain sum without its being claimed by the party, is not an error apparent on the face of the decree, and an application for review presented to the successor of the Judge who passed the decree is, therefore, incompetent. (*Ibid*.) This rule applies to Revenue Courts. 1936 R.D. 320.

O. 47, R. 3.—As to whether copy of judgment is to be filed along with review application, *see* 16 Pat.L.T. 595=1935 P. 486.

O. 47, R. 4.—The right of appeal under O. 43, R. 1 (w) is subject to conditions laid down by O. 47, R. 7, and therefore an appeal, not coming under this rule, cannot be maintained. 42 A. 626=18 A.L.J. 838; 18 C.W.N. 22=19 C.L.J. 225, 20 I.C. 647; 64 I.C. 219. *See also* 8 O.W.N. 1267. Review—Stages of proceedings. 20 I.C. 647. When once an application for review is granted an order dismissing the application for review is wrong. 74 I.C. 214=26 O.C. 24. *See also* 1923 L. 303. An order granting a review on the ground

Application where grant-
ed.

(2) Where the Court is of opinion that the application for review should be granted, it shall grant the same.

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for; and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

5. [S. 627.] Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded

Application for review in
Court consisting of two or
more Judges.

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that the view of the law taken was contrary to a Full Bench decision which had not been taken to its notice, is appealable. 3 P 134=75 I.C. 177=5 Pat L.T. 52. The discretion of Court in saying what constitutes good and sufficient reason is unlimited. 9 I.C. 532 The absence of a pleader is not a ground for review. 50 M. 67=1926 M.W.N. 890=97 I.C. 1008=1926 M. 980=51 M.L.J. 219. If Court thinks that an application for review should be granted, the rule does not stand in its way. 38 I.C. 769=115 P.R. 1916. An application for review of an order summarily dismissing an appeal can be granted without the issue of notice to respondent. (42 C 433, Ref.) 43 C 178=19 C.W.N. 1077. The expression "opposite party" means the party interested to support the order sought to be vacated. 43 C. 178=19 C.W.N. 1077. See also 63 I.C. 99=6 P.L.J. 625 Grounds which satisfied a Court that its own judgment may be reconsidered should not be criticised by Court of appeal. 31 M.L.J. 509=36 I.C. 437. Before granting an application for review notice to opposite party is necessary or else the granting is a nullity. 30 I.C. 165=42 C. 433, 19 I.C. 864=237 P.L.R. 1913. Notice to opposite party is imperative. 50 M. 67=51 M.L.J. 219. When a party seeks a review of judgment saying that a document not produced at the trial was subsequently discovered, he must strictly show that the document was not available at the time of the trial, or that no diligence on his part was wanting to produce the document. 37 I.C. 399 "Strict proof" refers to the formal correctness of the evidence offered and not to its sufficiency, effect or result. 20 Bom.L.R. 434=42 B. 295; 42 C. 830=19 C.W.N. 804. 35 I.C. 651=27 C.L.J. 540 See also 145 I.C. 766=1933 M. 217 Application for review on the ground of discovery of new evidence must be strictly proved (31 B. 381, Foll.) 9 I.C. 320 See also 42 C. 830=19 C.W.N. 804; 38 I.C. 403; 45 C. 60=21 C.W.N. 1076 Court must consider reasons for failure to produce the new evidence before order is passed. 104 I.C. 746. Court not considering whether new matters are important—Petition

ordered to be re-heard 1927 M. 826 (1)=104 I.C. 290 (2)

O 47, R. 4 (2) —It is a wrong procedure for a lower Court to review its former order merely on the ground that a ruling of High Court had not been brought to its notice on the previous occasion. 15 R.D. 16=1931 A. 91. See also 145 I.C. 766=1933 M. 217; 11 O.W.N. 249

APPEAL.—An order under O 47, R. 4, granting an application for review can be appealed against, but only on the grounds mentioned in O 47, R. 7 (1). 35 P.L.R. 467=1934 L. 575. See also 141 I.C. 188=34 P.L.R. 88=1933 L. 169; 146 I.C. 231=1933 A. 778, 144 I.C. 728=35 Bom.L.R. 280=1933 B. 183; 14 L.R. 80 (Rev.)=17 R.D. 131; 146 I.C. 530=37 C.W.N. 705=1933 C. 727. The right of appeal against an order granting an application for review given by O. 43, R. 1 (w), is qualified and controlled by O. 47, R. 7 and an appeal against such an order can lie only on one or other of the three grounds specified therein. 148 I.C. 1126=1934 L. 617.

REVISION.—A revision against an order refusing a review is not incompetent. 1934 A.L.J. 937=1934 A. 971.

O. 47, R. 5 —R. 5 would apply only to the case of a Court consisting of more than one Judge. According to S 18 of the Punjab Courts Act, where the Court of the Additional Judge is distinct from that of the District Judge, an order passed by the Additional Judge can be reviewed by the District Judge, though the former is still attached to the Court. 141 I.C. 392 (1)=34 P.L.R. 229=1933 L. 130 What R. 5 provides is that if on account of the absence of the Judge for a period of six months after the filing of the application, the application cannot be heard by the Judge, then it can be heard by another Judge of the Court. 145 I.C. 810 (2)=14 Pat.L.T. 234=1933 P. 433. Successor of Judge deciding case—When can grant review. 26 I.C. 366=1915 M.W.N. 22. Appeal heard by two Judges—One of whom has since left—Continuing Judge can grant review. 9 I.C. 552. See also 22 C.W.N. 550, 22 C.L.J. 95, 24 Bom.L.R. 371=1927 B. 232=101 I.C. 766

by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

Loc. Am.—[Bombay.] R. 5. For the word "six" the word "two" shall be substituted.

Application where rejected 6. [S. 628.] (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, the application shall be rejected.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

Order of rejection not appealable. Objections to order granting application. 7. [S. 629.] (1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

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O 47, R. 7.—The change in the language of R. 7 (1) is due to a mistake on the part of the Legislature and there is no deliberate departure from S. 629 of the C. P. Code, 1882. 31 M.L.J. 509=36 I.C. 437. See also 10 I.C. 725; 12 I.C. 624=10 P.L.R. 1912. Execution application—Dismissal for default—Order granting review—Notice is not necessary 69 I.C. 506. Omission to consider important facts which are on the record is a satisfactory ground for entertaining an application for review. 140 I.C. 409=1932 N. 177. As to whether this rule controls S 247, Agra Tenancy Act, regarding appeal from orders on review by Assistant Collector, see 1936 R. D. 257. No appeal can be entertained from the order refusing review even in proceedings in insolvency. 1935 P. 177.

APPEAL.—Rule is permissive. If party chooses to appeal he must restrict to grounds specified therein. 8 L. 617=1927 L. 435 (2), 1930 C. 424=34 C.W.N. 265; 162 I.C. 992=17 Pat.L.T. 766=1936 P. 310. There is no appeal under the law when an applicant has applied *within* 90 days of the order sought to be reviewed, except on the grounds mentioned in (a) and (b) of R. 7 (1); but an appeal is allowed in the case of an application filed beyond 90 days, if at the same time, there is no sufficient cause. The words "and for sufficient cause", in Cl. (c) of R. 7 (1) must be taken to refer to sufficient cause for review and not for admission of the application beyond time, i.e., they have the same meaning and the words "sufficient reason" in O 47, R. 1 18 R.D. 586=16 L.R. 9 (Rev.). Allowing appeal on any other ground is acting without jurisdiction and is liable to be set aside in revision. 7 R. 187=118 I.C. 120=1929 R. 105. The general right of appeal given by O. 43, R. 1 (w) must be held subject to the specific provisions of O. 47, R. 7 as regards the grounds on which an appeal can lie. 8 O.W.N. 1267; 131 I.C. 518=1931 A. 329; 140 I.C. 409=1932 N. 177; 16 R.D. 424=13 L. R. 281 (Rev.). No appeal lies from an order granting a review except on grounds mentioned in O 47, R. 7. 14 I.C. 39; 32 I.C. 860; 28 I.C. 707=2 L.W. 366; 31 M.L.J. 827=38 I.C. 373; 20 A.L.J. 517=44 A. 605. See also

1927 B 599=29 Bom L.R. 1355, 3 Lah L.J. 341=66 I.C. 992; 15 A.L.J. 899=43 I.C. 490=40 A. 68, 18 C.W.N. 22=19 C.L.J. 225, 31 M.L.J. 509, 1929 M. 261. R. 7 does not apply to a case where the only grounds alleged for review were that the Judge disposed of the case in chambers without giving the applicant a hearing and that the Court had ignored a binding decision of a superior Court. 8 O.W. N. 1267=1932 O. 63. The insufficiency of reason for which an application for revision is admitted is not a good ground for an appeal against the order granting the application. 16 R.D. 424=13 L.R. 281 (Rev.). Where once a Judge has granted the application for review, on whatever grounds he has granted it the appeal against it can only be made under the conditions laid down in R. 7 and as the question of the application for review being insufficiently stamped is not one of the grounds mentioned in R. 7 as being a proper ground for an objection, the appellate Court cannot go into the question of whether the Court-fee paid was sufficient or not 35 Bom.L.R. 280=1933 B. 183. In Bombay cl. (w) of R. 1 of O 43 is deleted by a rule made by the High Court and an order granting a review is appealable only under R. 7 of O. 47. Where the review was granted on the ground of an error on the face of the record, *held*, that the same was not appealable 31 Bom.L. R. 137=116 I.C. 227=1929 B. 183. Error in thinking that there was a mistake apparent on face of record—No appeal lies 1926 A. 492=94 I.C. 78 (1). Under R. 7 (1), an objection that the lower Court granted a review can be taken in appeal from the final decree only upon one of the three grounds specified in sub-rule (1). 19 I.C. 481=109 P.R. 1913; 38 I.C. 769=115 P.R. 1918; 49 P.W.R. 1913=18 I.C. 309; 11 P.R. 1913; 10 P. L. R. 1912=12 I.C. 624, 10 I.C. 725=35 P.W. R. 1911; 38 M.L.J. 224=55 I.C. 144. O. 43, R. 1 (w) should be read with O. 47, R. 7 14 I.C. 39. Under R. 7 the sufficiency or otherwise of the reason for granting a review is not a ground for appeal. 63 I.C. 171. No appeal is allowed from an order granting an application for review of an order dismissing a suit for default 17 I.C. 661=10 A.L.J. 396. An order refusing to re-admit applica-

(a) in contravention of the provisions of rule 2,—
 (b) in contravention of the provisions of rule 4, or
 (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.

Loc Am.—[Madras] R. 7 (1). The word "order" was substituted for the word "application" after the words "on the ground that the".

Registry of application granted, and order for re-hearing

8. [S. 630.] When an application for review is granted, a note thereof shall be made in the register, and the Court may at once rehear the case or make such order in regard to the re-hearing as it thinks fit.

Bar of certain applications

9. [S. 629, last para.] No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.

Notes.

tion for review of judgment is not appealable but is open to revision. 5 R. 121=102 I. C. 706=1927 R. 204. Where a decree is modified on review, the original decree is superseded and so no appeal lies from that decree, the remedy being to appeal from the decree passed on review. 9 A.L.J. 183=34 A. 282, 36 C.L.J. 484=1923 C. 113. The objection that the Court admitted, in review, inadmissible evidence may be taken on appeal from the final decree, i.e., original decree amended on review. 50 I.C. 119=23 C.W.N. 242. Against an order granting an application for review of judgment and restoring the appeal to the file, an appeal lies. 21 I.C. 943.

POWER OF APPELLATE COURTS—Order granting review of judgment confined to arrears of revenue only—Power of appellate Courts to reopen other questions. 1926 C. 243. Review by successor on the ground of accidental slip in the decree—Appellate Court cannot interfere. 24 L.W. 447=97 I. C. 545=1926 M. 1083. The fact that the appellate Court cannot interfere with the order granting review does not prevent that Court from considering the appeal from the ultimate decree passed after review on the merits. 1927 M.W.N. 411. Where an order was passed granting a review and setting aside the previous order, an appeal did not lie in so far as the order granting the review was concerned but that the order of the lower Court setting aside the previous order must be set aside in appeal. 105 I. C. 4.

APPEAL—An appeal does not lie from an order granting an application for review except on the grounds specified in R. 7. 141 I. C. 188=1933 L. 169.

REVISION—No revision lies when there is a right of appeal from the final decree. 32 I.C. 860=48 P.W.R. 1916, 1927 B. 599=29 Bom. L.R. 1355. But see also 12 I.C. 246=49 P.W.R. 1911; 31 M.L.J. 509=36 I.C. 437, 34 C.W.N. 265.

O. 47, R. 8—Provisions of the rule are mandatory. 1930 A.L.J. 1057. A review may be granted either as to the whole or part, and according to R. 8 on admitting of a review the whole case is not re-opened. 20 C. W.N. 1165=27 C.L.J. 326. It is open to Court to determine whether the whole case is to be re-heard or in part or in its entirety. In the absence of any special direction the whole case is re-opened. 53 C. 856=31 C.W. N. 1035=1927 C. 21. A Court can under R. 8 grant a review and at once proceed to re-hear the case. 26 I.C. 366=1915 M.W.N. 22. It is open to Court to make a simple order for re-hearing without making an order that no evidence should be produced except that which has been discovered subsequent to the suit. 157 I.C. 1084=1935 A.L.J. 436=1935 A. 435.

O. 47, R. 9—Where a plea of *res judicata* has been wrongly accepted between the parties by a single Judge of the Chief Court, the question cannot be re-opened afterwards by a Division Bench. 10 I.C. 679=25 P.W.R. 1911. As to scope and effect of O. 47, R. 9, see 8 L. 54=1927 L. 200=102 I.C. 523 (2). A second review of an order is barred by R. 9.

Loc. Ams—[Allahabad, Bombay, Oudh and Sind.] Add the following rule at the end of O. 47:—

"10 R. 38 of O. 41 shall apply, so far as may be, to proceedings under this order."
[Calcutta.] O. 47, R. 1 (2).

Cancel clause (2), R. 1, O. 48 and **substitute** therefor the following:—

"(2) The Court-fee chargeable for such service shall be paid when the processes are applied for, or within such time, if any, as the Court may, when ordering its issue, fix for the purpose."

ORDER XLVIII.

MISCELLANEOUS.

Process to be served at expense of party issuing.

1. [S. 93.] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued unless the Court otherwise directs.

Costs of service.

(2) The court-fee chargeable for such service shall be paid within a time to be fixed before the process is issued.

Loc. Ams—[Allahabad and Oudh.] Add the words "except as provided in O. 4, R. 1 (2)" at the beginning of clause (1) of R. 1.

[Nagpur] To sub-rule (2) of R. 1 of O. 48 **prefix** the words "Except as provided in O. 4, R. 1 (2)" and **substitute** the word "the" for "The".

[Calcutta.] **Substitute** for sub-rule (2):—

"(2) The Court-fee chargeable for such service shall be paid when the process is applied for, or within such time, if any, as the Court may, when ordering its issue, fix for the purpose."

Orders and notices how served.

2. [S. 94.] All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

3. [S. 644.] The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.

Loc Ams—[Oudh.] The following is **added** as R. 4 to O. 48 —

"Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

[Rangoon.] The words "or such forms as may be prescribed by the High Court of Judicature at Rangoon" shall be **inserted** after the word "Appendices".

ORDER XLIX.

CHARTERED HIGH COURTS.

1. [S. 636.] Notice to produce documents, summonses to witnesses, and every other judicial process, issued in the exercise of the original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notice to respondents, may be served by the attorneys in the suits or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs.

2. Nothing in this schedule shall be deemed to limit or otherwise affect any

Notes.

as it is practically for the review of the order passed on review. 10 I.C. 679=25 P. W.R. 1911, 20 C.W.N. 1165=27 C.L.J. 326 See also 8 L. 54=1927 L. 200.

O. 48, R. 1—See 3 C.W.N. 82; 11 W.R. 290; 9 W.R. 127. The provisions of R 1 operate as between party and party and not between the Government and the party. 8 Pat.L.T. 756=102 I.C. 791=1927 P. 318.

O. 48, R. 2—See 5 B. 249. The words of S. 80 as to how notice has to be served are mandatory and are not controlled by the provision contained in R. 2 which should be read

as subject to the special procedure as to service contained in S 83 35 C W N 161=58 C 850=132 I.C. 634=1931 C. 503 Duty of Court to fix time for payment of process fee—Non-compliance—Effect See 158 I.C. 250.

O. 48, R. 3—See 24 C. 766 (772).

O. 49, R. 1.—Mode of effecting of summonses. 96 I.C. 375=1926 C. 977

O. 49, R. 2.—See 9 A. 93. O. 41, R. 31 and O 20 and the rules thereunder do not apply to the Chartered High Courts as the rules relating to judgments were in force when the C. P. Code was enacted. 27 A.L.J. 713=161 I.C. 23=1929 A. 403

Saving in respect of Chartered High Courts

rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.

3. [S. 638.] The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely:—

- (1) rules 10 and 11, clauses (b) and (c) of Order VII;
- (2) rule 3 of Order X,
- (3) rule 2 of Order XVI;
- (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII;
- (5) rules 1 to 8 of Order XX; and
- (6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum),

and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

Loc Am.—[Bombay.] In R. 3, the word “and” immediately preceding paragraph (6) shall be *omitted* and the following paragraph shall be *inserted* between paragraphs (5) and (6), namely:—

“(5-a) R. 72-A of O. 21; and”

For the words and figures “R. 35” occurring in item (6) of R. 3, the words and figures “Rr. 31 and 35” shall be *substituted*.

The following clause shall be inserted as clause (1), namely:—

“(1) R. 21-A of O. 5;”

For the existing clause (1) the following shall be *substituted* namely:—

“(1-a) Rr. 10 and 11, clauses (b) and (c), and Rr. 19 to 26 of O. 7;”

“(1-b) Rr. 11 and 12 of O. 8;”

Below clause (6), the following shall be inserted, namely:—

“(7) R. 38 of O. 41,” and

The following shall be *added* as R. 4.—

“4. Under S. 128, paragraph 2, clause (1) of the Civil Procedure Code of 1908, the following power is delegated to the Registrar of the High Court, Appellate Side, Bombay.

“Where on a memorandum of appeal presented within the time prescribed for the same the whole or any part of the fee prescribed by the law for the time being in force relating to Court-fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such Court-fees and may admit the appeal to the register even though the subsequent payment of Court-fee may have been made after the time prescribed for presentation of the appeal.”

ORDER L.

PROVINCIAL SMALL CAUSE COURTS

1. The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—
 - (a) so much of this schedule as relates to—
 - (i) suits expected from the cognizance of a Court of Small Causes or the execution of decrees in such suits,
 - (ii) the execution of decrees against immoveable property or the interest of a partner in partnership property;
 - (iii) the settlement of issues; and

Notes.

O. 50, R. 1 (a) (ii).—Though a Small Cause Court is not required to frame issues yet where a case involves many questions, the Court should indicate what the points are to give the parties an opportunity to produce their evidence thereon. 59 I.C. 703.

APPENDIX A.—The forms in Appendix A must be used with caution. They seem to have been drafted by some one with an imperfect knowledge of pleading and some-

times are in direct conflict with the Code. For example, where they provide that original documents which are part of the evidence should be annexed to the plaint, they are to be taken as the standard of the requisite brevity and also no doubt as specimens of the character of pleadings required. But they are not to be adhered to slavishly, they are in fact not perfect by any means. 58 C. 418=134 I.C. 538=1931 C. 458

(b) the following rules and orders,—

Order II, rule 1 (frame of suit);

Order X, rule 3 (record of examination of parties);

Order XV, except so much of rule 4 as provides for the pronouncement at once of judgment;

Order XVIII, rules 5 to 12 (evidence);

Orders XLI to XLV (appeals);

Order XLVII, rules 2, 3, 5, 6, 7 (review);

Order LI.

ORDER LI.

PRESIDENCY SMALL CAUSE COURT.

1. Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XXI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts, 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

ORDER LII.

Loc Ams —[Allahabad, Bombay, Oudh and Sind.] R 38 of O 41 shall apply, so far as may be, to proceedings under S. 115 of the Code.

[Rangoon.] "O. 52 —Rules of procedure to be followed in the Appellate Side of the High Court of Rangoon. (*Omitted.*)

Order 53 —Rules for the conduct of suits in the Small Cause Court at Rangoon. (*Omitted.*)

Order 54 —Rules for the classification and arrangement of Civil Records. (*Omitted.*)

APPENDIX A.

PLEADINGS.

(1) Titles of Suits.

IN THE COURT OF

A. B. (*add description and residence*) Plaintiff

C. D. (*add description and residence*) Defendant.

(2) Description of Parties in Particular Cases.

¹ [The Secretary of State or the Federation of India or the Province of as the case may be.]

The Advocate-General of _____

The Collector of _____

The State of _____

The A. B. Company, Limited, having its registered office at _____

A. B., a public officer of the C. D. Company _____

A. B. (*add description and residence*), on behalf of himself and all other creditors of C. D., late of (*add description and residence*). _____

A. B. (*add description and residence*), on behalf of himself and all other holders of debentures issued by the _____ Company, Limited

The Official Receiver. _____

A. B., a minor (*add description and residence*), by C. D. [or by the Court of Wards], his next friend. _____

A. B. (*add description and residence*), a person of unsound mind [or of weak mind], by C. D., his next friend. _____

Leg. Ref.

¹ Words within brackets have been substituted by the Government of India (Adap-

tation of Indian Laws) Order, 1937, for the former words, *viz.*, "The Secretary of State for India in Council."

A.B., a firm carrying on business in partnership at

A. B. (*add description and residence*), by his constituted attorney, C. D. (*add description and residence*).

A. B. (*add description and residence*), shebait of Thakur.

A. B. (*add description and residence*), executor of C. D., deceased.

A. B. (*add description and residence*), heir of C. D., deceased.

(3) Plaints.

No 1

MONEY LENT

(Title.)

A. B., the above-named plaintiff, states as follows —

1. On the _____ day of _____ 19 _____, he lent the defendant _____ rupee
payable on the _____ day of _____
2. The defendant has not paid the same, except _____ rupees paid on the
day of _____ 19 _____.
3. The plaintiff was a minor [*or insane*] from the _____ day of _____ till
the _____ day of _____
[*If the plaintiff claims exemption from any law of limitation, say:—*]
[*Facts showing when the cause of action arose and that the Court has jurisdiction.*]
5. The value of the subject-matter of the suit for the purpose of jurisdiction is
rupees and for the purpose of Court-fees is _____ rupees.
6. The plaintiff claims _____ rupees, with interest at _____ per
cent. from the _____ day of _____ 19 _____.

No. 2.

MONEY OVERPAID.

(Title.)

A. B., the above-named plaintiff, states as follows —

1. On the _____ day of _____ 19 _____, the plaintiff agreed to buy and the
defendant agreed to sell _____ bars of silver at _____ annas per tola of fine silver.
2. The plaintiff procured the said bars to be assayed by E. F., who was paid by the
defendant for such assay, and E. F., declared each of the bars to contain 1,500 tolas of fine
silver, and the plaintiff accordingly paid the defendant _____ rupees
3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the
plaintiff was ignorant when he made the payment
4. The defendant has not repaid the sum so overpaid
[*As in paras. 4 and 5 of Form No. 1, and Relief claimed.*]

No. 3

GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows —

1. On the _____ day of _____ 19 _____, E. F. sold and delivered to
the defendant [one hundred barrels of flour, or the goods mentioned in the schedule hereto
annexed, or sundry goods].
2. The defendant promised to pay _____ rupees for the said goods on delivery
[or on the _____ day of _____, some day before the plaint was filed.]
3. He has not paid the same.
4. E. F., died on the _____ day of _____ 19 _____. By his last will he appointed
his brother, the plaintiff, his executor.
[*As in paras. 4 and 5 of Form No. 1.*]
7. The plaintiff as executor of E. F. claims [*Relief claimed*].

No. 4.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(Title.)

A. B., the above-named plaintiff, states as follows.—

1. On the _____ day of _____ 19 _____, plaintiff sold and delivered

No. 9.

USE AND OCCUPATION.

(Title.)

A.B., the above-named plaintiff, executor of the will of X.Y., deceased, states as follows.—

1. That the defendant occupied the [house No Street], by permission of the said X.Y., from the day of 19 , until the day of 19 , and no agreement was made as to payment for the use of the said premises.
2. That the use of the said premises for the said period was reasonably worth rupees.
3. The defendant has not paid the money.
[As in paras. 4 and 5 of Form No. 1.]
6. The plaintiff as executor of X.Y. claims [Relief claimed].

No 10.

ON AN AWARD.

(Title.)

A B., the above-named plaintiff, states as follows:—

1. On the _____ day of _____ 19____, the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of E.F. and G.H., and the original document is annexed hereto.
2. On the _____ day of _____ 19____, the arbitrators awarded that the defendant should [pay the plaintiff _____ rupees].
3. The defendant has not paid the money:
[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No. 11.

ON A FOREIGN JUDGMENT.

(Title.)

A.B, the above-named plaintiff, states as follows:—

- 1 On the _____ day of _____, 19____, at _____, in the State [or King-
dom] of _____, the _____ Court of that State
[or Kingdom], in a suit therein pending between the _____ plaintiff and the defendant, duly
adjudged that the defendant should pay to the plaintiff _____ rupees, with interest from
the said date.
- 2 The defendant has not paid the money.
[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

No 12.

AGAINST SURETY FOR PAYMENT OF RENT.

(Title)

A, B, the above-named plaintiff, states as follows —

1. On the _____ day of _____ 19____, E.F., hired from the plaintiff for the term of _____ years, the [house No. _____, _____ Street], at the annual rent of _____ rupees, payable [monthly]
- 2 The defendant agreed, in consideration of the letting of the premises to E.F., to guarantee the punctual payment of rent
- 3 The rent for the month of _____ 19____, amounting to _____ rupees, has not been paid.
- [If, by the terms of the agreement, notice is required to be given to the surety, add —]
4. On the _____ day of _____ 19____, the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.
5. The defendant has not paid the same.
- [As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

No 13.

Breach of Agreement to Purchase Land.

(Title.)

A B, the above-named plaintiff, states as follows:—

- 1 On the _____ day of _____ 19____, the plaintiff and the defendant entered into an agreement, and the original document is hereto annexed.

[Or on the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that defendant should purchase from the plaintiff forty bighas¹ of land in the village of for rupees]

2 On the day of 19 , the plaintiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [or, was ready and willing, and is still ready and willing, and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3 The defendant has not paid the money.

[As in paras 4 and 5 of Form No. 1, and Relief claimed]

No. 14.

NOT DELIVERING GOODS SOLD

(Title.)

A. B., the above-named plaintiff, states as follows —

1. On the day of 19 , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the day of 19 , and that the plaintiff should pay therefor rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would have accrued to him from such delivery

[As in paras. 4 and 5 of Form No. 1 and Relief claimed]

No. 15.

WRONGFUL DISMISSAL.

(Title.)

A B., the above-named plaintiff, states as follows:—

1 On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, or in the capacity of foreman, or as the case may be,] and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services [rupees monthly].

2 On the day of 19 , the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the day of 19 , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services

[As in paras. 4 and 5 of Form No. 1 and Relief claimed]

No. 16.

BREACH OF CONTRACT TO SERVE

(Title.)

A B., the above-named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of rupees, and that the defendant should serve the plaintiff [as an artist] for the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the day of 19 , offered so to do].

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards on the day of 19 , he refused to serve the plaintiff as aforesaid

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 17

AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP

(Title.)

A B., the above-named plaintiff, states as follows —

1 On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed. [Or state the tenor of the contract.]

¹ For the word "Bighas" the Calcutta High Court has substituted— "acres"
 "bighas"

[2 The plaintiff duly performed all the conditions of the agreement on his part.]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner.]

[*As in paras. 4 and 5 of Form No. 1 and Relief claimed.*]

No. 18.

ON A BOND FOR THE FIDELITY OF A CLERK.

(Title)

A B., the above-named plaintiff, states as follows —

1. On the day of 19 , the plaintiff took E F into his employment as a clerk

2 In consideration thereof, on the day of 19 , the defendant agreed with the plaintiff that if E F. should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all moneys, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding rupees

[Or, 2 In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of rupees, subject to the condition that if E F. should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all moneys, evidences of debt or other property which should he at any time held by him in trust for the plaintiff, the bond should be void]

[Or, 2 In consideration thereof, on the same date, the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3 Between the day of 19 , and the day of 19 , E F. received money and other property, amounting to the value of rupees for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid

[*As in paras. 4 and 5 of Form No. 1 and Relief claimed.*]

No. 19

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE

(Title.)

A B., the above-named plaintiff, states as follows —

1 On the day of 19 , the defendant, by a registered instrument, let to the plaintiff [the house No. , Street] for the term of years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term

2 All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit

3. On the day of 19 , during the said term. E F. who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and, still withholds the possession thereof from him

4 The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend rupees in moving, and lost the custom of G.H. and I J. by such removal.]

[*As in paras. 4 and 5 of Form No. 1 and Relief claimed.*]

No. 20

ON AN AGREEMENT OF INDEMNITY.

(Title)

A B., the above-named plaintiff, states as follows—

1. On the day of 19 , the plaintiff and defendant, being partners in trade under the style of A.B and C.D., dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm

2 The plaintiff duly performed all the conditions of the agreement on his part

3 On the day of 19 , [a judgment was recovered against the plaintiff and defendant by E F., in the High Court of Judicature at , upon a debt due from the firm to E F., and on the day of 19 ,] the plaintiff paid rupees [in satisfaction of the sale].

4 The defendant has not paid the same to the plaintiff

[*As in paras. 4 and 5 of Form No. 1 and Relief claimed.*]

No. 21.

PROCURING PROPERTY BY FRAUD.

(Title.)

A.B., the above-named plaintiff, states as follows—

1. On the day of 19 , the defendant, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent, and worth rupees over all his liabilities]

2. The plaintiff was thereby induced to sell [and deliver] to the defendant [dry goods] of the value of rupees.

3. The said representations were false [or state the particular falsehoods] and were then known by the defendant to be so.

4. The defendant has not paid for the goods [Or, if the goods were not delivered.] The plaintiff, in preparing and shipping the goods and procuring their restoration, expended rupees.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed]

No. 22.

FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(Title.)

A B, the above-named plaintiff, states as follows:—

1. On the day of 19 , the defendant represented to the plaintiff that *E F*. was solvent and in good credit, and worth rupees over all his liabilities [or that *E F* . then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit].

2. The plaintiff was thereby induced to sell to *E F*. [rice] of the value of rupees [on months credit].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [or to deceive and injure the plaintiff.]

4. *E.F.* [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the said rice, and the plaintiff has wholly lost the same

[As in paras 4 and 5 of Form No. 1 and Relief claimed]

No. 23

POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. The plaintiff is, and at all the times hereinafter mentioned was possessed of certain land called and situate in and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the day of 19 , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water

[As in paras. 4 and 5 of Form No. 1 and Relief claimed]

No 24

CARRYING ON A NOXIOUS MANUFACTURE

(Title)

A B., the above-named plaintiff, states as follows.—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called situate in

2. Ever since the day of 19 , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands and corrupted the air, and settled on the surface of the lands.

3. Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming-stock therefrom,

and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 25.

OBSTRUCTING A RIGHT OF WAY.

(Title.)

A B, the above-named plaintiff, states as follows —

1 The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of _____].

2 He was entitled to a right of way from the [house] over a certain field to a public highway and back and again from the highway over the field to the house, for himself and his servants [with vehicles, or on foot] at all times of the year

3 On the _____ day of _____ 19, defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, or foot, or in any manner] along the way [and has ever since wrongfully obstructed the same].

4. (State special damage, if any)

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 26.

OBSTRUCTING A HIGHWAY.

(Title)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from _____ to _____ so as to obstruct it.

2 Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [or into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 27.

DIVERTING A WATERCOURSE.

(Title)

A B, the above-named plaintiff, states as follows —

1 The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the _____, in the village of _____, district of _____

2 By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3 On the _____ day of _____ 19, the defendant by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than _____ sacks per day, whereas before the said diversion of water, he was able to grind _____ sacks per day

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 28

OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title.)

A B, the above-named plaintiff, states as follows —

1 Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2 On the _____ day of _____ 19, the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

No. 29.

INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title.)

A B, the above-named plaintiff, states as follows.—

1. On the _____ day of _____ 19, the defendants were common carriers of passengers by railway between _____ and _____

2. On that day the plaintiff was passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at [or near the station of or between the stations of and], a collision occurred on the said railway caused by the negligence and unskilfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., and state the special damage, if any as], and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman].

[As in paras. 4 and 5 of Form No. 1 and Relief claimed.]

[Or thus —2 On that day the defendants by their servants so negligently and unskilfully drove and damaged an engine and a train of carriages attached thereto upon and along the defendant's railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., as in para 3.]

NO. 30.

INJURIES CAUSED BY NEGLIGENT DRIVING.

(Title.)

A.B., the above-named plaintiff, states as follows —

1. The plaintiff is a shoemaker, carrying on business at . The defendant is a merchant of

2. On the day of 19, the plaintiff was walking southward along Chowringhee, in the City of Calcutta, at about 3 o'clock in the afternoon. He was obliged to cross Middleton Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a carriage of the defendant's drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken, and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

NO. 31.

FOR MALICIOUS PROSECUTION.

(Title.)

A.B., the above-named plaintiff, states as follows —

1. On the day of 19, the defendant obtained a warrant of arrest from [a Magistrate of the said city, or as the case may be] on a charge of and the plaintiff was arrested thereon, and imprisoned for [days, or hours, and gave bail in the sum of rupees to obtain his release].

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the day of 19, the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him; or in consequence of the said arrest, the plaintiff lost his situation as clerk to one E.F.; or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[As in paras. 4 and 5 of Form No. 1, and Relief claimed.]

NO. 32.

MOVEABLES WRONGFULLY DETAINED.

(Title.)

A.B., the above-named plaintiff, states as follows —

1. On the day of 19, plaintiff owned [or state facts showing a right to the possession] the goods mentioned in the schedule hereto annexed [or describe the goods] the estimated value of which is rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the day of 19 , the plaintiff demanded the same from the defendant, but he refused to deliver them.
[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) delivery of the said goods, or rupees, in case delivery cannot be had;
- (2) rupees compensation for the detention thereof.

The Schedule.

No. 33.

AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE.

(Title.)

A B, the above-named plaintiff, states as follows—

1. On the day of 19 , the defendant *C D*, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth rupees over all his liabilities].

2. The plaintiff was thereby induced to sell and deliver to *C.D.* [one hundred boxes of tea], the estimated value of which is rupees

3. The said representations were false, and were then known by *C.D.* to be so [or at the time of making the said representations, *C D.* was insolvent, and knew himself to be so].

4. *C D* afterwards transferred the said goods to the defendant *E F.* without consideration [or who had notice of the falsity of the representation].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

- (1) delivery of the said goods, or rupees, in case delivery cannot be had;
- (2) rupees compensation for the detention thereof.

No. 34.

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(Title.)

A B., the above-named plaintiff, states as follows —

1. On the day of 19 , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at , contained [ten bighas].

2. The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

3. On the day of 19 , the plaintiff paid the defendant rupees as part of the purchase money

4. That the said piece of ground contained in fact only [five bighas].

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims—

- (1) rupees, with interest from the day of 19 ;
- (2) that the said agreement be delivered up and cancelled

No. 35.

AN INJUNCTION RESTRAINING WASTE.

(Title.)

A.B., the above-named plaintiff, states as follows —

1. The plaintiff is the absolute owner of [describe the property].

2. The defendant is in possession of the same under a lease from the plaintiff

3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

[As in paras 4 and 5 of Form No. 1.]

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[Pecuniary compensation may also be claimed.]

No. 36.

INJUNCTION RESTRAINING NUISANCE.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. Plaintiff is, and at all times hereinafter mentioned was, the absolute owner of [the house No. Street, Calcutta]

2. The defendant is, and at all the said times was, the absolute owner of [a plot of, ground in the same street].

3. On the day of 19 , the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

[4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.]

[As in paras. 4 and 5 of Form No. 1.]

7. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

No. 37.

PUBLIC NUISANCE.

(Title.)

A.B., the above-named plaintiff, states as follows —

1. The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act

2. The plaintiff has obtained the consent in writing of the Advocate-General [or of the Collector or other officer appointed in this behalf] for the institution of this suit.

[As in paras. 4 and 5 of Form No. 1.]

5. The plaintiff claims—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road;

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 38.

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(Title.)

A.B., the above-named plaintiff, states as follows —

[As in Form No. 27.]

The plaintiff claims that the defendant be restrained by injunction from diverting the water aforesaid.

No. 39.

RESTORATION OF MOVEABLE PROPERTY THREATENED WITH DESTRUCTION, AND FOR AN INJUNCTION.

(Title.)

A.B., the above-named plaintiff, states as follows —

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grandfather which was executed by an eminent painter], and of which no duplicate exists [or state any facts showing that the property is of a kind that cannot be replaced by money].

2. On the day of 19 , he deposited the same for safe-keeping with the defendant.

3. On the day of 19 , he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

[As in paras. 4 and 5 of Form No. 1.]

8. The plaintiff claims—

(1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting];

(2) that he be compelled to deliver the same to the plaintiff.

No. 40.

INTERPLEADER.

(Title.)

A.B., the above-named plaintiff, states as follows —

1. Before the date of the claims hereinafter mentioned G.H. deposited with the plaintiff [describe the property] for [safe-keeping].

2. The defendant *C.D.* claims the same under an [alleged assignment thereof to him from *G.H.*]

3 The defendant *E.F.* also claims the same [under an order of *G.H.* transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5 He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.

6. The suit is not brought by collusion with either of the defendants.
[*As in paras 4 and 5 of Form No. 1.*]

9. The plaintiff claims—

(1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto;

(2) that they be required to interplead together concerning their claims to the said property;

[(3) that some person be authorized to receive the said property pending such litigation];

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1. *E.F.*, late of _____, was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of _____

[*Here insert nature of debt and security, if any.*]

2 *E.F.* died on or about the _____ day of _____. By his last will, dated the _____ day of _____, he appointed *C.D.* his executor [or devised his estate in trust, etc., or died intestate, as the case may be]

3. The will was proved by *C.D.* [or letters of administration were granted, etc.].

4. The defendant has possessed himself of the moveable [and immoveable, or the proceeds of the immoveable] property of *E.F.*, and has not paid the plaintiff his debt.

[*As in paras. 4 and 5 of Form No. 1.*]

7. The plaintiff claims that an account may be taken of the moveable [and immoveable] property of *E.F.*, deceased and that the same may be administered under the decree of the Court.

No. 42.

ADMINISTRATION BY SPECIFIC LEGATEE.

(Title.)

[*Alter Form No. 41 thus.*]

[*Omit paragraph 1 and commence paragraph 2*] *E.F.*, late of _____, died on or about the _____ day of _____. By his last will, dated the _____ day of _____, he appointed *C.D.* his executor, and bequeathed to the plaintiff, [*here state the specific legacy*]

For paragraph 4 substitute—

The defendant is in possession of the moveable property of *E.F.*, and, amongst other things, of the said [*here name the subject of the specific bequest*].

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said, [*here name the subject of the specific bequest*], or that, etc.

No. 43.

ADMINISTRATION BY PECUNIARY LEGATEE.

(Title.)

[*Alter Form No. 41 thus*]

[*Omit paragraph 1 and substitute for paragraph 2*] *E.F.*, late of _____, died on or about the _____ day of _____.

By his last will, dated the _____ day of _____, he appointed *C.D.* his executor, and bequeathed to the plaintiff a legacy of _____ rupees.

In paragraph 4 substitute "legacy" for "debt".

Another form.

(Title.)

E.F., the above-named plaintiff, states as follows:—

1. *A.B.* of *K.* in the _____ died on the _____ day of _____. By his last will, dated the _____ day of _____, he appointed the defendant

and *M.N.* [who died in the testator's lifetime] his executors, and bequeathed his property, whether moveable or immoveable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immoveable property for the person who would be the testator's heir-at-law, and as to his moveable property for the persons who would be the testator's next-of-kin if he had died intestate at that time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the day of . The plaintiff has not been married.

3. The testator was at his death entitled to moveable and immoveable property; the defendant entered into the receipt of the rents of the immoveable property and got in the moveable property; he has sold some part of the immoveable property.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) to have the moveable and immoveable property of *A.B.* administered in this Court, and for that purpose to have all proper directions given and accounts taken,
- (2) such further or other relief as the nature of the case may require.

No. 44.

EXECUTION OF TRUSTS.

(Title.)

A.B., the above-named plaintiff, states as follows—

1. He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of *E.F.* and *G.H.* the father and mother of the defendant, [or an instrument of transfer of the estate and effects of *E.F.* for the benefit of *C.D.*, the defendant, and the other creditors of *E.F.*].

2. *A.B.* has taken upon himself the burden of the said trust, and is in possession of [or of the proceeds of] the moveable and immoveable property transferred by the said instrument.

3. *C.D.* claims to be entitled to a beneficial interest under the instrument.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and proceeds of the sale of the said, or of part of the said, immoveable property, or moveable, or the proceeds of the sale of, or of part of, the said moveable property; or the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C.D.*, the defendant, and all other persons who may be interested in such administration, in the presence of *C.D.*, and such other persons so interested as the Court may direct, or that *C.D.* may show good cause to the contrary.

[N.B.—Where the suit is by a beneficiary, the plaint may be modelled, mutatis mutandis, on the plaint by a legatee.]

No. 45.

FORECLOSURE OR SALE.

(Title.)

A.B., the above-named plaintiff, states as follows—

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage—

- (a) (date);
- (b) (names of mortgagor and mortgagee),
- (c) (sum secured);
- (d) (rate of interest);
- (e) (property subject to mortgage);
- (f) (amount now due);
- (g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims)

(If the plaintiff is mortgagee in possession, add.)

3. The plaintiff took possession of the mortgaged property on the day of and is ready to account as mortgagee in possession from that time

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims—

- (1) payment, or in default [sale or] foreclosure [and possession];

[Where Order 34, Rule 6 applies.]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

No. 46.

REDEMPTION.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1 The plaintiff is mortgagor of lands of which the defendant is mortgagee

2. The following are the particulars of the mortgage —

(a) (date);

(b) (names of mortgagor and mortgagee);

(c) (sum secured),

(d) (rate of interest);

(e) (property subject to mortgage);

(f) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims.)

(If the defendant is mortgagee in possession, add.)

3. The defendant has taken possession [or has received the rents] of the mortgaged property

[As in paras 4 and 5 of Form No. 1.]

6 The plaintiff claims to redeem the said property and to have the same reconveyed to him [and to have possession thereof]

[Rangoon.] Appendix A, Forms Nos. 45 and 46

In Forms Nos. 45 and 46 of Appendix A, renumber clause 6 as clause 7 and insert the following as clause 6 —

"6 The persons, who, to the knowledge of the plaintiff, are interested in the mortgage security or in the right of redemption are as follows, namely:—"

No. 47.

SPECIFIC PERFORMANCE (No. 1).

(Title.)

A.B., the above-named plaintiff, states as follows.—

1. By an agreement dated the _____ day of _____ and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immoveable property therein described and referred to, for the sum of _____ rupees

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part but the defendant has not done so.

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras. 4 and 5 of Form No. 1.]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.

No. 48.

SPECIFIC PERFORMANCE (No. 2.)

(Title.)

A.B., the above-named plaintiff, states as follows —

1. On the _____ day of _____ 19____, the plaintiff and defendant entered into an agreement, in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immoveable property described in the agreement

2. On the _____ day of _____ 19____, the plaintiff tendered _____ rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the _____ day of _____ 19____, the plaintiff again demanded such transfer. [Or the defendant refused to transfer the same to the plaintiff.]

4. The defendant has not executed any instrument of transfer

5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

[As in paras 4 and 5 of Form No. 1.]

8. The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [following the terms of the agreement];

(2) rupees compensation for withholding the same.

No 49.

PARTNERSHIP.

(Title.)

A.B., the above-named plaintiff, states as follows:—

1 He and C.D., the defendant, have been for _____ years [or months] past carrying on business together under articles of partnership in writing [or under a deed, or under a verbal agreement].

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners [Or the defendant has committed the following breaches of the partnership articles —

(1)

(2)

(3)

[As in paras 4 and 5 of Form No. 1.]

5. The plaintiff claims—

(1) dissolution of the partnership,

(2) the accounts be taken,

(3) that a receiver be appointed.

[N.B.—In suits for the winding up of any partnership omit the claim for dissolution; and instead insert a paragraph stating the facts of the partnership having been dissolved.]

(4) WRITTEN STATEMENTS.

General Defences.

Denial

.. The defendant denies that (set out facts)

The defendant does not admit that (set out facts).

Protest

.. The defendant admits that _____ but says that

The defendant denies that he is a partner in the defendant firm of _____
The defendant denies that he made the contract alleged or any contract with the plaintiff.

The defendant denies that he contracted with the plaintiff as alleged or at all

The defendant admits assets but not the plaintiff's claim.

The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

Limitation

.. The suit is barred by article _____ or article _____ of the second schedule to the Indian Limitation Act, 1877.

Jurisdiction

.. The Court has no jurisdiction to hear the suit on the ground that (set forth the grounds).

On the _____ day of _____ a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

Insolvency

.. The defendant has been adjudged an insolvent

The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.

Minority

.. The defendant was a minor at the time of making the alleged contract

Payment into Court

The defendant as to the whole claim (or as to Rs. _____ part of the money claimed, or as the case may be) has paid into Court Rs. _____ and says that this sum is enough to satisfy the plaintiff's claim (or the part aforesaid).

Performance remitted. The performance of the promise alleged was remitted on the (date).

Rescission

.. The contract was rescinded by agreement between the plaintiff and defendant

Res judicata

.. The plaintiff's claim is barred by the decree in suit (give the reference).

Estoppel

.. The plaintiff is estopped from denying the truth of (insert statement as to which estoppel is claimed) because (here state the facts relied on as creating the estoppel).

Ground of defence subsequent to institution of suit

Since the institution of the suit, that is to say, on the _____ day of _____ (set out facts).

¹ See now the Indian Limitation Act, 1908 (IX of 1908), *infra*.

No. 1.

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.
3. The price was not Rs.

[or]

4. } Except as to Rs
5. } , same as { 1.
6. } { 2.
7. } { 3.

7. The defendant [or A B., the defendant's agent] satisfied the claim by payment before suit to the plaintiff [or to C D., the plaintiff's agent] on the day of

19 . 8 The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

No. 2.

DEFENCE IN SUITS ON BONDS

1. The bond is not the defendant's bond.
2. The defendant made payment to the plaintiff on the day according to the condition of the bond.
3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No. 3.

DEFENCE IN SUITS ON GUARANTEES

- 1 The principal satisfied the claim by payment before suit
2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 4.

DEFENCE IN ANY SUIT FOR DEBT.

1. As to Rs. 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows:—

| | | | | Rs. |
|--------------------|----|----|---------|-----|
| 1907, January 25th | . | .. | .. | 150 |
| „ February 1st | .. | . | .. | 50 |
| | | | Total . | 200 |

2. As to the whole [or as to Rs , part of the money claimed] the defendant made tender before suit of Rs and has paid the same into Court.

No. 5.

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

- 1 The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street, Calcutta, livery stable-keepers employed by the defendant to supply him with carriages and horses, and the person under whose charge and control the said carriage was, was the servant of the said .
- 2 The defendant does not admit that the said carriage was turned out of Middleton Street either negligently, suddenly or without warning, or at a rapid or dangerous place
- 3 The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.
4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6.

DEFENCE IN ALL SUITS FOR WRONGS.

1. Denial of the several acts [or matters] complained of.

¹ See now the Indian Limitation Act, 1908 (IX of 1908), General Acts, Vol. VI.

4. The defendant never took possession of the mortgaged property, or received the mts thereof.

(If the defendant admits possession for a time only, he should state the time, and any possession beyond what he admits.)

No. 13.

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.
2. *A B.* was not the agent of the defendant (if alleged by plaintiff).
3. The plaintiff has not performed the following conditions—(conditions).
4. The defendant did not—(alleged acts of part performance).
5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—(state why).
6. The agreement is uncertain in the following respects—(state them).
7. (or) The plaintiff has been guilty of delay.
8. (or) The plaintiff has been guilty of fraud (or misrepresentation).
9. (or) The agreement is unfair.
10. (or) The agreement was entered into by mistake.
11. The following are particulars of (7), (8), (9), (10) (or as the case may be).
12. The agreement was rescinded under conditions of Sale No. 11 (or by mutual agreement).

(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on, e.g., the Indian Limitation Act, accord and satisfaction, release, fraud, etc.)

No. 14.

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE.

1. *A.B.*'s will contained a charge of debts, he died insolvent, he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs. and the testator had some moveable property which the defendant got in, and which produced the net sum of Rs.

2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 15

PROBATE OF WILL IN SOLEMN FORM.

1. The said will and codicil of the deceased were not duly executed according to the provisions of the ¹Indian Succession Act, 1865 [or the ²Hindu Wills Act, 1870].

2. The deceased at the time of the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant].

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge, being [state the nature of the fraud].

5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [or of the contents of the residuary clause in the said will, as the case may be].

6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims—

(1) that the Court will pronounce against the said will and codicil propounded by the plaintiff,

(2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law.

¹ Now Act XXXIX of 1925.

No. 16.

PARTICULARS. (O. 6, R. 5.)

(Title of suit.)

Particulars. The following are the particulars of *(here state the matters in respect of which particulars have been ordered)* delivered pursuant to the order of the of *(Here set out the particulars ordered in paragraphs if necessary.)*

APPENDIX B.

PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT (O. 5, Rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit, or who shall be accompanied by some person able to answer all such questions, on the day of 19, at o'clock in the noon, to answer the claim; and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence.

NOTICE.—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2 If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both.

Loc. Ams.—[Bombay.] The following note shall be inserted in red ink in Form Nos. 1, 2, 3, 5 and 6:—

"NOTE.—Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out."

[Calcutta.] Form No. 1-A. Insert the following Form.—

No. 1-A.

SUMMONS TO DEFENDANT FOR ASCERTAINMENT WHETHER THE SUIT WILL BE CONTESTED.

(O. 5, Rr. 1, 5.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and able to answer all material questions relating to the suit on the day of 19, at o'clock in the noon in order that on that day you may inform the Court whether you will or will not contest the claim either in whole or in part and in order that in the event of your deciding to contest the claim either in whole or in part, directions may be given to you as to the date upon which your written statement is to be filed and the witness or witnesses upon whose evidence you intend to rely in support of your defence are to be produced and also the document or documents upon which you intend to rely.

Take notice that, in default of your appearance on the day before-mentioned, the suit will be heard and determined in your absence and take further notice that in the event of your admitting the claim, either in whole or in part the Court will forthwith pass judgment in accordance with such admissions.

GIVEN under my hand and the seal of the Court, this day of 19.

Seal.

Judge.

NOTICE.—If you admit the claim in whole or in part you should come prepared to pay into Court the money due by virtue of such admission together with the costs of this suit to avoid execution of any decree which may be passed against your person or property, or both.

[Madras.] Insert the following "Note" in Form No. 1.—

"NOTE.—Also take notice that in default of your filing an address for service before the day before-mentioned you are liable to have your defence struck out."

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

Loc. Am.—[Bombay.] See note under Form 1, Bombay, page 1148.

No. 4.

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT. (O. 37, R. 2.)
(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted a suit against you under O. XXXVII of the Code of Civil Procedure, 1908, for Rs. balance of the principal and interest due to him as the of a of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court within ten days from the service hereof to appear and defend the suit, and within such time to cause an appearance to be entered for you. In default whereof, the plaintiff will be entitled at any time after the expiration of such ten days to obtain a decree for any sum not exceeding the sum of Rs. and the sum of Rs. for costs [together with such interest, if any, from the date of the institution of the suit as the Court may order].¹

Leave to appear may be obtained on an application to the Court supported by affidavit or declaration showing that there is a defence to the suit on the merits, or that it is reasonable that you should be allowed to appear in the suit.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 5.

NOTICE TO PERSON WHO, THE COURT CONSIDERS, SHOULD BE ADDED AS CO-PLAINTIFF.
(O. 1, R. 10.)
(Title.)

To

[Name, description and place of residence.]

WHEREAS has instituted the above suit against for and whereas it appears necessary that you should be added as a plaintiff in the said suit in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved. Take notice that you should on or before the day of 19 , signify to this Court whether you consent to be so added.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

Loc. Am.—[Bombay] See note under Form 1, Bombay, page 1148.

No. 6.

SUMMONS TO LEGAL REPRESENTATIVE OF A DECEASED DEFENDANT. (O. 22, R. 4.)
(Title.)

To

WHEREAS the plaintiff instituted a suit in this Court on the day of 19 , against the defendant who has since deceased, and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said , deceased and desiring that you be made the defendant in his stead:

You are hereby summoned to attend in this Court on the day of 19 , at A.M. to defend the said suit and, in default of your appearance on the day specified, the said suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

Loc. Am.—[Bombay.] See note under Form 1, Bombay, page 1148.

No. 7.

ORDER FOR TRANSMISSION OF SUMMONS FOR SERVICE IN THE JURISDICTION OF ANOTHER COURT (O. 5, R. 21.)²
(Title.)

WHEREAS it is stated that

in defendant witness in the above suit is at present residing : It is ordered

¹ Inserted by Act XXX of 1926.

² Allahabad:—This form has been cancelled by the Rules of the Allahabad High Court.

that a summons returnable on the 19 , be forwarded to the day of Court of
for service on the said defendant with a duplicate of
this proceeding witness
The Court-fee of chargeable in respect to the summons has been realized in
this Court in stamps.
Dated 19 .

Judge.

No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER.

(O. 5, R. 24.)

(Title.)

To

To Superintendent of the Jail at

UNDER the provisions of Order 5, Rule 24 of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant
who is a prisoner in jail. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 9.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT OR SOLDIER.

(O. 5, Rr. 27, 28.)

(Title.)

To

UNDER the provisions of Order 5, Rule 27 (or 28, as the case may be) of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

Judge.

No. 10.

TO ACCOMPANY RETURN OF SUMMONS OF ANOTHER COURT¹.

(O. 5, R. 23.)

(Title.)

Read proceeding from the

for service on

forwarding

in suit No.

of 19

of that Court.

Read Serving Officer's endorsement stating that the
proof of the above having been duly taken by me on the oath of

and

and it is ordered that the
to the be returned

with a copy of

this proceeding.

Judge.

NOTE.—This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.

Loc. Am.—[Bombay.] Form No. 10. Amend the Form as follows:—

No. 10.

TO ACCOMPANY RETURN OF SUMMONS OF ANOTHER COURT.

(O. 5, R. 23.)

(Title.)

Read proceeding from the

forwarding for service on

in Suit No.

of 19

of that Court.

Read Serving Officer's endorsement stating that the
the above having been duly taken by me on the oath of
the be returned to the

and proof of
and it is ordered that
with this proceeding.

I hereby declare that the said summons on
has been duly served.

Judge.

¹ Allahabad.—This form has been cancelled by the Rules of the Allahabad High Court.

NOTE.—This form will be applicable to process other than summons the service of which may have to be effected in the same manner.

[Calcutta] Form No. 10. Insert the words "(or proof of the above having been duly made by the declaration of _____)" after the words "proof of the above having been duly taken by me on the oath of _____."

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR
NOTICE. (O. 5, R. 18.)
(Title.)

The affidavit of
I _____

son of _____

make oath
affirm

and say as follows:—

(1) I am a process-server of this Court
(2) On the _____ day of _____

19 _____

I received a

summons issued by the Court of _____
notice

in Suit No. _____

19 _____ of 19 _____, in the said Court, dated the _____ day of _____

(3) The said _____

time personally known to me, and I served the said summons on him on the _____ was at the
notice her
day of _____ 19 _____, at about _____ o'clock in the _____ noon at
by tendering a copy thereof to him and requiring his
her
signature to the original summons.
notice.

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and
in whose presence

(b) Signature of process-server,

(3) The said _____ or,

not being personally known to me _____ accom-
panied me to _____

he stated to be the said _____ and pointed out to me a person whom
_____, and I served the said summons on him
notice her
on the _____ day of _____
19 _____, at about _____ o'clock in the _____ noon at _____ by tendering
a copy thereof to him and requiring his signature to the original
her
summons.
notice.

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process and
in whose presence.

(b) Signature of process-server,

(3) The said _____ or,
and the house in which he ordinarily resides being personally
known to me, I went to the said house, in _____ and there on the _____
day of _____ 19 _____, at about _____ o'clock in the _____
noon, I did not find the said _____

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special
reference to Order 5, Rules 15 and 17.

(b) Signature of process-server.

(3) One _____ or,
accompanied me to _____ and there pointed
out to me _____ which he said was the house in which _____
resides. I did not find the said _____ there. _____
ordinarily

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special
reference to Order 5, Rules 15 and 17

(b) Signature of process-server.

If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

Sworn by the said
Affirmed day of 19 .

before me this

Empowered under section 139 of the Code of Civil Procedure, 1908, to administer the oath to deponents.

Loc. Ams.—[Calcutta] Form No. 11.—Substitute the following for the existing Form—

No. 11.

DECLARATION OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE (O. 5, R. 18.)

(Title.)

I a process-server, of this Court declare:—

(1) On the day of 19 I received a summons issued by the Court of 19 in Surt No. of 19 in the said Court, dated day of 19 for service on (2) The said was at the time personally known to me, and I served the said summons on him on the day of 19, at about o'clock in the

noon at by tendering a copy thereof to him and requiring his signature to the original summons notice.

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server.

(2) The said not being personally known to me or, pointed out to me a person whom he stated to be the said and I served the said summons on him on the day of 19 at about o'clock in the noon at by tendering a copy thereof to him

and requiring his signature to the original summons notice.

(a)

(b)

(a) Here state whether the person served, signed or refused to sign the process and in whose presence.

(b) Signature of process-server.

(2) The said and the house in which he ordinarily resides being personally known to me, I went to the said house, in and there on the day of 19, at about o'clock in the noon, I did not find the said

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to O. 5, Rr. 15 and 17.

(b) Signature of process-server.

(2) One at pointed out to me or, which he said was the house in which ordinarily resides. I did not find the said there.

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with special reference to O. 5, Rr. 15 and 17.

(b) Signature of process-server.

(3) If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

[Lahore.] *Substitute the following Form for existing Form No. 11:—*

No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE.

(O. 5, R. 18.)

(Title.)

The affidavit of _____, son of _____, I
make oath and say as follows:—
affirm

(1) I am a process-server of this Court.

(2) On the _____ day of _____ 19____, I received a summons issued by the
notice
 Court of _____ in Suit No. _____ of _____ 19____, in the said Court, dated the
 day of _____ 19____, for service on _____.
 (3) The said _____ was at the time personally known to me, and I served
 the said Summons on him on the _____ day of _____ 19____, at about _____ o'clock
notice her
 on the _____ noon at _____ by tendering a copy thereof to him and requiring his
her
 signature to the original summons
notice

(a)

(b)

(a) Here state whether the person served, signed or refused to sign, the process, and
 in whose presence.

(b) Signature of process-server.

(3) The said _____ or,
 and pointed out to me a person whom he stated to be the said _____, and I served the said
summons on him on the _____ day of _____ 19____, at about _____ o'clock in the _____ noon at
notice her
 1, tendering a copy thereof to him and requiring his signature to the original summons
her her notice

(a)

(b)

(a) Here state whether the person served, signed or refused to sign, the process, and
 in whose presence.

(b) Signature of process-server.

or,

(3) The said _____ and his house in which he ordinarily resides being personally known
pointed out to me
by I went to the said house in _____ and there on the _____ day of _____

19____ at _____ o'clock in the fore noon I did not find the said
after

I enquired { (a) _____ } neighbours.
 { (b) _____ }

I was told that _____ had gone to _____ and would not be back till _____
Signature of process server.

or,

(3) If substituted service has been ordered, state fully and exactly the manner in
 which the summons was served, with special reference to the terms of the order for substituted service.

Sworn
Affirmed by the said _____ before me this _____ day of _____ 19____.

*Empowered under Section 139 of the Code of
 Civil Procedure to administer the oath to deponents.*

[N.-W.F.P.] Substitute the following for the third and fourth parts of (3) in Form
 No. 11:—

“(3) The said _____ and his house in which he ordinarily resides being personally
known to me pointed out
to me went to the said house in _____ and there on the day of _____ 19____, at
 _____ o'clock in the fore noon, I did not find the said _____ I enquired from
after

I was told that _____ had gone to _____ and would not be back till _____ neighbours.
Signature of process server

No. 12.

NOTICE TO DEFENDANT. (O. 9, R. 6.)

(Title.)

[Name, description and place of residence.]

To

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear, but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons;

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the _____ day of _____ 19 _____ is now fixed for the hearing of the same; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

Loc Am.—[Madras] After Form No. 12, insert the following as Form No. 12-A:—

No. 12-A.

NOTICE TO THE PROPOSED GUARDIAN OF A MINOR DEFENDANT RESPONDENT.

(O. 32, Rr. 3 and 4.)

(Title.)

To

(Name, description and place of residence of proposed guardian.)

Take notice that X ^{plaintiff} _{appellant} in _____ has presented a petition to the Court

praying that you be appointed guardian *ad litem* to the minor ^{defendant (s)} _{respondent (s)}, and that the same will be heard on the _____ day of _____ 19 _____.

(2) The affidavit of X has been filed in support of this application

(3) If you are willing to act as guardian for the said ^{defendant (s)} _{respondent (s)} you are required to sign (or affix your mark to) the declaration on the back of this notice.

(4) In the event of your failure to signify your express consent in manner indicated above, take further notice that the Court may proceed under O. XXXII, R. 4, Code of Civil Procedure, to appoint some other suitable person or one of its officers as guardian *ad litem* of the minor ^{defendant (s)} _{respondent (s)} aforesaid.

Dated the _____ day of _____ 19 _____.

(Signed.)

(To be printed on the reverse)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian of the minor ^{defendant (s)} _{respondent (s)} therein mentioned.

(Signed) Y Z.

Witnesses.

1.
2.

No. 13.

SUMMONS TO WITNESS. (O. 16, Rr. 1, 5.)

(Title)

To

WHEREAS your attendance is required to _____ on behalf of the _____ in the above suit, you are hereby required [personally] to appear before this Court on the _____ day of _____ 19 _____, at _____ o'clock in the forenoon, and to bring with you [or to send to this Court.]

A sum of Rs. _____, being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendance laid down in rule 12 of O. XVI of the Code of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs _____ will be tendered to you for each day's attendance beyond the day specified.

Loc. Am.—[Madras.] Insert the following as Form No. 13-A after Form No. 13 in Appendix B of Schedule I.—

No 13-A

CERTIFICATE OF ATTENDANCE TO AN OFFICER OF GOVERNMENT SUMMONED AS A WITNESS IN A SUIT TO WHICH THE GOVERNMENT IS A PARTY.

(O. 16, R. 4-A.)

(Cause title.)

This is to certify that _____ (name) _____ (designation) being a Government servant from the province of _____ (name) was summoned to give evidence in his official capacity on behalf of the _____ plaintiff _____ in the above _____ suit _____ and was in attendance in this Court from the day of _____ day of 193 _____ (inclusive) and that a sum of Rupees _____ has been paid into Court by the _____ plaintiff _____ to-wards his travelling and subsistence allowance for _____ day according to the scale prescribed by the Government of the province of _____ (name) and that the said amount _____ has been _____ will be

remitted to the Government treasury at _____ to be credited to Government under the head "XVI-A Miscellaneous Fees and Fines".

Dated the _____ day of _____ 19 _____

Presiding Judge or
Chief Ministerial Officer.

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, R. 10.)

(Title.)

To _____
WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law, and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the _____ day of _____ 19 _____ at _____ o'clock in the forenoon and from day to day until he shall have leave to depart, and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

No 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS. (O. 16, R. 10.)

(Title.)

To _____
WHEREAS it appears from the examination on oath of the serving officer that the summons has been duly served upon the witness, and whereas it appears that the evidence of the witness is material and he has failed to attend in compliance with such summons This proclamation is therefore, under Rule 10 of Order XVI of the Code of Civil Procedure, 1908, issued requiring the attendance of the witness in this Court on the _____ day of _____ 19 _____ at _____ o'clock in the forenoon, and from day to day until he shall have leave to depart; and if the witness fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and seal of the Court, this _____ day of _____ 19 _____ Judge.

No. 16.

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS. (O. 16, R. 10.)

(Title.)

To _____

The Bailiff of the Court.

WHEREAS the witness _____ has not appeared cited by _____ the expiration of the period limited in the proclamation issued for his attendance, appeared

in Court, You are hereby directed to hold under attachment property belonging to the said witness to the value of and to submit a return, accompanied with an inventory thereof, within days.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 17.

WARRANT OF ARREST OF WITNESS. (O. 16, R. 10.)
(Title.)

To

The Bailiff of the Court,

WHEREAS has been duly served with a summons but has failed to attend [absconds and keeps out of the way for the purpose of avoiding service of a summons], you are hereby ordered to arrest and bring the said before the Court

You are further ordered to return this warrant on or before the day of 19 with an endorsement certifying the day on and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court this day of 19 Judge.

No. 18.

WARRANT OF COMMITTAL. (O. 16, R. 16.)
(Title.)

To

The Officer-in-Charge of the Jail at

WHEREAS the plaintiff (or defendant in the above-named suit) has made application to this Court that security be taken for the appearance of to give evidence (or to produce a document) on the day of 19, and whereas the Court has called upon the said to furnish such security, which he has failed to do: This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the said day and on such other day or days as may be hereafter ordered.

GIVEN under my hand and the seal of the Court this day of 19 Judge.

No. 19.

WARRANT OF COMMITTAL. (O. 16, R. 18.)
(Title.)

To

The Officer-in-Charge of the Jail at

WHEREAS whose attendance is required before this Court in the above-named case to give evidence (or to produce a document) has been arrested and brought before the Court in custody; and whereas owing to the absence of the plaintiff (or defendant) the said cannot give such evidence or produce such document, and whereas the Court has called upon the said to give security for his appearance on the day of 19, at which he has failed to do This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the day of

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

Loc. Am.—[Allahabad] Form No. 20. Add the following Form:—

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESSES.

No. of suit.

Name of parties.

In the Court of the

Date fixed for hearing

| [Form No. 4.] 1 | 2 | 3 | 4 | 5 | 6 |
|-------------------------------------|--|---------------------|-----------------------------------|---------------------|---|
| Number of witnesses to be summoned. | Name and full address of each person to be summoned. | Rank or occupation. | Distance of residence from Court. | | Name and address of person to whom unexpended traveling expenses and diet money should be returned. |
| | | | Rail. | Road | |
| | | | | Traveling expenses. | Diet expenses. |

No. 6.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION (O. 11, R. 14.)

(Title as in No. 1, supra.)

Upon hearing day of 19 ; and upon reading the affidavit of the do, at all reasonable times, on reasonable notice, produce at ; It is ordered that the do, at all the following documents, namely, , and that the be at liberty to inspect and peruse the documents so produced, and to make notes of their contents. In the meantime it is ordered that all further proceedings be stayed and that the costs of this application be.

No. 7.

NOTICE TO PRODUCE DOCUMENTS. (O. 11, R. 16)

(Title as in No. 1, supra.)

Take notice that the [plaintiff or defendant] requires you to produce for his inspection the following documents referred to in your [plaint or written statement, or affidavit dated the day of 19]

[Describe documents required.]

X. Y., Pleader for the

To Z., Pleader for the

No. 8

NOTICE TO INSPECT DOCUMENTS. (O. 11, R. 17.)

(Title as in No. 1, supra.)

Take notice that you can inspect the documents mentioned in your notice of the day of 19 [except the defendant numbered in that notice] at [insert place of inspection] on Thursday, next, the instant, between the hours of 12 and 4 o'clock.

Or, that the [plaintiff or defendant] objects to giving you inspection of documents mentioned in your notice of the day of 19 on the ground that state the ground—

No. 9.

NOTICE TO ADMIT DOCUMENTS (O. 12, R. 3)

(Title as in No. 1, supra.)

Take notice that the plaintiff [or defendant] in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his pleader or agent, at on between the hours of and the defendant [or plaintiff] is hereby required, within forty-eight hours from the last mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been, that such as are specified as copies are true copies; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

G.H., pleader [or agent] for plaintiff [or defendant]

To E.F., pleader, [or agent] for defendant [or plaintiff]

[Here describe the documents and specially as to each document whether it is original or a copy.]

No. 10.

NOTICE TO ADMIT FACTS. (O. 12, R. 5.)

(Title as in No. 1, supra.)

Take notice that the plaintiff [or defendant] in this suit requires the defendant [or plaintiff] to admit, for the purposes of this suit only, the several facts respectively hereunder specified; and the defendant [or plaintiff] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

G.H., pleader [or agent] for plaintiff [or defendant].

To E.F., pleader [or agent] for defendant [or plaintiff].

The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890.
2. That he died intestate.
3. That N. was his only lawful son.
4. That O. died on the 1st April, 1896
5. That O. was never married

No. 11.

ADMISSION OF FACTS PURSUANT TO NOTICE. (O. 12, R. 5.)

(Title as in No. 1, supra.)

The defendant [or plaintiff] in this suit, for the purposes of this suit only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or

limitations, if any, hereunder specified, saving all just exception to the admissibility of any such facts or any of them, as evidence in the suit:

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the defendant [or plaintiff] on any other occasion or by any one other than the plaintiff [or defendant, or party requiring the admission].

E.F. pleader [or agent] for defendant [or plaintiff].

To G.H., pleader [or agent] for plaintiff [or defendant].

| Facts admitted. | Qualifications or limitations, if any, subject to which they are admitted. |
|--|--|
| 1. That M. died on the 1st January, 1890 | 1. |
| 2. That he died intestate | 2 |
| 3. That N. was his lawful son | 3. But not that he was his only lawful son. |
| 4. That O. died | 4 But not that he died on the 1st April, 1896. |
| 5. That O. was never married | 5. |

No. 12.

NOTICE TO PRODUCE (GENERAL FORM). (O. 12, R. 8).

(Title as in No. 1, supra.)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly.

G.H., pleader [or agent] for plaintiff [or defendant].

To E.F., pleader [or agent] for defendant [or plaintiff].

APPENDIX D.

DECREES.

No. 1.

DECREE IN ORIGINAL SUIT. (O 20, Rr. 6, 7.)

(Title.)

Claim for

THIS suit coming on this day for final disposal before
in the presence of
for the defendant, it is ordered and decreed that
sum of Rs. be paid by the to the and that the
on account of the costs of this suit, with interest thereon at the rate of per cent.
per annum from that date to date of realization.

GIVEN under my hand and the seal of the Court, this day of 19
Judge.

Costs of Suit.

| Plaintiff. | | | Defendant. | | |
|--|-----|-------|-------------------------------------|-----|-------|
| | Rs. | A. P. | | Rs. | A. P. |
| 1. Stamp for plaint | | | Stamp for power | | |
| 2. Do. for power | | | Do. for petition | | |
| 3. Do. for exhibits | | | Pleader's fee | | |
| 4. Pleader's fee on Rs. | | | Subsistence for witnesses | | |
| 5. Subsistence for witnesses | | | Service of process | | |
| 6. Commissioner's fee | | | Commissioner's fee | | |
| 7. Service of process | | | | | |
| Total | | | Total | | |

Loc. Am. :—[Calcutta] Form No. 1. Cancel the table under the head "costs of suit" in the Form and substitute therefor the following :—

| Plaintiff. | | Defendant. | |
|--|-----------|---|-----------|
| | Rs. A. P. | | Rs. A. P. |
| 1. Stamp for plaint .. | | 1. Stamp for power .. | |
| 2. Do for power .. | | 2. Do. for petitions and affidavits .. | |
| 3. Stamp for petitions and affidavits .. | | 3. Costs of exhibits including copies made under the Bankers' Books Evidence Act, 1891 .. | |
| 4. Cost of exhibits including copies made under the Bankers' Books Evidence Act, 1891 .. | | 4. Pleaders' fees .. | |
| 5. Pleaders' fee on Rs. .. | | 5. Subsistence and travelling allowances of witnesses (including those of party if allowed by Judge) .. | |
| 6. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge) .. | | 6. Process fees .. | |
| 7. Process fees .. | | 7. Commissioner's fees .. | |
| 8. Commissioner's fees .. | | 8. Demi-paper .. | |
| 9. Demi-paper .. | | 9. Cost of transmission of records .. | |
| 10. Cost of transmission of records .. | | 10. Other costs allowed under the Code and General Rules and Orders .. | |
| 11. Other costs allowed under the Code and General Rules and Orders.. | | 11. Adjournment costs not paid in cash (to be deducted or added as the case may be) .. | |
| 12. Adjournment costs not paid in cash (to be added or deducted as the case may be) .. | | | |
| Total .. | | Total .. | |

Loc. Am —[Patna.] Form No. 1. Substitute the following for the schedule of "costs of suits" in the form of decree.—

Costs of Suit.

| Plaintiff | | Defendant. | |
|------------------------------------|-----------|------------------------------------|-----------|
| | Rs. A. P. | | Rs. A. P. |
| 1. Stamp for plaint .. | | Stamp for power .. | |
| 2. Do. for power .. | | Do. for petition or affidavit .. | |
| 3. Do for petition or affidavit .. | | Costs for exhibits .. | |
| 4. Costs for exhibits .. | | Pleader's fee .. | |
| 5. Pleader's fee on Rs. .. | | Subsistence— | |
| 6. Subsistence— | | (a) for defendant or his agent. .. | |
| (a) for plaintiff or his agent. .. | | (b) for witnesses .. | |
| (b) witnesses .. | | Commissioner's fee .. | |
| 7. Commissioner's fee .. | | Service of process .. | |
| 8. Service of process .. | | Copying or typing charge .. | |
| 9. Copying or typing charge .. | | Total .. | |
| Total .. | | | |

No 2.

SIMPLE MONEY DECREE. (S. 34.)

Title.

Claim for
 THIS suit coming on this day for final disposal before
 the presence of _____ for the plaintiff
 and of _____ for the defendant, it is ordered that the do
 pay to the _____ the sum of Rs. _____ with interest thereon at the
 rate of _____ per cent. per annum from _____ to the date of realization
 of the said sum and do also pay Rs. _____, the costs of this suit, with interest thereon at the
 rate of _____ per cent. per annum from this date to the date of realization.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____.

Judge.

Costs of Suit

| Plaintiff. | | Defendant. | |
|---------------------------------|-----------|------------------------------|-----------|
| | Rs. A. P. | | Rs. A. P. |
| 1. Stamp for plaint .. | | Stamp for power .. | |
| 2. Do. for power .. | | Do. for petition .. | |
| 3. Do. for exhibits .. | | Pleader's fee .. | |
| 4. Pleader's fee on Rs .. | | Subsistence for witnesses .. | |
| 5. Subsistence for witnesses .. | | Service of process .. | |
| 6. Commissioner's fee .. | | Commissioner's fee .. | |
| 7. Service of process .. | | | |
| Total .. | | Total .. | |

Loc. Am. [Calcutta.] Form No. 2. Cancel the table under the head "cost of suit" and substitute therefor the following.—

Costs of suit.

| Plaintiff. | | Defendant. | |
|---|-----------|--|-----------|
| | Rs. A. P. | | Rs. A. P. |
| 1. Stamp for plaint .. | | 1. Stamp for power .. | |
| 2. Do. for power .. | | 2. Do. for petition and affidavits .. | |
| 3. Do. for petition and affidavits .. | | 3. Costs of exhibits including copies made under the Bankers' Books Evidence Act, 1891 .. | |
| 4. Costs of exhibits including copies made under the Bankers' Books Evidence Act, 1891 .. | | 4. Pleadings' fee .. | |
| 5. Pleadings' fee on Rs. .. | | 5. Subsistence and travelling allowance of witnesses (including those of party if allowed by Judge) .. | |
| 6. Subsistence and travelling allowance of witnesses (including those of party, if allowed by Judge) .. | | 6. Process fees .. | |
| 7. Process fees .. | | 7. Commissioner's fees .. | |
| 8. Commissioner's fees .. | | 8. Demi-paper .. | |
| 9. Demi-paper .. | | 9. Cost of transmission of records .. | |
| 10. Cost of transmission of records .. | | 10. Other costs allowed under the Code and General Rules and Orders .. | |
| 11. Other costs allowed under the Code and General Rules and Orders .. | | 11. Adjournment costs not paid in cash (to be added or deducted as the case may be) .. | |
| 12. Adjournment costs not paid in cash (to be added or deducted as the case may be) .. | | | |
| Total .. | | Total .. | |

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE.

(Order XXXIV, rule 2.—Where accounts are directed to be taken)

(Title.)

This suit coming on his day, etc.; it is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received,

(iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed

2 And it is hereby further ordered and decreed that any amount received under clause (i) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being

NOTE—These new forms 3 to 11 have been substituted for old forms 3 to 11 by the Transfer of Property (Amendment) Supplementary Act (XXI of 1929). The necessity for the substitution of these new forms has been explained as follows in the Statements of Objects and Reasons —

“We propose to substitute new Forms for Forms 3 to 11 for decrees in mortgage suits appearing in Appendix D to the Code of Civil Procedure, 1908. Under Order XLVIII, rule 1, of the Civil Procedure Code, 1908, the Court has to follow the Forms with such variations as the circumstances of the case require. The present Form No. 3 in Appendix D does not correspond to rule 2 of order XXXIV under which it purports to have been made. It does not provide for directions for taking accounts but merely refers to the declaration of the amount due by the Court. Separate Forms Nos. 3 and 3-A are, therefore, framed for preliminary decrees for foreclosure in which accounts are directed to be taken and in which the amount due is declared by the Court. The Forms follow the amendments made in rules 2 and 3. So also Form No. 4 for a final decree for foreclosure is substituted for Form No. 10. It has been framed to conform to Forms Nos. 3 and 3-A. Similarly, Forms Nos. 5, 5-A, 7 to 7-C are framed for preliminary decrees for sale and redemption. They follow the amended rules 4 to 7.

Forms Nos. 7-D to 7-F have been added to provide for a final decree in a suit for foreclosure, sale or redemption, when the mortgagor pays the amount of the decree.

Form No. 8 is for a final decree under rules 6 and 8-A, and is substituted for the original Form No. 11. It is amended in accordance with the amendments made in rules 6 and 8-A.

Form No. 9 takes the place of the present Form No. 6. It provides for a case where, in a suit for foreclosure or sale, besides the mortgagor a subsequent mortgagee is joined as a defendant. The form sets out in detail the respective and relative rights of all parties as required in rules 2 (3) and 4 (3). The practice of allowing successive periods of redemption when there are several mortgages is falling into disuse even in England, and the usual course now is to give only one period of redemption, more particularly when the mortgaged property is likely to deteriorate (Ghose on mortgage, Vol. I, p. 639, 5th Edn.) The present Form No. 6 allows six months for redemption to a subsequent mortgagee and then three months further to the mortgagor. There is no reason why a period longer than the ordinary period of six months should be allowed for redemption and the mortgagee be made to wait for his money merely because the mortgagor has chosen to create further incumbrances. In Form No. 9 only one period of redemption is allowed to all defendants.

Forms Nos. 10 and 11 take the place of the existing Forms Nos. 7 and 8 and have been framed in accordance with the amendments in rules 3 to 8. In Form No. 11 the principle of one period of redemption is strictly adhered to.

received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4 And it is hereby further ordered and decreed—

(i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due, and the sum of Rs. _____ for the costs of the suit awarded to the plaintiff;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule, to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property, and that the parties shall be at the liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

Loc Am —[Rangoon] Substitute the following —

No. 3.

PRELIMINARY DECREE FOR FORECLOSURE (Title.)

This suit coming on this _____ day of _____, It is hereby ordered and declared that the sum of Rs. _____ being costs of this suit shall be paid by the defendant No. _____ to the _____, and it is declared that the amount due by the defendant No. _____ to the plaintiff is the sum of Rs. _____ being the balance of account as shown in the schedule hereto; and it is further declared that the plaintiff shall be entitled to apply for and obtain a final decree for foreclosure of the mortgage in suit provided that the defendant, or^b _____ may apply for and obtain a decree for redemption of the mortgage on payment into Court of the amount so declared to be due on or before the _____ day of _____ and on compliance with all further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment.

SCHEDULE.

| | | |
|----|--|-----|
| 1 | Due to the plaintiff for redemption | Rs |
| 2 | Due to the plaintiff for costs of suit | Rs. |
| 3. | Due to the plaintiff for costs, etc, in respect of the mortgage | Rs |
| 4. | Less costs, etc, in respect of the mortgage due to the defendant | |
| | No. | Rs |
| | Less costs of suit due to the defendant No. | Rs |
| | Due to the plaintiff | Rs. |

No 3-A.

PRELIMINARY DECREE FOR FORECLOSURE.

(Order XXXIV, rule 2.—Where the Court declares the amount due.)

(Title.)

This suit coming on this _____ day, etc., it is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this _____ day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with

(c) Or as otherwise apportioned.

(b) Any other party to the suit who has a right to redeem the plaintiff's mortgage.

interest thereon, and the sum of Rs. making in all the sum of Rs.

for the costs of this suit awarded to the plaintiff,

2. And it is hereby ordered and decreed as follows:

(i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court of the said sum of Rs.

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit, and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 4.

FINAL DECREE FOR FORECLOSURE.

(Order XXXIV, rule 3.)

(Title.)

Upon reading the preliminary decree passed in this suit on the day of and further orders (if any) dated the day of day of and the application of the plaintiff dated the day of for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage.

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned; ¹[and (if the defendant be in possession of the said mortgaged property) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property.]

2 And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

Loc. Am —[Rangoon]

No. 4.

FINAL DECREE FOR FORECLOSURE

(Title.)

Upon reading the preliminary decree passed in this suit on the day of and further orders, dated the day of and the application of the plaintiff, dated the day of for a final decree, and after hearing the parties, and on it appearing that payment of the sum found due by the preliminary decree and compliance with the further orders of the Court has not been made, within the time specified, by any party entitling him to apply for a decree for redemption,

It is hereby ordered and decreed that the defendants Nos. and all persons claiming through or under them or any of them are hereby absolutely debarred from all right of redemption of the property described in the Schedule hereto, and that the defendants Nos. are freed from all liabilities in respect of the mortgage mentioned in the schedule hereto and on account of this suit,

And it is ordered that the defendant No. shall deliver to the plaintiff possession of the said property.

SCHEDULE.

*The mortgaged property,
The mortgage.*

¹ Words not required to be deleted.

No. 5.

PRELIMINARY DECREE FOR SALE.

(Order XXXIV, rule 4.—Where accounts are directed to be taken.)

(Title.)

This suit coming on this day, etc., it is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

(i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable).

(ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received;

(iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum),

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage deed.

2 And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii), together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of , and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the defendant do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the plaintiff,

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

Loc. Am.—[Rangoon]

No. 5.

PRELIMINARY DECREE FOR SALE.

(Title.)

This suit coming on this _____ day of _____; It is hereby ordered and decreed that the sum of Rs. _____ being costs of this suit shall be paid by the defendant No. _____ to the _____ and it is declared that the amount due to the plaintiff by the defendant No. _____ is the sum of Rs. _____ being the balance of account as shown in the Schedule A hereto; and it is further declared that the plaintiff shall be entitled to apply for and obtain a final decree for sale of the property in suit²

Provided that any of the defendants Nos. _____ may apply for and obtain a decree for redemption of the mortgage on payment into Court of the amount so declared to be due on or before the _____ day of _____ and on compliance with all further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment.

And it is further declared that the amount due to the parties to the suit whose claims have been proved, and the priorities of such parties to payment out of the sale proceeds, are as shown in Schedule B hereto

SCHEDULE A.

| | |
|--|-----|
| 1. Due to the plaintiff for principal and interest on the mortgage. | Rs. |
| 2. Due to the plaintiff for costs of suit | Rs. |
| 3. Due to the plaintiff for costs, etc., in respect of the mortgage. | Rs. |
| Less costs, etc., due to the defendant No. _____ | Rs. |
| 4. Less costs of suit due to the defendant No. _____ | Rs. |
| Due to the plaintiff from defendant No. _____ | Rs. |

SCHEDULE B.

| Order of Priority. | Party | Amount due. |
|--------------------|-------|-------------|
| 1. | .. | .. |
| 2. | .. | .. |
| 3 | .. | .. |

No. 5-A.

PRELIMINARY DECREE FOR SALE.

(Order XXXIV, rule 4.—When the Court declares the amount due.)

(Title.)

This suit coming on this _____ day, etc., it is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the _____ day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with interest thereon, and the sum of Rs. _____

for the costs of the suit awarded to the plaintiff, making in all the sum of Rs. _____

2. And it is hereby ordered and decreed as follows.

(i) that the defendant do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court, the said sum of Rs. _____

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaintiff mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold, and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the

¹ Or as otherwise apportioned.² Or a specified part thereof.

Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, that plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 6.

FINAL DECREE FOR SALE (O. XXXIV, rule 5.)
(Title)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____ and the application of the plaintiff dated the _____ day of _____ for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the mortgage.

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

Loc. Am —[Rangoon.]

No 6.

FINAL DECREE FOR SALE.
(Title)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders dated the _____ day of _____ and the application of the plaintiff, dated the _____ day of _____ for a final decree, and after hearing the parties, and on it appearing that payment of the sum found due by the preliminary decree and compliance with the further orders of the Court has not been made within the time specified, by any party entitling him to apply for a decree for redemption

It is hereby ordered and decreed that the mortgaged property mentioned in the Schedule A hereto¹ be sold, and that for the purposes of such sale the parties shall produce before the Court or such officer as it appoints all documents of title in their possession or power relating to the said property,

And it is further ordered and decreed that the proceeds of the sale (after deduction therefrom of the expenses of the sale) shall, subject to any orders as to setting off the amount due against the purchase money, be paid into Court and applied in payment of the amounts found due to the parties under the preliminary decree and further orders of the Court in the order of priority as shown in the Schedule B hereto

It is further declared that the mortgages in respect of which the amounts are shown as due in Schedule B, and the right to redeem the same, shall be extinguished, except as to the right of any party entitled thereto to obtain a personal decree against the mortgagor for any balance unpaid.

SCHEDULE A THE PROPERTY. SCHEDULE B.

| Order of Priority. | Party. | Amount due. |
|--------------------|--------|-------------|
| 1. | .. | .. |
| 2. | .. | .. |
| 3. | .. | .. |

¹ Or a specified part.

No. 7.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR
A DECREE FOR FORECLOSURE IS PASSED.

(Order XXXIV, rule 7—Where accounts are directed to be taken.)

(Title.)

This suit coming on this _____ day, etc., it is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following.—

(i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable),

(ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received,

(iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2 It is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage money, or as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the _____ day of _____, and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objection as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the _____ day of _____, or any later date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs. _____ for the cost of the suit awarded to the defendant;

(ii) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the first Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendants shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quite and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as afore said, the defendant shall be at liberty to apply to the Court for a final decree, that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property, and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

Loc Am —[Rangoon.]—

No. 7.

DECREE AGAINST MORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF THE MORTGAGED PROPERTY.

(Title.)

Upon reading the application of the
passed in the suit on the day of _____

and reading the final decree
, and the Court being satisfied

that the net proceeds on the sale held under the aforesaid decree amounted to Rs. and have been paid to the parties, leaving balance(s) due as shown in the Schedule hereto, and that the balance due to _____ and are legally recoverable from the _____

_____ personally;
It is hereby ordered and decreed that the _____¹ do pay to _____² the sum of Rs _____ with further interest at the rate of six per cent. per annum from the _____ day of _____³ up to the date of realization of the said sum. and the costs of this application.

| Party. | SCHEDULE | |
|--------|------------|-----------------|
| | Amount due | Balance unpaid. |
| 1. | .. | .. |
| 2. | .. | .. |
| 3. | .. | .. |

No. 7-A

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT
BY MORTGAGOR A DECREE FOR SALE IS PASSED.

(Order XXXIV, rule 7—Where accounts are directed to be taken.)

(Title.)

This suit coming on this _____ day, etc., it is hereby ordered and decreed that it be referred to _____ as the Commissioner to take the accounts following—

(i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(ii) an account of the income of the mortgaged property received up to this rate by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;

(iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate, as is payable on the principal, or, failing both such rates, at nine per cent. per annum);

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage money, or as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the _____ day of _____, and that, upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the plaintiff do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. _____ for the costs of the suit awarded to the defendant,

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made, the mortgaged property or a sufficient part

¹ Mortgagor.
² Mortgagee.

³ Being the date of payment of proceeds of sale as aforesaid.

thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6 And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance, and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE

Description of the mortgaged property

No. 7-B.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR FORECLOSURE IS PASSED.

(Order XXXIV, rule 7—Where the Court declares the amount due.)

(Title)

This suit coming on this day, etc.; it is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. for the costs of the suit awarded to the defendant, making in all the sum of Rs.

2 And it is hereby ordered and decreed as follows:—

(i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court the said sum of Rs.

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, reconvey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit, and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 7-C.

PRELIMINARY DECREE FOR REDEMPTION WHERE ON DEFAULT OF PAYMENT BY MORTGAGOR A DECREE FOR SALE IS PASSED.

(Order XXXIV, rule 7.—Where the Court declares the amount due)

(Title.)

This suit coming on this day, etc., it is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. for the costs of this suit awarded to the defendant, making in all the sum of Rs.

2. And it is hereby ordered and decreed as follows:—

(i) that the plaintiff do pay into Court on or before the _____ day of _____ or any later date up to which time for payment may be extended by the Court the said sum of Rs. _____

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property to the plaintiff free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

3 And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance, and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property

No. 7-1).

FINAL DECREE FOR FORECLOSURE IN A REDEMPTION SUIT ON DEATH OF PAYMENT BY MORTGAGOR

(Order XXXIV, rule 8.)

(Title.)

Upon reading the preliminary decree in this suit on the _____ day of _____ and further orders (if any) dated the _____ day of _____, and the application of the defendant dated the _____ day of _____, for a final decree and after hearing the parties, and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the plaintiff and all persons claiming through under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned ¹[and (if the plaintiff be in possession of the said mortgaged property) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged property].

2. And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to this day arising from the said mortgage mentioned in the plaint or from the suit is hereby discharged and extinguished.

¹ Words not required to be deleted.

No. 7-E.

FINAL DECREE FOR SALE IN A REDEMPTION SUIT ON DEFAULT OF PAYMENT BY MORTGAGOR.
(Order XXXIV, rule 8)

(Title.)

Upon reading the preliminary decree passed in this suit on the _____ day of _____, and the further orders (if any) dated the _____ day of _____, and the application of the defendant dated the _____ day of _____, for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with the subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same

No. 7-F.

FINAL DECREE IN A SUIT FOR FORECLOSURE, SALE OR REDEMPTION WHERE THE
MORTGAGOR PAYS THE AMOUNT OF THE DECREE

(Order XXXIV, rules 3, 5 and 8)

(Title)

The suit coming on this _____ day for further consideration and it appearing that on the _____ day of _____ the mortgagor or _____, the same being a person entitled to redeem, has paid into Court all amounts due to the mortgagee under the preliminary decree dated the _____ day of _____; it is hereby ordered and decreed that—

(i) the mortgagee do execute a deed of re-conveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor¹ or, as the case may be, who has redeemed the property or an acknowledgment of the payment of the amount due in his favour,

(ii) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit

And it is hereby further ordered and decreed that, upon the mortgagee executing the deed of re-conveyance or acknowledgment in the manner aforesaid,—

(i) the said sum of Rs. _____ be paid out of Court to the mortgagee,

(ii) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor¹ [or the person making the payment] and the mortgagee do, when so required, concur in registering, at the cost of the mortgagor¹ [or other person making the payment], the said deed of re-conveyance or the acknowledgment in the office of the Sub-Registrar of _____, and

(iii) ¹[if the mortgagee, plaintiff or defendant, as the case may be, is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property in the aforesaid preliminary decree mentioned to the mortgagor¹ [or such person as aforesaid who has made the payment].

No. 8.

DECREE AGAINST MORTGAGOR PERSONALLY FOR BALANCE AFTER THE SALE OF THE
MORTGAGED PROPERTY.

(Order XXXIV, rules 6 and 8-A.)

(Title)

Upon reading the application of the mortgagee (the plaintiff or defendant, as the case may be), and reading the final decree passed in the suit on the day of and the Court being satisfied that the net proceeds of the sale held under the aforesaid final decree amounted to Rs and have been paid to the applicant out of the Court on the day of and that the balance now due to him under the aforesaid decree is Rs

And whereas it appears to the Court that the said sum is legally recoverable from the mortgagor (plaintiff or defendant, as the case may be) personally,

It is hereby ordered and decreed as follows:—

That the mortgagor (plaintiff or defendant, as the case may be) do pay to the mortgagee (defendant or plaintiff, as the case may be) the said sum of Rs with further interest at the rate of six per cent. per annum from the day of (the date of payment out of Court referred to above) up to the date of realization of the said sum, and the costs of this application

Loc. Am.—[Rangoon]:—

No 8.

PRELIMINARY DECREE FOR REDEMPTION.

(Title.)

This suit coming on this day of ; it is hereby ordered and decreed that the sum of Rs. being costs of this suit shall be paid by the defendant No to the ¹, and it is hereby declared that the amount due to the defendant No. by the plaintiff is the sum of Rs. being the balance of accounts as shown in the Schedule hereto; and it is further declared that, on payment into Court of the said amount on or before the day of and on compliance with all further orders of the Court and on payment of such further sums as the Court may determine to be payable on finally adjusting the account up to the date of payment, the plaintiff shall be entitled to apply for and obtain a final decree for redemption; and that if the plaintiff fails to make full payment as aforesaid, the defendant No. shall be entitled to apply for and obtain a decree.²

SCHEDULE

| | Rs. |
|---|-----|
| 1. Due to the defendant No. on the mortgage | |
| 2. Due to the defendant No. for costs of suit | .. |
| 3. Due to the defendant No. for costs, etc., in respect of the mortgage | .. |
| Less costs etc., in respect of the mortgage due to the plaintiff | .. |
| Less costs, of suit due to the plaintiff | .. |
| Due to the defendant No. | .. |

No. 9.

PRELIMINARY DECREE FOR FORECLOSURE OR SALE.

| | |
|-----------------|--------------------|
| [Plaintiff | .. 1st Mortgagee |
| Defendant No. 1 | .. Mortgagor. |
| Defendant No. 2 | .. 2nd Mortgagee.] |

(Order XXXIV, rules 2 and 4.)

(Title.)

The suit coming on this day, etc.; it is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of is the sum of Rs. for principal, the sum of Rs. for interest on the said principal, the sum of Rs. for costs, charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage-security with interest thereon and the sum of Rs. for the costs of this suit awarded to the plaintiff, making in all the sum of Rs.

¹ Or as otherwise apportioned.

² For sale or foreclosure.

(Similar declarations to be introduced with regard to the amount due to defendant No 2 in respect of his mortgage if the mortgage-money due thereunder has become payable at the date of the suit)

2. It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No 2¹ [or (if there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively] —

3. And it is hereby ordered and decreed as follows:—

(i) (a) that defendants or one of them do pay into Court on or before the day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs. _____ due to the plaintiff; and

(b) that defendant No. 1 do pay into Court on or before the day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs. _____ due to defendant No 2; and

(ii) that, on payment of the sum declared to be due to the plaintiff by defendants or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court, all documents in his possession or power relating to the mortgaged property in the plaintiff mentioned, and all such documents shall be delivered over to the defendant No. _____ (who has made the payment), or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant No. _____ (who has made the payment) quiet and peaceable possession of the said property.

(Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared to be due to defendant No. 2 with such variations as may be necessary having regard to the nature of his mortgage)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid of the amount due to the plaintiff, the plaintiff shall be at liberty to apply to the Court for a final decree—

(i) ¹*[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale]* that the defendants jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property, or

(ii) ¹*[in the case of any other mortgage]* that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and

(iii) ¹*[in the case where a sale is ordered under clause 4 (ii) above]* that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs of this suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2, and that if any balance be left, it shall be paid to the defendant No. 1 or other persons entitled to receive the same, and

(iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed—

(a) that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in the payment of the said amount, defendant No. 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree *(in the same manner as the plaintiff might have done under clause 4 above)*—

¹*(i) that the defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the schedule annexed hereto and shall, if so required, deliver up to defendant No 2 quiet and peaceable possession of the said property,] or*

¹ Words not required to be deleted.

¹[(a) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer it appoints, all documents in his possession or power relating to the mortgaged property;]

and (b) (if on the application of defendant No. 2 such a final decree for foreclosure passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed ¹[in the case where a sale is ordered under clause 5 above]—

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount payable by defendant No. 2 in respect of the plaintiff's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount, and that the balance, if any, shall then be applied in payment of the amount adjudged due to defendant No. 2 in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of this suit and such costs, charges and expenses as may be payable to defendant No. 2 under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same; and

(ii) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of the plaintiff's mortgage or defendant No. 2's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a person decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application, otherwise the Court may give such directions as it thinks fit.

SCHEDULE

Description of the mortgaged property.

No. 9.

FINAL DECREE FOR REDEMPTION (Title)

Upon reading the preliminary decree passed in this suit on the _____ day of _____ and further orders, dated the _____ 19____, and the decree and after hearing the parties and on it appearing that payment of the sum found due by the preliminary decree at subsequent orders has been made and all further orders of the Court have been complied with by the plaintiff

It is hereby ordered and decreed that the defendant No. _____ shall deliver to the plaintiff or to such person as the plaintiff appoints in this behalf the mortgaged property specified in the Schedule hereto and all documents in the possession or power of the defendant No. _____ relating to the said property, and shall execute and have registered (as required by the plaintiff and at the cost of the plaintiff) either (i) an acknowledgment in writing that all rights created by the mortgage in suit have been extinguished (ii) a retransfer to the plaintiff or to such third person as he may direct of the said property freed from the mortgage and from all encumbrances created by the defendant or by any person deriving title from him, or (iii) a transfer of the mortgage to such third person as the plaintiff may direct.

SCHEDULE

The property

Note—This form is applicable, with substitution of the proper party for the 'plaintiff', where the decree is in favour of a party other than the 'plaintiff'

Loc. Am.—[Rangoon.] Re-number Forms Nos. 12 to 23 as 10 to 21 respectively

No. 10.

PRELIMINARY DECREE FOR REDEMPTION OF PRIOR MORTGAGE AND FORECLOSURE OR SALE ON SUBSEQUENT MORTGAGE

| | |
|-----------------|--------------------|
| [Plaintiff | .. 2nd Mortgagee |
| v | |
| Defendant No. 1 | .. Mortgagor. |
| Defendant No. 2 | .. 1st Mortgagee.] |

(Order XXXIV, rules 2, 4 and 7.)

(Title.)

The suit coming on this _____ day, etc.; it is hereby declared that the amount due to defendant No. 2 on the mortgage mentioned in the plaint calculated up to this _____

¹ Words not required to be deleted.

day of _____ is the sum of Rs. _____ for principal, the sum of Rs. _____ for interest on the said principal, the sum of Rs. _____ for costs, charges and expenses (other than the costs of the suit) properly incurred by defendant No. 2 in respect of the mortgage security with interest thereon and the sum of Rs. _____ for the costs of this suit awarded to defendant No. 2, making in all the sum of Rs. _____

(Similar declarations to be introduced with regard to the amount due from defendant No. 1 to the plaintiff in respect of his mortgage if the mortgage money due thereunder has become payable at the date of the suit.)

2. It is further declared that defendant No. 2 is entitled to payment of the amount due to him in priority to the plaintiff ¹[or if (there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively:—]

3. And it is hereby ordered and decreed as follows:—

(i) (a) that the plaintiff or defendant No. 1 or one of them do pay into Court on or before the day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs. _____ due to defendant No. 2; and

(b) that defendant No. 1 do pay into Court on or before the day of _____ or any later date up to which time for payment has been extended by the Court the said sum of Rs. _____ due to the plaintiff; and

(ii) that, on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No. 1 or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, defendant No. 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or defendant No. 1 (whoever has made the payment), or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff or defendant No. 1 (whoever has made the payment) quiet and peaceable possession of the said property

(Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared due to the plaintiff with such variations as may be necessary having regard to the nature of his mortgage)

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid, of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

(i) ¹[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale] that the plaintiff and defendant No. 1 jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the defendant No. 2 quiet and peaceable possession of the said property, or

(ii) ¹[in the case of any other mortgage] that the mortgaged property or a sufficient part thereof shall be sold; and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property, and

(iii) ¹[in the case where a sale is ordered under clause 4 (ii) above] that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No. 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to the defendant No. 2 in respect of such costs of the suit, and such costs, charges and expenses as may be payable to the plaintiff under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908; and that the balance, if any, shall be applied in payment of the amount due to the plaintiff and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same, and

(iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to defendant No. 2 and the plaintiff, defendant No. 2 or the plaintiff or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed,—

(a) that, if the plaintiff pays into Court to the credit of this suit the amount adjudged due to defendant No. 2 but defendant No. 1 makes default in the payment of the said amount, the plaintiff shall be at liberty to apply to the Court to keep defendant No. 2's mort-

¹Words not required to be deleted.

gage alive for his benefit and to apply for a final decree (in the same manner as the defendant No. 2 might have done under clause 4 above)—

¹[(i) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property;] or

¹[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property;]

and (b) (if on the application of defendant No. 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed (in the case where a sale is ordered under clause 5 above)—

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount paid by the plaintiff in respect of defendant No. 2's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount; and that the balance, if any, shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same, and

(ii) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2's mortgage or the plaintiff's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

[Note. Forms 10-A & 10-B framed by the Madras High Court must be deemed to have been superseded by Act XXI of 1929. They are therefore omitted.]

No. 11.

PRELIMINARY DECREE FOR SALE.

| | | |
|------------------|----|-----------------------------|
| [Plaintiff— | .. | Sub or derivative mortgagee |
| v. | | |
| Defendant No. 1. | .. | Mortgagor. |
| Defendant No. 2. | .. | Original mortgagee.] |

(Order XXXIV, rule 4.)

(Title.)

This suit coming on this day, etc., it is hereby declared that the amount due to defendant No. 2 on his mortgage calculated up to this day of in the sum of Rs.

for principal, the sum of Rs. for interest on the said principal, the sum of Rs.

for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon and the sum of Rs for the costs of the suit awarded to defendant No. 2, making in all the sum of Rs.

(Similar declarations to be introduced with regard to the amount due from defendant No. 2 to the plaintiff in respect of his mortgage.)

2. And it is hereby ordered and decreed as follows:—

(i) That defendant No. 1 do pay into Court on or before the said day of or any later date up to which time for payment may be extended by the Court the said sum of Rs. due to defendant No. 2.

(Similar declarations to be introduced with regard to the amount due to the plaintiff, defendant No. 2 being at liberty to pay such amount.)

(ii) That, on payment of the sum declared due to defendant No. 2 by defendant No. 1 in the manner prescribed in clause 2 (i) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the

¹Words not required to be deleted.

suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff and defendant No. 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned, and all such documents (except such as relate only to the sub-mortgage) shall be delivered over to defendant No. 1, or to such person as he appoints, and defendant No. 2 shall, if so required, re-convey or re-transfer the property to defendant No. 1 free from the said mortgage clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims and free from all liability arising from the mortgage or this suit and shall, if so required, deliver up to defendant No. 1 quiet and peaceable possession of the said property; and

(iii) That, upon payment into the Court by defendant No. 1, of the amount due to defendant No. 2, the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs, charges and expenses, as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908; and that the balance, if any, shall then be paid to defendant No. 2; and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff, the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance.

3. And it is further ordered and decreed that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff the plaintiff shall bring into the Court all documents, etc. [as in sub-clause (ii) of clause 2].

4. And it is hereby further ordered and decreed that, in default of payment by defendants Nos. 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold, and that for the purposes of such sale the plaintiff and defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property.

5. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs, charges and expenses as may be payable under rule 10, together with such subsequent interests as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2; and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same.

6. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 or defendant No. 1 (as the case may be) for the amount of the balance.

7. And it is hereby further ordered and decreed that, if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in payment of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—*(declarations in the ordinary form to be introduced according to the nature of defendant No. 2's mortgage and the remedies open to him thereunder)*

8. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

SCHEDULE.

Description of the mortgaged property.

No. 12.

DECREE FOR RECTIFICATION OF INSTRUMENT.

(Title.)

It is hereby declared that the _____, dated the _____ day of _____ 19____, does not truly express the intention of the parties to such _____
And it is decreed that the said _____ be rectified by _____

No. 13.

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS.

(Title.)

It is hereby declared that the _____, dated the _____ day of _____ 19____, and made between _____ and _____, is void as against the plaintiff and all other creditors, if any, of the defendant.

No. 14.

INJUNCTION AGAINST PRIVATE NUISANCE.

(Title.)

Let the defendant , his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff

No. 15.

INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

Let the defendant , his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down, so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in his said premises as are ancient lights.

No 16

INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(Title)

Let the defendant , his agents, servants, and workmen, be perpetually restrained from using or permitting to be used any part of the lane at , the soil of which belongs to the plaintiff, as a carriage way for the passage of carts, carriages or other vehicles either going to or from the land marked B in the annexed plan or for any purpose whatsoever

No. 17

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT.

(Title.)

It is ordered that the following accounts and inquiries be taken and made. that is to say :—

In creditor's suit—

1. That an account be taken of what is due to the plaintiff and all other the creditors of the deceased.

In suits by legatees—

2. That an account be taken of the legacies given by the testator's will.

In suits by next-of-kin—

3. That an inquiry be made and account taken of what or of what share, if any, the plaintiff is entitled to as next-of-kin [or one of the next-of-kin] of the intestate.

[After the first paragraph, the decree will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow omitting the first formal words. The form is continued as in a creditor's suit.]

4. An account of the funeral and testamentary expenses.

5. An account of the moveable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

6. An inquiry what part (if any) of the moveable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do, on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the ¹shall find it necessary for carrying out the objects of the suit to sell any part of the moveable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9. And that Mr. E. F. be receiver in the suit (or proceeding) and receive and get in all outstanding debts and outstanding moveable property of the deceased, and pay the same into the hands of the ¹(and shall give security by bond for the due performance of his duties to the amount of rupees).

10. And it is further ordered that if the moveable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquires be made, and accounts taken, that is to say—

(a) an inquiry what immoveable property the deceased was seized of or entitled to at the time of his death;

¹Here insert the name of the proper officer.

(b) an inquiry what are the incumbrances (if any) affecting the immovable property of the deceased or any part thereof;

(c) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

11. And that the immovable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit be sold with the approbation of the Judge, free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G.H. shall have the conduct of the sale of the immovable property, and shall prepare the conditions and contracts of sale subject to the approval of the Judge and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle

13. And it is further ordered that, for the purpose of the inquiries hereinbefore directed, the defendant shall advertise in the newspapers according to the practice of the Court, or shall make such inquiries in any other way which shall appear to the Judge to give the most useful publicity to such inquiries.

14. And it is ordered that the above inquiries and accounts be made and taken and that all other acts ordered to be done be completed, before the day of _____, and that the defendant do certify the result of the inquiries, and the accounts, and that all other acts ordered as completed, and have his certificate in that behalf ready for the inspection of the parties on the day of _____

15. And, lastly, it is ordered that this suit [or proceeding] stand adjourned for making final decree to the day of _____

[Such part only of this decree is to be used as is applicable to the particular case.]

No 18.

FINAL DECREE IN AN ADMINISTRATION SUIT BY LEGATEE.

(Title.)

1. It is ordered that the defendant do, on or before the day of _____, pay into Court the sum of Rs. _____, the balance by the said certificate found to be due from the said defendant on account of the estate of the testator and also the sum of Rs. _____ for interest, at the rate of Rs. _____ per cent. per annum, from the day of _____ to the day of _____, amounting together to the sum of Rs. _____

2. Let the defendant do of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs. _____ ordered to be paid into Court as aforesaid, as follows:-

(a) The costs of the plaintiff to Mr. _____, his attorney [or pleader] or and the costs of the defendant to Mr. _____, his attorney [or pleader].

(b) And (if any debts are due) with the residue of the said sum of Rs. _____ after payment of the plaintiff's and defendant's costs as aforesaid, let the sums, found to be owing to the several creditors mentioned in the schedule to the certificate of the _____ together with subsequent interest on such of the debts as bear interest, be paid, and, after making such payments, let the amount coming to the several legatees mentioned in the schedule, together with subsequent interest (to be verified as aforesaid), be paid to them

3. And if there should then be any residue, let the same be paid to the residuary legatee.

No. 19.

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE, WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE PAYMENT OF LEGACIES.

(Title.)

1. It is declared that the defendant is personally liable to pay the legacy of Rs. _____ bequeathed to the plaintiff,

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy;

3. And it is also ordered that the defendant do, within _____ weeks after the date of the certificate of the _____, pay to the plaintiff the amount of what the defendant shall certify to be due for principal and interest;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit, the same to be taxed in case the parties differ.

¹Here insert the name of the proper officer.

No. 20

FINAL DECREE IN AN ADMINISTRATION SUIT BY NEXT-OF-KIN

(Title)

1. Let the ¹of the said Court tax the costs of the plaintiff and defendant in this suit and let the amount of the said plaintiff's costs, when so taxed, be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of *E.F.*, the intestate, within one week after the taxation of the said costs by the said ¹, and let the defendant retain for her own use out of such sum her costs, when taxed.

2 And it is ordered that the residue of the said sum of Rs. , after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows.—

(a) Let the defendant, within one week after the taxation of the said costs by the ¹as aforesaid, pay one-third share of the said residue to the plaintiff *A.B.*, and *G.D.*, his wife, in her right as the sister and one of the next-of-kin of the said *E.F.*, the intestate.

(b) Let the defendant retain for her own use one other third share of residue, as the mother and one of the next-of-kin of the said *E.F.*, the intestate

(c) And let the defendant, within one week after the taxation of the said costs by the ¹as aforesaid, pay the remaining one-third share of the said residue to *G.H.*, as the brother and the other next-of-kin of the said *E.F.*, the intestate

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND THE TAKING OF PARTNERSHIP ACCOUNTS.

It is declared that the proportionate shares of the parties in the partnership are as follows:—

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the day of and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, etc.,

And it is ordered that be the receiver of the partnership-estate, and effects in this suit and do get in all the outstanding book-debts and claims of the partnership.

And it is ordered that the following accounts be taken —

1. An account of the credits, property and effects now belonging to the said partnership,

2 An account of the debts and liabilities of the said partnership,

3. An account of all dealings and transactions between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the ¹may, on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the day of and that the

¹do certify the results of the accounts, and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the day of

And, lastly, it is ordered that this suit stand adjourned for making a final decree to the day of

No. 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP AND TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs. be applied as follows.—

1. In payment of the debts due by the partnership set forth in the certificate of the ¹amounting in the whole to Rs.

2. In payment of the costs of all parties in this suit, amounting to Rs.

[These costs must be ascertained before the decree is drawn up.]

3 In payment of the sum of Rs. to the plaintiff as his share of the partnership assets, of the sum of Rs. , being the residue of the said sum of Rs.

now in Court, to the defendant as his share of the partnership assets.

[Or, and that the remainder of the said sum of Rs be paid to the said plaintiff (or defendant) in part payment of sum of Rs. certified to be due to him in respect of the partnership-accounts]

¹ Here insert the name of the proper officer.

4. And that the defendant [*or* plaintiff] do on or before the _____ day of _____
 pay to the plaintiff [*or* defendant] the sum of Rs. _____
 being the balance of the said sum of Rs _____ due to him, which will then remain due.

No 23.

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS
 (Title.)

It is hereby decreed as follows —

1. That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.

2 That the defendant do pay to the plaintiff the sum of Rs. _____ with interest thereon at the rate of _____ per cent. per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit

Or

2. That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.

3. That an enquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court] [the expiration of three years from the date of the decree].

Schedule.

Loc Am.—[Madras.] Insert the following:—

No. 24.

DECREE SANCTIONING A COMPROMISE OF A SUIT ON BEHALF OF A MINOR OR LUNATIC.

(Title.)

This suit coming on this day for final disposal in the presence of etc., and C D., the defendant, a minor by E F., his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing dated the _____ day of _____

and made between A B., the plaintiff, of the one part, and the said C. D. by the said guardian *ad litem* of the other part (or. on the terms hereafter set forth), and, it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto: It is ordered as follows:—

(Set out the terms of the compromise.)

APPENDIX E.

EXECUTION.

No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD NOT BE RECORDED AS CERTIFIED. (O. 21, R. 2.)

(Title.)

To

WHEREAS in execution of the decree in the above-named suit _____ has applied to this Court that the sum of Rs. _____ recoverable under the decree

has been _____ paid _____ and should be recorded as certified, this is to give you notice that you are to appear before this Court on the _____ day of _____

19 _____, to show cause why the _____ payment _____ adjustment _____ aforesaid should not be recorded as certified.

GIVEN under my hand and the seal of the Court, this _____ day of _____

19 _____ Judge.

No. 2.

PRECEPT. (SECTION 46.)

(Title.)

UPON hearing the decree-holder it is ordered that this precept be sent to the Court of _____ at _____ under section 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending any application which may be made by the decree-holder for execution of the decree.

Schedule.

Dated the _____

day of _____

19 _____

Judge.

No. 3.

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT. (O. 21, R. 6.)

(Title.)

WHEREAS the decree-holder in the above suit has applied to this Court for a certificate to be sent to the Court of _____ at _____ for execution of the decree in the above suit by the said Court, alleging that the judgment-debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under Order XXI, Rule 6 of the Code of Civil Procedure, 1908, it is

Ordered.

That a copy of this order be sent to _____ with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction

Dated the _____ day of _____ 19 .

Judge.

No. 4.

CERTIFICATE OF NON-SATISFACTION OF DECREE. (O. 21, R. 6.)

(Title.)

CERTIFIED that no¹ satisfaction of the decree of this Court in Suit No. _____ of 19 _____, a copy which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

Dated the _____ day of _____ 19 _____

Judge

No 5.

CERTIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT. (O. 21, R. 6)

(Title.)

| Number of suit and the Court by which the decree was passed | Names of parties. | Date of application for execution. | Number of the execution case. | Processes issued and dates of service thereof | Costs of execution. | Amount realized | How the case is disposed of | REMARKS. |
|---|-------------------|------------------------------------|-------------------------------|---|---------------------|-----------------|-----------------------------|----------|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| | | | | | Rs. A P. | Rs A. P. | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | | | | | |

Signature of Muharrir in charge

Signature of Judge.

Loc. Am.—[Rangoon.] In the heading of Form No. 5, for the words and figures "O. 21, R. 6," the word and figures "S. 41" shall be substituted.

¹ If partial, strike out "no" and state to what extent.

No. 6.

APPLICATION FOR EXECUTION OF DECREE. (O. 21, R. 11.)

In the Court of
I, , decree-holder, hereby apply for execution of the decree herein below set forth.—

North.

| No of suit. | Names of parties | Date of decree. | Whether any appeal preferred from decree | Payment or adjustment made, if any. | Previous application, if any, with date and result | Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree | Amount of costs, if any, awarded. | Against whom to be executed. | Mode in which the assistance of the Court is required | | | | | | | | |
|-------------|--------------------------------|--------------------|--|-------------------------------------|---|--|---|------------------------------|---|---------|-------|-------|-------|-------|---------|----------------------------|--|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | | | | | | | | |
| 789 of 1897 | A B—Plaintiff C D—Defendant | October 11th, 1897 | No | None. | Rs. 72-4 recorded on application, dated the 4th March, 1899 | Rs 314-8-2 principal [interest at 6 per cent per annum from date of decree till payment] | <table border="1"> <tr> <td>Rs. A. P</td> <td></td> </tr> <tr> <td>47 10 4</td> <td>.. ..</td> </tr> <tr> <td>8 2 0</td> <td>.. ..</td> </tr> <tr> <td>Total</td> <td>55 12 4</td> </tr> </table> | Rs. A. P | | 47 10 4 | | 8 2 0 | | Total | 55 12 4 | Against the defendant C D. | <p>[When attachment and sale of movable property is sought]</p> <p>I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realised by attachment and sale of defendant's movable property as per annexed list and paid to me.</p> <p>[When attachment and sale of immovable property is sought]</p> <p>I pray that the total amount of Rs [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me</p> |
| Rs. A. P | | | | | | | | | | | | | | | | | |
| 47 10 4 | | | | | | | | | | | | | | | | | |
| 8 2 0 | | | | | | | | | | | | | | | | | |
| Total | 55 12 4 | | | | | | | | | | | | | | | | |

I declare that what is stated herein is true to the best of my knowledge and belief.
Signed _____ decree-holder.

Dated the _____ day of _____ 19____
[When attachment and sale of immovable property is sought,]
Description and specification of property

The undivided one-third share of the judgment-debtor in a house situated in the village of _____, value Rs 40, and bounded as follows—
East by G's house; west by H's house, south by public road, north by private lane and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified

Signed _____

, decree-holder

No. 7.

NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE. (O. 21, R. 16.)¹
(Title.)

To

WHEREAS _____ has made application to this Court for execution of decree in Suit No. _____ of 19 _____ on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court _____ on the _____ day of _____ 19 _____ to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

No. 8.

WARRANT OF ATTACHMENT OF MOVABLE PROPERTY IN EXECUTION OF
A DECREE FOR MONEY (O. 21, R. 30.)
(Title.)

To

The Bailiff of the Court

WHEREAS _____ was ordered by decree of this Court passed on _____ day of _____ 19 _____, in Suit No. _____ of _____

| DECREE. | | | | |
|--------------------|----|---|---|---|
| Principal | . | | | |
| Interest | . | | | |
| Costs | . | | | |
| Costs of execution | . | | | |
| Further interest | . | | | |
| Total | .. | — | — | — |

19 _____, to pay to the plaintiff the sum of Rs. _____ as noted in the margin, and whereas the said sum of Rs. _____ has not been paid. These are to command you to attach the movable property of the said _____ as set forth in the schedule hereunto annexed or which shall be pointed out to you by the said _____ and unless the said _____ shall pay to you the said sum of Rs. _____ together with Rs. _____, the cost of this attachment, to hold the same until further orders from this Court. You are further commanded to return this warrant on or before the _____ day of _____ 19 _____, with an endorsement certifying the day on which and manner

in which it has been executed or why it has not been executed

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____

Schedule.

Judge.

No. 9.

WARRANT FOR SEIZURE OF SPECIFIC MOVABLE PROPERTY ADJUDGED
BY DECREE. (O. 21, R. 31.)
(Title.)

To

The Bailiff of the Court.

WHEREAS _____ was ordered by decree of this Court passed on _____ day of _____ 19 _____, in Suit No. _____ of _____, to deliver to the plaintiff the movable property (or a _____ share in the movable property) specified in the schedule hereunto annexed, and whereas the said property (or share) has not been delivered;

These are to command you to seize the said movable property (or a share of the said movable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court this _____ day of _____ 19 _____

Schedule.

Judge

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT. (O. 21, R. 34.)
(Title.)

To

TAKE notice that on the _____ day of _____ 19 _____, the decree-holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of _____, whereof a draft is hereunto annexed, of the movable property specified hereunder, and that the _____ day of _____ 19 _____

¹App. E, No. 7.—The words "R. 16" for the words "R. 22" were substituted by Act X of 1914, Sch. I.

is appointed for the hearing of the said application, and that you are at liberty to appear on the said day and to state in writing any objections to the said draft.

Description of property

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC. (O. 21, R. 35.)

(Title)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of has been decreed to , the plaintiff in this suit, you are hereby directed to put the said in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

Schedule.

No. 12.

NOTICE TO SHOW CAUSE WHY A WARRANT OF ARREST SHOULD NOT ISSUE. (O. 21, R. 37.)

(Title.)

To

WHEREAS has made application to this Court for execution of decree in Suit No. of 19 by arrest and imprisonment of your person, you are hereby required to appear before this Court on the day of 19 , to show cause why you should not be committed to the civil prison in execution of the said decree

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 13

WARRANT OF ARREST IN EXECUTION. (O. 21, R. 38.)

(Title.)

To.

The Bailiff of the Court.

WHEREAS was adjudged by a decree of the Court in Suit No. of 19 , dated the day of 19 , to pay to the

| DECREE | | | | |
|---------------|--|--|--|--|
| Principal . . | | | | |
| Interest . . | | | | |
| Costs . . | | | | |
| Execution . . | | | | |
| Total .. | | | | |

decree-holder the sum of Rs. as noted in the margin, and whereas the said sum of Rs. has not been paid to the said decree-holder in satisfaction of the said decree, these are to command you to arrest the said judgment-debtor and unless the said judgment-debtor shall pay to you the said sum of Rs. together with Rs. for the costs of executing this process, to bring the said defendant before the Court with all convenient speed. You are further commanded to return this warrant on or before the day of 19 , with an endorsement certifying the day on which and

manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court this day of 19 Judge.

No. 14.

WARRANT OF COMMITTAL OF JUDGMENT-DEBTOR TO JAIL. (O. 21, R. 40)

(Title.)

To

The Officer in charge of the Jail at

WHEREAS who has been brought before this Court this day of 19 , under a warrant in execution of a decree which was made and pronounced by the said Court on the day of 19 , and by which decree it was that ordered that the said should pay ; And whereas the said has not obeyed the decree nor satisfied the Court that he is entitled to be discharged from custody, you are hereby, in the name of the King-Emperor of India, commanded and required to take and receive the said into the civil prison and keep him imprisoned therein for a period not exceeding or until the said decree shall be fully satisfied, or the said shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure

1908; and the Court does hereby fix annas per diem as the rate of the monthly allowance for the subsistence of the said confinement under this warrant of committal. during his

GIVEN under my signature and the seal of the Court, this day of 19 Judge.

No. 15

ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE.
(Sections 58, 59)
(Title.)

To

The Officer in charge of the Jail at
UNDER orders passed this day, you are hereby directed to set free
judgment-debtor now in your custody.

Dated Judge.

Loc. Ams.—[Cal] Insert the following after Form No. 15, Appendix E —
No. 15-A.

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PERSON
AND SURETIES [O XXI A, Rr 3 (a) and (5).]

In the Court of Civil Suit No at

A.B. of against

C.D. of
Know all men by these presents that we, I. J. of etc., and K.L. of etc, and M.N. of etc., are jointly and severally bound to the Judge of the Court of in Rupees to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us in the whole our and each of our heirs, executors and administrators, jointly and severally, by these presents

Dated this day of 19

And whereas the movable property, livestock specified in the schedule hereunto annexed has been attached under a warrant from the said Court dated the day of 19 in execution of a decree in favour of in suit No of 19 on the file of and the said property has been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property livestock aforesaid (and shall properly maintain and take due care of the livestock aforesaid) and shall obey any further order of the Court in respect thereof, then this obligation shall be void, otherwise it shall remain in full force and be enforceable against the above bounden I. J. in the execution proceeds

I. J.
K.L.
M.N.

Signed and delivered by the above bounden in the presence of

[Madras] Form 15. For the word "Dated" substitute the words "Given under my hand and the seal of the Court, this day of 19"

[Lahore and Madras.] Add the following form.—

No. 15-A.

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT IN CHARGE
OF PERSON INTERESTED AND SURETIES. (O. 21, R. 43)

In the Court of at
Civil Suit No. of

A.B. of against

C.D. of

Know all men by these presents that we, I. J. of etc., and K.L. of etc., and M.N. of etc., are jointly and severally bound to the Judge of the Court of in Rupees to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents

Dated this day of 19

AND WHEREAS the movable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the day of 19 in execution of a decree in favour of in Suit No. of 19, on the file of and the said property has been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void otherwise it shall remain in full force.

I.J.
K.L.
M.N.

Signed and delivered by the above bounden
[Lahore.] Add the following as Form No 15-B:—

in the presence of .

No. 15-B.

BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT IN CHARGE OF ANY PERSON AND SURETIES. [O 21, R. 43 (1) (c)]

In the Court of

Civil Suit No

at
of 19 .

A. B. of

against

C. D. of

Know all men by these presents the we, I. J. of etc., and K.L. of etc., and M.N. of etc., are jointly and severally bound to the Judge of the Court of in Rupees to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs executors and administrators, jointly and severally, by these presents.

Dated this

day of

19 .

And whereas the movable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court dated the day of 19 , in execution of a decree in favour of in Suit No. of 19 on the file of and the said property has been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void otherwise it shall remain in full force and be enforceable against the above bounden I. J. in accordance with the procedure laid down in Section 145, Civil Procedure Code, as if the aforesaid I. J. were a surety for the restoration of property taken in execution of a decree

I.J.
K.L.
M.N.

Signed and delivered by the above bounden in the presence of
[Rangoon.] The following shall be inserted as Form 15-A—

No. 15-A.

FORM OF RECEIPT FOR MONEY DEPOSITED IN CONNECTION WITH THE ATTACHMENT OF PROPERTY TOGETHER WITH NOTICE TO DECREE-HOLDER.

In the Court of

Execution Case No.

of 19

versus

Received the sum of Rs. on account of the following expenditure to be incurred in connection with attachment of property as per list appended.—

Rs. A. P.

*Strike out if used in Courts other than the High Court of Judicature at Rangoon, and the Small Cause Court, Rangoon.

†Strike out if used in the High Court of Judicature at Rangoon, and the Small Cause Court, Rangoon.

Process Fee
Rules—

*15 (1) (b)

(ii) †17 (i)

(c) (ii) (2).

1. Custody fees.
2. Feeding Charges.
3. Conveyance charges.

4. Other expenses
(to be specified)

Total. _____

N.B.—The decree-holder is hereby warned that the sum deposited by him for recurring charges will be exhausted on the day of 19 , and that unless a further deposit is made before that date the attachment will cease.

Dated this

day of

19 .

Bailiff.

"List of property to be attached".

No. 16.

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF. (O. 21, R. 46.)

(Title.)

To

WHEREAS _____ has failed to satisfy a decree passed against _____ on the _____ day of _____ 19 _____ in Suit No. _____ of 19 _____, in favour of _____ for Rs. _____; It is ordered that the defendant be, and is hereby prohibited and restrained, until the further order of this Court, from receiving from _____ the following property in the possession of the said _____ that is to say, _____, to which the defendant is entitled, subject to any claim of the said _____ and the said _____ is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

No. 17.

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENTS (O. 21, R. 46)

(Title.)

To

WHEREAS _____ has failed to satisfy a decree passed against _____ on the _____ day of _____ 19 _____ in Suit No. _____ of 19 _____ in favour of _____ for Rs. _____, It is ordered that the defendant be, and is hereby prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant namely, _____ and that you, the said _____, be, and you are hereby prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise than into this Court

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

No. 18.

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION. (O. 21, R. 46.)

(Title.)

To

Secretary of _____ Defendant and to Corporation.
WHEREAS _____ has failed to satisfy a decree passed against _____ on the _____ day of _____ 19 _____, in Suit No. _____ of 19 _____, in favour of _____ for Rs. _____, It is ordered that you, the defendant, be, and you are hereby prohibited and restrained, until the further order of this Court, from making any transfer of _____ shares in the aforesaid Corporation, namely, _____, or from receiving payment of any dividends thereon; and you, _____ the Secretary of the said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

No. 19.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF RAILWAY COMPANY OR LOCAL AUTHORITY. (O. 21, R. 48)

(Title.)

To

WHEREAS _____, judgment debtor in the above-named case, is a (describe office of judgment-debtor) receiving his salary (or allowances) at your hands, and whereas _____, decree-holder in the said case, has applied in this Court for the attachment of the salary (or allowances) of the said _____ to the extent of _____ due to him under the decree; You are hereby required to withhold the said sum of _____ from the salary of the said _____

in the monthly instalments of _____ and to remit the said sum
 (or monthly instalments) to this Court.
 GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____
 Judge.

 No. 20

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT (O 21, R. 51).
 (Title.)

To _____
 The Bailiff of the Court.
 WHEREAS an order has been passed by this Court on the _____ day of _____
 19____, for the attachment of _____; you are hereby directed to seize the said
 and bring the same into Court.
 GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____
 Judge.

 No. 21.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY
 IN THE CUSTODY OF A COURT OF JUSTICE OR [PUBLIC OFFICER] (O. 21, R. 52.)
 (Title.)

To _____
 SIR,
 The plaintiff having applied, under R. 52 of O. 21 of the Code of Civil Procedure,
 1908, for an attachment of certain money now in your hands (*here state how the money*
is supposed to be in the hands of the person addressed, on what account, etc.), I request that
 you will hold the said money subject to the further order of this Court.

I have the honour to be,

SIR,

Your most obedient servant,
 Judge.

Dated the _____ day of _____ 19____

 No. 22.

NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT. (O. 21, R. 53.)
 (Title.)

To _____
 SIR The Judge of the Court of _____
 I have the honour to inform you that the decree obtained in your Court on the
 day of _____ 19____, by _____
 in Suit No. _____ of 19____, in which he was
 and _____ was
 has been attached by this Court on the application of _____
 the _____ in the suit specified above. You are
 therefore requested to stay the execution of the decree of your Court until you receive an
 intimation from this Court that the present notice has been cancelled or until execution of
 the said decree is applied for by the holder of the decree now sought to be executed or by his
 judgment-debtor.

Dated the _____ day of _____ 19____

I have the honour, etc.,
 Judge.

 No. 23.

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE. (O. 21, R. 53.).
 (Title.)

To _____
 WHEREAS an application has been made in this Court by the decree-holder in the above
 suit for the attachment of a decree obtained by you on the _____ day of _____ 19____
 in Suit No. _____, in the Court of _____ of 19____, in which
 was _____ and
 It is ordered
 that you, the said _____ and you are hereby, prohibited
 and restrained, until the further order of this Court, from transferring or charging the same
 in any way.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____
 Judge.

Leg. Ref.

¹ Words within brackets, substituted for
 words 'Officer of Government,' by The

Government of India (Adaptation of Indian
 Laws) Order, 1937

No 24

ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF IMMOVABLE PROPERTY.

(O 21, R. 54.)

(Title.)

To WHEREAS you have failed to satisfy a decree passed against you on the defendant.
day of 19 , in Suit No
of 19 . in favour of for Rs.

, It is ordered that you, the said
, be and you are hereby, prohibited and restrained,
until the further order of this Court, from transferring or charging the property specified
in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that
they are hereby, prohibited from receiving the same by purchase, gift or otherwise.

GIVEN under my hand and the seal of the Court, this day of 19 .
Schedule

Judge.

No. 25

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC. IN THE HANDS OF A THIRD
PARTY. (O 21, R. 56)

(Title.)

To WHEREAS the following property has been attached in
execution of a decree in Suit No of
19 , passed on the day of 19 , in
favour of for Rs
It is ordered that the property so attached, consisting of Rs.
in money and Rs.

in currency-notes, or sufficient part thereof to satisfy the said decree,
shall be paid over by you, the said
to

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No 26.

NOTICE TO ATTACHING CREDITOR (O 21, R 58)

(Title)

To WHEREAS has
made application to this Court for the removal of attachment on
placed at your instance in execution of the
decree in Suit No.
of 19 , this is to give you notice to appear before this Court on , the
day of 19 , either in person or by a pleader of the Court duly instructed to support
your claim, as attaching creditor

GIVEN under my hand and the seal of the Court, this day of 19

No 27.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY (O. 21, R. 66.)

(Title)

To The Bailiff of the Court.
THESE are to command you to sell by auction, after giving
days' previous notice, by affixing the same in this Court-house, and after making due
proclamation, the
property attached under a warrant from this Court, dated the
day of 19 , in execution of a decree in favour
of in Suit No.
of 19 , or so much of the said property as shall realize the sum of Rs.
being the of the said decree and costs still
remaining unsatisfied.

You are further commanded to return this warrant on or before the
day of 19 , with an endorsement
certifying the manner in which it has been executed or the reason why it has not been
executed

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 28.

NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION (O. 21, R. 66.)
(Title.)

To WHEREAS in the above-named suit, Judgment-debtor.
for the sale of , the decree-holder, has applied
that the , you are hereby informed
19 , has been fixed for settling the terms of the
proclamation of sale. day of
GIVEN under my hand and the seal of the Court, this 19 .
Judge.

No. 29.

PROCLAMATION OF SALE (O. 21, R. 66.)
(Title.)

Notice is hereby given that, under R. 64 of O. 21 of the Code of Civil Procedure, 1908,
(1) S. No. of 19 , de- an order has been passed by this Court for the sale of the
cided by the of attached property mentioned in the annexed schedule, in
in which was plaintiff satisfaction of the claim of the decree holder in the suit
and was defendant. mentioned in the margin (1), amounting with costs and interest
up to date of sale to the sum of

The sale will be by public auction, and the property will be put up for sale in the lots
specified in the schedule. The sale will be of the property of the judgment-debtors above-
named as mentioned in the schedule below, and the liabilities and claims attaching to the
said property, so far as they have been ascertained, are those specified in the schedule against
each lot

In the absence of any order of postponement, the sale will be held by
at the monthly sale commencing at
o'clock on the at

In the event, however, of the debt above specified and of the costs of the sale
being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly
authorized agent. No bid by, or on behalf of, the judgment-creditors above-mentioned,
however, will be accepted, nor will any sale to them be valid without the express permission
of the Court previously given. The following are the further

Conditions of Sale.

1. The particulars specified in the schedule below have been stated to the best of the
information of the Court, but the Court will not be answerable for any error, mis-statement
or omission in this proclamation.

2. The amount by which the buildings are to be increased shall be determined by the
officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to
the bidder, the lot shall at once be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provided
always that he is legally qualified to bid, and provided that it shall be in the discretion of the
Court or Officer holding the sale to decline acceptance of the highest bid when the price
offered appears so clearly inadequate as to make it advisable to do so.

4. For reasons recorded, it shall be in the discretion of the officer conducting the sale
to adjourn it subject always to the provisions of R. 69 of O. 21.

5. In the case of movable property, the price of each lot shall be paid at the time of
sale or as soon after as the officer holding the sale directs and in default of payment the
property shall forthwith be again put up and re-sold.

6. In the case of immovable property, the person declared to be purchaser shall pay
immediately after such declaration a deposit of 25 per cent on the amount of his purchase-
money to the officer conducting the sale, and in default of such deposit the property shall
forthwith be put up again and re-sold.

7. The full amount of the purchase-money shall be paid by the purchaser before the
Court closes on the fifteenth day after the sale of the property exclusive of such day, or if
the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth
day.

8. In default of payment of the balance of purchase-money within the period allowed,
the property shall be re-sold after the issue of a fresh notification of sale. The deposit, after
defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government.

Notes.

App. E, Form No. 29.—The effect of
condition 3 in form No. 29, App. E is to give
the Court a quasi revisional discretion in the

matter and not to require the Court itself to
knock down the property. 9 Rang. 608=135
I.C. 654=1932 Rang. 17 (19 C.W.N. 633,
Ref.).

and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

GIVEN under my hand and the seal of the Court, this

day of 19

Judge.

Schedule of Property.

| Number of lot | Description of property to be sold, with the name of each owner where there are more judgment-debtors than one | The revenue assessed upon the estate or part of the estate; if the property to be sold is an interest in an estate or a part of an estate paying revenue to Government. | Detail of any incumbrances to which the property is liable. | Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value |
|---------------|--|---|---|---|
| | | | | |

Loc. Am—[Allahabad.] Form No. 29 *Delete* the sentence "No bid by. . . previously given" in the paragraph above "Conditions of sale."

[Madras] *Add* the following as a 'Note' to Form No. 29—(Proclamation of sale)—of Appendix E to Schedule I of the Code of Civil Procedure, 1908.

"Note.—The title-deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title-deeds, or mortgages not disclosed in the encumbrance certificate"

No. 30

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE (O. 21, R. 66)

(Title.)

To

The Nazir of the Court.

WHEREAS an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the

day of 19, has been fixed for the sale of the said property, copies of the proclamation of sale are by this warrant made over to you, and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published

Dated the

day of

19.

Schedule.

Judge.

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE ON A RE-SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT (O. 21, R. 71.)

(Title.)

Certified that at the re-sale of the property in execution of the decree in the above-named suit, in consequence of default on the part of the purchaser, there

Notes.

App. E, Form No. 31.—At an execution sale the deficiency on re-sale by reason of the purchaser's default was not certified by the officer holding the sale in accordance with Form No. 31 in App. E of the C. P.

Code. Held, that the absence of such a certificate would not prevent the decree-holder from recovering the deficiency arising on the re-sale. 141 I.C. 367=29 N.L.R. 52=1933 N. 123

No. 36

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE. (O 21, Rr. 90, 92.)
(Title.)

To

WHEREAS the under-mentioned property was sold on the _____ day of _____ 19____, in execution of the decree passed in the above-named suit and whereas the decree-holder [or judgment-debtor], has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [or fraud] in publishing [or conducting] the sale, namely, that
Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the _____ day of _____ 19____, when the said application will be heard and determined.

GIVEN under my hand and the seal of Court, this _____ day of _____ 19____.
Description of property

Judge.

No. 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE. (O. 21, Rr. 91, 92.)
(Title.)

To

WHEREAS _____, the purchaser of the under-mentioned property sold on the _____ day of _____ 19____, in execution of the decree passed in the above named suit, has applied to this Court to set aside the sale of the said property on the ground that _____ the judgment-debtor, had no saleable interest therein

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the _____ day of _____ 19____, when the said application will be heard and determined

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.
Description of property.

Judge.

No 38

CERTIFICATE OF SALE OF LAND. (O 26 R. 94.)
(Title)

This is to certify that _____ has been declared the purchaser at a sale by public auction on the _____ day of _____ 19____, of _____ in execution of decree in this suit, and that the said sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19____.
Judge

Loc. Am.—[Nagpur] In form No. 38, insert the words "for Rs _____ between the words "The purchaser" and "At a sale"

[Patna.] Substitute the following form for Form No. 38 —
No. 38.

CERTIFICATE OF SALE OF LAND (O 21, R 94)

District _____
In the Court of _____

Execution Case No _____ at _____ of 19____. decree-holder.

vs.

Judgment-debtor.

This is to certify that _____, son of _____, by caste _____, by occupation _____, resident of _____, Thana _____, District _____, has been declared the purchaser at a sale by public auction on the _____ day of _____ 19____, of the property specified below in execution of the decree in Suit No. _____ of this Court (1) and that the said sale has been duly confirmed by this Court

GIVEN under my hand and the seal of the Court, this _____ day (2) of _____ 19____.

Judge.

Specification and price of properties (3)

(1) If the decree has been received by transfer from other Court, enter the name of that Court.

(2) The date when the sale became absolute.

(3) Particulars sufficient to identify the property including the name of each registration sub-district in which any part of the property is situated should be fully stated.

to deliver or account to the Nazir of this Court for the moveable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorised agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the

contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property, may be passed against you.

DATED this day of

19

Munsif.

Subordinate Judge.
at

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND. (Section 72.)
(Title)

To

, Collector of

SIR,

In answer to your communication No , dated , representing that the sale in execution of the decree in this suit of land situate within your district is objectionable, I have the honour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you

I have the honour to be,
SIR,
Your Obedient Servant,
Judge.

Loc. Am.—[Allahabad.] Add the following Form —

No. 43

The security to be furnished under section 55 (4) shall be, as nearly as may be, by a bond in the following form —

In the Court of

at

Suit No.

A B. of

C.D. of

Against

of 19

.. Plaintiff.

.. Defendant

WHEREAS in execution of the decree in the suit aforesaid, the said C.D., has been arrested under a warrant and brought before the Court of ; and whereas the said C.D. has applied for his discharge on the ground that he undertakes within one month to apply under section 5 of Act No III of 1907, to be declared an insolvent, and the said Court has ordered that the said C.D. shall be released from custody if the said C.D. furnish good and sufficient security in the sum of Rs. that he will appear when called upon and that he will within one month from this date apply under section 5 of Act No III of 1907, to be declared an insolvent;

Therefore I, E.F., inhabitant of have voluntarily become security, and do hereby bind myself, my heirs and executors, to as Judge of the said Court and his successors in office that the said C.D. will appear at any time when called upon by the said Court, and will apply in the manner and within the time hereinbefore set forth, and in default of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said Court on its order, the sum of Rs.

Witness my hand at

this

day of

19

(Sd.) E.F.
Surety

Witness:

APPENDIX F. SUPPLEMENTAL PROCEEDINGS.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, R. 1.)
(Title.)

To

The Bailiff of the Court.
WHEREAS

| | | | | | |
|-----------|----|----|----|---|---|
| Principal | .. | .. | — | — | — |
| Interest | .. | .. | | | |
| Costs | .. | .. | | | |
| TOTAL | | | .. | | |

, the plaintiff in the above suit claims the sum of Rs as noted in the margin, and has proved to the satisfaction of the Court that there is probable cause for believing that the defendant

is about to

These are to command you to demand and receive from the said the sum of Rs.

as sufficient to satisfy the plaintiff's claim, and unless the said sum of Rs. is

forthwith delivered to you by or on behalf of the said , to take the said into custody, and to bring him before this Court, in order that he may show cause why he should not furnish security to the amount of Rs.

for his personal appearance before the Court, until such time as the said suit shall be fully and finally disposed of, and until satisfaction of any decree that may be passed against him in the suit.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 2.

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE JUDGMENT. (O 38, R. 2.)

(Title)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant, has been arrested and brought before the Court,

And whereas on the failure of the said defendant to show cause why he should not furnish security for his appearance, the Court has ordered him to furnish such security;

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit, and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at this day of 19 (Signed.)

Witnesses

- 1.
- 2.

No. 3

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION FOR DISCHARGE. (O. 38, R. 3.)

(Title.)

To WHEREAS , who became surety on the day of 19 for your appearance in the above suit, has applied to this Court to be discharged from his obligation,

You are hereby summoned to appear in this Court in person on the day of 19 , at A.M., when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

No. 4.

ORDER FOR COMMITTAL. (O. 38, R. 4.)

(Title.)

WHEREAS , plaintiff in this suit, has made application to the Court that security be taken for the appearance of , the defendant, to answer any judgment that may be passed against him in the suit, and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has failed to do, it is ordered that the said defendant be committed to the civil prison until the decision of the suit, or, if judgment be pronounced against him, until satisfaction of the decree

GIVEN under my hand and the seal of the Court, this day of 19 Judge

No. 5.

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR FULFILMENT OF DECREE. (O. 38, R. 5.)

(Title.)

To The Bailiff of the Court.
WHEREAS has proved to the satisfaction of the Court that the defendant in the above suit ;
These are to command you to call upon the said defendant on or before the day of 19 , either to furnish security for the sum of rupees to produce and place at the disposal of this Court

Notes.

App. F, Form No 2—The mere omission of the title and the name of the presiding officer from a security bond will not make it an invalid document. 1930 A.L.J. 913.

when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him; or to appear and show cause why he should not furnish security, and you are further ordered to attach the said and keep the same under safe and secure custody until the further order of the Court, and you are further commanded to return this warrant on or before the day of 19, with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 6

SECURITY FOR THE PRODUCTION OF PROPERTY. (O 38, R. 5.)

(Title.)

WHEREAS at the instance of , the plaintiff in the above suit, the defendant has been directed by the Court to furnish security in the sum of Rs to produce and place at the disposal of the Court the property specified in the schedule here unto annexed;

Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree; and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs or such sum not exceeding the said sum as the said Court may adjudge

Witness my hand at this day of 19 .
Schedule (Signed)

Witnesses :

- 1.
- 2.

No. 7.

ATTACHMENT BEFORE JUDGMENT, ON PROOF OF FAILURE TO FURNISH SECURITY. (O 38, R 6)

(Title.)

To

The Bailiff of the Court

WHEREAS , the plaintiff in the suit, has applied to the Court to call upon , the defendant, to furnish security to fulfil any decree that may be passed against him in the suit, and whereas the Court has called upon the said to furnish such security, which he has failed to do; these are to command you to attach , the property of the said , and keep the same under safe and secure custody until the further order of the Court; and you are further commanded to return this warrant on or before the day of 19, with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 8.

TEMPORARY INJUNCTIONS. (O 39, R 1.)

(Title.)

Upon motion made unto this Court by , Pleader of [or Counsel for] the Plaintiff A.B., and upon reading the petition of the said plaintiff in this matter filed [this day] [or the plaint filed in this suit on the day of , or the written statement of the said plaintiff filed on the

Notes.

App. F, Form No. 6.—Per *Kemp, A.C.J.*—The words "Court may adjudge" in Form 6, Appendix F, mean that the Court is to be the arbitrator and not that it is merely to decree what the parties consent to

Per *Blackwell, J.*—The words "as the said Court may adjudge" at the end of Form 6 apply only to a question which might arise in execution in proceedings against the surety. They have no application to the decree which

the Court must pass before requiring the defendant to produce and place at the disposal of the Court the property specified or the value of the same or such portion thereof as may be sufficient to satisfy the decree. Having regard to the definition of the word 'decree' in S. 2 (2) the recording of a compromise and the passing of a decree in accordance therewith would be an adjudication by the Court in the suit. 54 B. 113=31 Bom.L.R. 1442=1930 B 122.

and day of] and upon hearing the evidence of in support thereof [if after notice and defendant not appearing: add, and also the evidence of as to service of notice of this motion upon the defendant C.D.]: This Court doth order that an injunction be awarded to restrain the defendant C.D., his servants, agents and workmen, from pulling down or suffering to be pulled down, the house in the plaint in the said suit of the plaintiff mentioned [or in the written statement, or petition of the plaintiff and evidence at the hearing of this motion mentioned], being No. 9, Oilmongers Street, Hindupur, in the Taluk of , and from selling the materials whereof the said house is composed, until the hearing of this suit or until the further order of this Court

Dated this

day of

19 .

Judge.

[Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus:—

to restrain the defendants and from parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [or bill of exchange] in question, dated on or about the etc., mentioned in the plaintiff's plaint [or petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[In Copyright cases] to restrain the defendant C.D., his servants, agents or workmen, from printing, publishing or vending a book, called , or any part thereof, until the, etc

[Where part only of a book is to be restrained] to restrain the defendant C.D., his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [or petition and evidence, etc.] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled and also that part which is entitled [or, which is contained in page to page both inclusive] until , etc.

[In Patent cases] to restrain the defendant C.D., his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff's plaint [or petition, etc., or written statement, etc.] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [or as the case may be] mentioned, and from counterfeiting, imitating or resembling the same inventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc.

[In cases of Trade marks] to restrain the defendant C.D., his servants, agents or workmen, from selling or exposing for sale, or procuring to be sold, any composition or blacking [or as the case may be] described as or purporting to be blacking manufactured by the plaintiff A.B., in bottles having affixed thereto such labels as in the plaintiff's plaint [or petition, etc.] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff A.B., and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A.B., until the, etc

[To restrain a partner from in any way interfering in the business] to restrain the defendant C.D., his agents and servants, from entering, into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security in the name of the partnership-firm of B. and D., and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done, any act, in the name or on the credit of the said partnership firm of B. and D., or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc

No 9.¹

APPOINTMENT OF A RECEIVER. (O. 40, R. 1.)

(Title)

To

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 19 , in favour of ; You are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order 40 of the Code of Civil Procedure, 1908, with full powers under the provisions of that Order.

Leg. Ref.

and 10" instead of "6 and 7" respectively by Act X of 1914, Sch. I.

¹The last two forms were re-numbered "9

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on . . . You will be entitled to remuneration at the rate of . . . per cent. upon your receipts under the authority of this appointment. GIVEN under my hand and the seal of the Court, this . . . day or . . . 19 . . .

Judge.

Loc. Am.—[Madras] Substitute the following for Form No. 9¹ of Appendix F to Schedule I.—

No. 9.

APPOINTMENT OF A RECEIVER. (O 40, R. 1.)

(Title.)

WHEREAS it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below (or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the day of . . . 19 . . . in favour of . . .).

It is hereby ordered that *A.B.*, be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents, issues and profits thereof under Order XL of the Code of Civil Procedure, 1908, with all powers under the provisions of that order, except that he shall not without leave of the Court (1) grant leases for a term exceeding three years, or (2) institute suits in any Court (except suits for rent), or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs. 1,000 or (4) expend on the repairs of any property in any period of two years more than half of the net annual rental of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would be let when in a fair state of repair, provided that such amount shall not exceed Rs. 1,000.

And it is further ordered that the . . . parties . . . — to the above suit and all persons claiming under them do deliver up quiet possession of the properties, moveable and immoveable, specified below together with all leases, agreements for lease, kabuleats, account books, papers, memoranda and writings relating thereto to the said receiver. And it is further ordered that the said receiver do take possession of the said property, moveable and immoveable, and collect the rents, issues and profits of the said immoveable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

And it is further ordered that the said receiver do out of the first moneys to be received by him pay the debts due from the said . . . and shall be entitled to retain in his hands the sums of Rs. . . . for current expenses, but subject thereto shall pay his net receipts, as soon as the same come to his hands, into Court to the credit of this suit. He shall once in every . . . months file his accounts and vouchers in Court, the first account to be filed on the . . . day of . . . and to be passed on the day of . . . He shall be entitled to commission at the rate of Rs. . . . per cent. on the net amounts collected by him or to the sum of Rs. . . . per month (or as the case may be) as his remuneration (or he shall act without any remuneration).

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the estate in addition to his own office establishment the following further establishment —

(Here enter specification of property.)

GIVEN under my hand and the seal of the Court, this . . . day of . . . 19 . . .
Loc Am.—[Patna.] Appendix F, Form No 9

In the Schedule of costs in the Form of Decree in Appeal No 9, Appendix G, to the first schedule of the Civil Procedure Code, Act V of 1908, add "copying or typing charges" below the item "Pleader's fee on Rs. . . ." in the columns for Appellant and Respondent, and number the new entry in the first column as "5".

No. 10¹

BOND TO BE GIVEN BY RECEIVER. (O. 40, R. 3.)

(Title)

Know all men by these presents, that we, . . . and . . . and . . . are jointly and severally bound to . . . of the Court of . . . in Rs. . . . to be paid to the said . . . or his successor in office for the time being For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this . . . day of . . . 19 . . .

Leg. Ref.

¹The last two forms were re-numbered by Act X of 1914 Sch I

"9 and 10" instead of "6 and 7" respectively

Whereas a plaint has been filed in the Court by _____ against
for the purpose of [*here insert the object of suit*]:

And whereas the said _____ has been appointed, by order of the abovementioned Court, to receive the rents and profits of the immoveable property and to get in the outstanding moveable property of _____ in the said plaint named:

Now the condition of this obligation is such, that if the above-bounden shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immoveable property, and in respect of the moveable property, of the said _____ at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above-bounden in the presence of

Note.—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

Loc. Am—[Allahabad.] Add the following two forms 11 and 12:—No. 11 The security to be furnished under Order XXXVIII, Rule 9, shall be, as nearly as may be, by a bond in the following form:—

In the Court of _____ at _____ Suit No. _____ of 19 ____
.. Plaintiff

versus

.. Defendant

Amount of suit, Rupees

Whereas in the suit above specified the plaintiff aforesaid, has applied to the said Court that the said defendant, _____, may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do, certain property of the said defendant, _____, may be attached.

And whereas, on the failure of the said defendant, _____, to furnish such security, or, show cause why it should not be furnished, the property aforesaid of the said defendant has been

attached by order of the said Court.

Therefore I _____, inhabitant of _____, have voluntarily become security and hereby bind myself, my heirs and executors, to _____ as Judge of the said Court, and his successors in office, that the said defendant, shall produce and place at the disposal of the said Court, when required, the property herein below specified, namely, (here give description of property or refer to an annexed schedule), or the value of the same, or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to _____ as Judge of the said Court and his successors in office on its order such sum to the extent of rupees (here enter a sufficient sum to cover the amount of suit with costs and the costs of the attachment) as the said Court may adjudge against the said defendant.

Witness my hand at _____ this _____ day of 19 ____
(Signed.)

Witnesses.

Surety.
(Signed.)

No. 12.

The security to be furnished under Order XXXIX, Rule 2 (2), shall be, as far as may be, by a bond in the following form:—

In the Court of _____ at _____ Suit No. _____ of 19 ____
.. Plaintiff

versus

.. Defendant.

Whereas, in the suit above specified, instituted by the said plaintiff, to restrain the said defendant _____, from (here state the breach of contract or other injury), the said Court has, on the application of the said plaintiff, granted an injunction to restrain the said defendant from the repetition (or the continuance) of the said breach of contract (or the wrongful act complained of), and required security from the said defendant against such repetition (or continuance);

Therefore I _____, inhabitant of _____, have voluntarily become security and do hereby bind myself, my heirs and executors to _____ as Judge of the said Court and his successors in office that the said defendant shall abstain from the repetition (or continuance) of the breach of contract aforesaid (or wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right), and in default of his so abstaining, I bind myself my heirs and executors to pay into

Court, on the order of the Court such sum to the extent of rupees as the Court shall adjudge against the said defendant.

Witness my hand at this day of 19 ,
Witnesses : Surety.

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No 1.

MEMORANDUM OF APPEAL. (O. 41, R. 1.)

(Title.)

The above-named appeals to the Court at from the decree of in Suit No. 19 , dated the day of 19 , and sets forth the following grounds of objection to the decree appealed from, namely—

No. 2.

SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION OF DECREE.

(O. 41, R. 5.)

(Title.)

To

THIS security bond on stay of execution of decree executed by witnesseth—

That , the plaintiff in Suit No of 19 , having sued the defendant, in this Court and a decree having been passed on the day of 19 , in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plaintiff decree-holder having applied to execute the decree, the defendant has made an application praying for stay of execution and has been called upon to furnish security. Accordingly I, of my own free-will, stand security to the extent of Rs. mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court the said defendant shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

Witnessed by :

(Signed.)

- 1.
- 2.

No. 3.

SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL. (O. 41, R. 6)

(Title.)

To

THIS security bond on stay of execution of decree executed by witnesseth:—

That , the plaintiff in Suit No. of 19 , having sued the defendant, in this Court and a decree having been passed on the day of 19 , in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court, the said appeal is still pending.

Now the plaintiff decree-holder has applied for execution of the said decree and has been called upon to furnish security. Accordingly I, of my own free-will, stand security to the extent of Rs. , mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or varied by the Appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this day of 19 .

Schedule.

(Signed.)

Witnessed by :

1.
2.

No. 4.

SECURITY FOR COSTS OF APPEAL. (O 41, R. 10.)

(Title.)

To

THIS security bond for costs of appeal executed by
witnesseth :—

This appellant has preferred an appeal from the decree in Suit No. _____ of 19
against the respondent, and has been called upon to furnish security. Accordingly I, of
my own free-will, stand security for the costs of the appeal, mortgaging the properties
specified in the schedule hereunto annexed. I shall not transfer the said properties or
any part thereof, and in the event of any default on the part of the appellant, I shall duly
carry out any order that may be made against me with regard to payment of the costs of
appeal. Any amount so payable shall be realized from the properties hereby mortgaged, and
if the proceeds of the sale of the said properties are insufficient to pay the amount due I and
my legal representatives will be personally liable to pay the balance. To this effect I exe-
cute this security bond this _____ day of _____ 19 .

Schedule.

(Signed.)

Witnessed by :

1.
2.

No. 5.

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL. (O. 41, R. 13.)

(Title.)

To

YOU are hereby directed to take notice that _____, the _____ in the above
suit, has preferred an appeal to this Court from the decree passed by you therein on the
_____ day of _____ 19 .

You are requested to send with all practicable despatch all material papers in the suit,
Dated the _____ day of _____ 19 .

Judge.

No. 6.

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL. (O. 41, R. 14)

(Title.)

APPEAL from the _____ of the Court of _____ dated the
_____ day of _____ 19 .
To _____

Respondent.

TAKE notice that an appeal from the decree of _____ in this case has been
presented by _____ and registered in this Court, and that
the _____ day of _____ 19 has been fixed by this Court for the hearing
of this appeal.

If no appearance is made on your behalf, by yourselves, your pleader, or by some one
by law authorised to act for you in this appeal, it will be heard and decided in your
absence.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .
Judge.

[Note.—If a stay of execution has been ordered, intimation should be given of the
fact on this notice.]

Loc. Ams.—[Madras] Insert the following note in red ink in Form No. 6 of
Appendix G to Schedule I, namely —

"Also take notice that if an address for service is not filed before the aforesaid date,
this appeal is liable to be heard and decided as if you had not made an appearance."

Insert the following Forms as 6-A and 6-B in Appendix G to the first schedule of
the Code of Civil Procedure :—

No 6-A.

NOTICE TO RESPONDENT. (O. 41-A, R. 2.)

(Cause title.)

APPEAL from the _____ of the Court of _____
dated the _____ day of _____ 19 .
To _____

Respondent.

TAKE notice that an appeal from the above decree (order) has been presented by the
above-named appellants and registered in this Court, and that if you intend to defend the

Page 1207.

Loc. Am. [Madras]

Substitute the following for Form No. 9 in Appendix (G):—

DECREE
ORDER.

IN THE COURT OF THE
Present.—

Judge.

day, the day of 193 .

Appeal Suit }
Civil Miscellaneous Appeal Suit } No. of 19 .
Between:

} *Appellant*

and

} *Respondent.*

On appeal from the Decree/Order of the Court of the
dated the day of 19 and
made in

Original Suit }
Execution Petition } No. of 19 .
Interlocutory Application }
Between:—

} *Plaintiff—Petitioner*

and

} *Defendant—Respondent.*

Particulars of valuation.

Rs. A. P.

1. Valuation in Appeal

2. Do. in suit

DECREE—ORDER.—Thus Appeal coming on this day for hearing
having been heard on the day of 19 , upon perusing
the grounds of appeal, the Decree/Order and judgment of the lower Court
and the material papers in the case and upon hearing the arguments of
Mr. for the Appellant and of Mr.

for the Respondent, and the appeal having stood over to this day for consideration, this Court doth order and decree that the decree/order of the lower Court be and hereby is confirmed and this appeal dismissed. This Court doth further order and decree that the Appellant () do pay to the Respondent () Rs for costs in this appeal and do bear own costs Rs.

Particulars of costs.

| Appellants. | Amount Rs. A P. | Respondents. | Amount Rs A. P |
|---|--------------------|----------------------------|-------------------|
| 1. Stamp on Appeal Memo .. | | 1. Stamp for power.. | |
| 2. Stamp on vakalat. | | 2. Stamp for petition. | |
| 3. Stamp on copies of lower Court decree/order and judgment including copying fee.. | | 3. Service of process. | |
| 4. Stamp on petitions | | 4. Pleader's fee on Rs. .. | |
| 5. Process fees .. | | | |
| 6. Fee for preparation of process.. | | | |
| 7. Pleader's fee on Rs . | | | |
| Total | _____ | Total .. | _____ |

Given under my hand and the seal of the Court this day of 19 .

Judge

Court

Appeal Suit)
Civil Miscellaneous) No. of 19 .
Appeal Suit)

DECREE—ORDER

This appeal coming on for hearing on the _____ day of _____
 19 , before _____ in the presence for _____ for the appellant and of _____
 for the respondent, it is ordered—
 The costs of this appeal, as detailed below, amounting to Rs. _____
 are to be paid by _____ The costs of the original suit are to be paid by _____
 GIVEN under my hand this _____ day of _____ 19 .
 Judge.

Costs of Appeal.

| Appellant. | Amount. | | | Respondent. | Amount. | | |
|------------------------------------|---------|----|----|-------------------------|---------|----|----|
| | Rs. | A. | P. | | Rs. | A. | P. |
| 1. Stamp for memorandum of appeal. | | | | Stamp for power .. | | | |
| 2. Do. for power .. | | | | Do. for petition .. | | | |
| 3. Service of process .. | | | | Service of process .. | | | |
| 4. Pleader's fee on Rs. .. | | | | Pleader's fee on Rs. .. | | | |
| Total .. | | | | Total. .. | | | |

Loc. Ams.—[Calcutta and Madras] Omit the words beginning from "Memorandum of Appeal" and ending with the words "the following reasons".

[Patna.] Form No. 9. In the schedule of costs in the form of Decree in Appeal No 9, Appendix G, to the first Schedule of the Code of Civil Procedure, Act V of 1908, add "copying or typing charges" below the item "Pleader's fee on Rs. _____" in the columns for Appellant and Respondent and number the new entry in the first column as "5."

No. 10

APPLICATION TO APPEAL IN FORMA PAUPERIS. (O. 44, R. 1.)

(Title.)

I _____ the above-named, present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the moveable and immoveable property belonging to me with the estimated value thereof.

Date the _____ day of _____ 19 .

(Signed.)

[Note.—Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper.]

No. 11.

NOTICE OF APPEAL IN FORMA PAUPERIS. (O. 44, R. 1.)

(Title.)

WHEREAS the above-named _____ has applied to be allowed to appeal as a pauper from the decree in the above suit dated the _____ day of _____ 19 and whereas the _____ day of _____ 19 has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the aforementioned date.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .
 Judge.

No. 12.

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BY GRANTED. (O. 45, R. 3.)

(Title.)

To _____ has applied to this Court for a certificate that as regards amount or value and nature, the above case fulfils the requirements of section 110 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to His Majesty in Council.

The _____ day of _____ 19 _____ is fixed for you to show cause why the Court should not grant the certificate asked for.
 GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____
 Registrar.

Loc. Am.—[Madras] Insert the following as new Forms after Form. No. 12 —
 No. 12-A.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL (O. 45, R. 7)

(In cases where the subject-matter of the appeal is of sufficient value and the findings of the courts are not concurrent.)

Read petition presented under O. XLV, R. 3 of the Code of Civil Procedure, praying for the grant of a Certificate to enable the petitioner to appeal to His Majesty in Council against the decree of this Court in _____ Suit No. _____ of 192 .
final order

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of _____ for the petitioner and of _____ for the respondent (if he appears) this court doth certify that the amount of the subject-matter of the suit in the court of first
value

instance is Rs. 10,000 and the amount of the subject-matter in dispute on appeal
upwards of Rs. 10,000 value

to His Majesty in Council is also of the value of Rs. 10,000 or that the decree
upwards of Rs. 10,000 final order

appealed from involves directly some claim or question to property of the value of
indirectly respecting

Rs. 10,000 and that the decree appealed from does not affirm the decision of
upwards of Rs. 10,000 final order
 the lower Court.

No. 12-B.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL. (O. 45, R. 7.)

(In cases where the subject-matter is of sufficient value and the finding of the court are concurrent.)

Read petition presented under O. XLV, R. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of this Court in _____ Suit No _____ of 192 .
final order

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of _____ for the petitioner and of _____ for the respondent (if he appears) this Court doth certify that the amount of the subject-matter of
value

the suit in the court of first instance is Rs. 10,000 and the amount
upwards of Rs. 10,000 value

matter in dispute on appeal to His Majesty in Council is also of the value of Rs. 10,000
upwards of Rs. 10,000 or that the decree appealed against involves directly some claim or
final order indirectly

question to property of the value of Rs. 10,000 and that the affirming
respecting upwards of Rs. 10,000

decree appealed from involves the following substantial question (s) of law, viz. :—
final order

(1)

(2)

No. 12 C.

CERTIFICATE OF LEAVE TO APPEAL TO HIS MAJESTY IN COUNCIL. (O. 45, R. 7.)

(In cases where the subject-matter in dispute is either not of sufficient value or is incapable of money valuation.)

Read petition presented under O. XLV, R. 3 of the Code of Civil procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of this Court in _____ Suit No. _____ of 192 .
final order

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of _____ for the petitioner and of _____ for the

respondent (if he appears) this court doth certify that the $\frac{\text{amount}}{\text{value}}$ of the subject-matter of the suit both in the court of first instance and in this court is below Rs. 10,000 in value incapable of money valuation this court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below, *vis.* :—

(1)
(2)

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE KING IN COUNCIL. (O. 45, R. 8.)
(Title)

To WHEREAS _____, the
in the above case, has furnished the security and made the deposit required
by Order XLV, R. 7 of the Code of Civil Procedure, 1908
TAKE notice that the appeal of the said _____ to His Majesty in
Council has been admitted on the _____ day of _____ 19 .
GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .
Registrar.

No. 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED. (O. 47, R. 4.)
(Title.)

To TAKE notice that _____ has applied to this Court for a review
of its decree passed on the _____ day of _____ 19 in the above case.
The _____ day of _____ 19 is fixed for you to show cause why the
Court should not grant a review of its decree in this case.
GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .
Judge.

APPENDIX H.
MISCELLANEOUS.
No. 1.

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED. (O. 14, R. 6.)
(Title.)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [or of law] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the _____ day of _____ 19 and filed as Exhibit _____ in the said suit, is or is not beyond the statute of limitation (or state the point at issue whatever it may be).

We therefore severally bind ourselves that, upon the finding of the Court in the negative [or affirmative] of such issue, _____ will pay to the said _____ the sum of Rupees _____ (or such sum as the Court shall hold to be due thereon,) and I, the said _____, will accept the said sum of Rupees _____ (or such sum as the Court shall hold to be due) in full satisfaction of my claim on the bond aforesaid [or that upon such finding I, the said _____, will do or abstain from doing, etc., etc.]

Plaintiff.
Defendant.

Witnesses —

1.

2.

Dated the _____

_____ day of _____ 19 .

No. 2.

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER COURT FOR TRIAL.
(SECTION 24.)

To In the Court of the District Judge of _____ No. _____ of 19 .
WHEREAS an application, dated the _____ day of _____ 19 has
been made to this Court by the _____ in Suit No. _____ at _____, in
of 19 _____ now pending in the Court of the _____, in
which _____ is plaintiff and _____ is defendant, for the transfer
of the suit for trial to the Court of the _____ at _____ 19 .
You are hereby informed that the _____ day of _____ 19 .
has been fixed for the hearing of the application, when you will be heard if you desire to
offer any objection to it.
GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .
Judge.

No. 3.

NOTICE OF PAYMENT INTO COURT. (O. 24, R. 2)

(Title.)

TAKE notice that the defendant has paid into Court Rs. the sum is sufficient to satisfy the plaintiff's claim in full.

and says that

To Z., *Pleader for the plaintiff.*

X. Y., *Pleader for the defendant.*

No. 4.

NOTICE TO SHOW CAUSE. (GENERAL FORM.)

(Title.)

To

WHEREAS the above-named application to this Court that

has made

You are hereby warned to appear in this Court in person or by a pleader duly instructed on the _____ day of _____ 19____, at _____ o'clock in the forenoon to show cause against the application, failing wherein the said application will be heard and determined *ex parte*.

GIVEN under my hand and the seal of the Court, this day of 19 Judge.

Loc. Am.—[Allahabad] Substitute the following for form No. 4 of ^{Judge.} Appendix H.

No. 4.

NOTICE TO SHOW CAUSE. (GENERAL FORM.)

In the Court of _____ at _____ District.
Civil Suit No. _____ of _____ 19 _____.
Miscellaneous No. _____ of _____ 19 _____.

Miscellaneous No. _____ of _____ 19__.

resident of

VERSUS

resident of

To

WHEREAS the above-named _____ has made application to this Court that _____ you are hereby warned to appear in this Court in person or by a pleader duly instructed on the _____ day of _____ 19_____, at _____ o'clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined *ex parte* and it will be presumed that you consent to be appointed guardian for the suit.

GIVEN under my hand and the seal of the Court this day of 19 .
Judge.

No. 5.

LIST OF DOCUMENTS PRODUCED BY PLAINTIFF
DEFENDANT. (O 13, R. 1.)

(Title.)

| No. | Description of document. | Date, if any, which the document bears. | Signature of party or pleader. |
|-----|--------------------------|---|--------------------------------|
| 1 | 2 | 3 | 4 |
| | | | |

Loc. Am.—[Allahabad.] LIST OF DOCUMENTS PRODUCED BY PLAINTIFF
DEFENDANT (O. 13, R. 1.)

In the Court of _____ at _____ District _____
 Suit No. _____ of 19 _____
 .. Plaintiff
versus
 .. Defendant.

List of documents produced with the plaint (*or* at first hearing) on behalf of plaintiff (*or* defendant).

This list was filed by _____ this _____ day of _____ 19 _____.

| Serial number. | Description and date, if any, of the document. | What became of the document. | | | Remarks. |
|----------------|--|--|--|--|----------|
| 1 | 2 | 3 | | | 4 |
| | | If brought on the record the exhibit mark put on the document. | If rejected, date of return to party, and signature of party or pleader to whom the document was returned. | If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, Chapter III the date of enclosure in the envelope. | |

Signature of party or pleader producing the list,

No. 6.

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS ABOUT TO LEAVE THE JURISDICTION. (O. 18, R. 16.)

(Title.)

Plaintiff (*or* Defendant).

To

WHEREAS in the above suit application has been made to the Court by _____ that the examination of _____, a witness required by the said _____, in the said suit may be taken immediately, and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction (*or any other good and sufficient cause to be stated*):

TAKE notice that the examination of the said witness _____ will be taken by the Court on the _____ day of _____ 19 _____.

Dated the _____ day of _____ 19 _____.

Judge.

No. 7.

COMMISSION TO EXAMINE ABSENT WITNESS. (O. 26, Rr. 4, 18.)

(Title.)

To

WHEREAS the evidence of _____ is required by the _____ in the above suit; and whereas _____, you are requested to take the evidence on interrogatories [*or viva voce*] of such witness _____, and you are hereby appointed Commissioner for that purpose. The evidence will be taken in the presence of the parties or their agents if in attendance, who will be at liberty to question the witness on the points specified, and you are further requested to make return of such evidence as soon as it may be taken.

Process to compel the attendance of the witness _____ will be issued by any Court having jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____.

Judge.

Loc. Ams.—[Patna] Form No. 7. Add the following note at the foot of the form:—

Note.—The Commissioner has power under Chapter X of the Indian Evidence Act to control the examination of witnesses.

No. 8.

LETTER OF REQUEST. (O. 26, R. 5.)

(Title.)

(Heading.—To the President and Judges of etc., etc., or as the case may be.)

WHEREAS a suit is now pending in the _____ in which A. B. is plaintiff and C.D. is defendant; and in the said suit the plaintiff claims

(Abstract of claim.)

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be examined as witnesses upon oath touching such matters, that is to say:

E.F. of

G.H. of

I.J. of

and

And it appearing that such witnesses are resident within the jurisdiction of your honourable Court,

Now I _____, as the _____ of the said Court, have the honour to request, and do hereby request, that for the reasons aforesaid and for the assistance of the said Court, you, as the President and Judges of the said _____, or some one or more of you, will be pleased to summon the said witness (and such other witnesses as the agents of the said plaintiff and defendant shall humbly request you in writing so to summon) to attend at such time and place as you shall appoint before some one or more of you or such other person as according to the procedure of your Court is competent to take the examination of witnesses, and that you will cause such witnesses to be examined upon the interrogatories which accompany this letter of request (or *ex viva voce*) touching the said matters in question in the presence of the agents of the plaintiff and defendant or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the answers of the said witnesses to be reduced into writing, and all books, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your tribunal, or in such other way as is in accordance with your procedure, and to return the same, together with such request in writing, if any, for the examination of other witnesses to the said Court.

(Note.—If the request is directed to a Foreign Court, the words "through His Majesty's Secretary of State for Foreign Affairs for transmission" should be inserted after the words "other witnesses" in the last line of this form.)

No. 9.

COMMISSION FOR A LOCAL INVESTIGATION, OR TO EXAMINE ACCOUNTS. (O. 26, Rr. 9, 11.)

(Title.)

To

WHEREAS it is deemed requisite, for the purposes of this suit, that a commission should be issued, you are hereby appointed Commissioner for the purpose of _____ Process to compel the attendance before you of any witnesses, or for the production of any documents whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 _____ Judge.

No. 10.

COMMISSION TO MAKE A PARTITION. (O. 26, R. 13.)

(Title.)

To

WHEREAS it is deemed requisite for the purposes of this suit that a commission should be issued to make the partition or separation of the property specified in and according to the rights as declared in, the decree of this Court, dated the _____ day of _____ 19 _____, you are hereby appointed Commissioner for the said purpose and are directed to make such inquiry as may be necessary, to divide the said property according to the best of your skill and judgment in the shares set out in the said decree, and to allot such shares to the several parties. You are hereby

authorized to award sums to be paid to any party by any other party for the purpose of equalizing the value of the shares.

Process to compel the attendance before you of any witness, or for the production of any documents, whom or which you may desire to examine or inspect, will be issued by any Court having jurisdiction on your application.

A sum of Rs. _____, being your fee in the above, is herewith forwarded,

GIVEN under my hand and the seal of the Court, this

day of 19
Judge.

—
No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, R. 3.)
(Title.)

To

Minor Defendant.
Natural Guardian.

WHEREAS an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you¹ are hereby required to take notice that unless within _____ days from the service upon you of this notice, an application is made to this Court for the appointment of you¹ or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of the Court, this

day of 19
Judge.

Loc. Ams.—[Allahabad]—Substitute the following for form:—
No 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN.

In the Court
Suit No.
Resident of

at

of 19

District.

Plaintiff,

vs.

Defendant

Resident of

To

(1)

Minor defendant
and
²Natural
Certificated guardian,

the person in whose care the minor is alleged to be Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you

(1) said minor, and (2)

the ²natural
certificated guardian or the person in

whose care the minor is alleged to be are hereby required to take notice that unless within _____ days from the service upon you of this notice, an application is made of this Court to show cause why the person named below should not be appointed or for the appointment of any other person willing to act as guardian for the suit, the Court will proceed to appoint the person named below or some other person to act as guardian of the minor for the purposes of the said suit.

Proposed guardian

son of

resident of

GIVEN under my hand and the seal of the Court, this

day of 19
Judge.

[Madras.] Substitute the following for Form
No. 11.

NOTICE TO GUARDIAN APPOINTED OR DECLARED, OR TO FATHER OR OTHER NATURAL GUARDIAN, OR TO THE PERSON IN CHARGE OF THE MINOR.

[O 32, R. 3 (5)]

(Title.)

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor.

¹Insert the name of the guardian.

²Cut out the word "natural" if the certificated guardian is named; cut out the word "certificated" if the natural guardian be

intended and cut out both "natural" and "certificated" and the word "or" if the guardian be of neither class but one with whom the minor lives.

WHEREAS an application has been presented on the part of the
in the above suit for the appointment of a guardian for the suit for the said minor, you
are hereby required to take notice that, unless within _____ days
from the service upon you of this notice an application is made to this Court for the
appointment of you or of some friend of the said minor to act as ^{his} ~~her~~ guardian for the
purposes of the said suit, the Court will proceed to appoint some other person to act as
guardian of the said minor for the purposes of the said

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 ____.

[Madras.] Substitute the following for Form 11-A.—

No. 11-A.

NOTICE TO PROPOSED GUARDIAN OF A MINOR _____
defendant
respondent
[O. 32, R. 3 (9).]

To

(Y.Z.).

(Name, description and place of residence of proposed guardian).

Take notice that X _____ in
plaintiff
appellant

has presented a petition

to the Court praying that you be appointed guardian *ad litem* to the minor _____
defendant (s)
respondent (s)

and that the same will be heard on the _____ day of _____ 19 ____.

2. The affidavit of X has been filed in support of this application.

3. If you are willing to act as guardian for the said _____ you are requested
defendant (s)
respondent (s)

to sign (or affix your mark to) the declaration on the back of this notice

4. In the event of your failure to signify your express consent in the manner indicated
above, take further notice that the Court may proceed under O. 32, R. 3, Code of Civil
Procedure, to appoint some other suitable person or one of its officers as guardian *ad litem*

of the minor _____ aforesaid.
defendant (s)
respondent (s)

Dated this _____ day of _____ 19 ____.

(Signed)

(To be printed on the reverse.)

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guar-
dian of the minor _____ therein mentioned.
defendant (s)
respondent (s)

(Signature)

Y.Z.

Witnesses.

1.
2.

APPENDIX H MISCELLANEOUS.

[Nagpur.] For Form No. 11 substitute the following.—

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN. (O. 32, R. 4-A.)

(Title.)

To

Minor defendant
Legally appointed Guardian.

Actual
Proposed Guardian.
on the part of the plaintiff

WHEREAS an application has been presented _____ for
the appointment of you _____ on behalf of the minor defendant
as the guardian of the suit of the minor defendant
his legally appointed (you the said minor)¹ you

_____ guardian and you
actual

the proposed guardian for the suit are hereby required to take notice that unless you, the
proposed guardian, appear before this Court on or before the day appointed for the hearing
of the case and stated in the appended summons, and express your consent to your appoint-

¹Here insert name of guardian.

ment, or unless an application is made to this Court for the appointment of some other persons to act as guardian of the minor for the suit, the Court will proceed to appoint an officer of the Court or a pleader or some other person to act as guardian to the minor for the purposes of the said suit of which summons in the ordinary form is herewith appended.

GIVEN under my hand and at the seal of the Court this
day of 19 .

Judge.

Form No. 11.

[Patna.] For Form No. 11 substitute the following forms —

No. 11.

NOTICE TO MINOR DEFENDANT AND GUARDIAN OF APPLICATION FOR
APPOINTMENT OF THE GUARDIAN TO BE GUARDIAN FOR THE SUIT.

(O. 32, R. 3.)

(Title.)

To

Minor defendant

Guardian (appointed by the authority, or
natural, or the person in whose care the
minor is as the case may be).

WHEREAS an application has been presented on the part of the plaintiff in the
above suit for the appointment of you¹ as guardian
for the suit to the minor defendant, you the said minor and you¹

are hereby required to take notice that unless within 21 days
from the service upon you of this notice you¹

give your consent to be appointed to act as
guardian, the Court will proceed, subject to the decision of any objection that may be
raised to appoint an officer of the Court to act as guardian to you the minor for the
said suit.

GIVEN under my hand and the seal of this Court, this day of 19
Judge.

Form No. 11-A.

NOTICE TO PROPOSED GUARDIAN.

[O. 32, R. 4 (3).]

(Title.)

To

residing at

Take notice that the abovenamed petitioner has made an application to this Court to
appoint you guardian for the suit of minor defendant in
No. of 19 and that the

said application will be heard on the day of next
GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

[Patna.]

Form No. 11-A.

NOTICE TO MINOR DEFENDANT AND GUARDIAN OF APPLICATION FOR APPOINTMENT
OF ANOTHER PERSON TO BE GUARDIAN FOR THE SUIT. (O 32, R. 3.)

To

Minor defendant.

Guardian (appointed by authority, or
natural, or the person in whose care
minor is).

WHEREAS an application has been presented on the part of the plaintiff in the above
suit for the appointment of¹

as guardian for the suit to the minor
defendant, you the said minor and you²

are hereby required to take notice that unless
within 21 days from the service upon you of this notice you²

make an application
for the appointment of yourself or of some friend of you the minor to act as guardian, the
Court will proceed, subject to the decision of any objection that may be raised, to appoint²

of the Court to act as guardian to you the minor for the said suit.
or an officer

GIVEN under my hand and the seal of this Court, this day of 19
Judge.

¹Here insert name and description of pro-
posed guardian.

²Here insert name of guardian upon whom
the notice is to be served.

No. 11-B.

NOTICE TO THE PROPOSED GUARDIAN FOR THE MINOR DEFENDANT, WHEN THE PERSON
PROPOSED IS NOT THE GUARDIAN APPOINTED BY AUTHORITY OF THE NATURAL
GUARDIAN OF THE PERSON IN PERSON IN WHOSE CARE THE MINOR IS.

(O. 32, R. 4)

(Title.)

District

In the Court of

Suit No.

at
of 19 .

Plaintiff.

versus

Defendant.

To

WHEREAS an application has been presented by the plaintiff in the above case for the
appointment of you¹

as guardian for
the suit to the minor defendant you are hereby required to take notice that unless within
days from the service upon you of this notice you make
an application to the Court intimating your consent to act as guardian for the suit, the
Court will proceed to appoint some other person to act as a guardian to the minor for the
purposes of the said suit

GIVEN under my hand and the seal of this Court, this day of 19 .
Judge.

No. 12

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF PAUPERISM
(O. 33, R. 6.)

(Title.)

To

WHEREAS has
applied to this Court for permission to institute a suit against
in *forma pauperis* under O. 33 of the Code of Civil Procedure, 1908, and whereas the Court
sees no reason to reject the application, and whereas the
day of 19 , has been fixed for receiving such evidence as
the applicant may adduce in proof of his pauperism and for hearing any evidence which may
be adduced in disproof thereof.

Notice is hereby given to you under R. 6 of O. 33 that in case you may wish to offer any
evidence to disprove the pauperism of the applicant, you may do so on appearing in this
Court on the said day of 19 .

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

No. 13.

NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE. (Section 145.)

(Title.)

To

WHEREAS you did on become liable
as surety for the performance of any decree which might be passed against the said
defendant in the above suit; and whereas a decree was passed
on the day of 19 against the said
defendant for the payment of , and whereas application has been
made for execution of the said decree against you:

Take notice that you are hereby required on or before the day of
19 to show cause why the said decree should
not be executed against you, and if no sufficient cause shall be, within the time specified,
shown to the satisfaction of the Court, an order for its execution will be forthwith issued in
the terms of the said application

GIVEN under my hand and the seal of the Court, this day of 19 .
Judge.

¹ Here insert the name of the proposed guardian.

No. 14,
REGISTER OF CIVIL SUITS (O. 4, R. 2.)
Court of the _____ at _____
Register of Civil Suits in the year 19 .

| PLAINTIFF | | DEFENDANT. | CLAIM | APPEARANCE | JUDGMENT. | APPEAL. | EXECUTION | RETURN OF EXECUTION. |
|--|--|------------|-------|------------|-----------|---------|-----------|----------------------|
| Number of suit. | | | | | | | | |
| Date of presentation of plaint. | | | | | | | | |
| Name. | | | | | | | | |
| Description | | | | | | | | |
| Place of residence. | | | | | | | | |
| Name. | | | | | | | | |
| Description. | | | | | | | | |
| Place of residence | | | | | | | | |
| Particulars. | | | | | | | | |
| Amount or value. | | | | | | | | |
| When the cause of action accrued | | | | | | | | |
| Day for parties to appear. | | | | | | | | |
| Plaintiff. | | | | | | | | |
| Defendant. | | | | | | | | |
| Date. | | | | | | | | |
| For whom. | | | | | | | | |
| For what, or amount. | | | | | | | | |
| Date of decision of appeal. | | | | | | | | |
| Judgment in appeal. | | | | | | | | |
| Date of application. | | | | | | | | |
| Date of order. | | | | | | | | |
| Against whom. | | | | | | | | |
| For what and amount if money. | | | | | | | | |
| Amount of costs. | | | | | | | | |
| Amount paid into Court. | | | | | | | | |
| Arrested. | | | | | | | | |
| Minute of other Re- turn than payment of arrest, and date of every re- turn. | | | | | | | | |

NOTE.—Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only, as the case may be, need be entered in the register.

Loc. Ans.—[Calcutta.] Cancel columns 20 to 27 of Form No. 14—Register of Civil Suits, Appendix H, Schedule I and substitute therefor the following columns :—

| EXECUTION. | | | | | | | RETURN OF EXECUTIONS. | | | | | | |
|---|--|---|--------------------------|-------------------------------|------------------|---|-------------------------|-------------------|--|--|--|--|--|
| No. of execution application as per execution register and the date of application. | Relief sought, if money, amount claimed. | Order and date thereof. If portion of relief not granted, what portion. | Against whom order made. | For what amount to be stated. | Amount of costs. | Adjustments and satisfaction reported, if any | Amount paid into Court. | Persons arrested. | Whether judgment-debtor committed to jail; if not, why not. If committed to jail, the period of stay in it | Minute of other return, other than arrest and payment. | Amount or relief still due and why execution petition is closed. | If petition infructuous, why and to what extent. | Appeal, if any, against order in execution and, if so, the result. |
| 20 | 21 | 22 | 23 | 24 | 25 | 26 | 27 | 28 | 29 | 30 | 31 | 32 | 33 |

[Madras]—Form No. 14 (O 4, R. 2).
(FORMS NOS 14 TO 25 OMITTED)

No. 15.

REGISTER OF APPEALS. (O. 41, R. 9.)

COURT (or HIGH COURT) AT

Register of appeals from decrees in the year 19 .

[illegible]

Loc Am. [Allahabad] Add the following forms Nos 16 to 18.—

No. 16 The security to be furnished under Order 25, Rule 1, shall be, as nearly as may be, by bond in the following form:—

In the Court of _____ at _____ of 19 _____
Suit No. _____ Plaintiff

VET.S45

Defendant.

WHEREAS a suit has been instituted in the said Court by the said plaintiff to recover from the said defendant the sum of rupees and the said plaintiff is residing out of British India (or is a woman) and does not possess any sufficient immoveable property within British India independent of the property in the suit

Therefore, I, inhabitant of _____, have voluntarily become security, and do hereby bind myself, my heirs and executors to the Judge of the said Court and to his successors in office that the said plaintiff _____, his heirs and executors, shall, whenever called on by the said Court, pay all costs that may have been or may be incurred by the said defendant _____, in the said suit, and in default of such payment I bind myself, my heirs and executors, to pay all such costs to the said Court on its order.

Witness my hand at _____ this _____ day of _____ 19____.

(Signed.) _____

Witness.

Surety.

No. 17.

ADDRESS FOR SERVICE.

Under Order VII, Rules 19 to 26; Order VIII, Rules 11 and 12; Order XLI, Rule 38; Order XLVI, Rule 8; Order XLVII, Rule 10; Order LII, Rule 1.

Original—No. of 19
or Case

VERSUS

Plaintiff

Defendant.

This address shall be within the local limits of the District Court within which the suit is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other province:—

| Name, parentage and caste | Residence. | Pargana or tahsil. | Post Office. | District. |
|---------------------------|------------|--------------------|--------------|-----------|
| | | | | |

Dated,

Any summons, notice or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party .. *Plaintiff.*
Defendant.
Appellant..
Respondent.

Or

I file the above address according to the instructions given by my client (name) (and capacity)

Signature of Bleader

N.B.—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

No. 18.

NOTICE OF CHANGE OF ADDRESS FOR SERVICE.

Under Order VII, Rules 19 to 26, Order VIII, Rules 11 and 12; Order XLI, Rule 18; Order XLVI, Rule 8, Order XLVII, Rule 10; Order LII, Rule 1

In the Court of the

Suit
Original—No
or Case

of 19 .

.. Plaintiff

versus

.. Defendant.

This address shall be within the local limits of the District Court within which the suit is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other province.—

| Name, parentage and caste. | Residence | Pargana or tahsil. | Post Office. | District. |
|----------------------------|-----------|--------------------|--------------|-----------|
| | | | | |

Dated,

Any summons, notice or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is again changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party .. *Plaintiff.*
Defendant.
Appellant.
Respondent

Or

I file the above address according to the instructions given by my client (name) (and capacity).

Signature of pleader.

N.B.—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

THE SECOND SCHEDULE.

ARBITRATION.

Arbitration in Suits.

1. [S. 506.] (1) Where in any suit all the parties interested agree that

Notes.

Schedule II: APPLICATION TO ENFORCE AWARD—APPLICATION TO RECORD COMPROMISE

—DISTINCTION.—When Court is asked to enforce the decision of another voluntary tribunal, the conduct of the tribunal should be under its guidance and subject to its control, and also subject to the special provisions laid down in Sch. II. If parties come to the Court with a cut and dried statement that the matters in dispute between them have been adjusted, O 23, R. 3, will apply; but if they state that though they have referred their disputes to arbitration they do not agree mutually to accept the decision of the arbitrator, then the matter is not governed by O 23, R. 3. In that case, there being no agreement, the matter must be governed by Sch. II. An agreement to go to arbitration and accept the award is not of such a nature that a decree can be passed in accordance therewith, and the award ultimately made by the arbitrator is in no sense a part of the agreement, as contemplated by O 23, R. 4. 14 P. 799=16 Pat L T. 280=1935 P. 243.

PROCEDURE GOVERNING ARBITRATION IN PENDING SUITS—Per *Agarwala*, 1—Sch. II contemplates two classes of arbitration, (1) those in pending suits, and (2) those regarding matters which are not the subject of pending suits. The former are governed by paras. 1 to 16 of that schedule, while the latter, which again fall into two classes, are governed respectively by para. 17 and paras. 20 and 21 of that schedule. So far as pending suits are concerned, the matter in dispute can be referred to arbitration only in accordance with paras. 1 to 3 of Sch. II; that is to say, the parties must apply to the Court in which the suit is pending for a reference to an arbitrator, the Court is then required to proceed to appoint an arbitrator and direct a reference to him. 14 P. 799=16 Pat. L.T. 280=1935 P. 243.

Para. 1: SCOPE OF THE SCHEDULE.—See 29 C. 167=29 I.A. 51. Schedule II does not apply to the award of an arbitrator under R. 22 of the Bengal Government Rules framed under S. 43 of the Co-operative Societies Act. 60 C. 906=37 C.W.N. 649=1933 C. 595 (2). Provisions of this schedule should be strictly complied with. 49 I.C. 262=1923 A. 65. But see also 49 M.L.J. 812 (P.C.); 1931 O. 127; 27 A.L.J. 31. They are permissive and not mandatory. 131 I.C. 443=8 O.W.N. 71=1931 O. 127. A party to an agreement after the arbitrator proceeds to evidence cannot withdraw from the arbitration. Court cannot compel a private arbitrator to arbitrate against his will. 43 A. 101=18 A.L.J. 952. There is no provision in Sch. II meeting an agreement to refer to arbitration which sets forth that any matters which

might in future arise between the parties might also be referred to the decision of the arbitrators on application of the parties. 1930 A. 319 (2). In order to ascertain whether an award can be set aside or not, it is necessary to refer not to R. 1 of Ch. XXIII of the High Court Original Side Rules, but to the substantive provisions of the Code. 38 C.W.N. 784. Charges of misconduct levelled against the arbitrator can be enquired into only when the award has been filed in Court. 58 C.L.J. 234.

FORM OF REFERENCE.—All parties interested must join in the application. See 47 C. 555; 27 C.L.J. 339; 42 M. 632=36 M.L.J. 538; 44 M.L.J. 359, 1929 L. 477=119 I.C. 235; 1930 M. 646=126 I.C. 735; 56 M.L.J. 35=1929 M. 31. Any agreement as contemplated by Sch. II, para. 1, between the parties should clearly set forth in the form of issues the matters in difference between the parties on which the arbitrators are required to arbitrate. 1930 A. 319 (2). A reference is bad if one interested party does not join. 17 M.L.J. 394, 29 A. 423; 64 I.C. 221, 79 I.C. 48. It is open to parties to refer to arbitration only some of the disputes in a pending suit and the expression of all parties interested can only refer to the parties interested in the subject-matter of the arbitration and not on the subject-matter of the whole suit where the two are not identical. 104 I.C. 342=1927 S. 239. Cl. (2) requiring application to be in writing is directory and not mandatory. 105 I.C. 105. See also 131 I.C. 443=1931 O. 127; 155 I.C. 290=1935 O.W.N. 642. The record of an agreement to refer to arbitration in the Court's proceedings, which are signed by both the parties and their respective pleaders, constitutes sufficient compliance with the requirements of para. 1 of Sch. II even though there is no written application to the Court by the parties. 1935 O.W.N. 1069=1935 O. 499. A verbal submission to arbitration is valid even though there is a likelihood of a question of title to immovable property being affected. 11 I.C. 481=14 C.L.J. 188; 34 I.C. 741=3 L.W. 375, 46 A. 208, 78 I.C. 378. When a reference to arbitration in a suit is a general one of the whole case the power of dealing with costs rests with the arbitrator. 46 I.C. 182. The parties could ratify a reference to arbitration though the procedure laid down has not been strictly followed by appearing before the arbitrator and giving evidence. 9 I.C. 412. A person having an option to avoid an award is deemed to have consented to it if he voluntarily submits to proceedings before arbitrators. 19 I.C. 374=6 S.L.R. 146; 9 I.C. 522. A Court executing a decree cannot refer a matter in the execution proceedings. 52 C. 559=87 I.C. 633.

ORAL APPLICATION.—A written application to refer to arbitration is not necessary. If

Parties to suit may apply for order of reference.

any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

Notes.

both parties consent to a reference to arbitration and the Court passes an order of reference to arbitration in their presence, though not upon a written application the order cannot be superseded and an award made thereon is valid and binding. 1933 R 407=12 R. 1

AGREEMENT TO REFER—PRESENTATION TO COURT.—A commissioner was appointed for the examination of witnesses; and on the day fixed for appearance before the commissioner, the parties presented to the commissioner an application addressed to the Court stating that they had agreed to refer their disputes to arbitration. Thereupon the Court made a reference under para. 1, Sch. II. *Held*, that the application to the commissioner was proper presentation to the Court and that the order passed thereon was correct 10 O.W. N. 1102=1933 O. 521=147 I.C. 855.

EXECUTION PROCEEDINGS.—Para. 1 lays down that all the parties interested in a suit may agree to a reference to arbitration. An execution proceeding is not a suit and therefore it does not entitle the parties to an execution proceeding to file an application for a reference to arbitration. Therefore, such arbitration proceedings are invalid and the Court is not entitled to enforce them. 1935 A. 125=4 A.W.R. 1366. *See also* 152 I.C. 397=1934 A.L.J. 1181=4 A.W.R. 890. The decision by the Court although in the alleged capacity of an umpire, cannot be said to be non-appealable but it must be held to be a decision of the executing Court appealable under S 47, C.P. Code. I.L.R. 1937 B 144=38 Bom.L.R. 1303=1937 B. 111. As to applicability of this para. 1 to objections under O 21, R. 58, *see* 1936 A.W. R. 251=1936 A.L.J. 142

INSOLVENCY PROCEEDINGS.—A Court cannot refer to arbitrators a proceeding in insolvency (88 P.R. 1887, *Ref. to*) 50 P.R. 1916=34 I.C. 549

OMISSION TO SIGN THE PETITION.—Para. 1 does not require an application in writing for an order of reference to arbitration should necessarily be signed by the parties to the suit agreeing to the reference 43 C 290=43 I.A. 1=20 C.W.N. 137=30 M.L.J. 67 (P.C.); 11 I.C. 481, 34 I.C. 741, 46 A. 208; 78 I.C. 378; 48 A. 237=24 A.L.J. 235=1926 A. 238; 1929 A. 763=52 A. 84, 56 M.L.J. 35, 38 I.C. 226; 133 I.C. 606=1931 A.L.J. 904. *See also* 1933 R. 407=12 R. 1. Where nobody signs on behalf of a party and nobody professes to verify the petition before the Court on his behalf, he is not a party to the reference to arbitration. 130 I.C. 291=1931 A.L.J. 100=1931 A. 242 (1).

MINOR PARTIES.—Where one of the parties to a suit was an infant, the agreement to refer was signed by the adult parties and by the guardian *ad litem* of the infant, and all

the parties, including the guardian, appeared before the Judge and he thereupon made an order of reference, the order was proper and the award thereon was not vitiated. 43 C. 290=43 I.A. 1=30 M.L.J. 67 (P.C.). Para. 1 is subject to the provisions of O. 32, R. 7. Where one of the parties to the suit is a minor, the leave of the Court for the agreement to refer the suit to arbitration should be obtained before an application for an order of reference is made. Such leave cannot be granted by the Court after the award has been delivered. 1936 A.L.J. 1333=1937 A. 65 (F.B.). The omission of the next friend or the guardian *ad litem* of the minor to obtain leave of the Court does not render the order of reference and the award void, but only voidable at the option of the minor as against all the parties. Such an order of reference and the award can be assailed by the minor either in the suit itself or by a separate suit (*Ibid.*) But *see contra* 36 A. 69 (F.B.), 1936 A.L.J. 53=1936 A. 740. When a guardian *ad litem* has been appointed for a minor it is the guardian alone who can represent the minor in all proceedings in that suit and where the Court refers the matter to arbitration, it must ascertain if the guardian agrees to such a course. 1930 A.L.J. 923=1930 A. 646 A natural guardian can, on behalf of a minor, enter into an arbitration so as to be binding on the minor if it is proper, reasonable and for the benefit of minor 44 B 202=22 Bom.L.R. 266, 11 I.C. 481=14 C.L.J. 188, 56 I.C. 593, 29 I.C. 800=8 Bur.L. T. 122. A minor is bound by an agreement of arbitration entered into by his predecessor-in-title 50 I.C. 879=23 C.W.N. 293, 11 I.C. 481=14 C.L.J. 188 Where a minor, party to a reference, is not properly represented and his guardian fails in his duty to protect his interests, the award is not binding on the minors. 56 I.C. 593 Where some of the parties to a reference to arbitration are minors, it is the duty of the Court to ascertain if the reference is for the benefit of the minors 15 S.L.R. 165=64 I.C. 50.

AUTHORITY OF PLEADERS.—Pleader must be expressly authorised to refer a matter. 36 C.W.N. 8=1932 C. 343; 29 A. 492. Unless he is authorised his signature will not bind his client. 29 A. 423. *See* 104 I.C. 202=1927 L. 362 One pleader appearing for another pleader cannot make a valid reference. 96 I.C. 277=1926 L. 563. The authority need not be in writing of the parties consenting to the reference 23 B. 629. If a party knows about it and acquiesces in it, he cannot afterwards raise objection. 29 A. 429

PARTIES—EFFECT OF NON-JOINDER OF SOME PARTIES.—When some of the defendants to a suit do not join in a reference to arbitration, Court should examine the facts of each case before coming to the conclusion that the arbitration is invalid. 39 A. 489=15 A.L.J.

(2) Every such application shall be in writing and shall state the matter

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427, 11 C. 37. See also 122 I.C. 100=1930 L. 523; 118 I.C. 906; 117 I.C. 783. Where an award is declared invalid because one of the parties to the proceeding did not join in the reference the award cannot be upheld in part if the decree is a joint one. 130 I.C. 291 =1931 A.L.J. 100=1931 A. 242 (1). (2 P. 777, Dist.) But see 133 I.C. 31=1931 A.L.J. 442=1931 A. 453. In making a reference to arbitration, if the parties against whom proceedings have been taken *ex parte* or who did not appear at the trial have not joined, the reference to arbitration is invalid and the award is wholly void. 119 I.C. 235=1929 L. 477. See also 31 Punj.L.R. 55=121 I.C. 378, 1930 M. 646; 56 M.L.J. 35. Objections to award on the ground of invalidity from any cause whatever should be decided by the Court which has made the order of reference to arbitration and by no other Court. 39 A. 489.

UNNECESSARY PARTIES.—A Hindu widow in possession of property in lieu of maintenance is not a necessary party to a suit for partition, and her not joining in a reference to arbitration in such a suit does not vitiate the award. 35 A. 107=11 A.L.J. 66.

NON-CONTESTING PARTIES.—A reference to arbitration between the plaintiff and the contesting defendants is not rendered invalid by reason of the non-concurrence therein of a non-contesting defendant. Further, where the non-contesting defendant has by his subsequent conduct consented to the reference by being present throughout the whole of the arbitration proceedings, it is not open to him or to the plaintiffs to maintain that he was not a party to the arbitration. 148 I.C. 1168=4 A.W.R. 852=1934 A.L.J. 694=1934 A. 658.

DEATH OF A PARTY.—The death of one of the parties to an arbitration does not necessarily revoke the authority of the arbitrator. 33 A. 645=8 A.L.J. 678; 14 C.L.J. 188=11 I.C. 481; 15 C.L.J. 360=13 I.C. 161. Whether death of the parties who had signed a reference to arbitration is itself enough to bring their agreement to an end. 143 I.C. 635=1933 S. 68.

WHO IS AN INTERESTED PARTY.—See 24 A. 229, 32 A. 657; 39 A. 489, 27 C.L.J. 939; 25 C.L.J. 339; 1929 A. 763=52 A. 84. A reference to arbitration by parties who are interested in the subject-matter in difference between them is a good reference, and the award made thereon is a legal one. In order to find out whether the parties have interest in the subject-matter in difference it is necessary to see the nature of the suit in which that question is raised and not the possibility of their having any interest in a future litigation which may arise as the result of the decree in the suit. 148 I.C. 512=1934 P. 19. If all the parties interested at the time of the reference have not joined in the reference, the reference is invalid. 8 A.L.J. 645=10 I.C. 559; 71 I.C. 326=1924 C. 353; 21 C.W.N. 387; 102 I.C. 26. Subsequent agreement cannot make the reference valid. 48 A. 239=24 A.L.J. 235=1926 A. 238. A matter was referred to arbitration

by some of the defendants and plaintiff. The other defendants who did not join in the reference were *ex parte* but were highly interested parties. *Held*, that the Court had no jurisdiction to make the reference and that the award and decree passed thereon were invalid. 10 O.W.N. 790=147 I.C. 189=1933 O. 384. The fact that a defendant to a suit has not appeared and that the suit has been ordered to proceed *ex parte* is a question of fact to be considered when the question of his interestedness, in the case of a reference of the subject-matter of the suit to arbitration, is to be considered; but it is not necessarily in itself a final and conclusive answer. Where the Court treats such circumstances as final and conclusive on question of interestedness, there is a failure to exercise jurisdiction which is open to revision. 159 I.C. 188=1935 S. 212. A suit was filed against two persons described as owners of a firm. The summons issued to them was taken by a son of one of them who was managing the firm, and written statement was filed by him on their behalf. The case was referred to arbitration at the instance of plaintiffs and this person and award was made. *Held*, that though the son had no power to refer to arbitration and as such the reference was not proper, still as he was managing the business, substantial justice was done and that the award could not be interfered with. (1926 A. 238, Ref.) 1933 A. 924=147 I.C. 746. The plaintiff brought a suit for the recovery of Rs. 210 on foot of a promissory note alleged to have been executed by the first defendant in favour of the second defendant from whom the plaintiff took an assignment of his rights under the promissory note. The relief claimed against defendant No. 2 was that in case defendant No. 1 be found to have made any payment to the second defendant in respect of the promissory note, a decree may be passed for that amount against defendant No. 2. When the suit was pending, a reference to arbitration was made by the plaintiff and the first defendant only and an award was passed. *Held*, that the second defendant was not a *pro forma* defendant; he was as much interested in meeting the defence of the first defendant as the plaintiff himself, because if the first defendant's plea prevailed, the second defendant would be exposed to a claim for damages by the plaintiff. So the reference to arbitration in which the second defendant who continued to be a party to the suit did not join and the award passed in pursuance thereof were invalid. 1933 A.L.J. 602=1933 A. 739. A reference, however, made by father of a joint Hindu family is binding on sons unless fraud is proved. 104 I.C. 202=1927 L. 362. See also 12 Pat.L.T. 733. Where a claimant objects to the attachment of property in execution of a decree and the matter is referred to arbitration judgment-debtor is a necessary party to the reference. 64 I.C. 469. A person who is not a necessary party is not a person interested

sought to be referred.

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within para. 1. 42 M. 632=36 M.L.J. 538. A Court has no jurisdiction to make an order of reference without consent of all the parties, and an award made on such reference is illegal. 55 I.C. 747=47 C. 555=31 C. L.J. 150; 43 I.C. 169=27 C.L.J. 339, 25 C.L.J. 339=21 C.W.N. 387; 61 I.C. 221; 9 C.W.N. 873, 61 I.C. 451; 45 I.C. 321; 49 A. 812=25 A. L.J. 606=1927 A. 563. It is not part of the authority of one partner of a firm to refer a suit to which the firm is a party to arbitration. 36 C.W.N. 8. (48 A. 239.) A partner of a firm cannot enter into an agreement to refer on behalf of a firm unless all the parties join. 133 I.C. 558. See also 148 I.C. 1080=34 P.L.R. 417=1934 L. 483, 34 Bom.L.R. 1112. If some of the partners do not join in submitting a dispute to arbitration the award does not become invalid or ineffectual as between the persons making the reference. It is binding on them especially when it has been acted upon. 134 I.C. 99. Whether an order of reference to arbitration made by the Court on application of the plaintiff and one of the defendants is legal, see 44 I.C. 480. A defendant who is *ex parte* may be a party "interested" within Sch. II, Para. 1. 42 M. 632=36 M.L.J. 538, 22 L.W. 395=1925 M. 1209, 96 I.C. 273 (1)=23 L.W. 769, 50 M.L.J. 100. An award is not invalid because certain defendants having no interest in the suit or only nominally on the record do not join in the reference to arbitration by the other parties. 36 M. 353=21 M.L.J. 990, 76 I.C. 2=5 Pat L.T. 239=2 P. 777, 48 A. 239=1926 A. 238=24 A.L.J. 235. But see 48 M.L.J. 142=1925 M. 621. A person having a limited interest in the land cannot by a reference to arbitration confer on the arbitrator an authority to alienate a more extensive interest than he himself has. 25 I.C. 949.

PRIVATE TRUST.—Where two parties were litigating in their own right, claiming that each of them was of right entitled to the muth, and there was nothing to suggest that the muth was of the nature of public charity and that income was to be spent on public purposes and was neither a religious order nor confined to the benefit of a group of persons belonging to that order and the parties did not ask the Court to appoint a trustee on the supposition that the office was vacant, *hild*, the dispute must be deemed to be of a private nature and reference to arbitration of such a dispute was neither illegal nor forbidden by law or contrary to any well-known rule of public policy. 151 I.C. 148=1934 A.L.J. 711=1934 A. 368. Suit under S. 92—Reference to arbitration—Legality of—Suit regarding private rights to property—Issue raised to public rights—Arbitration—Reference to—Jurisdiction of arbitrators—Declaration in award that property is trust property—If illegal—Scheme for administration—Jurisdiction to frame. 30 S.L.R. 478.

RESTITUTION OF CONJUGAL RIGHTS.—There is no provision of law which excludes a suit for restitution of conjugal rights from the

purview of Sch. II. Though it is entirely within the discretion of the Court to grant or refuse to grant a decree for restitution of conjugal rights, there is no warrant for holding that such a suit does not come within the ambit of Para. 1, and that such a suit cannot be referred to arbitration even when all the parties interested agree to have the dispute settled by arbitration. 152 I.C. 90=11 O.W.N. 1203=1934 O. 494.

PRIVATE REFERENCE.—Parties can refer disputes to private arbitration though a suit between them is pending. They need not apply to Court for the purpose. 33 I.C. 67=19 M.L.T. 328; 23 M.L.J. 290=16 I.C. 478. See also 27 A. 53. But see 30 C. 218, 37 C. 63, 29 C. 167. But the same arbitration cannot relate to matters within and without jurisdiction between parties and non-parties and partly under agreement and partly under order of reference. 53 C. 258=53 I.A. 1=92 I.C. 633=1925 P.C. 293 (P.C.). Though some of the parties have not joined in the reference of the dispute to arbitration, the award does not become invalid or ineffectual as between the persons making the reference. The award is binding on them especially when it has been acted upon. 71 I.C. 860.

REFERENCE TO COURT.—When a suit is not maintainable under the law an agreement by a party to abide by the decision of the Court cannot be binding. 21 I.C. 958=19 C.W.N. 1141. The parties may appoint Court as arbitrator and if the Judge accepts, his award is final and is not open to appeal. 26 M. 76, 23 B. 752, 37 M.L.J. 100, though the Government orders prohibit such acceptance. 44 M.L.J. 258; 43 A. 266. See also 42 M. 625, 38 C. 421. In case of reference to Chamber of Commerce, Rules of the Chamber are binding on the parties. See 30 I.C. 681=42 C. 1140=19 C.W.N. 820.

SUBJECT OF REFERENCE.—"Matters in difference"—Meaning of. See 33 Bom L.R. 51=130 I.C. 588. A portion of the claim under reference to an arbitration cannot be withdrawn without the consent of the other party. 46 I.C. 477=28 C.L.J. 275. The jurisdiction of Courts to refer to arbitration is confined to matters in difference in the suit itself. 14 L.W. 666=65 I.C. 92. An award under an invalid reference being itself invalid gives no rights either as an award or as a compromise. (*Ibid*) Where parties apply to Court to refer to the arbitration of a particular person the words used in the application should not be interpreted in a narrow sense but should be taken to mean that the parties are desirous of having the whole dispute settled by the arbitrator and therefore he could award damages. 15 I.C. 321.

VALIDITY OF REFERENCE.—Validity of reference—Pending reference to High Court—Jurisdiction—Separate suit, if lies. 19 A. L.J. 876=44 A. 91. Award—Reference to three persons one of whom was authorized to report decision to Court—Statement filed by one, is an award. 1933 A.L.J. 149. The provisions of Para. 1 must be strictly complied

2. [S. 507.] The arbitrator shall be appointed

Appointment of arbitrator in such manner as may be agreed upon between the parties.

3. [S. 508.] (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine,

Order of reference. and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

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with in order that there might be a valid reference 25 C.W.N. 832 See also 60 I.C. 195=24 C.W.N. 775. Where a pleader signed a reference on behalf of a party but his vakalat-nama did not contain a power to refer to arbitration, *held*, the reference was not valid so far as that party is concerned 25 C.W.N. 832. Successive disputes as they arise may be referred, and successive awards passed. 60 I.C. 195=24 C.W.N. 775 To constitute a valid reference to arbitration it is enough if all the parties to suit interested in the subject-matter agree to the reference. 44 M.L.J. 359=17 L.W. 424=1923 M. 502 Not only the writing out an application to refer a pending suit to arbitration but the presentation of it must have the concurrence of all parties concerned. In other words, the parties interested must not only agree to refer the matter in difference between them to arbitration but they all must also apply to Court for making an order of reference 142 I.C. 678=34 P.L. R. 247. High Court will not interfere in revision with an award on the ground that certain exonerated defendants were not parties to the reference when no such objection had been taken to the award in the Court below 44 M.L.J. 359, *supra*. Absence of one of the arbitrators at one of the meetings at which, it is shown that nothing material was done, does not make the award invalid. 12 L.W. 505=60 I.C. 181.

REVOCATION OF REFERENCE—It is within Court's jurisdiction on equitable grounds to restrain defendant from proceeding to arbitration when an action brought impeaches the instrument containing the agreement for reference 70 I.C. 864=15 S.L.R. 5 Where parties have once agreed to a submission to arbitration the agreement is binding and enforceable and cannot be annulled except for some such reason as that the agreement had been obtained by fraud, coercion or undue influence. He cannot revoke it at his sweet will and pleasure. The fact that one of the arbitrators figured as a witness for the prosecution in a security proceeding against the party is no ground for its revocation 137 I.C. 198=1932 A.L.J. 331=1932 A. 348. It is not open to a party to an agreement of reference to revoke the submission to arbitration except for good cause. "Sufficient cause" is not confined to cases of fraud, coercion and undue influence. The fact that the arbitrator is related to one of the parties as the brother of his son-in-law does afford a real likelihood of an operative prejudice on his part, and the existence of such relationship with one of the parties unknown to the other disqualifies him from acting as an arbitrator.

(1925 S. 150, Rel. on.) 143 I.C. 635=1933 S. 68 After agreeing to refer, either party has a *locus penitentiae* to withdraw before the order of reference is made and he may take advantage of it. 142 I.C. 678=34 P.L. R. 247. See also 27 I.C. 424; 29 C. 278; 27 M. 112; 4 P.L.J. 394.

Para. 2.—In order that a reference may be made under R. 2 all parties must join in the application to Court. It is not enough if the petition is signed by all. 17 P.R. 1911=9 I.C. 195. In selecting arbitrator good faith is essential 1933 S. 68. In cases of arbitration where a person is appointed by two parties to exercise judicial duties there should be *uberrima fides* on the part of all parties concerned in relation to his selection and appointment and every disclosure which might in the least affect the minds of those who are proposing to submit their dispute to the arbitrament of any particular individual, as regards his selection and fitness for the post ought to be made, so that each party may have every opportunity of considering whether the reference to arbitration to that particular individual should or should not be made (25 C. 141, *Foll.*) 143 I.C. 635=1933 S. 68 The Commissioner merely submits his report for the approval of the Court and he has no greater power than what the parties and the Court choose to give him. 25 I.C. 227.

Para. 3 MATTER IN DIFFERENCE.—When the order states that "all matters in difference in the suit are referred," the arbitrators should ascertain upon what points the parties are at issue 2 N.W.P. 150, 33 Bom. L.R. 51. If Court wants to appoint an arbitrator under Sch. II, it is bound to pass an order to that effect and fix a date for return of award and also for objections being filed. 1929 M. 789 After Court has, on the application of parties, referred a pending suit to arbitration, its power to further deal with the case is of a very limited nature, as for example, if there is no occasion to remit the award under para. 14 and if a party's application to set aside the award under para. 15 is dismissed, Court can act, if at all, under para. 12 only. 1930 L. 26. Where reference to arbitration was made by parties after the suit was disposed of by trial Court and before appeal was filed, *held*, that the award was immune from the objection that unless proceedings before arbitrators are stayed under para. 18, there might be a clash between the decision of the Court and of the arbitrators. The award is enforceable if appeal is subsequently withdrawn. 7 O.W. N. 815=1930 O. 432. Where a dispute is referred to arbitrators through Court, the

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit.

Where reference is to two or more, order to provide for difference of opinion.

4. [S. 509.] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

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scope of their enquiry is the scope of the suit itself as disclosed by the pleadings and they have no jurisdiction to extend it either as regards the subject-matter or the persons affected by it. Both the arbitrators who so exceed their duties and the Court itself which nevertheless passes a decree in terms of the award are acting in excess of their jurisdiction 38 L.W. 927=1933 M. 862=65 M.L.J. 755 The decision of arbitrators upon a matter not in difference between the parties and not referred to them, is null and void 15 W.R. 172. Arbitrators have no implied power to deal with question of costs. 9 B. 82. See also 54 A. 122=136 I.C. 789=1932 A. 183. Court will not confirm an order made by arbitrators making payment of their fees a condition precedent to hearing their reference. 6 C. 809 On this rule, see also 1929 B 51=114 I.C. 262=30 Bom.L.R. 1588. Suit cannot be dismissed for default for plaintiff's absence on the day fixed for submission of umpire's report 1937 Pesh. 49

MAKING OF THE AWARD.—The word "making" has been substituted for the word "delivery" to give effect to the decisions in 22 M. 22, 26 A. 105 See also 13 B. 119. The parties to a partition suit made a statement in Court to the effect that three persons named by them should decide the case and that the case might be referred to them. They further said that any one of the three gentlemen might come to Court and state what was the decision arrived at by the three gentlemen to whom the case was referred. This was done and accordingly one of the three gentlemen appeared before the Court and made a statement on oath and he stated that he had consulted his other colleagues and had taken their signatures also on the written judgment *Held*, that this was a reference to arbitration and that the statement of the person was an award and not merely a statement made under Oaths Act. 145 I.C. 403=1933 A.L.J. 149=1933 A. 313.

Para 3 (2).—Clause (2) has the effect of rigidly restricting Courts to the exact procedure laid down in this schedule. 10 B. 381

PRACTICE AND PROCEDURE.—Court has power to refer a question of jurisdiction, namely, whether the cause of action arose in one place or another, to the arbitrator 54 A. 297=1932 A. 665 It is the duty of Court to appoint a date within which to make the award 46 I.C. 324=5 O.L.J. 205. See also 13 A. 300; 18 M. 22. Where Court had fixed no time for making award but had fixed one for filing it, *held*, that the award filed before the latter date is not invalid. 20 I.C. 773=16

O.C. 233 See also 46 I.C. 324=5 O.L.J. 205; 37 I.C. 844. Where costs incurred prior to reference to arbitration were also referred but arbitrators in delivering award did not deal with the question of costs, *held*, that Court could not subsequently deal with the question of costs because once the reference was made Court became *junctus officio* regarding that matter. 54 A. 122=1931 A.L.J. 1155=1932 A. 183. Time for submission of award—Extension by arbitrators themselves—Propriety of. 27 C.W.N. 420=1923 C. 410. Where the whole case is referred to the arbitrator and he is called on to decide all questions that were in dispute between the parties, the fact that the Court failed to frame issues noting the points in dispute between the parties and refer them specifically does not matter. 54 A. 297=1932 A. 665. The law gives parties the right to have the matter submitted to arbitration at any time before the judgment is pronounced. 24 I.C. 610. A party cannot resile from a reference to arbitration at his sweet will and pleasure. 17 O.C. 386=27 I.C. 424 See also 137 I.C. 198=1932 A.L.J. 331=1932 A. 348. If parties agree that a reference be withdrawn and if the arbitrator also agrees, Court should supersede the arbitration. The fact that subsequently plaintiff and arbitrator reconsidered their previous resolve in concurrence with defendants cannot revive the reference which has come to an end. Nothing short of a fresh agreement to refer can invest the arbitrator with power to decide the controversy between the parties. The authority of arbitrator, having been revoked by both the parties with his consent, cannot be re-conferred upon him by only one of the parties and the Court. Any award made in such circumstances cannot be upheld as a valid award. 150 I.C. 222=1934 A.L.J. 473=1934 A. 95. By adding a new para 2 [i.e., Sch. II, para. 3 (2)] to S. 508 of the C.P. Code, 1882, the legislature did not deprive the Court of all its powers over an arbitration proceeding under its order except in the cases incorporated in paras 5, 8 and 15 of Sch. II. On the other hand, the Court has jurisdiction, in a proper case, to grant leave to revoke an arbitration on good cause being shown, although such jurisdiction has to be exercised with great care and caution 36 Bom.L.R. 827=1934 B. 388. The appropriate time for entertaining charges of misconduct against an arbitrator is when the award has been filed. 27 C.W.N. 420=1923 C. 410

Para. 4.—An award is not invalid in case the order of reference does not provide for a difference of opinion between the arbitrators, when there is no difference of opinion

- (a) by the appointment of an umpire; or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or
- (c) by empowering the arbitrators to appoint an umpire; or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

Power of Court to appoint arbitrator in certain cases. 5. [S. 510.] (1) In any of the following cases, namely:—

(a) [S. 507, cl. (2).] Where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or

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among them. 17 W R 30. That there is no provision made for the appointment of an umpire in case of difference of opinion among arbitration, does not make the submission bad on that account. 13 I C. 161=15 C L.J. 360. Award of umpire without consultation with arbitrators is good. 55 P R. 1915=30 I C. 87. There is nothing in law which prevents an umpire when there is a difference of opinion between the arbitrators from deciding the case entirely on his own opinion 144 I C 1020=1933 L. 587. An arbitrator cannot be an arbitrator as well as an umpire 138 I.C 651=36 C.W.N 332=1932 C. 491. In case where arbitrators are empowered to appoint an umpire from seven persons named in the order of reference, they cannot appoint a person not named 7 M.H.C.R. 72. A majority award is not bad even in the absence of a specific provision to that effect in the reference 40 I.C. 646=21 C.W.N. 895. But see next case. Where a dispute is referred to several arbitrators and the deed of reference does not provide for the prevalence of the views of the majority in the case of the decision not being unanimous, a majority award cannot be maintained. 49 I.C. 522 Where parties have entered into an agreement to be bound by the opinion of the majority of arbitrators, the omission of the Court to record that fact in the order of reference does not vitiate the arbitration. 23 I.C. 842 In the absence of a clause providing for an award made by less than all being valid, each of them must act personally as if he were the sole arbitrator. For as the office is joint if one refuse or omit to act, the others can make no valid award. 17 I C. 320=16 O.C. 94 In case no provision is made that the decision of the majority of arbitrators should be binding, and two out of five arbitrators withdraw a decision by the majority is invalid 7 M. 174; 4 M. 311, 17 B. 129 The parties to a suit agreed that three gentlemen could be appointed arbitrators and one of them should be appointed 'sarpanch' and they should decide the case. No provision was made for any difference of opinion The arbitrators could not agree and there was a majority of 2 to 1. Held, that as no umpire was appointed in the case it was necessary that there should be a

unanimous decision for a valid award to be made. 1934 A.L.J. 66=147 I C. 623 (1)=1934 A. 109 (1).

Para. 4 (2).—The Court can extend the time allowed. 4 M. 311.

Para 5: SCOPE.—An arbitrator is a Judge chosen by the parties themselves and a Court should not thrust an arbitrator on an unwilling party except under circumstances laid down in R. 5 51 A. 501=27 A.L.J. 182=115 I.C. 611=1929 A. 144. The section applies to cases where arbitrator accepts and afterwards refuses to act. 6 M. 414; 18 C. 324 (327). See also 31 P L R 386=1930 L. 125, 1929 B. 51 Where arbitrator refused to act and Court acting *suo motu* superseded the reference to arbitration, held, that order superseding arbitration was contrary to law and that it should be set aside. 7 O W.N. 1043 A reference to arbitration stands on the same footing as all other lawful agreements and cannot be revoked by a party except on good cause. 22 I.C. 548=1914 M. W N. 52. See also 64 I C. 459=19 A.L.J. 823. Where in fact reference to arbitration has become impossible and by implication Court has superseded it, the jurisdiction of Court to try the issue between the parties is not affected. But where the proceeding is still pending before the arbitrators, Court has no jurisdiction to try the case. 5 Pat.L.J. 672=57 I C 473, 16 I C. 277=10 A.L.J. 23 Court can revoke an arbitration only in the case specified in paragraphs 5, 8 and 15. 39 M.L. T. 195=105 I C. 92=1927 M. 110. The fact that one of three arbitrators gave evidence before the others, does not constitute misconduct on the part of the arbitrators so as to vitiate their award. 40 I C. 646=21 C.W. N. 895 Where one of the parties to an arbitration deliberately absents himself from the hearing, the award concluded in his absence is not bad. (*Ibid*) "Refuses to act", meaning of 7 A. 20, 7 A. 523; 10 A. 137; 1 A.L.J. 683. The mere fact that an arbitrator has declined to sign an award made by a majority of arbitrators does not show that he has refused to act. 1 A.L.J. 683. A refusal to accept by some arbitrators makes the award of the rest illegal 21 M.L.J. 263=9 I.C 173 (F.B.) The appointment of a new arbitrator in place of one who refused to

(b) where an arbitrator or umpire

(i) dies, or

(ii) [S. 510.] refuses or neglects to act, or becomes incapable of acting, or

(iii) leaves British India in circumstances showing that he will probably not return at an early date, or

(c) [S. 511.] where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit.

Notes.

act must be made by both the parties. 112 P.R. 1918=48 I.C. 395

Para 5 (1) (b).—According to the true construction of para. 5 the Court may appoint a new arbitrator in the place of one who has refused nomination, for that is a refusal to act within the meaning of the section (6 M 414, 18 C. 324, overruled.) 33 A 743=38 I A 181=21 M L.J. 1151 (P C). The power of Court to appoint an arbitrator in the place of one who refuses to act arises, not on the refusal, but only on the failure of one of the parties to appoint a new arbitrator after formal notice to do so (17 M. 498, Dist.) 134 I C 733=33 Bom.L.R. 1022=1931 B. 529. Court appointing fresh arbitrator, on refusal of first arbitrator, without issuing notice to the other party acts with material irregularity. 50 I C 655=17 A L J 643 Whether non-compliance with para 5 is an irregularity or illegality, *see* 1931 A L J 682 =1931 A. 761. An arbitrator failing to submit his award within the time fixed may be held to have refused or neglected to act within para 5 (b) so that if another arbitrator is appointed without formally discharging the former, the appointment cannot be questioned 23 I.C. 842. Where two arbitrators were appointed to decide a case and one of them withdraws pending the arbitration the remaining arbitrator cannot proceed with the case and file an award 56 I.C. 644=2 Lah.L.J. 637; 17 I.C. 389=24 M. L.J. 15.

BECOMES INCAPABLE OF ACTING.—When a person goes away from the country and remains away, and there is no evidence to show an intention to return, that person becomes incapable of acting. 4 Beng L.R. (O C) 89. Arbitrators could not delegate the powers conferred on them 17 B 129 The performance of acts of a ministerial character may be delegated 29 C. 854 (P. C.). Where only one arbitrator is appointed to decide a matter, no umpire can be appointed 25 W.R. 11.

Sub-para (2).—*See* 1 C. 200; 11 M. L.J. 128; 23 W.R. 221; 6 C L R. 1, 24

A. 312; 16 I.C. 177=10 A L.J. 23 When the agreement to refer does not give Court any power to appoint an umpire, Court could not appoint one. 8 A. 64 Where parties had agreed that the case should be decided by arbitration and counsel for parties made statements before Court giving the names of the two persons who were to be appointed arbitrators, but the statements were silent as to what was to happen in case both the persons refused to act and there was no express provision that Court would have no power to appoint a third arbitrator and that the suit must be decided on the original side and Court appointed a third arbitrator on refusal of named arbitrators to act, *held*, (i) that the power conferred upon Court under Para 5 (2) existed and was not contrary to any agreement between the parties, (ii) that by leaving the question open the parties obviously intended that the ordinary statutory powers would be enforced in the case of a deadlock 151 I C 148=1934 A L J. 711 =1934 A. 368 When a party selects an arbitrator he cannot subsequently ask Court to select another on the ground that the arbitrator whom he selected turned out to be a friend of the opposite party. 3 A.L.J. 185. Where a Court appoints a fresh arbitrator without complying with the formalities prescribed in para. 5 (2), the appointment is without jurisdiction or at least tainted with material irregularity, and the order appointing the arbitrator can be set aside in revision. 146 I C. 493=1933 O. 540

Paras. 5, 8 and 15: SCOPE—IF EXHAUSTIVE—POWER OF COURT TO REVOKE ARBITRATION—EFFECT OF PARA. 3 (2)—Paras. 5, 8 and 15 do not exhaust the cases in which a Court can revoke an arbitration. Para 3 (2) does not deprive Court of all its powers over an arbitration proceeding under its order except in the cases mentioned in paras 5, 8 and 15 The Court has jurisdiction in a proper case, to grant leave to revoke an arbitration on good cause being shown 36 Bom L R. 827=1934 B 388

Paras. 5 and 17 (4).—An agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more

Powers of arbitrator or umpire appointed under paragraph 4 or 5.

6. [S. 512.] Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

Summoning witnesses and default.

7. [S. 513.] (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

8. [S. 514.] Where the arbitrators or the umpire cannot complete the

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of the arbitrators refuses to act, thus making the agreement incapable of performance, Court in such a case has no jurisdiction under para. 17 (4) to make a reference to arbitrators who are willing to act. It can only make an order of reference if, on the date of such order, the arbitrators appointed in accordance with the agreement are willing to act as such. Though it has power under para. 5 to appoint arbitrators in the place of those refusing to act, that can be done only after the order is made, because para 19 comes into operation only when there is an order of reference already made by it. 151 I. 1001=11 O.W.N. 1188

Para. 6. ARBITRATOR IS NOT BOUND TO FOLLOW TECHNICAL PROVISIONS OF EVIDENCE ACT—An arbitrator is not bound to follow the technical provisions of the Evidence Act and his decision cannot be challenged on the ground that he relied upon document not admissible under the Act 120 I.C. 494=1930 L. 280 (2). An arbitrator is fully justified in rejecting in part the case set up by either party and ascertaining the real facts according to his own view of the evidence. A counsel is not entitled to attack the findings of facts given by the arbitrator on the evidence led by the parties. Whether his conclusions are right or wrong is not a matter which is open for consideration by trial Court or appellate Court on revision. 120 I.C. 494=1930 L. 280 (2).

Para. 7—There is nothing illegal in parties to an arbitration agreeing before Panchayatdars to have evidence taken after the administration of any reasonable form of oath to witnesses. 29 I.C. 49=2 L.W. 320 The words "refusing to give their evidence" are intended to refer to the case of a person who refuses to give evidence when placed on oath and required to answer questions put to him 11 I.C. 259=8 A.L.J. 929.

Para 8.—The time for filing an award may be extended by Court either before or after the expiration of the period fixed for the making of the award. But the extension must be made before the award is delivered 45 B. 1071=23 Bom.L.R. 614; 9 I.C. 241; 14 A. 343. Where the arbitrator returned the

papers to Court stating his inconvenience to proceed with the matter on the due date but he never declined to arbitrate, held, that Court had jurisdiction to send the papers back to arbitrator and extend the time 54 A. 297=1932 A. 665. Application for extension of time must be made in writing. 3 M. 59. Power of extending time is permissive and discretionary, and the provision does not negative the right to extend time by agreement and acquiescence of parties. 50 I.C. 52=4 P.L.J. 265. An order of a Court permitting the arbitrator to enlarge time for making an award is not *ultra vires* and there is no objection to Court's delegation with consent of parties, functions regarding enlargement of time. 31 I.C. 597=19 C.W.N. 165 Such a consent would be inferred from the fact that the parties conducted the case and took a willing part in the proceedings before the arbitrator, though the date fixed for the filing of the award had expired. (50 I.C. 52 Foll.) 163 I.C. 380=1936 L. 466 Where Court leaves it to the discretion of arbitrator to complete the award within a reasonable time and he does so, it cannot be said that there has been substantial miscarriage of justice merely because Court did not fix any time within which award was to be submitted. 163 I.C. 590=1936 R. 240 An award not delivered within the time fixed by Court is a nullity. 55 I.C. 221 But see 27 I.C. 233=18 C.W.N. 325. Award filed after the time fixed—Not a nullity. 34 I.C. 177=56 P.L.R. 1917. See also 52 I.C. 352 On an application for extension of time, Court is entitled and bound to take all the circumstances of the case into consideration, including allegation of misconduct of arbitrators, without deciding whether those allegations are true or not, and also whether any good could be gained by giving further time or whether the arbitration is to be superseded 146 I.C. 1081=1930 P. 566 If arbitrators do not submit their award within time, Court may supersede the arbitration and proceed with the suit 57 I.C. 890. When the Court without extending the time for submission of an award proceeded to deal with the suit, there was in effect an order superseding arbitration and no formal order to the effect was necessary. 21 I.C. 558=1913 M.W.N. 863. See also 5 P.L.J. 672=57 I.C.

Extension of time for making award. award within the period specified in the order, the Court may, if it thinks fit, either allow further time, and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration and in such case shall proceed with the suit.

Where umpire may arbitrate in lieu of arbitrators. 9. [S. 515.] Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

(a) if they have allowed the appointed time to expire without making an award, or

(b) if they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

10. [S. 516.] Where an award in a suit has been made, the persons who

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473 An order of supersession should be made only at the expiry of the time fixed for the filing of the award and not at the stage of the reference itself. An order passed by Court in the middle of the hearing of a suit making a reference, and providing in anticipation that if the award is not filed by a particular date, the trial must go on that day, is not one in accordance with law 44 L.W. 608 = 71 M.L.J. 648. Where an order of supersession was passed on the date fixed but the award reached the Court the same day after passing of the order the Court would be justified in setting aside its order of supersession. 17 I.C. 320 = 16 O.C. 94. Date fixed for filing of award—Non-appearance of parties—Dismissal of suit is bad 3 Pat.L.T. 346 = 65 I.C. 144. Where parties submit their difference to arbitration, they cannot be allowed to revoke or withdraw from the submission except for very good cause. 48 I.C. 711 = 4 P.L.J. 394. Delay in making an award by the arbitrators caused by the voluntary absence of one of the parties who now seeks to impugn the award is not enough to justify the Court in refusing to file the award on the ground of delay. (*Ibid.*)

Paras 8, 9 and 10 SCOPE—AWARD MADE BUT NOT FILED IN TIME FIXED—EFFECT—POWER OF COURT TO EXTEND TIME.—Where the arbitrators have made the award in time, but not filed it in Court within the time fixed, Court has ample jurisdiction to extend the time for filing it, which is merely a ministerial act 152 I.C. 1068 = 36 Bom L.R. 831 = 1934 B. 398.

Para. 9.—In case where arbitrators are unable to decide the case, the award of the umpire alone is valid. 4 M. 311. See also 27 A.L.J. 31.

Para. 10. SCOPE AND ILLUSTRATIVE CASES.—When parties accept an award and apply to the Court for filing it, the Court should not refuse to file it basing its view on some correspondence between the Registrar of the High Court and the District Judge, which it is not entitled to look at 38 P.L.R. 318. The provisions of the rule are mandatory. 17 I.C. 430 = 15 O.C. 294. The duty imposed upon the arbitrator by this rule can be enforced by an order of Court made upon the arbitrator. 17 C. 832 (839). Whether omission to file depositions and documents invalidates the

award, see 93 I.C. 446 (2) = 1926 O. 307 = 1 Luck. 139; 119 I.C. 694 = 26 N.L.R. 168 = 1929 N. 264. Arbitrators may deliver their award to a third person to be filed in Court. 5 B.L.R. 357. Court is bound to give notice to parties of the filing of the award. 20 A. 474. Omission to give notice is a serious irregularity and is a good ground for revision. 94 I.C. 115 = 1926 C. 1018, 119 I.C. 331. Notice is not necessary where parties are present in Court when award is filed or where they have come to know of the award otherwise 21 I.C. 298 = 310 P.L.R. 1913. See also 28 Bom L.R. 511 = 95 I.C. 547 = 1926 B. 312. Notice to pleaders sufficient 45 C.L.J. 458 = 1927 C. 619, 119 I.C. 331. Pleadings of parties seeing the award and initialling the order sheet amount to waiver of notice 95 I.C. 321 = 1927 P. 135. Decree passed without notice of the filing of the award being given to the parties is invalid. 11 M. 144, 62 I.C. 849 = 24 O.C. 263; 89 I.C. 240 = 1925 L. 619, 158 I.C. 904 = 1935 A.L.J. 986 = 1935 A. 852. Court cannot pass a decree in terms of an award before expiry of 10 days allowed by Art 158 of the Limitation Act. An agreement not to object to the award does not cover illegalities 45 M. 466 = 71 I.C. 269 = 1922 M. 179. The draft award signed by the arbitrators is the award 1 M.H.C.R. 178. The arbitrators need not sign award at the same time and in the presence of each other. 18 M. 22; 29 B. 36. When two out of three arbitrators alone sign the award and file it in Court, and third signs it after it is filed, the award is invalid. 33 C. 498. See also 1 P.L.J. 306 = 35 I.C. 358; 56 M.L.J. 35; 7 O. W.N. 541 = 1930 O. 389. Case referred to three arbitrators—Only two arbitrators acting—To hold that only two arbitrators had full authority to act is to commit either error of law or fact. 1929 C. 831. After an award is made the arbitrators have no power to review it. 9 C. 575. Award signed by arbitrators—Subsequent change of opinion by one of them—Legality. 11 I.C. 481 = 14 C.L.J. 188. Rejection of an application for further time to file objections—Effect of. 45 M. 466 = 71 I.C. 266. See also 24 O.C. 234 = 64 I.C. 90 = 8 O.L.J. 626. Where parties agree to be bound by the decision of the majority of arbitrators, the refusal of the minority to sign the award will not invalidate the proceedings provided there was a decision of the majority after

Award to be signed and filed.

made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice

of the filing shall be given to the parties

11. [S. 517] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court,

Statement of special case by arbitrators or umpire.

state the award as to the whole or any part thereof in the form of a special case for the opinion of the

Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and to form part of the award.

Power to modify or correct award.

12. [S. 518.] The Court may, by order, modify or correct an award,—

Notes.

full discussion by the whole body of arbitrators. 1 P.L.J. 90=34 I.C. 105

ESTOPPEL.—The mere signature by a party to an award does not necessarily in all cases estop him from afterwards disputing its correctness. Nor does the mere signature necessarily remove all objection to the irregularity in the award. Where the suit is based on the award itself and not on any agreement by the parties whereby they mutually accepted the award and the question of the acceptance of the award is not in issue it cannot be said that a party is estopped because of his signature. If both parties to the award signed it after it was delivered it may be that a suit could be filed to enforce the terms of the award on the ground that there was a definite contract by the parties by virtue of their signatures. 7 R. 136=117 I.C. 574=1929 R. 166

AWARD SENT BY POST.—A Court is not competent to act on an award unless it is not only signed by all the arbitrators but is also properly placed before it by the arbitrators and by no other persons. Where award was sent to Court by post and none of the arbitrators took responsibility for saying as to who caused the award to be sent to Court, the award was not properly placed before the Court, and, as such, could not be acted upon by it. (1928 P. 231, Rel on; 1 P.L.J. 90; 6 B. 663, Expl.; 6 W.R. 95, Ref.) 118 I.C. 606=1929 P. 178

ORAL AWARD.—The question whether an oral award can extinguish a decretal debt depends on the terms of the reference and the terms of the award. *Quære.*—Whether an oral award is good. 1933 L. 777

Para. 11 Score.—1925 B. 22. Award may be made in the form of a special case. 52 C. 100=1925 C. 599. A charge of misconduct against the umpire cannot be (based on or) strengthened by the mere fact that in the exercise of his discretion, he refused to state a special case. 134 I.C. 1080=35 C.W.N. 1287=1931 P.C. 289=61 M.L.J. 623 (P.C.). Arbitrators cannot apply to the Court for confirmation of an order passed by them making payment of their fees a condition precedent to the hearing of the reference. 6 C. 809.

Para. 12.—The jurisdiction of arbitrators to make an award on a reference must be limited to the subject-matter in dispute between the parties, and the subject-matter in dispute, so far as property in suit is concerned,

must be property mentioned in the plaint in respect of which relief is claimed. 30 S.L. R. 478. The fact that the defendant in his written statement raises issues as to other properties and the fact that the Court apparently raises issues covering not only the property mentioned in the plaint but also property referred to in the written statement will not give the arbitrators jurisdiction to decide as to that property which is not the subject-matter of the suit at all. The decision of the arbitrators must relate only to the property specifically mentioned in the plaint. (*Ibid*) Where one portion of the award related to matters referred, and another portion went beyond the strict terms of the reference, but the two portions are clearly separable, the whole award is not invalid. 29 C. 854 (P.C.). If some portion of the award refers to extraneous matters it can be separated from other portions, provided it does not attack the decision relating to matters of reference. 2 P. 777=76 I.C. 2=5 Pat. L.T. 239. An award should be construed not by oral evidence given by the arbitrators, but by looking at the language of the award itself. 3 N.-W.P. 117; 20 A. 245. Paras. 12 and 14 do not apply to an award made without the intervention of Court. In such a case Court has no power to amend or remit the award. (27 A. 526, approved) 14 I.C. 978=5 Bur. L.T. 55. See also 141 I.C. 72=34 P.L.R. 34=1933 L. 139. Modifications and corrections of the award by Court must be confined to para. 12 and if a Court goes beyond that and makes substantial modifications because it takes a different view from that held by the arbitrator as to what was just and fair, it acts without jurisdiction. 78 P.R. 1916=35 I.C. 887. See also 34 P.L.R. 34=1933 L. 139=141 I.C. 72. When Court modifies or corrects an award under para. 12 it is that award and not the original one with which the decree must accord. No appeal or second appeal therefrom is competent. 34 P.L.R. 34=141 I.C. 72=1933 L. 139. Courts have long ceased from sitting in appeal on award either with regard to errors of law or error on questions of fact. 1933 S. 292. The award in accordance with which Court has to pronounce judgment is the one that embodies the real intention of the parties. 19 I.C. 496=24 M.L.J. 483. Court is bound to correct any obvious mistakes or slips in an award as in the case of decrees. 19 I.C. 496

(a) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred; or

(b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision; or

(c) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

13. [S. 519.] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Order as to costs of arbitration.

Where award or matter referred to arbitration may be remitted.

14. [S. 520.] The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

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=24 M.L.J. 483. Para. 12 applies only if the "imperfection in form" exists in the award at the time when it is filed in Court by the arbitrator, and not if it comes into existence at a subsequent stage on the happening of an unanticipated event. 1930 L. 26. Award—Reference to Commissioner for taking accounts—Report—Procedure. 22 Bom L. R. 1416=45 B 512 Dissolution of partnership—Power to award interest. 56 I.C. 941 An arbitrator has no power to review his own award 99 P. R. 1917=43 I.C. 350 Material irregularity on the part of Court in dealing with objections to an award of arbitrators is a ground for revision 78 P.R. 1916=35 I.C. 887.

REFERENCE TO ARBITRATION—SUBSEQUENT OFFER BY DEFENDANT TO BE BOUND BY OATH OF PLAINTIFF—OATH MADE—EFFECT—Plaintiff sued defendant for a sum of money and parties subsequently agreed to refer the matter to the arbitration of an advocate of the Court. The arbitrator was empowered to decide the dispute between the parties after hearing evidence. Subsequently defendant made a statement, in the course of which he said that if plaintiff were to make certain statements on oath a decree might be passed in accordance with the plaintiff, and plaintiff stated on oath the facts which defendant had required of him. In making his award, however, the arbitrator made certain deductions from the claim of plaintiff. Plaintiff made an objection to the award that the arbitrator ignored the compromise or adjustment which had been made between the parties. *Held*, that the statement of defendant and the conduct of plaintiff did not amount to a compromise as defined in O. 23, R. 3 which would deprive the arbitrator of the powers with which he was vested by the reference to arbitration and that Court could not modify the award. 1933 A. 956.

ARBITRATOR'S POWER TO—DIRECT PAYMENT BY INSTALMENTS.—In adjudging the amount payable by one party to another, an arbitrator has full power to direct payment by instalments. The directions as to the number, amount, mode and time of payment of these instalments are, therefore, matters

within the discretion of the arbitrator and the essential parts of an award which a Court has no more power to modify than it has to enhance or reduce the total sum found payable by the arbitration. Even if the order fixing the instalments is erroneous, harsh or oppressive, the error is one of substance in the adjudication of the dispute, and not of form which could be amended without affecting the decision. 1930 L. 26=11 L. 342.

Paras 12 and 14 LIMITATION—Art. 158 of the Limitation Act applies only to objections under Para 15 *s.e.*, where the application is to set aside the award completely. Where the application, on the other hand, is only for the modification or remission of the award, it comes within Para. 12 or Para. 14, and Art. 158, which provides 10 days limitation is not applicable thereto. 146 I.C. 596=1933 A.L.J. 519=1933 A. 648.

Para 13—If the submission does not leave the question of costs to the arbitrators they cannot decide it. 9 B 82 When under the reference all matters in dispute between the parties are referred, the arbitrators can deal with the question of costs. 1 Beng L. R. (O.C.) 144 Court can award arbitration fees as costs in a suit where no award is made or where it is silent though an award has been made. 19 I.C. 611=6 S.L.R. 226 Costs incurred in processes of obtaining an order from Court are within the discretion of the Court, and outside the province of arbitrators but an award is not bad merely because of their inclusion. 27 I.C. 526=8 S. L.R. 136, 7 O.W.N. 97=1930 O. 89. In the absence of any express provision in the II Schedule for the remuneration of arbitrators, the English Law should be applied unless there is an express provision to the contrary, and no such prohibition exists in the Code. The term "*costs of the arbitration*" is wide and general and there is no justification for limiting it to such costs as might be represented by travelling expenses and the summoning of witnesses. Court has, therefore, jurisdiction to award remuneration to the arbitrators for their services. 152 I.C. 373=17 N.L.J. 153=1934 N. 199.

Para. 14. SCOPE.—This para. does not apply to arbitrations under the Arbitration

(a) where the award has left undetermined any of the matters referred

Notes.

Act (IX of 1899); 29 C. 793; nor to awards on private references. 14 I.C. 978; 24 I.C. 132; 34 I.C. 355. An award should not be remitted for re-consideration in the light of legal opinion obtained by one of the parties. 2 A. 181. *See also* 16 C. 806. A portion only of the award cannot be remitted. 24 A.L.J. 705=96 I.C. 531=1926 A. 567. An award is not invalid if it refers the parties to a regular suit concerning certain matters 15 M. 348. The legality of an order remitting an award for reconsideration of the arbitrators may be challenged on appeal against the decree ultimately passed. 22 M. 202 *See also* 3 A 636. A document although headed as an award and signed by the arbitrators, which merely recommended a solution of the matters referred, will not be treated as an award. 11 C 356 In case the arbitrators refuse to re-consider an award remitted to them, Court may set aside the award under S. 15 If it does so, it should decide the case itself 16 C 806 Main question left over by arbitrators to be decided by Court—Award not final—Procedure. 146 I.C. 22=1933 L. 530. On this rule, *see also* 119 I.C. 726=1930 L. 22; 1929 S 164 Where the arbitrator clearly holds that the plaintiff's suit should be dismissed and that he should be directed to apply to the Revenue Authorities for partition, the Court acts wholly without jurisdiction in remitting the award to the arbitrator for reconsideration in the absence of any of the grounds mentioned in para. 14. 152 I.C. 1023=37 P.L.R. 18=1935 L. 113.

ILLUSTRATIVE CASES.—Evidence taken by some only of the arbitrators—Award is invalid. 45 I.C. 34=16 A.L.J. 307. Court could set aside an award if there was an error of law patent on the face of it as mis-construction of documents 44 B. 780=21 Bom. L.R. 1037 Where an arbitrator neglects to consider some of the matters referred to arbitration he is guilty of an irregularity under para. 14 and the award is vitiated 149 I.C. 396=3 A.W.R. 415=1934 A. 493. Acting on evidence adduced by one party behind the back of the other vitiates the award. 64 I.C. 363=22 P.L.R. 1922. Where parties agree to refer their disputes to an arbitrator they ought not to be allowed to resile from the position which they took at the time of the reference. 15 I.C. 321. Merely technical objections should not be allowed to disturb an award, which is fairly made. (*Ibid*) Parties representing whole property to be theirs—Third persons interested in the property—Party to reference cannot challenge the award on that ground. 4 P. 670=1925 P. 810. An obvious slip on the part of the arbitrator, effect of. *See* 52 I.C. 100=1925 C. 599 Where a portion of the award is in excess of the reference, it is open to Court to pass a decree and enforce the award so far as it relates to the dispute between the parties. 1 Bur. L.J. 265=72 I.C. 193=1923 R. 130. Where arbitrator clearly

holds that plaintiff's suit should be dismissed and that he should be directed to apply to the Revenue Authorities for partition, Court acts wholly without jurisdiction in remitting the award to the arbitrator for reconsideration in the absence of any of the grounds mentioned in para. 14 152 I.C. 1023.

TRANSFER OF CASE.—As a rule in the absence of any provision to the contrary when a case is transferred from the file of one Court to that of another, the Court to which the case is so transferred is vested with all the powers possessed by the Court which was originally seized of the case and such Court can deal with the case in the same manner as the original Court and there is no provision of law which excludes a Court to which a case is transferred to deal with an award based on a reference made by the other Court before transfer of the case from its file. 146 I.C. 582=10 O.W.N. 1196=1933 O. 547.

Para 14 (a).—Where the parties to arbitration withdraw certain questions they cannot be allowed to say that they are not decided. 38 A 380=14 A.L.J. 481 Arbitrators have jurisdiction to decide whether they should award interest and an award of interest does not invalidate the award 46 C. 534=23 C.W.N. 704. An award must conform both in form and substance to the submission. 31 I.C. 33=32 C.I.J. 237. An award is bad if it goes beyond the scope of the reference. 26 I.C. 73. Mistake of law on a legal point referred to an arbitrator does not vitiate his award. 26 I.C. 697=19 C.W.N. 476. A Court may remit an award on ground of some matters being left out. 23 I.C. 862. *See also* 116 I.C. 590=1929 S. 164; 131 I.C. 303 (1)=1931 L. 215. An arbitrator is not bound by the rules of practice adopted in Courts, but he cannot go beyond the questions submitted to him. 15 C.L.J. 110=16 C.W.N. 256. When an award deals with a matter extraneous to the reference which matter can be separated therefrom the Court may modify the award or may remit it to the arbitrators for correction. 76 I.C. 1007=1923 L. 411. *See also* 14 I.C. 978=5 Bur.L.T. 55, 66 P.R. 1915=31 I.C. 80 But *see* 1936 A.M.L.J. 55. An arbitrator appointed to decide whether a sale should be set aside is competent to say that it may be set aside if the vendor repays the purchase-money 15 I.C. 573=1912 M.W.N. 901. When the valid part of an award is separable from the invalid party, the award should be declared valid to that extent but where misconduct is proved, the whole award is invalid 14 I.C. 978=5 Bur.L.T. 55 A refusal of a Court to remit an award is unappealable. 15 I.C. 573=1912 M.W.N. 901. When arbitrators have to decide disputes between firms they must inquire who the partners are, to discover whether they have jurisdiction, whom they must serve with notices and the scope of their inquiries. 9 I.C. 712=4 S.L.R. 196. The fact that the arbitrators have taken evidence on matters

to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;

(b) where the award is so indefinite as to be incapable of execution;

(c) where an objection to the legality of the award is apparent upon the face of it.

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outside their jurisdiction will not necessarily invalidate the award or make the proceedings improper, if the award is within jurisdiction. 9 I.C. 712=4 S.L.R. 196. Where a cause or matters in difference are referred to an arbitrator, whether a lawyer or layman, he is constituted the sole and final judge of all questions of both law and fact. The only exceptions to that rule are the cases where the award is the result of corruption or fraud and one other where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. 146 I.C. 582=10 O.W.N. 1196=1933 O. 547.

Para. 14, (b)—An award is not incapable of execution simply because the executing Court will have to make an enquiry into the various circumstances before determining what each party is entitled to get. 119 I.C. 726. An award against a firm is not bad and is governed by the provisions relating to the execution of a decree against a firm. 56 I.C. 325=47 C. 29. Where the arbitrators give rules for calculation without giving the actual result, it can be considered as sufficiently certain if the actual result may be worked out. 13 I.C. 161=15 C.L.J. 360. An award should be a final decision on all matters referred to the arbitrator. Where it leaves undecided one of the cardinal points in controversy, the award is bad. 10 I.C. 450=13 C.L.J. 399, 92 P.R. 1913. It should be signed by all the arbitrators at the same time and place. 92 P.R. 1913=22 I.C. 811. But see 45 I.C. 154. Private arbitration—Omission to determine some of the questions—Court not empowered to remit—Refusal. 48 I.C. 711=4 P.L.J. 394. Uncertain award—Setting aside of. 34 I.C. 355=3 O.L.J. 137.

Cl. (c).—The error of law must be apparent on the face of the award or from any document or paper connected with or forming part of the award. See 49 C. 646; 30 L.W. 868=1930 M. 38; 52 C. 100, 24 A.L.J. 480; 78 I.C. 230, 78 I.C. 238 (M.); 48 A. 475=95 I.C. 416=1926 A. 501. An error on the face of an award is a very narrow ground and the jurisdiction has to be administered with great care in order that extraneous considerations not appearing on the face of the award are not introduced into the matter. In a partition suit the issue whether any and what marriage expenses should be awarded to the plaintiff was specifically referred to the arbitrator. The arbitrator awarded a sum of Rs. 800 for marriage expenses. It was contended that such a provision constituted an error of law apparent on the face of record. Held, that there was nothing on the face of the award to show that the arbi-

trator proceeded on any erroneous proposition of law as he had enunciated none. 145 I.C. 465=27 S.L.R. 96=1933 S. 260. An arithmetical error will not bring it under this clause if the decision is within the terms of reference. 42 A. 277=18 A.L.J. 241. Where a suit on a promissory note claiming interest, is referred to arbitration and an award is filed awarding interest to the plaintiff, it is doubtful whether the want of provision in the promissory note for the payment of interest is the kind of objection to legality of the award apparent on the face of it which is contemplated by para. 14 (c). 1934 A.L.J. 939=4 A.W.R. 95=1934 A. 939. A patent inconsistency or mistake can be corrected before the award is made a rule of Court. 21 A.L.J. 541. Where an award of the arbitrators of both parties represents their decision, the failure of the arbitrator of one party to sign does not render it invalid. 43 I.C. 154. But see 22 I.C. 811. When a party's absence is intentional at the time of the delivery of the award, whether it is vitiated by such absence. 33 I.C. 467. Award given after a long time—Revocation of submission—Effect of. 13 I.C. 48. An award to be valid must be the award of all the arbitrators without difference. Where there is an uneven number of arbitrators, there is no presumption that a majority award shall be binding. 54 I.C. 912=38 M. L.J. 145. Reference to three persons—Award signed by two—Application to set aside award—Limitation. 8 L.W. 171=47 I.C. 597. A decision of an arbitrator should not be set aside under S. 115 on the ground of errors in the admission of evidence where such admission does not materially affect his decision. 26 I.C. 106=1914 M.W.N. 614. An award need not be a reasoned judicial decision and the arbitrators need not even give their reasons for their conclusions. 23 M.L.J. 290=16 I.C. 478 (29 C. 854, Rel.). Arbitrators can get the help of others' opinions in arriving at their own opinions provided they do not thereby delegate or surrender their own judgments. 23 M.L.J. 290=16 I.C. 478. A refusal by some arbitrators to act makes the award of the rest illegal. 21 M.L.J. 263=9 I.C. 173 (F.B.). The mere approval of a compromise arrived at between the parties before an arbitrator is not an award. 54 I.C. 311. On this section see also the following cases:—Effect of award signed by some arbitrators only. See 25 C.L.J. 396=22 C.W.N. 301; 55 I.C. 883; 8 L.W. 171=47 I.C. 597; 1 L. 481, distinguishing, 12 M. 113 and 7 A. 523. Award in excess of claim cannot be upheld. 25 I.C. 951. Effect of arbitrators signing at different times. 13 I.C. 161=15 C.L.J. 360; 16 I.C. 223=16 C.L.J. 573; 55 I.C. 883=1 L. 481.

15. [S. 521.] (i) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider it. But no award shall be set aside except on one of the following grounds, namely:—
- Ground for setting aside award.

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Minute of dissent by one of the arbitrators after signing award 49 I.C. 522 The law of succession of orators is not so obvious as to bring a wrong decision of arbitrators on this question within the meaning of Sch II, para. 14 (c). 1935 R. 16=154 I.C. 557.

APPEAL.—An order remitting an award for reconsideration of the arbitrators is not open to challenge in appeal. (1925 L. 466 and 1921 L. 145, Rel. on, 1929 L. 174, Ref.) 146 I.C. 22=1933 L. 530 Reference to arbitration pending criminal proceedings—Prosecution withdrawn by District Magistrate on application of parties before award—Reference and award—If illegal *Held*, that as an independent and responsible authority, such as a District Magistrate, had intervened and discharged the duty imposed upon him by law, it could not be said that the fact that he acted on the request of one of the parties to a reference made that reference or the award upon it unlawful on the ground that the consideration was immoral or against public policy. 1937 S. 156. Where the arbitrator gave his decision after examination of the parties only and the parties did not at the time protest against this procedure and demand that witnesses should be examined *Held*, that they could not be heard to complain of this defect in the procedure adopted and urge it as a ground for setting aside the award. The failure of the arbitrator to ask the parties whether they desired to produce any witnesses for examination was just such a slip in his procedure which did not go to the substance of his decision. 158 I.C. 832=1935 R. 308.

Para. 15: SCOPE AND APPLICABILITY.—The provisions of this para. and para. 16 are applicable to appellate Courts. 10 A. 8. Objection on the very merits of the question adjudicated upon by the arbitrators is beyond the scope of this section. 7 Bom.L.R. at p. 797. No objection can be raised as to the form of the proceedings anterior to the reference or to the form of issues. 43 A. 305=19 A.L.J. 33 An order on the objections to an award of an arbitrator should comply with the provisions of O. 20, R. 5 and the Court should state its finding or decision with the reasons therefor upon each separate issue. 1935 A.L.J. 309=154 I.C. 310=1935 A. 519

OBJECTION WHEN TO BE RAISED.—Objection to irregularity may be waived by party. 1 R. 15=74 I.C. 6=1923 R. 187. *See also* 119 I.C. 529=1929 S. 200; 27 A.L.J. 540=117 I.C. 361=1929 A. 521. There is nothing wrong in parties agreeing to abide by the award of a majority of arbitrators even where one of

the parties is a minor represented by a guardian. 114 I.C. 367=1929 M. 144; 9 P.R. 1913=16 I.C. 996, 51 I.C. 53=10 L.W. 57. Where the parties agree to be bound by the unanimous opinion of the arbitrators or by the opinion of the majority in case of difference, the Court has no power to force upon the parties the award of the umpire alone 134 I.C. 30=1931 A.L.J. 906. Agreement not to object to award does not preclude parties from objecting on the ground of fraud or bad faith. 107 P.W.R. 1916=34 I.C. 192 The parties cannot raise objection to jurisdiction after having submitted to jurisdiction of the arbitrators. 42 A. 661=18 A.L.J. 644 Objection to be taken only in the trial Court, not in appellate Court 36 A. 69=12 A.L.J. 57 (F.B.) Award when not binding on minor. 34 M.L.J. 71=45 I.C. 763.

AWARD WHEN CAN BE SET ASIDE.—An award cannot be set aside under this section on the ground of irregularity of the reference. 11 C.W.N. 1152. *See also* 1933 A. 294. Award should not be set aside on account of technical error. 91 I.C. 659 (2)=1925 R. 383 The same presumption which attaches to proceedings before a Court of Justice should attach to proceedings before arbitrators 18 A. 422 (F.B.) In case of an arbitration out of Court, an error in calculation, unless so palpable and gross as to afford strong evidence of misconduct, is no ground of interference by Court. Court has no power either to correct such errors or to eject an award which contains them 133 I.C. 522=1933 M. 619=34 L.W. 507 Arbitrator having personal interest, unknown to one of the parties cannot act as such 31 I.C. 597=19 C.W.N. 165. Award after supersession by Court can be set aside. 21 M.L.J. 263=9 I.C. 173 (F.B.) Award otherwise than in accordance with the order of reference is 'otherwise, invalid' within S. 15 53 C. 258=53 I.A. 1=1925 P.C. 293 (P.C.), 50 A. 955; 34 C.W.N. 813. As to the meaning of the words "or otherwise invalid", 58 C. 629=35 C.W.N. 238 52 C.L.J. 298 An award cannot be set aside on the mere surmise that the arbitrator had been partial. 7 A. 273. Or on the ground that the arbitrator's decision is against the written statement of defendant 7 W.R. 28. Award made out of time is not void but voidable. 50 I.C. 52=4 P.L.J. 265 When there is provision for extension of time, it is not sufficient ground for refusing to file the award. 55 P.W.R. 1919=51 I.C. 636. But where time has not been extended, an award given after time fixed in the agreement is not valid and binding on the parties. 1933 L. 173=145 I.C. 129.

MISCONDUCT.—If Court finds that the award of arbitrator has been arrived at by action which amounts to misconduct, the only course open to it is to set aside the award altogether. It is not empowered to

(a) corruption or misconduct of the arbitrator or umpire;

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sit in appeal on an arbitrator. It cannot disallow or set aside a part of it and pass an order dismissing the suit; it must supersede the arbitration and dispose of the suit on the merits. 1936 A.M.L.J. 54. "Misconduct" means neglect of duties or judicial misconduct; it does not necessarily mean moral turpitude. 9 A. 253, 30 C. 397. See 93 I.C. 446 (2)=1926 O. 307=1 Luck. 139, 1930 S. 103. "Misconduct" means misconduct in carrying out terms of reference. Acting beyond powers is acting without jurisdiction. 49 M.L.J. 529 Court has inherent jurisdiction to deal with allegations of misconduct of arbitrator, even though the award is not made. 146 I.C. 1081=1933 P. 566. Legal "misconduct" ensues where the arbitrator's or umpire's procedure is so irregular as to be opposed to the principles of natural justice. Where an opportunity is afforded to one side to get an advantage with the arbitrator over the other, either by lack of notice, or by the absence of the other side, and where there is even a remote possibility of the advantage so obtained unconsciously influencing the mind of the arbitrator, the proceedings are vitiated by a breach of the principles of natural justice. Where an umpire sends for one of the parties alone and asks him to sort the papers and rearrange the records and to find out certain exhibits in the case for him, he is not guilty of misconduct, as the act is a mere ministerial act and does not vitiate the award of the umpire. 59 B. 268=155 I.C. 669=37 Bom.L. R. 69=1935 B. 127. There is a duty upon the arbitrator to disclose material facts which might reasonably be held to have prevented any of the parties to the arbitration agreeing to his appointment as arbitrator. An arbitrator failing to disclose such facts is guilty of misconduct. But the failure of an arbitrator to disclose the fact of his indebtedness to the father-in-law of one of the defendants would not amount to misconduct where the debt due by the arbitrator is an ordinary business debt. 4 A.W.R. 852=148 I.C. 1168=1934 A.L.J. 694=1934 A. 658. Perversity is misconduct. 14 I.C. 978=5 Bur.L. J. 55. Error of law, if misconduct. 42 A. 277=18 A.L.J. 241=58 I.C. 585. Not hearing parties is misconduct. 25 Bom.L.R. 392=1924 B. 149. Irregularities in procedure may amount to misconduct. 36 A. 336=12 A.L.J. 537=27 M.L.J. 181 (P.C.), 85 I.C. 424=1924 B. 149; 130 I.C. 833 (Taking third party's opinion). 130 I.C. 833 (Omission to examine necessary witness). 1930 M. 645 (Receiving evidence of one party in absence of other party). Where the terms of reference to arbitration do not authorize the making of private enquiries, an arbitrator making private enquiries, is guilty of legal misconduct. 4 A.L.J. 159, 20 A.L.J. 117=65 I.C. 779. See also 26 O.C. 107=74 I.C. 401, 10 I.C. 450=13 C.L.J. 399, 49 I.C. 303=9 P.W.R. 1919. But if the parties had expressly bound themselves to abide by his decision in

whatsoever manner he might see fit to arrive at, he cannot be said to be guilty of such misconduct. 20 A.L.J. 125=64 I.C. 934; 29 O.C. 258=94 I.C. 162=1926 O. 383; 119 I.C. 529=1929 S. 200. Where certain proceedings were referred to three arbitrators and it appeared that the parties knew that arbitrators might be examined as witnesses and two of them were so examined subsequently each on one side, *held*, that the award and decree were not vitiated. 34 C.W.N. 689. There is no doubt that if the arbitrators use knowledge or information derived from other sources and if they fail to communicate to the parties what they so know and if the party making objection is prejudiced, the award would be invalidated. But where an arbitrator has been selected because of his personal knowledge of the matter in dispute, it would not be misconduct on his part to use his personal knowledge in coming to a certain decision, although in such cases it is desirable that he should tell the parties what his personal knowledge is and give an opportunity to them to adduce evidence sufficient to vary his views. 41 L.W. 104=1935 M. 152=155 I.C. 1059=69 M.L.J. 558. Where an award has not been substantially affected by any knowledge or information possessed or obtained by the arbitrator and parties are not prejudiced by such an error on the part of the arbitrator, the Court will not interfere. (*Ibid*) An arbitrator should proceed in his investigation in a proper manner and take evidence in the presence of the parties. Whether his conduct amounts to "misconduct" so as to vitiate the award is a question to be decided by the Court which considers it under para. 15, Sch. II, C.P. Code. Simply because the arbitrator asks a person certain questions relating to the accounts in the absence of the parties, it cannot be said that he misconducts himself. 7 R.P. 261=152 I.C. 838=1935 P. 16. Where it appears from the award that the arbitrator in arriving at the decision was influenced by secret inquiry about the case made by him after recording the evidence and by the opinion of third persons about the merits of the case, his conduct amounts to judicial misconduct and vitiates the award. 1931 L. 111. Private enquiries when justifiable. 67 I.C. 866=1922 L. 480, 1936 A.M.L.J. 55; 1936 N. 291. The extent to which an arbitrator may seek outside advice upon matters of law is difficult to prescribe in general terms. Where the language of the award indicated no more than that the umpire took advice upon the general rules of law bearing upon the case and did not mean that he left to an outsider the burden of deciding any issue in the case instead of exercising his own judgment thereon, the umpire cannot be said to be guilty of misconduct and the case against him in this respect is not strengthened merely because the umpire in the exercise of his discretion refused to state a special case. 134 I.C. 1080=35 C.W.N. 1287=1931 P.C. 289=61 M.L.J. 623 (P.C.).

(b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire;

(c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

Notes.

See also 145 I.C. 329=1933 L. 538. Refusal to call witnesses produced by either party. 12 C.W.N. 569. The failure to hear the parties and, if necessary, their witnesses, unless absolved therefrom by the terms of submission amounts to misconduct on the part of the arbitrator within the meaning of Para. 15. 162 I.C. 772=1936 R. 191. Also hearing one side and declining to hear the other side. 27 M. 255, 9 A. 253. But when an arbitrator communicates the private information to the other arbitrators and parties who can check the information and contradict it, the award will not be vitiated. 41 M. L.J. 276. Examining witness in the absence of parties and making enquiries behind their back. 44 M.L.J. 263=73 I.C. 470; 8 L. 329=101 I.C. 153 (1)=1927 L. 425; 1930 M. 646; 1936 N. 291. Simply because the arbitrator asks a person certain questions relating to the accounts in the absence of the parties, it cannot be said that he misconducts himself. 152 I.C. 838=1935 P. 16. Examining the witness of one party in the absence of the other party is an irregularity which amounts to misconduct. 34 C.L.J. 39. See also 133 I.C. 522 (2)=1931 M.W.N. 451=1931 M. 619. But such an irregularity can be cured by waiver. (*Ibid.*) Private communication with parties is misconduct. L.R. 3 A. 84. *Ex parte* procedure, if misconduct. 33 I.C. 467. Arbitrators when justified in hearing case *ex parte*. 47 C. 29=56 I.C. 325; 53 I.C. 337=13 S.L.R. 75; 27 I.C. 526=8 S.L.R. 136. Decision without taking evidence is fatal to the award in the absence of agreement that an arbitrator should decide a dispute on his own knowledge of the facts. 42 A. 185=18 A.L.J. 78=54 I.C. 443. See also 49 M.L.J. 115=1925 M. 1086. Delegation of functions is misconduct. 31 I.C. 33=22 C.L.J. 237. Just as a Court cannot be held to blame if it alters a rough draft of its judgment before pronouncing it, similarly an arbitrator cannot be condemned for altering what he had not finally decided and pronounced. Hence change of previous intention before the award is made is not misconduct. 158 I.C. 379=1935 L. 491. The absence of an arbitrator cannot be deemed to amount to misconduct, where it is clear that no business of a disputed character was gone into during the absence of the arbitrator and where the decision of the arbitrators is that of all the arbitrators. (2 C.L.J. 61, Rel. on.) 34 C.W. N. 689. Where the parties agreed that the case should be decided by three arbitrators, but the enquiry was made and the award given by two arbitrators alone, and where the parties never agreed to accept the decision of two arbitrators alone, held that the action of the two arbitrators in proceeding

alone in such way was undoubtedly misconduct. 1936 N. 291. An award given without applying the mind to the question really involved in the case is not binding. 34 M. 453=38 I.A. 169=21 M.L.J. 1110 (P.C.). Leaking out of contents of award before pronouncement, when arbitrator had not taken any of the parties into his confidence would not constitute misconduct. 125 I.C. 552=1935 O.W.N. 582=1935 Oudh 349. Nor the writing of part of the award by a third party at the dictation of the arbitrator. (*Ibid.*) An arbitrator can conduct business in any way he thinks best and is not fettered by rules of practice or procedure obtaining in Courts. 13 I.C. 520=14 O.C. 308. See also 113 I.C. 785=1929 O. 1. Arbitrators can use their personal knowledge of trade usages. 41 B. 518=37 I.C. 271=18 Bom L.R. 532. See also 28 Bom. L.R. 986=97 I.C. 673=1926 B. 527, 114 I.C. 367=1929 M. 144. But see 57 I.C. 604. In practice it is advisable that the arbitrator should acquaint the parties of his personal knowledge, so that the parties may alter his opinions by adducing evidence, if necessary. 28 Bom L.R. 986=1926 B. 527. An honest admission of evidence in violation of rules of evidence is no ground for setting aside an award. 38 B. 60=15 Bom L.R. 392. Admitting in evidence and absence of inquiry regarding legality of vouchers passed by minors, when not objected to by parties in the course of arbitration proceedings, would not vitiate the award. 164 I.C. 296=1936 L. 492. Nor refusal to summon witnesses cited by party. 39 I.C. 767. When an award is set aside on the ground of misconduct, the Appellate Court cannot pass a decree in terms of the award. 4 A.L.J. 256.

Para 15 (1) (b).—Failure of a party to disclose to the opposite party his relationship and monetary dealings with arbitrator amounts to fraudulent concealment, and would be good ground for setting aside award. 155 I.C. 522=1935 O.W.N. 582=1935 Oudh. 349. Where the opposite party coming to know of such relationship omits to object to the arbitration in ignorance of his right to revoke, the omission does not operate as waiver, as there can be no waiver without full knowledge of one's legal rights. (*Ibid.*)

Sub-Para. (1) (c).—AWARD OUT OF TIME.—VALIDITY OF.—Under Sch. 2, the time fixed in the agreement for giving the award can be orally extended. But where the time has not been extended, an award given after the time fixed in the agreement is not valid and binding on the parties. 145 I.C. 129=1933 L. 173. In an arbitration under the orders of Court, it is sufficient if the award is made, that is, completed and signed by the arbitrators, within the time fixed by Court, it is not necessary that it should actually reach the

(2) Where an award becomes void or is set aside under clause (1), the

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hands of Court within such period to make it valid. There is nothing in para 15 to indicate that there is any necessity for the award being submitted or delivered or filed in time in order to maintain its validity. "Made" in the rule does not mean delivery, because "making" and "delivery" indicate different stages. 38 C.W.N. 784. The fact that an award has been filed beyond the period allowed by Court may be only a ground for setting it aside, and obviously, if not set aside, it is a valid award. And Court has jurisdiction to refuse to set aside an award, even where it is made after the expiration of the period allowed by it. The jurisdiction will be exercised on the ground of justice, equity and good conscience. 10 O.W.N. 1177=1933 O. 563.

EXCEEDING TERMS OF REFERENCE.—An award of the arbitrators travelling beyond the reference and not warranted by the terms of reference is unenforceable. 151 I.C. 338=1934 A. 117. Its validity can be challenged under this para. 15. 1935 O.W.N. 1036=158 I.C. 11.

EXCESSIVE COSTS AWARDED BY ARBITRATOR.—An arbitrator who was asked to decide a suit was authorized to deal with costs as they would be dealt with by Court. The arbitrator dismissed the plaintiff's suit but under the circumstances of the case allowed him costs to the extent of Rs. 2,000 even though the ordinary costs in the suit were only about Rs. 100 and even though the plaintiff had not claimed any special costs either in the suit or before arbitrator. *Held*, that the part of the award dealing with costs was not separable from the rest and that the whole award should be set aside. 146 I.C. 439=27 S.L.R. 327=1933 S. 295.

ARBITRATOR FILING AWARD WHICH ONE OF THEM REFUSED TO SIGN.—The failure of one of several arbitrators to sign an award may have a different effect in different cases, but if one of the arbitrators withdraws from the arbitration altogether and refuses to co-operate with his colleagues, and they nevertheless proceed to give an award without his help, that must amount to misconduct. But if the arbitrators had arrived at a decision but merely waited to sign the award, and in the interval between the decision and the signing of the award, one of them changed his mind and refused to sign it, it does not necessarily follow that the arbitrators have been guilty of misconduct in framing the award and filing it in Court. 152 I.C. 929=1935 A. 90.

COMPROMISE BY PARTIES ACCEPTED BY ARBITRATORS WITHOUT SANCTION OF COURT.—Where a partition suit is referred to arbitration and the arbitrators accepted a compromise consented to by all the parties and by the guardians on behalf of the minors but without sanction of the Court under O. 32, R. 7, the absence of the Court's sanction does not render a decree passed on the compromise void, but only voidable at the option of the minor; and no other party can call it in ques-

tion except the minor on attaining majority or before then through a next friend. But the very guardians, who had consented to it, cannot subsequently plead that their consent will not affect the right of the minors. (58 C. 628 and 29 C. 167, Ref.) 38 L.W. 927=1933 M. 862=65 M.L.J. 755.

ARBITRATORS TAKING FEES FROM ONE SIDE ONLY—OTHER SIDE UNABLE TO PAY.—It has to be emphasised that though the arbitrators in proceedings referred to them are entitled to payment of their fees in respect of the award they make, yet they should award altogether a method of collecting their fees which lays them to imputations of corruption, or at any rate, prejudice—however unfounded such imputations might prove to be on close examination. It is generally undesirable, not to say improper, for arbitrators to take money from one side only before the award is actually made. Such taking of money from one of the parties singly before the making of the award would be sufficient cause to set aside the award. Where the whole sum of money was in the first instance paid by one of the parties, but half of it was provided by way of accommodating the other as the latter was unable to pay his half-share, and the latter did not object to this, and it also appeared from the minutes of the proceedings that the whole matter of payment of fees was one of mutual arrangement between the contending parties, it cannot be said that the arbitrators were guilty of misconduct or were influenced in their decision by the manner in which their fees came into their hands. Though it would have been wiser for the arbitrators, when one of the parties was not in a position to pay his share, to have proceeded and completed their award and then retained their award until such time as their fees were paid by the party in whose favour it was in fact made, the arbitrators are not guilty of such misconduct as would require the setting aside of their award. 38 C.W.N. 784. Reference of cross-suits—Agreement of parties that proceedings in one may be used to determine questions in the other—Arbitrators proceeding on that basis—Omission to set out issues—Award not invalid. 38 C.W.N. 784. It is only one Court, namely the Court which refers the case to arbitration, that should finally decide the question whether the award is invalid, not only for the reason specifically mentioned in Cl (c), but on other grounds also. 163 I.C. 380=38 P.L.R. 725=1936 L. 466.

"OR BEING OTHERWISE INVALID"—INTERPRETATION OF—The words "or being otherwise invalid" in Para. 15 (1) (c) cannot be construed as being *eiusdem generis* with the two preceding grounds of invalidity. The legislature by inserting those words intended and provided that every ground upon which the validity of the award in law could be challenged should fall within the ambit of para. 15 (1) and could be relied on as a ground for setting aside the award. 12 R. 675=156 I.C. 414=1935 R. 94. The last ground in cl. (c)

Court shall make an order superseding the arbitration and in such case shall proceed with the suit.

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is not to be taken *ejusdem generis* with the grounds mentioned before. It need not be some ground akin to corruption or misconduct of the arbitrator. 150 I.C. 222=1934 A.L.J. 473=1934 A. 95. An objection to the validity of reference to arbitration comes within the purview of para 15. 1936 A.L.J. 1333=1937 A. 65 (F.B.)=167 I.C. 99 (1935 A.W.R. 1182=159 I.C. 441=1935 A. 1014 overruled.)

APPLICATIONS TO SET ASIDE AWARD.—An application to set aside an award falls within para. 15 and does not include proceedings under paras. 12 and 14. 1913 M.W.N. 338=24 M.L.J. 483. *See also* 10 P.L.T. 53=115 I.C. 680, 7 P.L.T. 644. No form is prescribed for an application to set aside award. 45 B. 1071=23 Bom L.R. 614.

APPEAL FROM DECREE ON AN AWARD.—An appeal lies on the ground that the so-called award was never delivered by the arbitrator and was in fact and in law no award at all. 29 A. 439. No appeal lies from a decree on the sole ground that the arbitrator was guilty of misconduct. 29 A. 457 (F.B.) *See also* 36 Bom.L.R. 1222; 45 A. 441=21 A.L.J. 326; 65 I.C. 50=15 S.L.R. 165=1922 Sind 1. No appeal lies against an order setting aside an award. 28 A. 408; 11 C. 172. But *see* 37 A. 456=13 A.L.J. 653, 34 I.C. 192, 15 I.C. 928=236 P.L.R. 1912. (Award can be restored by Court of appeal.) Appeal from order superseding award. *See* 55 I.C. 1. Judgment partly based on award and partly on findings of fact is appealable. 24 A.L.J. 705=96 I.C. 531=1926 A. 567.

REVISION—An order setting aside an award on the ground of misconduct is not liable to revision. 26 B. 551; 6 O.W.N. 816=1929 O. 493; 34 Bom.L.R. 376=1932 B. 232. But *see contra* 27 A.L.J. 918=1929 A. 743, 51 A. 1010. *See also* 5 A. 293; 47 A. 916=1925 A. 566. As to finality of award, *see also* 17 O.C. 33=18 C.W.N. 426=27 M.L.J. 128 (P.C.); 27 A.L.J. 918=1929 A. 743. Where only some of the arbitrators take part in the hearing, but no objection is then taken and the merits of the award are not affected thereby, an order confirming such award is not open to revision on this ground. 38 L.W. 927=1933 M. 862=65 M.L.J. 755. Where the validity of an award is impugned on the ground that the arbitrator held his enquiry in the absence of the objector and the latter applies to Court to summon the arbitrator as a witness to substantiate his allegation, the refusal of Court so to do is not only a material irregularity but is an illegality and the order passed by the Court filing the award and passing a decree on its basis is improper. 145 I.C. 329=34 P.L.R. 397=1933 L. 538. *See also* 1933 O. 327. The object of para. 15 is to give finality to a decree passed in accordance with the decision of the arbitrator. If the party concerned fails to impeach the award before the Court making the

reference or if his objection to the validity of the award is disallowed and a decree is passed in accordance therewith, the award becomes final and the decree passed upon it is not open to appeal or revision. 152 I.C. 90=11 O.W.N. 1203. *See also* 1933 A. 924.

RIGHT OF SEPARATE SUIT—Where the proceeding has assumed the character of a reference to arbitration it is governed by the second schedule and the party cannot institute a separate suit. It cannot be said that there cannot be arbitration proceedings until a valid reference has been made. Court has jurisdiction to entertain objections to the validity of the award and a separate suit for that purpose will not lie. The remedy lies under para. 15 (1), 32 Bom.L.R. 389. Where the power of attorney did not authorise the agent to refer to arbitration but nevertheless the agent referred a pending suit to arbitration and an award was passed, the principal who was not aware of the reference and came to know of it only after the proceedings were over, is entitled to institute a suit challenging the validity of the award. He need not file a petition to excuse the delay and urge his objections under para. 15 of Sch. II. 1933 M.W.N. 1475. When the question raised relates to the validity of the reference itself, the validity of an award following upon the reference can be challenged by a suit. The party so objecting is not bound to take proceedings under para. 15. 1935 A. M.L.J. 89.

LIMITATION.—The Limitation Act is certainly applicable to arbitration proceedings but it does not necessarily follow that awards which have not been decided in accordance with the Limitation Act are on that account invalid. In any case, where the defendant raised no such plea before the arbitrators or in the subsequent negotiations and the violation of the law of limitation does not appear "upon the face of the award" there is no ground for setting it aside. 133 I.C. 522 (2)=1931 M. 619. *See also* 9 C. 36, 29 C. 106.

Paras 15 and 16—If objection to an award is disallowed and a decree is passed on the award the award becomes final and the decree cannot be challenged either in appeal or revision. The interference in revision by the High Court is discretionary and such power should not be exercised in such cases (1932 O. 156, Rel. on.) 10 O.W.N. 669=1933 O. 327. But the order made by the Court, where it has acted illegally or with material irregularity in the exercise of its jurisdiction, can be challenged by way of revision though not by way of appeal, whether the illegality or irregularity was committed before the reference to arbitration or after the receipt of the award. 167 I.C. 99=1936 A.L.J. 1333-1937 A. 65 (F.B.). Para 15 (1) (c) shows that all objections against the validity of an award can be brought in the Court making the reference, the words "or being otherwise invalid" being wide enough to cover all kinds of objections

16. [S. 522.] (1) Where the Court sees no cause to remit the award or any of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award or the Court has

Judgment to be according to award.

Notes.

to an award. When once a decree is passed in terms of an award, an appeal is not competent against the decree on the ground that the reference to arbitration was invalid as all the interested parties did not join in making the reference, and revision will be more objectionable than an appeal. 159 I.C. 1041=1936 O.W.N. 16; 163 I.C. 380=38 P.L.R. 725=1936 L. 466

Para 16. RIGHT OF SUIT.—The intention of para. 16 is to give finality to a decree passed in accordance with the decision of the arbitrator. 9 O.W.N. 191. No suit to set aside an award is maintainable, the proper way being an application to the Court to set aside the award. 56 I.C. 677=13 Bur. L.T. 34. Nor a suit on the original claim which has become merged in the award. 33 I.C. 554=8 L.B.R. 157. See also 32 Bom.L.R. 389, 1935 L. 134. The provisions of the para. are applicable to appellate Courts 10 A. 8

POWERS OF COURT.—In delivering the judgment Court must confine itself to plaintiff's claim and give a decision thereon 14 W.R. 369, and cannot grant interest when the award does not grant it 23 W.R. 105. When an award grants maintenance in perpetuity Court will not pass a decree to that effect 7 B. 151. Court can separate the valid part from the invalid part of an award 16 P.W.R. 1913=17 I.C. 684. The word 'award' in the last sentence must be understood to mean an award as given by the arbitrators and not as amended by the Court 8 A. 449 (452)

FORM OF AWARD.—An award stated "I am of opinion that the plaintiff's case is not proved. I accordingly recommend the Court to dismiss the suit of the plaintiff with costs" It was contended that the award was invalid in form and that it should say "I dismiss the suit" Held, overruling the contention, that the function of an arbitrator is to come to a decision on the issues which have been referred to him and when his award is received the Court decides the suit and it is not for the arbitrator to dismiss or decree the suit. 1935 A.W.R. 190=1935 A.L.J. 396=159 I.C. 35=1935 A. 372.

AFTER THE TIME FOR MAKING SUCH APPLICATION HAS EXPIRED.—Court should give time to enable a party to apply to set aside an award 1906 A.W.N. 221. See Art 158, Lim. Act. Under para 16, Court should not pronounce judgment within ten days of the receipt of the award, which is the period under Art. 158, Limitation Act, for putting in objections to the award. 152 I.C. 157=1934 M. 619=67 M.L.J. 377. A decree passed before the expiration of such time is liable to be set aside. 9 I.C. 197 (2)=21 M.L.J. 444. See also 25 A.L.J. 787=102 I.C. 608=1927 A. 614. Such decree can be set aside by High Court only under S. 115 and

no appeal lies. 45 B. 832=22 Bom.L.R. 1454=59 I.C. 811. An appeal against such a decree can be treated as a revision 1912 M.W.N. 1232=17 I.C. 431; 9 I.C. 197=21 M.L.J. 444. An order refusing to hear such objections as time-barred is liable to be set aside in revision. 96 P.L.R. 1915=28 I.C. 427. It is not necessary to allow 10 days where an award has been accepted by the parties. 27 P.W.R. 1914=23 I.C. 591. Also 27 N.L.R. 240=134 I.C. 282, but see 34 I.C. 845 (Sind). Where such objections were dismissed for default, and decree was passed on the award, Court cannot refuse to entertain a subsequent application for restoration of the petition of objections. 18 A.L.J. 756=57 I.C. 200.

APPEAL AND REVISION.—No appeal lies from a decree based upon judgment pronounced in accordance with an award except upon one or other of the two grounds prescribed in para. 16 (2). No appeal lies on the ground that the award was invalid and therefore no valid decree could be based upon it 12 R. 675=156 I.C. 414=1935 R. 94. See also 152 I.C. 838=1935 P. 16, 1936 R. 240=163 I.C. 590. A revision is however competent. 39 P.L.R. 51. No appeal lies from a decree made in accordance with an award, it is immaterial whether the validity of the award is challenged on the ground of the illegality of the procedure of the arbitrator or on account of the invalidity of the reference which constitutes the foundation of his authority 13 L. 528=136 I.C. 11=1932 L. 239. But an appeal will lie from a decree passed in accordance with an award if such decree has been passed without allowing to the parties the time prescribed for filing objections 29 A. 584. Appeal will also lie where the Court did not pronounce judgment in accordance with award, but in accordance with its modification of the award. 153 I.C. 764=1935 P. 109. Although the intention of para. 16 is to give finality to decrees passed in accordance with the decision of the arbitrator yet it cannot be said that in no possible case can a revision be entertained against such decrees. If for instance it can be shown that the lower Court acted altogether without jurisdiction in passing a decree in terms of the award, it would be permissible to entertain a revision under S. 115. 146 I.C. 582=10 O.W.N. 1196=1933 O. 547. Where a decree has been passed in accordance with the award, it cannot be interfered with in revision unless the decree discloses some excess or defect of jurisdiction or irregularity in the exercise of jurisdiction. If the award is incomplete, it is the duty of the objector to apply to have the award remitted under para. 14. But where the objector failed to object to award in trial Court, the High Court cannot in revision interfere with the decree passed in accordance

refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

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with the award. 38 L.W. 330=1933 M. 697=65 M.L.J. 376 Where the Judge refuses to consider the objections to an award on the ground that they were time-barred, and a decree is passed in accordance with the award, no appeal lies and an application for revision is competent. 142 I.C. 835=1933 K. 38. Where an award is made according to law no appeal lies. 29 B. 285 See also 14 I.C. 455=9 A.L.J. 258. No appeal lies from a decree purporting to follow an award except on the ground that it is not based on an award or in other words there is no award. 12 Lah.L.J. 89, 35 C.W.N. 1069=138 I.C. 848. See also 31 P.L.R. 81=1930 L. 219; 10 L. 871=31 P.L.R. 165; 31 P.L.R. 337=120 I.C. 673=1930 L. 219. (No second appeal lies) 52 C.L.J. 298. No appeal lies from a decree which is in accordance with an award made by the arbitrator. The mere fact that the validity of the reference is impeached by a party on the ground that she was not a party to the reference does not take the case out of the ambit of the rule. 12 L. 408=32 P.L.R. 44=1931 L. 126 Para. 16 contemplates an award made in a case where there has been a valid submission to arbitration. Where the reference itself is impugned for want of consent of the parties interested an appeal will lie against the decree passed on the basis of the invalid award. (25 C.W.N. 832, Relied on.) 34 C.W.N. 813. See also 58 C. 628=35 C.W.N. 238=1931 C. 211. There must be strict conformity with the provision of l. 1. (1) of this para. 49 A. 178=24 A.L.J. 1036 Matters outside the arbitration proceedings are open to appeal 39 M. 853=32 I.C. 881=30 M.L.J. 465; 52 C.L.J. 298 Where Court did not pronounce judgment according to the award but in accordance with its modifications of the award, an appeal will lie from such a decree. 153 I.C. 764=1935 P. 109. Decree on an award overruling the objections of a party without giving him an opportunity to substantiate them by evidence is revisable but not appealable. 3 L.L.J. 487=20 P.L.R. 1922; 37 I.C. 400=3 O.L.J. 583. A second appeal is maintainable when the Court of first instance sets aside the award and passes a decree on the merits and the lower appellate Court sets aside that decree and passes a decree in accordance with the award. 4 O.W.N. 1085 (F.B.). See also 153 I.C. 764=1935 P. 109. An appeal lies from an order directing a private award to be filed even though Court has passed a decree on its basis. 38 A. 380=35 I.C. 833=14 A.L.J. 481. But where Court had granted frequent adjournments on the ground that the dispute had been referred to an arbitrator, such orders amount in substance to a reference by Court and no appeal will lie. 39 A. 401=15 A.L.J. 452. An order refusing to file an award is a

decree and is appealable. 27 M. 255. Where the validity of the award is in question an appeal lies. 11 C. 37 (41); 49 I.C. 262 Also when award is shown to be illegal and void *ab initio*. 24 C. 469 (472); 1903 A.W.N. 159 But no appeal lies after passing of decree, even though award could have been set aside by objections being raised under para. 15. 39 C. 822=18 I.C. 69. See also 18 C.L.J. 35=18 C.W.N. 626, 19 I.C. 405; 29 C. 167, 18 M.L.T. 34=31 I.C. 206 Cases where no appeal or revision will lie. See 25 I.C. 583=1914 M.W.N. 865; 38 M. 256=25 M.L.J. 507; 34 I.C. 845=9 S.L.R. 183, 104 I.C. 202=1927 L. 362. When objections are overruled, no appeal lies 1 P.L.J. 306=35 I.C. 358. An order determining that there has been no valid reference to arbitration is a decree. 25 C. 757 (F.B.); 18 A. 442 (F.B.); 18 M. 423 (F.B.); 8 C.W.N. 916; 29 C. 167; 33 C. 899. Where after the matter in dispute in suit was referred to arbitration and an award passed the objections of the petitioner were rejected and Court proceeded under para 16 to pronounce judgment according to the award, *held*, that the order was of an interlocutory nature and incapable of being revised. 143 I.C. 309=34 P.L.R. 651=1933 L. 692.

AGREEMENT TO REFER—SEVERAL DEFENDANTS REPRESENTED BY SAME COUNSEL—AGREEMENT SIGNED BY PLEADER—VALIDITY—APPEAL.—Under Sch. II, para. 16 (2), what is open to challenge is not the award but the decree, and an appeal lies only if the decree is in excess of or not in accordance with the award. Where three defendants are represented by one and the same pleader, whose *vakalatnama* authorises him to compromise the suit, and he signs the agreement of reference to arbitration as pleader, it has to be assumed that he signs it on behalf of all the defendants who have engaged him, unless he states that he so signs it only on behalf of some only or any of the defendants take any objection to the arbitration proceedings. All the defendants are, therefore, parties to the reference, which is valid and binding on all. The award cannot be challenged and no appeal, therefore, lies from the decree passed therein. 152 I.C. 838=1935 P. 16.

REVISION.—As to cases where no revision lies, see 29 C. 167; 26 O. C. 107=74 I.C. 401; 134 I.C. 30=1931 A.L.J. 906. But see 9 M. 475. Revision lies on the ground of material irregularity 11 P.W.R. 1916=31 I.C. 700. See also 31 I.C. 458 (M.). As to when such decree is liable to be set aside on revision, see 2 L.L.J. 487 and 37 I.C. 400 cited *supra*.

PRACTICE.—When objections are filed to an award, Court ought to give a chance to the party of proving his objection by evidence, and to deal with the objections judicially. Court ought to accept the award of the arbitrator as final as regards any statement made

Order of reference on agreements to refer.

17. [S. 523.] (1) Where any persons agree in writing that any difference between them shall be referred to arbitration, the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be

Application to file in Court agreement to refer to arbitration.

filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or if otherwise, between the applicant as plaintiff, and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

Notes.

by him in the award as to the conduct of proceedings, without taking evidence in the matter or finding that the evidence adduced in support of the objections is insufficient. 152 I.C. 157=40 L.W. 364=1934 M. 619=67 M.L.J. 377.

Para. 17: SCOPE OF PARA.—See 137 I.C. 198=1932 A.L.J. 331. The use of the word "may" in the rule shows that the provisions of the second schedule are permissive and not mandatory. 8 O.W.N. 71 An application under para. 17 of the second schedule asking the Court to file an agreement to refer a dispute to arbitration does not amount to a suit within the meaning of S. 80 of the Code. 13 L. 672 This para. does not apply where there is a pending suit which affects the subject-matter of the reference to arbitration 30 C. 218 (226); 115 P.R. 1912=15 I.C. 140. See also 17 P.R. 1911=9 I.C. 195, 40 I.C. 38=4 O.L.J. 131, 54 B. 197=31 Bom.L.R. 1403=1930 B. 98 Where there is no matter of difference between parties there can be no reference. 30 C. 831; 21 B. 335 (342); 2 A.L.J. 493; 11 C.W.N. 1152. No reference in anticipation of future differences. 12 I.C. 639=5 S.L.R. 92. Where an agreement relates to the division by metes and bounds of revenue-paying land wherein there is also a dispute between parties as to title, the lands concerned can be validly made the subject-matter of an award and a decree under para. 17. 122 I.C. 724

APPLICABILITY OF PARA.—Where a contract of insurance between the parties is finally accepted in a presidency-town and a clause in the contract provides for a reference to arbitration in case of a dispute arising as to any right or liability of either party, the provisions of the Indian Arbitration Act would be applicable and not of Sch. II 1937 A.L.J. 98=1937 A. 208. Where an award is made by arbitrators under the Arbitration Act, under an agreement contained in a contract between the parties, an application to file such an award cannot be made under Para. 20 An agreement of that kind falls under Para. 17, and the proper procedure is to apply to the Court for enforcing that agreement, and the Court is then to make an order of reference

Para. 20 refers to a reference by the parties to arbitration about any dispute that might have arisen between them, while Para. 17 applies to future disputes. 38 Bom.L.R. 607=1936 B. 401.

ESSENTIALS OF A VALID AGREEMENT TO REFER—Agreement should be in writing. It is not necessary that it should be in form of written contract signed by parties so as to be an instrument or document But it is necessary that there should be some writing which should embody the whole of the agreement. 1935 A.W.R. 964=1935 A.L.J. 998=156 I.C. 904=1935 A. 886. The agreement to refer must clearly define the powers of the arbitrators 16 C. 482; 11 C. 232 Para 17 does not require that arbitrators should necessarily be named, in the agreement. 35 P.R. 1911=9 I.C. 655. Arbitrators who are left for future election cannot be said to be "named" in the agreement. 20 B. 232 (236) The application need not now be made by the parties in person or by their respective pleaders specially authorized in writing in this behalf. See 24 C. 459. The application is not a suit though it has to be registered as a suit. 61 I.C. 390=6 P.L.J. 287.

ALL THE PARTIES INTERESTED.—The parties who are materially interested in the suit should join in the application 10 W.R. 171, 17 C. 37; 4 C.L.R. 65; 24 A. 229 An award on a reference not agreed to by all the parties interested is invalid in law. 9 C.W.N. 873. See also 17 M.L.J. 394. But see 33 C. 899 and 11 C.W.N. 1152 The agreement for reference must be executed by all the parties. 38 I.C. 577=9 Bur L.T. 253. In a suit for winding up a partnership, a petition to refer the suit to arbitration must meet with the consent of all the parties 26 M. 47, 22 A. 135 The father of a joint Hindu family in his capacity of managing member can refer to arbitration the partition of joint family property. 16 A. 231. Mother though *de facto* guardian of Muhammadan minors is not competent to agree to reference to arbitration affecting minor's property. 47 C. 713=26 C.W.N. 246. Where one of two appointed guardians consents to the agreement to refer to arbitration subsequently but not at the time of agree-

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed

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ment, the agreement is not valid. 47 C. 713=57 I.C. 945.

REFERENCE TO ARBITRATION AFTER SUIT—PROCEDURE—45 B. 245=59 I.C. 53=22 Bom.L.R. 1048. If parties to a pending suit agree to refer the matter to arbitration and to withdraw the suit then pending, and the suit is subsequently withdrawn in pursuance of such agreement, the agreement can be filed under Para. 17. 152 I.C. 614=1935 L. 59.

Para. 17(4).—Where the arbitrator is fully aware of the terms of the order of reference, accepts the office of the arbitrator and actually decides the controversy between the parties by giving an award, the mere fact that the order of reference was not formally communicated to him is a mere trifling irregularity, and would not vitiate the arbitration. 167 I.C. 171=1937 A.L.J. 29=1937 A. 141 (F.B.). So also where the order of reference itself does not fix the time within which the award should be filed, but the Court subsequently fixes a time-limit and calls upon the arbitrator to file an award within that time and the award is filed. (*Ibid.*) Unless there has been such a delay as to lead to the inference that the parties had abandoned the reference to arbitration, anything short of that inference cannot cut down the statutory period of limitation and the right to have the agreement of reference filed in Court. 1933 L. 18. See also 1933 R. 331. Where the conduct of the parties, coupled with the long and unexplained delay of six years amounted to a cancellation of the agreement to refer their disputes to arbitration the agreement could not be filed. 54 I.C. 126. The Court has no discretion to refuse to make the reference to the arbitrators nominated by the parties. 61 I.C. 390=6 P.L.J. 287. Court has no jurisdiction to make the order of reference except to all the specified arbitrators. An agreement to refer becomes void if any one of the arbitrators die or refuse to act. 42 I.C. 911 (1)=11 Bur.L.T. 160, 44 I.C. 866=71 P.R. 1918. See also 1933 L. 18; 1933 R. 331. But see 40 I.C. 38=4 O.L.J. 131 (Court can substitute another in his place). Court will refuse to file an agreement in case the arbitrators named in it decline to act. 12 Beng.L.R. App. 13. But where there is a distinct provision by which a party is authorised to appoint another in the place of the one refusing to act, the agreement to refer would still hold good. 155 P.R. 1919=51 I.C. 636. The effect of the refusal to act of the sole arbitrator named by the parties on the agreement to refer to arbitration is a question of intention in each case, depending on whether the dominant intention of the parties was that the matter should be referred to arbitration, the personnel of the arbitrator being merely a subsidiary question or whether the essence of the agreement was to refer the matter to the arbitration of a particular person and him alone. The fact that the arbitrator is named in the same or a subsequent agreement is by no means conclusive.

1933 L. 18. Court cannot give a direction that in case of difference of opinion, the opinion of the majority must prevail 1926 M. 1183=51 M.L.J. 440. Court acts with material irregularity if it does not strictly comply with the terms of the agreement to refer to arbitration. 35 P.R. 1911=9 I.C. 655. On this sub-cl. (4), see also 122 I.C. 237=3 P. 443.

REVOCATION OF AGREEMENT.—A party to a reference can only revoke his submission on good grounds. 17 C. 200. See also 20 A. 145, 27 M. at 115. The cause for revoking submission should be urged when a notice is issued under Para. 17 and need not be deferred till the award is completed. 1933 S. 68. Consent to reference being obtained by misrepresentation is ground for revocation. 50 I.C. 637. So also relationship of arbitrator to one of the parties. 1933 S. 68. A reference once made cannot be arbitrarily revoked. 29 A. 49; 20 A. 145; 27 M. at 115. See also 39 I.C. 349=12 P.R. 1917. As to what is good cause for revocation, see 10 D. 381; 17 C. 200; 29 C. 278. If one party to a submission has been guilty of such laches as to entitle the other party to repudiate the submission, the latter will not be deprived of his right to repudiate merely owing to the absence of formal legal notice of revocation. 134 I.C. 733=33 Bom.L.R. 1022=1931 B. 529. Parties prosecuting case before arbitrators cannot afterwards challenge the award on ground of jurisdiction. 42 A. 661=18 A.L.J. 644. After reference is made the suit cannot be withdrawn. 9 A. 168. A Judge can act as arbitrator by consent of the parties. 26 M. 76; 23 B. 752. When he so acts, no appeal will lie from his decree. 10 C.W.N. 835; 4 A.L.J. 89.

UMPIRE.—As to the power of Court to appoint an umpire, see 8 A. 64. As to validity of appointment of umpire as sole arbitrator by Court, see 134 I.C. 733=33 Bom.L.R. 1022=1931 B. 529 (2).

APPEAL.—A decision passed under this section is a decree and an appeal lies therefrom. 22 M. 229. An order refusing to file an agreement is not appealable. 5 A. 333 (F.B.). But see 9 M.L.J. 10. Where an agreement to refer to arbitration was filed but, on the arbitrators failing to act, Court revoked the order of reference and dismissed the suit, *held*, the order of revocation was not appealable. 48 A. 27=23 A.L.J. 891. No appeal lies from a decree passed on an award arrived at under Para. 17 except in so far as it is at variance with the award. 160 I.C. 1075=1936 L. 617.

PLEADER'S FEE IN OUDH.—Proceedings before an arbitrator and proceedings subsequent to the award are all proceedings in the matter of an application made by a party under Para. 17, and according to R. 289 (6) of the Oudh Civil Rules only one-fourth of the fee payable to pleaders in the case of suits decided on merits on contest can be taxed. 7 O.W.N. 97=1930 O. 89.

in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

18. Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit: and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit.

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JURISDICTION—The refusal to refer to arbitration on the part of the other party is a fundamental part of the cause of action in an application under Para. 17 to have the agreement filed in Court. So where such refusal took place in Lahore, Courts in Lahore have jurisdiction to entertain the application, though the proposed arbitrator might have resided elsewhere and the cause of action relating to other reliefs arose elsewhere. 1933 L. 18 Jurisdiction—Agreement for reference—Application for filing—Refusal by some arbitrators to act—Power of Court to order agreement to be filed. See 11 O.W.N. 1188.

COURT-FEE—The Court-fee on a memorandum of appeal is an *ad valorem* fee computed on the value of the subject-matter in dispute. 5 A 333.

Paras 17 (4), (5) and 19.—When an agreement is entered into to refer a dispute to some named arbitrators and one of them subsequently refuses to act as such, Court cannot pass an order of reference under Para. 17, nor has Court power to appoint another arbitrator, as that power can be exercised only where there is already an order of reference. 9 Luck 321=11 O.W.N. 12=1934 O. 67.

Paras. 17, 18 and 19.—The parties had agreed to refer their disputes to arbitration and abide by the unanimous award of three specified arbitrators. Pending arbitration proceedings, one of the arbitrators died. The agreement contained no provision for filling up the vacancy. One of the parties thereupon filed a suit and the other applied under Para. 18 for stay. *Held*, Court had no power to stay the proceedings as the agreement became inoperative on the death of one of the arbitrators. Any reference made by Court to two of the arbitrators only or after substituting a new arbitrator in the place of the deceased would not be consistent with the agreement. That is a sufficient reason within the meaning of Paras 17 (4) and 18. The provisions of Paras. 4 and 5 cannot be invoked; those provisions can only be applied if they are consistent with the agreement (*vide* Para. 19). 54 M. 469=32 L.W. 905=60 M.L.J. 676.

Para. 18: SUIT IN CONTRAVENTION OF

AGREEMENT—Court can stay such suit. 61 I.C. 322; 66 I.C. 43=2 L. 335=1922 L. 353; 2 L. 19=60 I.C. 776; 39 I.C. 508=92 P.R. 1913; 68 I.C. 235=25 O.C. 63=1922 O. 158. The power vested in a Court to stay a suit is purely discretionary and can be exercised only on an application made for that purpose by one of the parties to the suit at or before the settlement of issues. 22 I.C. 811=92 P.R. 1913, 68 I.C. 235=25 O.C. 63. *See also* 1930 M.W.N. 1028. Discretion should not be exercised unjudicially or capriciously. 1937 L. 206. The existence of the award is a complete bar to the suit until the award is set aside by a Court of competent jurisdiction. 57 I.C. 894. An award extinguishes all claims embraced in the submission and afterwards furnishes the only basis on which the rights of the parties can be determined, and constitutes a bar to any action on the original demand. 25 I.C. 220=7 Bui.L.T. 308. In case of an agreement to allow disputes to be tried by another tribunal, Court will take into consideration all those grounds as in a case of submission to arbitration. 15 S.L.R. 88. Where after a reference to arbitration one of the parties brings a suit against the other and the latter deliberately refrains from applying for stay of the suit he must be deemed to have waived his right to arbitration. 44 A. 292=20 A.L.J. 128. A party to an agreement to refer a dispute to arbitration is not debarred from bringing an independent suit on title. 24 I.C. 490=12 A.L.J. 757. Para. 18 does not apply if an order for stay of a suit is vacated owing to the refusal of one of the arbitrators to act and the suit is proceeded with. 50 I.C. 879=23 C.W.N. 293. Where in spite of an agreement to refer to arbitration the plaintiff filed the suit and one of the arbitrators refused to act, *held*, that the plaintiff was entitled to a removal of the stay. The suit was not barred by the agreement to refer to arbitration. 64 I.C. 289=23 Bom.L.R. 511. Suit in contravention of agreement to refer dispute to arbitration—Suit not stayed—Award during its pendency—Validity. 157 I.C. 867=1935 L. 916. Proper course of the party relying on the award. (*Ibid*) Agreement to refer to arbitration after institution of suit. If adjustment within the meaning of O. 23, R. 3—Stay of suit. 38 B. 687=16 Bom.L.R. 653.

19. [S. 524.] The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.

Provisions applicable to proceedings under paragraph 17.

Arbitration without the intervention of a Court.

- 20 [S. 525] (1) Where any matter has been referred to arbitration with-

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When parties have deliberately made contracts with an arbitration clause and chosen to select their own *forum*, there is a *prima facie* duty upon Court to respect the agreement. If difficult questions of law are likely to arise such as would inevitably entail a special case being prepared and reference to Court made by an arbitrator the Court may in the exercise of its discretion refuse to stay. So also, if a question of law would arise which is clearly outside the purview of the arbitration clause and other questions, though within it, are so intimately connected with the prime question that a more convenient course would be to try the whole action in Court, a stay may be refused. Stay refused in the particular case 58 C. 1107=35 C.W.N. 514=53 C.L.J. 321=1931 C. 772 (2). Where a contract between plaintiffs and defendants, providing for reference to arbitration in case of disputes arising out of the contract, is impeached by a suit by the plaintiffs on equitable grounds, arbitration proceedings which had commenced should be stayed pending the disposal of the suit 46 I.C. 173=22 C.W.N. 535. The fact that a small portion of the relief claimed is not within the scope of the arbitration clause is not in itself a sufficient reason for refusing to stay proceedings where the main subject of the action is within the clause. 58 C. 1107=134 I.C. 529=35 C.W.N. 514.

Para. 19: SCOPE AND OPERATION OF.—Para. 19, can only come into operation when an order of reference has already been made under para. 17. 151 I.C. 1001=11 O.W.N. 1188. This para does not prohibit the setting aside of an award for misconduct although the agreement states that the award should be accepted as final 6 M. 368, 17 M. 498. Order filing or refusing to file award. Appeal lies. 60 I.C. 590. The provisions of the Code apply as far as possible, to the proceedings under Sch. II. 62 I.C. 927. A mere declaratory award is incomplete and should be remitted to arbitrators for completion. It cannot be executed. 6 S.L.R. 146=19 I.C. 374.

Para. 20.—The arbitrators need not be made parties to an application under this para. 14 P. 855. Para 20 was devised for the purpose of enabling any Court having jurisdiction, where the subject-matter of the award lies within more than one jurisdiction, to direct the award to be filed. 37 B. 442=15 Bom.L.R. 362. In order that a Court may order an award relating to immovable property to be filed under Para. 20, it is necessary that Court must have jurisdiction over the whole of the subject-matter of the

award. And it is not open to it to pass a decree in terms of a portion only of the award (55 M 689, Rel.) 55 A 542=143 I. C. 571=1933 A.L.J. 741=1933 A. 380. There is no law preventing an applicant to file an award made without the intervention of the Court, from objecting to a portion of the award. At the same time there is no provision entitling an applicant to ask the Court to file a part of the award. 38 P.L.R. 80=164 I.C. 543=1936 L. 682. Whether it is open to a Court to separate a portion of the award from the rest of it and proceed to pass a decree only in respect of a part? 16 P. 34=17 P.L.T. 835=1937 P. 214. But see 39 Bom.L.R. 159; 9 R. 480 (485)=1931 R. 252 (F.B.) (noted *infra*, under heading '*jurisdiction*'). A private award partitioning the joint property by metes and bounds including agricultural land cannot be filed in Court as part of the award relates to the partition of agricultural land, over which the Civil Courts have no jurisdiction under S. 158 (2) (*xvii*) of the Punjab Land Revenue Act. (22 I.C. 381, Foll.) 143 I.C. 143 (1)=34 P.L.R. 454=1933 L. 732 (2). See also 17 R.D. 36=14 L.R. (Rev.) 35. Para. 20, unlike Paras 1 and 17, does not require that the reference should be in writing. The language of that paragraph does not require that there should be a written reference. All that is necessary is that the Court must be satisfied that the matter had been referred to arbitration, that an award had been made thereon and that there was no ground or proof which would vitiate the award 133 I.C. 531=1931 A. 751. See also 33 P.L.R. 934. An award after dealing with certain ornaments which were ordered to be distributed among the parties stated, "or if any one desires to purchase them the market price of all these ornaments should be assessed and deducting the amount of his own share distribute the balance equally among the other sharers." So also in respect of a house it was provided that it should be sold to one of the sharers, and that he should pay the other sharers their shares in the sale price. *Held*, that the provisions in the award could not be held to be bad for indefiniteness and that the award was not invalid on that account. The most that could be said was that the award was only declaratory in that respect, but that was no reason for refusing to file it 39 Bom.L.R. 159. Where in an application to file an award, a prayer is added that a portion of the award is invalid and therefore in the final decree that may be passed on the award that portion should not be included, the application is competent as the main prayer to file the award is in accordance with law, and the Court could

Filing award in matter referred to arbitration without intervention of Court in court.

out the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award, that the award be filed

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either ignore the subsequent illegal prayer or allow the applicant to amend his application by deleting such prayer. 38 P.L.R. 86=1936 L. 682 The powers of Court in a proceeding under this rule are exhausted as soon as it decides either to file the award or refuses to file it. 47 I.C. 960=5 O.L.J. 471. The provisions of this section are not superseded by S. 47 of the Dekhan Agriculturists' Relief Acts. 8 B. 20. There is no provision in the Land Revenue Act or in the Code, which would give a Court hearing cases under the Land Revenue Act jurisdiction to entertain an application under this para. 14 L.R. 35 (Rev.) =17 R.D. 36. The word "matter" is not wider than the expression "matter in difference" in Para. 1. 12 I.C. 639=5 S.L.R. 92. Where a dispute in regard to money obtained by bribes taken dishonestly from the public is referred to an arbitrator and an award is made, the award cannot be filed in Court nor can a decree be passed thereon. 149 I.C. 396 =1934 A.L.J. 1256=1934 A. 493.

AWARD—An award made out of Court becomes effective from the date when it is made and not from the date when Court orders it to be filed in Court. 166 I.C. 947=1937 S. 7. A document although headed an award and signed by the arbitrators, which merely recommends a solution of the questions referred, will not be treated as an award. 11 C. 356. A settlement recorded by a person asked to act as mediator and agreed on by the parties, is not an award and if at all it is operative it is so only as a contract as between those who have signed it. 53 I.C. 283 (M.); 48 P.L.R. 1915=28 I.C. 298. Where in a partition through arbitrators appointed without the intervention of Court the procedure of the arbitrators was in accordance with the express wishes of the parties and this was strongly corroborated by the fact that the parties attested the award, even though some of the property was not partitioned, it cannot be said that the award was incomplete. 150 I.C. 288 (2)=1934 L. 305 (1). When an award has been lost, a Court can take secondary evidence of its provisions and pass a decree. 15 M. 99. See also 1 L. 45=55 I.C. 845. An award which is partly within and partly exceeds the terms of the submission to arbitration cannot be enforced. 3 M. 68. An award may be delivered bit by bit where the agreement to refer provides for it. 4 C. L.R. 92. See 22 A. 224. A suit for a declaration that an award was fraudulently passed does not lie. 20 M. 89. If there was no matter in difference between the parties, there could be no reference and award. 30 C. 831, 16 C. 482, 31 C. 203; 29 M. 44; 27 A. 526; 9 Bom L.R. 259. But see 9 Bom L.R. at 888. A Court should refuse to file an award

which refers to matters not referred to arbitration. 29 M. 303. An order rejecting an application to file an award is not a decision that the award is bad in law. 43 A. 108=18 A.L.J. 960, 22 Bom L.R. 1377=45 B. 329. The rejection of an application to have an award filed in Court is no bar to a regular suit to enforce the rights created by the award. 55 M. 689=139 I.C. 877=62 M.L.J. 550. If a party to an arbitration proceeding fails to take an objection to the absence of one out of several arbitrators, he will be deemed to have waived his right to take objection to the whole of the irregularity caused thereby and the award must be filed. 67 I.C. 866=1922 C. 181 (1). So also where in an application under this para. the value for the purpose of jurisdiction is fixed. The valuation cannot be questioned in execution proceedings when the objection is not taken in the award proceedings or in any appeal arising therefrom. 1936 L. 63. Where a dispute between a Company and two others was referred to arbitration and a decree was based on the basis of the award but an objection was taken in execution on the ground that the parties had not agreed to be bound by the procedure under the Arbitration Act, held, (1) that the decree was not on the face of it a nullity; (2) that in any case the objection was not one which could be entertained by the executing Court. 140 I.C. 180=1933 L. 46. A plaintiff who has not carried out what he was directed to perform under the award cannot sue to enforce that part of the award which is favourable to him. 22 C.W. N. 66=27 C.L.J. 486. Award on private reference—Institution of suit prior to commencement of proceedings by arbitrators—Jurisdiction of arbitrators—Legality of the contract of submission—Enquiry into—Suit to set aside the award—Maintainability. 3 L. 296=69 I.C. 583. See also 1935 L. 134. Where a person consents to be bound by an award although it is made during the pendency of the suit, the award is binding on the parties. (3 L. 296, Rel. on) 131 I.C. 126=1931 L. 594. On a private reference to arbitration an award which is passed by the arbitrators and which does not partition agricultural land but only settles the shares of the parties can be validly filed in the Civil Court. 81 P.W.R. 1918=45 I.C. 166. Award alleged invalid—Decree on original cause of action may be granted. 33 I.C. 494=68 P.W.R. 1916. Para. 20 does not limit the time for the issue of notice thereunder. 21 I.C. 298=310 P.L.R. 1913. An application to file an award under this para. is a suit within the meaning S. 16 of the Provincial Small Cause Courts Act. 158 I.C. 1102=1935 S. 208. It is not within the jurisdiction of a Small Cause Court to file an award which, though it directs payment of money within the limits

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to show cause, within a time specified, why the award should not be filed.

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of its pecuniary jurisdiction, goes on to declare the dissolution of marriage between the parties. A Civil Court can accept the award passed on reference to arbitration by parties in a dispute as to the demarcation of boundaries under S. 41, U.P. Land Revenue Act, 1901. 50 I.C. 193=6 O.L. J. 84. The expression "subject-matter of the award" means the whole matter dealt with and decreed by the award and not any particular portion. 51 I.C. 53=10 L.W. 57, 12 I.C. 639. A suit lies on an award even though it has not been filed in Court under Para. 20 within six months as required by Art. 178 of the Limitation Act. 2 L.W. 230=29 I.C. 49, 42 I.C. 116=4 O.L. J. 487; 27 I.C. 31=7 Bur.L.T. 279. Where an award is not acted upon by parties, it does not bar a suit regarding the original rights of the parties. 29 Bom.L.R. 301=101 I.C. 398=1927 B. 237. Arbitrators need not even give reasons for their decision and are not even bound to record anything of the proceedings. They may even ignore any position advanced by the parties, as an award is not a judicial decision. 17 I.C. 33=1912 M.W.N. 1076 (23 M.L.J. 290, 38 C. 143, Ref.). Nor are they bound to decide a point if the parties show by their conduct that they did not want a formal decision thereon. 17 I.C. 33=1912 M.W.N. 1076. But they are bound to decide all matters in dispute in their award and their failure to do so cannot be condoned because the Court does not sustain a contention not dealt with by them. 17 I.C. 33=1912 M.W.N. 1076. Where arbitrators were appointed to partition certain property but they did not divide the debts outstanding but directed one party to pay the other a lump sum as the cash equivalent of his share, *held*, that the arbitrators had travelled outside the provisions of the submission and that the award could not be filed. (27 A. 526, Ref.) 137 I.C. 198=1932 A.L.J. 331=1932 A. 348. An award partitioning joint family property, made on reference by only some members of the joint family is a valid award which can be filed under this para and is binding on those members who actually join the reference and can be enforced against them. The mere fact that some members of the joint family do not join, does not make the award invalid. The award may or may not be set aside at the instance of third person but that it is not a matter which enters into consideration in proceedings under Paras. 20 or 21. 1936 Pesh. 96. A person who is a stranger to the submission to reference and under no obligation to abide by the award could not avail himself of it and could not be said to

be a person interested in the award. 69 I.C. 714=26 O.C. 1. A Court is competent to pass a decree on an award as modified by a lawful compromise filed by the parties and that from a decree so passed no appeal lies except in so far as the decree is in excess of or not in accordance with the award so modified. 25 O.C. 213=68 I.C. 209 (31 C. 516; 45 B. 245, 37 B. 693, 2 L. 114, 27 A. 526, 29 M. 303; 4 Pat.L.J. 394; 30 P.R. 1914; 21 C.L.J. 248, Ref.). An award made in arbitration cannot be remitted to the arbitrators without the intervention of the Court. 7 Bur.L.T. 287=24 I.C. 132. A settlement made by arbitrators cannot be reopened in order to show errors in the account except on the ground of fraud. 38 M.L.J. 247=43 M. 429. On this rule, *see also* 23 S.L.R. 349=116 I.C. 102=1929 S. 107, 7 O.W.N. 815=1930 O. 432. Where a party agreed to be bound by the decision of a Committee and although the Committee had no power to delegate its power of disposal to a new tribunal, it left the matter to some of its members: *held*, that the award of the members to whom the matter was delegated was not binding on the party. 133 I.C. 531=1931 A. 751.

Para. 20 (3).—*See* 8 A. 340 (351), 6 B. 663 (666); 28 B. 287, 16 A. 231.

FILING AWARD—REPRESENTATIVE ACTION—FORM OF NOTICE—Where an application has been made for filing an award notice must be given to the parties to the arbitration other than the applicant. In the case of a representative action it is not necessary to give separate notices under O. 1, R. 8 and under Para. 20. 149 I.C. 324=35 Bom.L.R. 1101=1934 B. 6.

JURISDICTION [Per Page, C.J. and *Mya Bu, J.*, in the order of reference].—Where a part of an award made in an arbitration without the intervention of Court deals with property outside the jurisdiction of the Court which is requested to file it, if that part is separable without disturbing the basis and equilibrium of the award as a whole, the Court may delete that part of it and order the rest to be filed. Merely because the award deals with some matters which are not within the jurisdiction, it does not follow that the award cannot be filed. 39 Bom.L.R. 159; 9 R. 480=1931 R. 252 (F.B.) *See also* 158 I.C. 60=1935 S. 184; 1935 L. 794, 55 M. 689=62 M.L.J. 550. The question whether the charge over immoveable property was or was not the subject-matter of the reference is not material in considering whether the Court has jurisdiction to entertain an application under this para. If the subject-matter of the award refers to a

21. [S. 526.] (1) Where the Court is satisfied that the matter has been

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charge on immovable property outside the jurisdiction of a Court to which an application is made under this para., it *prima facie* ousts the jurisdiction of that Court in view of the provisions of S. 16. [51 C. 361 (P.C.), Rel. on; 30 M. 478, Expl and Dist.] 25 S.L.R. 204. On the question of jurisdiction, see 51 I.C. 53=10 L.W. 57; also 136 I.C. 445=13 Pat. L.T. 169 (Agreement to refer under S. 152, Companies Act).

"PERSON INTERESTED IN AWARD".—The arbitrator is not "a person interested in the award" within the meaning of this para. Therefore an application presented by him for filing the award cannot be treated as one under para 20. 1935 L. 134

STAMP.—In proceedings under para 20 an unstamped award may be admitted in evidence and filed in Court after paying the penalty under the Stamp Act. 66 P.R. 1913=20 I.C. 491. (12 M. 331, Dist.)

COURT-FEE.—This is the same as that for an application. 10 C. 11. An order directing an award passed in an arbitration out of Court to be filed is neither a decree nor an order having the force of a decree. An appeal therefore need only be stamped with a Court-fee of Rs. 2 under Art 11, Sch. II of the Court-Fees Act. It need not be stamped *ad valorem* on the value of the appeal (25 A.L.J. 741, 9 L. 380, Foll.; 33 C. 11, Dist.) 6 Luck 703=139 I.C. 622=9 O.W.N. 800

LIMITATION.—Six months from date of award which is the time when it is given to the parties. 9 C. 575 Applicant cannot claim the benefit of S. 6 of the Limitation Act 1 R. 256=76 I.C. 493=1923 R. 226 Under special circumstances S. 5 and S. 14 of the Limitation Act if may be applied 38 A. 85=31 I.C. 899=13 A.L.J. 1115. Application under this para is not the only remedy open to a person in whose favour award is made. He can file regular suit, and Art 178 Limitation Act, will not apply 1936 L. 134 Where in an application for filing an award one of the party respondents in whose favour also the award had been made applied to the Court to be transposed as applicant but it appeared that the period of limitation for his filing an application had already expired, *held*, that the Court could transpose the party and that the mere transfer did not amount to a fresh application so as to create a bar of limitation against him. 133 I.C. 410=1931 A. L. J. 863=1931 A. 725.

APPEAL.—The order refusing to file an award is a decree from which an appeal lies 29 C. 167 (P.C.); 27 M. 255 (F.B.), 29 M. 303 But see 31 C. 757 (F.B.) See also 11 C. W.N. 220 Reference to arbitration out of Court pending suit—Application to make award rule of Court—Objection to procedure on appeal—Sustainability 142 I.C. 195=34 P.L.R. 340=1933 L. 746.

REVISION.—An order of refusal is subject to revision 8 Bom L.R. 570.

WITHDRAWAL.—An application under this section can be withdrawn. 31 C. 516; 4 C.L.

J. 162. See also 18 C. 414; 28 A. 621; 29 B. 621 (F.B.); 16 M.L.J. 474, 29 M. 303.

Paras. 20 and 17.—The law prohibits proceedings either under para. 17 or para. 20 only in cases where a suit is pending with regard to the same subject-matter at the time of the presentation of application and not otherwise. Where therefore in a pending suit, the parties referred the matter in dispute to arbitration out of Court, an award was passed and after the suit was allowed to be withdrawn with the consent of the parties, one of them applied under para. 20 to have the award made a rule of Court, there being no suit pending at the time the application is made, Court has jurisdiction to admit the application and pass a decree in accordance therewith (51 B. 908, Foll.; 54 B. 197, Diss. from.) 141 I.C. 83=1933 pesh. 18. As to relative applicability of paras. 17 and 20, see *supra* 38 Bom.L.R. 607=1936 B. 401 (noted under para. 17 under heading 'applicability of para.').

Paras 20 and 21: SCOPE.—Paras. 20 and 21 do not apply where the matters referred to arbitration are already the subject-matter of a suit between the parties to the reference. 45 B. 245=22 Bom L.R. 1048. There is no distinction between an award which deals *solely* with disputes which are the subject-matter of a suit and that which *inter alia* deals with disputes which are not the subject-matter of a suit except in the case of an award in which the decision in respect of such disputes which are not the subject-matter of the suit is separable from that which deals with the matters which are in the suit. If the award could be separated, that part of the award which deals with extraneous matters may be enforced as a decree. 158 I.C. 60=1935 S. 184 The fact that the agreement of reference was written after the arbitrator had looked into the *bahis* of the plaintiff is no ground for the Court to refuse to file the award and pass a decree thereon 37 P.L.R. 491 Where the arbitrators deliver a unanimous oral award, but on its being reduced to writing subsequently, one of the arbitrators resiles and refuses to sign the award, it is nevertheless competent to the Court to give effect to the award. The oral award is complete without the writing and the refusal on the part of one of the arbitrators to sign it when reduced to writing does not make it invalid 44 L.W. 32=1936 M. 713=71 M.L.J. 342. Award accepted and signed by parties—E. enforcement as compromise See 31 P.L.R. 225.

Para 21: AWARD FILED IN COURT—DECREE WHETHER CAN BE PASSED THEREON.—Where disputes between the parties are referred by agreement to arbitration and the arbitrator files the award in Court and no order is made for remitting the award to the consideration of the arbitrator nor is the award set aside, the award remains filed in Court and it is enforceable as if it were a decree of the Court. The Arbitration Act does not contain any provision for making a decree on

Filing and enforcement
of such award.

referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15

Notes.

an award such as is contained in para. 21, and if such a decree is made, it is one without jurisdiction and therefore a nullity. But a party to the arbitration is however entitled under the Act to enforce the arbitrator's award through the Court in exactly the same way as if it was a decree. 60 I.A. 71=60 C. 670=64 M.L.J. 341 (P.C.). Paragraph 21 does not lay down any particular form of order. All it states is that the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award. All that is necessary is that the mandatory direction which constitutes the order must be present somewhere. Where the Judge, instead of passing a separate order with respect to the filing of the award, and then a judgment in terms of the award followed by a decree, combined the order for filing the award and judgment into one. *Held*, that the procedure was not irregular. At any rate, even if it was an irregularity, it did not mislead either of the parties and hence would be curable under S. 99 1936 N. 246. The arbitrators are judges of law as well as judges of fact, and an error in law or error in fact or in arithmetic cannot vitiate an award, unless the error or mistake is so palpable and gross as would afford strong evidence of misconduct I.L.R. (1936) N. 44=1936 N. 197. A Court to which an application is made to file an award made by arbitrators should not arrogate to itself the functions of a Court of appeal from the arbitrators. Before it can interfere with the award, a great deal more than mere error on the part of the arbitrators has to be shown (*Ibid*) See also 7 O.W.N. 1095=1931 O 6 (5 O.W.N. 1001, Foll.; 23 A. 383, Dist.) Court can determine the genuineness or validity of the award filed. 20 M. 89. A Court must, before enforcing award, satisfy itself that it is enforceable in the same way as a decree would be enforceable if it were a decree. 42 A. 525=18 A.L.J. 652. See also 12 I.C. 639=5 S.L.R. 92. An award of three arbitrators made without final discussion with the fourth arbitrator and in his absence and to which he does not agree is not an award by a majority of four arbitrators. The three arbitrators must be regarded as having been guilty of misconduct in drawing up the final award without consulting the fourth one at all and the award is consequently vitiated. 7 R. 715=121 I.C. 801=1930 R. 136. But where there is a reference to five arbitrators one of them was not present at the meeting but the parties, however, orally agreed that the remaining four arbitrators should proceed with the case and dispose of the matter, *held*, that though the subsequent oral agreement was hit at by S. 92, Evidence Act, the defendant himself having agreed to the procedure, it was not a proper case for interference in revision. 135 I.C. 230=1931 A.L.J. 1087; 130 I.C. 156=1931

N. 66. A direction in the award to the parties to modify the decree duly passed by Courts of law does not amount to an ousting of the jurisdiction of the Court. The award is an adjustment of decrees under O 21, R. 2. 48 A. 475=24 A.L.J. 480=95 I.C. 416=1926 A. 501. In the absence of a contrary provision, parties, agreeing to settle their differences by the judgment of a body made up of an uneven number of persons, are presumed to imply that they would accept the decision of the majority 42 B. 669=19 Bom L.R. 618. When a defendant denies a reference to arbitration the jurisdiction of the Court is not taken away. 25 C. 757 (F.B.); 17 A. 21 (F.B.); 20 M. 89. Generally a person who is not a party to or properly represented in any proceedings should not be bound by those proceedings 26 C.W.N. 804=1922 C. 226. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the C. P. Code. It will suffice if there is a substantial representation of the different interests before the arbitrators. (*Ibid*.) If there has been a substantial representation of the interests of the legal representatives by the other parties on the record and if the enquiry is full and fair, the award will be binding and a decree could be passed thereon 26 C.W.N. 804=1922 C. 226. (31 A. 572=15 C.L.J. 360, Dist.) A father in a joint Hindu family in his capacity as managing member, can refer to arbitration the partition of family property. 16 A. 231; 19 C. 334. The award of an arbitrator on a question of partition when all the members of the joint family are not parties to it is invalid. 48 I.C. 953=1919 P.H.C.C. 141. It is competent for the arbitrators to decide whether or not an alleged interpolation was in the contract as originally made. 59 I.C. 439=24 C.W.N. 557. The arbitrators can construe the terms of a will with reference to the circumstances of the case. 6 P. 556. A party relying on an award must prove that he has abided by its conditions. 41 I.C. 245. Where parties have consented to an award, they cannot be allowed to object that the award is partial or incomplete. 32 P.L.R. 754. (12 L. 65, Foll.) Capacity to make a submission to an arbitrator is co-extensive with capacity to contract 19 C.W.N. 948=21 C.L.J. 273. As a submission only refers to the arbitrator, questions between the parties, the moment he touches the interest of strangers, he exceeds his authority and his award is void. (*Ibid*.) Submission to an arbitration does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject-matter. 19 C.W.N. 948=21 C.L.J. 273. Under para. 21, a Court can direct a private award to be filed if the ground mentioned in paras. 14 and 15 are not established. If such grounds are established the Court must refuse to file the award. 21 C.L.J. 248=19 I.C. 941. A Court has no power

is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

Exclusion of certain words in the Specific Relief Act, 1877.

22. The last thirty-seven words of section 21 of the Specific Relief Act, 1877, shall not apply to any agreement to refer to arbitration, or to any award, to which the provisions of this schedule apply.

Notes.

to direct the filing of an award which is open to attack in part. 15 C.L.J. 110; 13 I.C. 118=16 C.W.N. 256. It is permissible to separate such portion of the award as goes beyond the powers of the arbitrator, and to maintain the remainder if good. 53 I.C. 992. Where award related both to movable and immovable properties, and the portion relating to the latter was invalid for want of registration, it is open to the Court to reject that portion in the application and grant with reference to the movables. 158 I.C. 812=1935 O.W.N. 1141. But see 135 I.C. 230=1931 A.L.J. 1087=1932 A. 154 Award made after long delay and under suspicious circumstances—Right of parties to call upon arbitrator to decide within time. 52 I.C. 847=71 P.R. 1919. A private award which decides matters not referred to arbitration cannot be filed and no decree can be passed thereon though such matters are separable from the rest of the award. 30 P.R. 1914=23 I.C. 422. Compromise during suit—Court's duty to inquire if parties are bound by compromise set up by one of them. 63 P.L.R. 1912=15 I.C. 478. The parties to an arbitration filed the award in Court for a decree to be passed on it. One of the parties filed a solenamah in the Court and prayed that a compromise decree should be passed. By the solenamah one party had given up his rights under the award and had made amicable arrangements of all disputes. The Court refused to pass a compromise decree. *Held*, that the Court rightly refused to pass such a compromise decree in proceedings under Schedule II. 1937 C. 201. On an application for the filing of an award the only form which such a decree should take was an order that an award should be filed, and as the parties did not unite in praying that the application should be dismissed it was the duty of the Judge to proceed to consider whether the award which had been submitted should be filed. The Court therefore in its order refusing to pass a decree in terms of the compromise and in the subsequent order for filing the award did not act without jurisdiction, nor did it act irregularly in the exercise of its jurisdiction. (*Ibid.*) Unregistered private award filed in Court—Court passing decree on award—Legality—Registration Act, Ss. 17 and 49. (*Ibid.*) An award by arbitrators may be either oral or in writing, and both are equally binding on the parties. 45 I.C. 813=34 M.L.J. 184. See also 12 P.L.T. 733. (26 B. 132, Foll.) An award is

sufficient to pass title to property. The Transfer of Property Act is not exhaustive of the modes of transfer. 45 I.C. 813=34 M.L.J. 184 An award is not in the nature of a foreign judgment and a Court is therefore not entitled to go into the merits of the same. 29 I.C. 49=2 L.W. 320 Where a person was a party to arbitration but was not a party to the decree which followed upon the award he could not enforce the decree. 52 I.C. 849=6 O.L.J. 322.

Para. 21 (1)—Court cannot refuse to file an award by imposing conditions beyond those mentioned in para. 21 (1). 33 I.C. 67=19 M.L.T. 228. See also 4 B. 1, 33 C. 757, 13 M.L.J. 275 When an application is made for filing an award passed on a reference out of Court, Court should in the first instance pass an order that the award be filed and then proceed to pronounce judgment according to the award. It is necessary and important that two orders should be passed, because whereas an appeal directing an award to be filed is appealable under S. 104 (1) (f), an appeal from the decree based on the award can be challenged only so far as it is not in accordance with the award. 1933 A.L.J. 40=1933 A. 166.

APPEAL—Order filing award—Appeal lies 60 I.C. 590. See also 134 I.C. 474=8 O.W.N. 789, 55 M. 689=62 M.L.J. 550.

Para. 21 (2).—18 A.L.J. 78=54 I.C. 44; 123 P.R. 1912=10 I.C. 512, 10 I.C. 454=13 C.L.J. 399. An order refusing to set aside an *ex parte* decree passed in accordance with an award is appealable. 38 A. 297=14 A.L.J. 332. A decree passed under Sch. II, para. 21 (2) is a "decree" and the provisions of R. 13 of O. 9 apply to it. 62 I.C. 927.

REVISION—A decree based on a private award filed in Court is not open to revision. 23 I.C. 950=114 P.L.R. 1914; 49 I.C. 979=31 P.W.R. 1919; 7 P.W.R. 1911=9 I.C. 38.

APPEAL TO PRIVY COUNCIL.—The provisions of para. 21 (2) do not affect the right of applicant to go in appeal to the Privy Council. 15 I.C. 2=15 O.C. 55. If a suit is filed before the award is made and the award is attacked as invalid, if the objections fail, the suit must be dismissed, and the plaintiff cannot claim a decree on the basis of the award. 13 S.L.R. 75=53 I.C. 337 (6 Bom H.C.R. 231, Ref.; 11 M.I.A. 7, Foll.)

Para. 22—The scope of S. 21 of the Specific Relief Act is limited by paragraph 22. 64 I.C. 204. See also 9 Bur.L.T. 98=35 I.C. 710.

23. The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be issued for the respective purposes therein mentioned.

Forms.

APPENDIX.

No. 1.

APPLICATION FOR AN ORDER OF REFERENCE.

(Title of Suit.)

1. This suit is instituted for (*state nature of claim*).
2. The matter in difference between the parties is (*state matter of difference*).
3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.
4. The applicants therefore apply for an order of reference.

A.B.
C.D.

Dated the _____ day of _____ 19 .

NOTE.—If the parties are agreed as to the arbitrators, it should be so stated.

No. 2.

ORDER OF REFERENCE.

(Title of Suit.)

UPON reading the application presented on the _____ day of _____ 19
it is ordered that the following matter in difference arising in this suit, namely:—

be referred for determination to X and Y, or in case of their not agreeing then to the determination of Z, who is hereby appointed to be umpire; and such arbitrators are to make their award in writing on or before the _____ day of _____ 19 ,
and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within _____ months after the time during which it is within the power of the arbitrators to make an award shall have ceased

Liberty to apply.

GIVEN under my hand and seal of the Court, this day of _____ 19 .
Judge.

No 3

ORDER FOR APPOINTMENT OF NEW ARBITRATOR.

(Title of Suit)

WHEREAS by an order, dated the _____ day of _____ 19 [*state order of reference and death, refusal, etc., of arbitrator*], it is by consent ordered that Z be appointed in the place of X (deceased, or as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order, and it is ordered that the award of the said arbitrators be made on or before the _____ day of _____ 19 ,

GIVEN under my hand and the seal of the Court, this _____ day of _____ 19 .
Judge.

No 4.

SPECIAL CASE.

(Title of Suit.)

In the matter of an arbitration between A.B. of _____ and C.D. _____, the following special case is stated for the opinion of the Court:—

[Here state the facts concisely in numbered paragraphs.]

The questions of law for the opinion of the Court are:—

First, whether—

Secondly whether—
Dated the _____ day of _____ 19 .
X.
Y.

No. 5.

AWARD.

(Title of Suit.)

In the matter of an arbitration between A. B. of _____ and C. D. of _____

WHEREAS in pursuance of an order of reference made by the Court of _____ and dated the _____ day of _____ 19 _____ the following matter in difference between A. B. and C. D. namely—

has been referred to us for determination,

Now we, having duly considered the matter referred to us, do hereby make our award as follows.—

We award—

(1) that _____

(2) that _____

Dated the _____

day of _____

19 _____

X.

Y.

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

1. [S. 321.] Where the execution of a decree has been transferred to the Collector under section 68, he may—

Powers of Collector.

Notes.

Sch. III.—A decree was satisfied by a lease of the judgment-debtor's properties by the Collector. Attempts were made to alter the terms of the lease but the Governor-in-Council disallowed such alteration and directed certain proceedings in respect of defaulting lessees. The lessees having defaulted in paying the lease money the Collector cancelled the lease and sold the property which was purchased by the decree-holder. The order of the Collector confirming the sale was affirmed by the Deputy Commissioner. *Held*, in revision by the Governor-in-Council, that the order cancelling the lease and confirming the sale were illegal and without jurisdiction, as being in contravention of the prior order of the Governor-in-Council and that the sale must therefore be set aside. 19 N.L.J. 22

Para. 1.—Where a decree is transferred to a Collector for execution, it is not open to the Collector to allow the validity of the order for sale to be questioned. In that respect, he can be in no better position than a Court executing a decree transferred to it—he cannot go behind the decree. Conversely, as it is not within the Collector's competence to consider this question, it must be open to the Court to consider it, on a proper application and assuming that there is no bar of *res judicata*. The mere fact that the carrying out of the Court's order has been delegated to the Collector cannot deprive the Court of jurisdiction to consider the validity of the order. 60 B. 516=163 I.C. 305=9 R.B. 4=38 Bom.L.R. 221=1936 B. 227. When a decree is transferred to the Collector for execution he can send back the papers, if he fails in effecting a sale of the property. 42 A. 152=24 C.W.N. 394=38 M.L.J. 259(P.C.). For good reasons the Court which passed the decree can also send back the papers to the Collector without fresh application for execution. In this case the Court enforces

what it has already ordered. (*Ibid.*) All that is delegated to the Collector is to consider the proper mode in which a decree may be satisfied by an agriculturist debtor so as to save, if possible, the sale of his property and the Court passing the decree can enquire into the question whether the decree-amount is satisfied or not and order a further execution when the Collector has returned the papers under an erroneous belief that the whole amount had been liquidated. 26 S.L.R. 506=1933 S. 112. Where a decree is sent to a Collector for execution he should let the land on premium so that the decree amount might be raised. But the Civil Court has no jurisdiction to interfere with the order passed by the Collector in respect of the transferred decree 35 Bom.L.R. 761=1933 Bom. 369. After a Civil Court passes a decree for joint possession of a revenue paying estate the Collector not only has to make allotment but to complete the partition by delivery of possession and he fails to exercise a jurisdiction vested in him by law if he refers the parties to the Civil Court for this purpose. 56 I.C. 806. Collector to whom execution of a decree has been transferred may lease any property for a term on payment of a premium but he cannot provide for payment by instalments of the decree amount. *Held also*, that the Collector has no jurisdiction to reduce the amount of the decree by reducing the rate of interest. 50 A. 827=115 I.C. 125=1928 A. 558. The date on which the Collector ceases to have power to deal with the property under Sch. III of the C. P. Code is the date on which the deposit was made in Court of the amount to satisfy the decree fully and an alienation effected after the payment is made, is not invalid merely because the proceedings of the Collector formally continue. 122 I.C. 371=1930 N. 220. Collector becomes *junctus officio* when the decree becomes adjusted between the parties. 19 N.L.J. 175. "Ance-

(a) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment-debtor to raise the amount of the decree; or

(b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or

(c) sell the property ordered to be sold or so much thereof as may be necessary.

2. [S. 322.] Where the execution of a decree, not being a decree ordering the sale of immovable property in pursuance of

Procedure of Collector in special cases.

a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of

which the Court has ordered the sale of immovable property has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment-debtor can be discharged without a sale of the whole of his available immovable property, may proceed as hereinafter provided.

Notice to be given to decree-holders and to persons having claims on property.

3. [S. 322-A] (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for compliance and calling upon—

(a) every person holding a decree for the payment of money against the judgment-debtor capable of execution by sale of his immovable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder;

(b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the court-house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

4. [S. 322-B.] (1) Upon the expiration of the said period, the Collector

Notes.

tral land" as defined in (All.) General Rules, Ch. IV, R. 8 (a) means property owned continuously from 1—1—1860 by the proprietor. Land gifted to the judgment-debtor after that date is not, therefore, "ancestral land" and the sale thereof need not be by the Collector. 1933 A. L. J. 91=1933 A. 138 (1)=147 I. C. 185.

LIMITATION.—The thirty days period of limitation for making an application for setting aside sale counts from the date of acceptance of the bid by the sub-divisional officer and not from the date of sale held by the Tahsildar, Naib Tahsildar under orders of the sub-divisional officer. 17 N. L. J. 41.

Paras. 1 and 2. SCOPE OF.—Where a mortgage is executed over properties, some items of which were under the Collector's management in execution of a money decree, under Sch. III, the mortgage is void only in

respect of the items in the management of the Collector but is valid as regards the rest of the items. 122 I. C. 369=1930 N. 237

Paras. 3 and 4 (3).—Where gifted property has been attached and execution sent to Collector, it is the duty of the Collector to send notice to the donee under para 3, calling upon her to state her objections. Where even without such notice, the donee raises objection, Collector should proceed under para. 4 (3), and not merely in form the donee that she should apply to the Court which passed the decree. 1935 O. W. N. 879.

Para. 4.—The Collector cannot adjudicate upon questions of title. 11 A. 94. On this section, see also 18 A. 315. An appeal from the decision by which a disputed claim is settled under this section is cognizable as a miscellaneous appeal. 4 M. 420. But see 7 A. 565.

Amount of decrees for payment of money to be ascertained, and immovable property available for their satisfaction.

immovable property, and inquiry.

shall appoint a day for hearing any representations which the judgment-debtor and the decree-holders or claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judgment-debtor's may, from time to time, adjourn such hearing and

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immovable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

5. [S. 322-C] The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4, draw up a statement specifying the circumstances of the judgment-debtor and of his immovable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court; and such Court shall thereupon issue the notices, hold the enquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

Effect of decision of Court as to dispute 6 [S. 322-D.] The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree.

Scheme for liquidation of decrees for payment of money. 7. [S. 323.] (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4 or paragraph 5, the Collector may,—

(a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property; or,

(b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—

(i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property, or

Notes.

Para. 7 (1) (b)—Under para. 7 (1) (b) Collector has to take into account the whole decretal amount with interest 37 Bom. 32=17 I C 142=14 Bom L.R. 787. Though judgment-debtor makes no real attempt to pay off the decree amount for a long time after the passing of the decree, when he pays a

portion and undertakes to make further payments by a certain date, it is not advisable to order the sale of the property, especially when there is no definite valuation of the property or order to be sold by Court. Collector is competent to have recourse to sale or lease or other methods to recover the decretal amount. 19 N.L.J. 27.

- (ii) by mortgaging the whole or any part of such property; or
- (iii) by selling part of such property; or
- (iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale; or
- (v) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules, consistent with this Act as may, from time to time, be made in this behalf by the [Provincial] Government.

8. [S. 324.] Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

9. [S. 324-A.] (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all moneys which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.

(2) Such charges shall include all debts and liabilities from time to time due to ²[the Crown] in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him.

Leg. Ref.

¹ Substituted for word 'Local' by Government of India (Adaptation of Indian Laws) Order, 1937.

² For words "the Government" the words "the Crown" have been substituted by *ibid*.

Notes.

Para. 9.—Collector holds any money which

may be realised in execution, at the disposal of the Civil Court by which the decree was sent to him for execution. S. 73 applies to such proceeds. 16 A. 1. See also 133 I.C. 423; 1931 O.L.J. 1064. As to the right of revenue authorities, to recover expenses of sale as in cases under the Land Revenue Code, see 28 Bom L.R. 1191=99 I.C. 289=1927 B. 17.

(3) The balance shall be applied by the Court—

(a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immovable property, or otherwise as the Court may under section 73 direct; or

(c) where the Collector has proceeded under paragraph 2—

(i) in keeping down the interest on incumbrances on the property;

(ii) where the judgment-debtor has no other sufficient means of subsistence in providing for his subsistence to such amount as the Court thinks fit; and

(iii) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment-debtor or such other person as the Court directs.

10. [S. 325.] Where the Collector sells any property under this schedule, he shall put it up to public auction in one or more lots, as he thinks fit, and may—

(a) fix a reasonable reserved price for each lot;

(b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property;

(c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

11. [S. 325-A.] (1) So long as the Collector can exercise or perform in

Notes.

Para. 10.—As to whether a sale of Collector is subject to the confirmation of the Civil Court, and whether Collector can set aside a sale, see 11 B. at p. 484

Para. 11 SCOPE OF PARA.—Para. 11 must be construed strictly. 6 O.W.N. 843=1929 O. 435. It is perfectly clear that para 11 does not forbid, in terms or otherwise, the transfer of the property in respect of which Collector can exercise or perform any of the powers or duties conferred upon him in the earlier paragraph of Sch. III. Indeed, such property can be the subject of transfer with the permission of Collector. All it does is to impose a partial disability on the judgment-debtor in the matter of transfer during the time Collector can exercise his powers and duties respectively conferred and imposed by paras. 1 to 10. 144 I.C. 373=1933 A.L.J. 1522=1933 A. 468. A transfer made in contravention of para. 11, is void and of no legal effect whatsoever. A person who is incompetent to transfer property by reason of para 11, is on the same footing as a minor or lunatic, who is incompetent to contract. S. 65, Contract Act, cannot be applied to such a case or invoked by the vendor in order to entitle him to a refund of the purchase-money paid by him in consideration of the transfer which is void. Nor does S. 73 of the contract apply to the case, because the

law will not presume or imply a contract where there could not have been a contract. 1 L.R. (1937) Nag. 111. See also 1933 A.L.J. 1564=1933 A. 908; 11 O.W.N. 1626=1935 Oudh 156 But a family settlement entered into by judgment-debtors does not contravene the provisions of this para. as it is not a mortgage, charge, or lease or alienation within the meaning of this para. 154 I.C. 267=1935 O.W.N. 278=1935 Oudh 245. The C form sent by the Civil Court embodied Mouza R, 12 annas share for Mouza B and the absolute occupancy fields of Mouza A. Collector provisionally withheld Mouza R from sale as he estimated that the sale proceeds of the other two items would be sufficient to satisfy the debt. Held, that because R village was the last in the order, in which the attached property was intended to be sold, it could not be said that the Collector could not exercise his power in respect of it. The judgment-debtor was therefore no more competent to transfer R than he was to transfer the other two items of property 1934 Nag. 285=153 I.C. 687 Where law has imposed a personal disability of an absolute character, as in the case of a minor or a person of unsound mind, every contract made by him is void. Where the disability is partial, as in the case of a judgment-debtor to whom Sch. III applies, an alienation made by him is invalid;

Restrictions as to alienation by judgment-debtor or his representative, and prosecution of remedies by decree-holders.

respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written

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but any agreement to pay money recoverable from his person and other property, movable or immovable, is unaffected by the partial disability imposed by Para. 11. Such agreement is enforceable in law and is as valid as any other contract. The executant admitted in a deed that a sum of Rs. 20,000 had been advanced to him and he undertook to repay it on demand. This covenant was quite distinct and separate from the other part of the agreement under which the debtor gave security for the payment of the amount due from him. The debtor was incompetent to mortgage the property by virtue of Para. 11. *Held*, that the creditor was entitled to enforce his remedy under the first part of the agreement. 144 I.C. 373=1933 A.L.J. 1522=1933 A. 468. *See also* 164 I.C. 945=1936 O. W. N. 1033 (enforceability of personal covenant in mortgage). The Collector cannot return the decree as satisfied till the whole amount including interest up to date of satisfaction has been paid. 37 B. 32=14 Bom.L.R. 787. Para 11 does not apply to the case of non-ancestral property comprised in a decree for sale. Such a decree cannot be transferred for execution to Collector. But, if it so transferred through a mistake, the prohibition against alienation, in Para. 11, will not apply, and an alienation, without Collector's permission is not invalid. 153 I.C. 612=11 O.W.N. 1626=1935 O. 156. *See also* 11 O.W.N. 1571=1935 O. 121. A junior member of a Hindu joint family cannot be allowed to deal with family property which has been placed in charge of Collector under para. 11. 132 I.C. 568=1931 A.L.J. 400. This para is a bar to the relinquishment by a person of his interest in immovable property, and such relinquishment is invalid. 163 I.C. 672=1936 A.L.J. 680=1936 A. 452. The word "incompetent" is to be read in the exact and plain sense that the word implies. 46 C. 183=45 J.A. 219=35 M.L.J. 733 (P.C.). *See also* 6 O.W.N. 843=1929 O. 435; 121 I.C. 888. The object of para. 11 is to protect the debtor as far as possible from the risk of losing his property wholly or for all time, and mere attachment before judgment cannot defeat that object. 68 I.C. 188=1922 N. 238; 46 C. 183=45 J.A. 219=35 M.L.J. 733 (P.C.). *See also* 121 I.C. 888=1929 O. 441=6 O.W.N. 750. An order transferring decree for execution to Collector takes effect the moment it is passed; a transfer made between the passing of the order and the date of its reaching the Collector, is void. 92 I.C. 44=1926 N. 246. The incompetency created by this section does not extend to the lessee from Collector. 53 I.C. 776. Para. 11 no doubt prohibits the transfer of any pro-

perty by way of mortgage but the stage at which any person entitled to plead that the mortgage was void is when the suit is instituted on the mortgage. Where such an objection is not raised it is not open to the judgment-debtor or his representative to contest the validity of the previous decree in a later proceeding. 1930 A.L.J. 1594=1931 A. 38. A party seeking to avoid transfer under para. 11, must show that on the date of transfer Collector was exercising powers under the Code and the decree was still unsatisfied. 17 I.C. 887=8 N.L.R. 182; 66 I.C. 642=8 O.L.J. 358. While a decree is under execution by Collector it is illegal for a Civil Court to issue process against the property. 66 I.C. 642=8 O.L.J. 358. Even where the Civil Court releases subsequently some of the properties from attachment so long as decree is under execution by Collector, judgment-debtor cannot mortgage even property released from attachment without permission of Collector. 164 I.C. 945=1936 O.W.N. 1033. An order by a Court executing a money decree against judgment-debtor directing Collector to pay surplus sale proceeds if any to the money decree-holder and not to judgment-debtor, does not amount to issuing a process and is not illegal. 102 I.C. 94=1927 O. 216. So long as the property is under attachment in Collector's proceedings, a mortgage of the property by the debtor would be invalid. But once Collector's power has terminated as a result of satisfaction or payment into Court by the debtor, a subsequent alienation by the debtor would not be invalid merely on the ground of formal continuation of proceedings before Collector, or on the ground that the formal order releasing the property had not yet been passed by Collector. 15 N.L.J. 173; 144 I.C. 267=I.R. 1933 N. 224. A decree which has been fully satisfied out of Court is one that is incapable of execution and Collector cannot exercise any of the powers conferred upon him by the Code and thereupon the incompetency of judgment-debtor to mortgage his property ceases. A mortgage therefore executed by the judgment-debtor on the date of sale fixed by Collector to pay off decree-holder is not void, if decree-holder has been on that date paid off. (1930 N. 237 and 8 N.L.R. 182, *Rel on*) 1933 N. 238. But where on transfer of execution to Collector, the sale officer returns the file to Civil Court to find out the extent and correct description of the property, and the Civil Court orders thereon, it cannot be said that the Collector had not seized of the case in the interval. Any mortgage effected in the interval by judgment-debtor would be invalid. 162 I.C. 362=1936 O.W.N. 489=1936 O. 280. The question whether Collector can exercise powers or not, should be judged not from a

permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

Notes.

purely theoretical point of view, but from the standpoint as to whether he can practically and effectively exercise any of his powers with respect to the property alienated under Sch. III. After Collector's certification of payment of the decree, the property, the sale of which is subsequently set aside, must be considered to have gone out of the jurisdiction of Collector. 1934 N. 285. The permission of Collector for a mortgage by judgment-debtor need not take the form of a certificate under O. 21, R. 83. It is enough if Collector knows of the mortgage and gives sanction to it in writing. 102 I.C. 94=1927 O. 216. Permission can be inferred from written words employed by the Collector from time to time there was written permission granted in the case 7 O.W.N. 988=1930 O. 510. It is not necessary for judgment-debtor to inform Collector that a decree-holder is about to attach the property, and permission to mortgage obtained from Collector suppressing that fact, would not render mortgage invalid. 19 N.L.J. 94. 'Such property' in paragraph 11 means the judgment-debtor's property over which Collector had power to deal with under the provisions of the III Sch. 1930 A.L.J. 1594=1931 A. 38. Where part of judgment-debtor's property is under Collector's management, judgment-debtor can validly mortgage the rest of his property. The words "such property or part" relate back to the earlier words the judgment-debtor's immovable property "or any part thereof in respect of which Collector is exercising his functions. Any part of the property in respect of which such functions are not being exercised is available to the owners thereof to deal with as they wish. 30 N.L.R. 331=1934 N. 264. Sch. III, Para. 11 (3)—If controls S. 48—Twelve years' period, if extended when decree-holder not deprived of remedy. 11 O.W.N. 1103=1934 O. 465.

DELEGATION OF POWERS.—A Collector acting under Para. 11, is not competent to delegate his power to permit an alienation of the property by the judgment-debtor. The granting of such permission is not a mere routine work. 153 I.C. 612=11 O.W.N. 1626=1935 O. 156.

Para. 11 (2).—This clause applies to all

cases where Collector is making arrangements for sale of property; and when he is so acting any order of Civil Court for arrest of judgment-debtor or demanding security from him is *ultra vires* and illegal. 1935 N. 52 (1)=18 N.L.J. 138.

Para. 11 (3).—The words "period of limitation" in Para. 11(3) apply to the restrictions placed upon the right of a decree-holder to take out execution of his decree both by the Limitation Act and S. 48 of the Code. 17 A. L.J. 1140=42 A. 118. Collector's powers under Para. 11 do not come to an end as soon as the property is sold by auction and fetches more than the decretal amount. 60 I.C. 310=16 N.L.R. 194. But see also 122 I.C. 371=1930 N. 220. Collector's power over property attached in execution of a decree terminates as soon as a payment sufficient to satisfy the decree has been made, and an alienation effected after such payment is not invalid. 122 I.C. 371. They exist at least till the confirmation of the sale. 60 I.C. 310=16 N.L.R. 194. If an objection has been raised as to a sale by a Collector his powers to confirm the sale are suspended and he must refer the objection to the Civil Court. 45 B. 812=61 I.C. 287=23 Bom.L.R. 254. A purchaser's suit, to establish his title to the property sold, is not barred by S. 47. 45 B. 812=23 Bom.L.R. 254. On this rule, see also 64 I.C. 855; 45 I.C. 240.

COLLECTOR GIVING PERMISSION TO MORTGAGE.—NEGOTIATIONS FAILING—COLLECTOR DIRECTING SALE—PERMISSION, IF IMPLIEDLY REVOKED.—The effect of Collector giving the permission to mortgage a certain property in writing is to remove the incapacity which is imposed by Para. 11, on a judgment debtor, and to confer upon him a capacity to transfer the property in such a manner as to avoid conflict with the rights of decree-holder. Any transfer made after such a permission is liable to be set aside not as being void *ab initio* but only at the instance of decree-holder if he is prejudiced. The permission to mortgage, not of a limited nature, is therefore not impliedly revoked on account of the failure of the negotiations relating to the contemplated mortgage and the subsequent order of Collector directing sale of that property. 1934 N. 285=153 I.C. 687.

12. [S. 325-E.] Where the property of which the sale has been ordered is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and performed by such one of the Collectors of the said district as the ¹[Provincial Government] may by general rule or special order direct.

Provision where property is in several districts.

Powers of Collector to compel attendance and production.

13. [S. 325-C.] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a Civil Court to compel the attendance of parties and witnesses and the production of documents.

THE FOURTH SCHEDULE.

(See section 155.)

ENACTMENTS AMENDED.

| Year. | No. | Short title. | Amendment. |
|-------|-----|---------------------------|--|
| 1870 | VII | The Court Fees Act, 1870. | In article 1 of Schedule I, after the word "plant" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted. From article 11 of Schedule II the words "from an order rejecting a plaint or" shall be omitted For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely.— "Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908." |

THE FIFTH SCHEDULE.

(See section 156.)

ENACTMENTS REPEALED.

[Repealed by Sch. II of Act XVII of 1914.]

THE INDIAN COINAGE ACT (III OF 1906).

| Year. | No. | Short title. | How repealed or otherwise affected by legislation. |
|-------|-----|-------------------------------|--|
| 1906 | III | The Indian Coinage Act, 1906. | Repealed in part, X of 1914 Amended, IV of 1918, XXI of 1919, X 1924, IV of 1927; II of 1934. |

Prefatory note.—The currency of British India is regulated by two modern Acts which supersede all prior legislation on the subject. The first, The Indian Paper Currency Act (III of 1905), deals with the issue, legal tender, and payment of currency notes. The second, the Indian Coinage Act (III of 1906) provides for the coining of silver (rupees), nickel (one anna pieces) and bronze (pice). The standard coin of India is the silver Government rupee. Other forms of rupee, such as the Portuguese rupee and Hyderabad or Sicca rupees are, however, in circulation. Gold coin of London Mint or the branch Mints which has not been decreed is legal tender at a fixed sum of rupees for one sovereign. Pro-

Leg. Ref.

¹ Substituted by the Government of India

(Adaptation of Indian Laws) Order, 1937.

vision is made as to the amount of Indian coin which is legal tender. Provision is also made for the currency of certain coin made under former Acts, and the Indian Government is authorized to mint other coin for issue by the Government of territories beyond British India. (S. 23)

The coinage of Ceylon (1892), Mauritius (1876) and East Africa and Uganda (1905) is based on the silver rupee as a standard; but in these possessions and protectorates the subsidiary pieces are the rupee-cent, and not annas and pies as in India.

In Hongkong the standard coin is the Mexican silver dollar (1895) but British dollars and Hongkong dollars are treated as equivalent to the Mexican dollar.

In the Straits Settlements (1903) and Labuan (1905) the standard coin is the Straits Settlements dollar.

In British South Africa the standard is British sterling money.

The currency of the Dominion of Canada is regulated by legislation of the Dominion Parliament. (Ency. of Laws of England, 2nd Ed., Vol. III, Title "Coins," p. 142.)

The following from the Statement of Objects and Reasons may also be noted (see *Fort St. George Gazette*, Part III, p. 129):—

"The object of this Bill is to consolidate the Acts relating to the coinage. The law, as originally formulated in the Indian Coinage Act (XXIII of 1870) has been materially modified by two Acts, namely, the Indian Coinage, and Paper Currency Act (VIII of 1893), which abolished obligatory free coinage, and the Indian Coinage and Paper Currency Act (XXII of 1899), which made gold coins a legal tender. The present Bill proposes to repeal both these Acts as well as the main Act of 1870, to reproduce the provisions, so far as they are still required, in a consolidated form and to provide for the introduction of a nickel one-anna and of a bronze coinage.

THE INDIAN COINAGE ACT (III OF 1906).¹

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THE SCHEDULE.—*Repealed.*

[2nd March, 1906.]

An Act to consolidate and amend the law relating to Coinage and the Mint.

WHEREAS it is expedient to consolidate and amend the law relating to Coinage and the Mint; It is hereby enacted as follows:

Preliminary.

Short title and extent.

1. (1) This Act may be called THE INDIAN COINAGE ACT, 1906; and

Leg. Ref.

¹ For Statement of Objects and Reasons, see *Gazette of India*, 1905, Part V, p. 32; for Report of Select Committee, see *ibid.*, 1906, Part V, p. 9, and for Proceedings in Council, see *ibid.*, 1905, Part VI, p. 142; *ibid.*, 1906, Part VI, p. 28.

The Act has been declared in force in the Angul district by the Angul Laws Regulation (III of 1913), B and O Code, Vol. I, p. 885.

The Act has been declared in force in the Arakan Hill District by the Arakan Hill District Laws Regulation (I of 1916), Bur. Code, Vol. I.

(2) It extends to the whole of British India, inclusive of British Baluchistan, the Santhal Parganas and the Pargana of Spiti.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) “deface”, with its grammatical variations and cognate expressions, includes clipping, filing, stamping, or such other alteration of the surface or shape of a coin as is readily distinguishable from the effects of reasonable wear;

(b) “the Mint” includes the Mints now existing and any which may hereafter be established;

(c) “prescribed” includes prescribed by a rule made under this Act;

(d) “remedy” means variation from the standard weight and fineness; and

(e) “standard weight” means the weight prescribed for any coin.

Power to establish and abolish Mints. 3. The ¹[Central Government] may, by notification in the ¹[Official Gazette].

(a) establish a Mint at any place at which a Mint does not for the time being exist; and

(b) abolish any Mint, whether now existing or hereafter established.

Silver Coinage.

Silver coins. 4. The following silver coins only shall be coined at the Mint for issue under the authority of the ¹[Central Government] namely:—

(a) a rupee to be called the Government rupee

(b) a half-rupee, * * *

(c) a quarter-rupee, * * *

3* * *

5. (1) The standard weight of the Government rupee shall be one hundred and eighty grains Troy and its standard fineness shall be as follows, namely, eleven-twelfths, or one hundred and sixty-five grains of fine silver, and one-twelfth, or fifteen grains of alloy.

(2) The other silver coins shall be of proportionate weight and of the same fineness:

Provided that in the making of silver coins, a remedy shall be allowed of an amount not exceeding the following, namely:—

| | Remedy in weight. | Remedy in fineness |
|-----------------------------|----------------------|---------------------|
| Rupee | | |
| Half-rupee | Five-thousandths .. | Two-thousandths. |
| ⁴ [Quarter-rupee | Seven-thousandths .. | Three-thousandths] |

Nickel Coinage.

56. The following nickel coins only shall be coined at the Mint for issue under the authority of the ¹[Central Government], namely; ⁶[an eight-anna, a four-anna, a two-anna and a one-anna piece].

Leg. Ref.

¹ Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

² The words “or eight-anna piece” and “or four-anna piece” in clauses (b) and (c), respectively were omitted by S. 2 of the Indian Coinage (Amendment) Act (XXI of 1919).

³ The words “and (d) an eighth of a rupee, or two-anna piece” were omitted by S. 2 of the Indian Coinage (Amendment)

Act (IV of 1918).

⁴ These items were substituted for the original items by S. 3, *ibid*.

⁵ This section was substituted for the original S. 56 by S. 4, *ibid*.

⁶ These words were substituted for the words “a two-anna piece and a one-anna piece” by S. 3 of the Indian Coinage (Amendment) Act (XXI of 1919).

7. The standard weight of the 1[eight-anna, four-anna, two-anna and one-anna pieces shall be one hundred and twenty, one hundred and five, ninety, and sixty grains Troy, respectively]:

Standard weight. Provided that, in the making of nickel coin, a remedy shall be allowed of an amount not exceeding one-fortieth in weight.

Bronze Coinage.

28. The following bronze coins only shall be coined at the Mint for issue under the authority of the 3[Central Government], namely:—

- (a) a pice, or quarter-anna;
- (b) a half-pice, or one-eighth of an anna; and
- (c) a pie, being one-third of a pice, or one-twelfth of an anna.

Standard weight and composition. 9. (1) The standard weight of the pice shall be seventy-five grains Troy, and the other bronze coins shall be of proportionate weight

(2) Bronze coins shall be coined from a mixed metal consisting of copper, tin and zinc:

Provided that, in the making of bronze coins; a remedy shall be allowed of an amount not exceeding one-fortieth in weight.

Dimensions and Designs of Coins.

Power to direct coining and to prescribe dimensions and designs. 10. (1) The 3[Central Government] may, by notification⁴ in the 3[Official Gazette].

(a) direct the coining and issuing of all coins referred to in sections 4, 6 and 8, and

(b) determine the dimensions of, and designs for, such coins.

(2) Until the 3[Central Government] otherwise determines by notification under sub-section (1), the dimensions and designs of the silver coins coined under this Act shall be those prescribed for the like silver coins under the 5Indian Coinage Act, 1870, at the time of the commencement of this Act.

Legal Tender.

8[11. Gold coins, coined at His Majesty's Royal Mint in England or at any Mint established in pursuance of a proclamation of His Majesty as a branch of His Majesty's Royal Mint, shall not be legal tender in British India in payment or on account, but such coins shall be received by the Reserve Bank of India at its offices, branches and agencies in India at the bullion value of such coins calculated at the rate of 8 4/512 grains troy of fine gold per rupee.]

Demonetization of sovereign and half-sovereign. 12 (1) The rupee and half-rupee shall be a legal tender in payment or on account:

Provided that the coin—

- (a) has not lost in weight so as to be more than two per cent. below standard weight, and
- (b) has not been defaced.

Leg. Ref.

¹ These words were substituted by S 4 of the Indian Coinage (Amendment) Act (XXI of 1919).

² For legal tender of bronze coins coined outside British India, see the Bronze Coin (Legal Tender) Act (XXII of 1918).

³ Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

⁴ For Notifications issued under this section, see Gen. R. and O.

⁵ Repealed by this Act.

⁶ This section was substituted for the original S 11 by Act II of 1934

The original S 11 stood as follows:—

Gold coins, whether coined at His Majesty's Royal Mint or at any Mint established in pursuance of a proclamation of His Majesty as a branch of His Majesty's Royal Mint, shall not be legal tender in British India in payment or on account, but such coins shall be received at any mint currency office and, at any time after the 30th day of September, 1927, at any Government Treasury other than a Sub-Treasury, at the bullion value of such coins calculated at the rate of 8 4/512 grains Troy of fine gold per rupee.

(2) The quarter-rupee * * *¹ shall be a legal tender in payment or on account for any sum not exceeding one rupee:

Provided that the coin—

(a) has not lost in weight so as to be more than such percentage below standard weight as may be prescribed as the limit of reasonable wear, and

(b) has not been defaced.

213. 3[The eight-anna, four-anna, two-anna,] and one-anna nickel coins specified in section 6 shall be a legal tender in payment or on account for any sum not exceeding one

Nickel coin when a legal tender.

rupee at the rate of 4[two, four,] eight and sixteen

for a rupee, respectively.

14. The bronze coins specified in section 8 shall be a legal tender in payment or on account for any sum not exceeding one rupee at the following rates, respectively, namely:—

(a) the pice at the rate of sixty-four for a rupee, or four for an anna;

(b) the half-pice at the rate of one hundred and twenty-eight for a rupee or eight for an anna; and

(c) the pie at the rate of one hundred and ninety-two for a rupee, or twelve for an anna.

Coin made under former Acts.

15. (1) (a) All silver coin of the weight and standard specified in Acts No. XVII of 1835,⁵ No. XXI of 1838,⁶ No. XIII of 1862⁸ and the Indian Coinage Act, 1870,⁷ and

(b) all copper coin of the weight specified in Acts No. XXI of 1835,⁵ No. XXII of 1844,⁶ No. XIII of 1862,⁵ and the Indian Coinage Act, 1870,⁷

which may have been issued since the passing of those Acts respectively, and declared by those Acts respectively to be a legal tender, shall, ⁸[subject only to the provisions of section 15-A and] in the case of silver coin to the provisos contained in section 12 of this Act in so far as such provisos apply to like coins under this Act, continue to be a legal tender for the amounts for which the like silver and bronze coins are a legal tender under this Act respectively.

(2) All double pice copper coins which may have been issued under the Acts specified in sub-section (1), clause (b), shall continue to be a legal tender in payment or on account for any sum not exceeding one rupee at the rate of thirty-two for a rupee or two for an anna.

915-A. Notwithstanding anything contained in section 12, section 13,

Power to call in coin.

section 14 or section 15, the ¹⁰[Central Government] may, by notification in the ¹⁰[Official Gazette] call in,

with effect from such date as may be specified in the notification, any coin, of whatever date or denomination, referred to in any of those sections other than the rupee and half-rupee referred to in sub-section (1) of section 12 and on and from the date so specified such coin shall cease to be a legal tender save at a Government currency office:

Provided that such coin shall continue to be a legal tender also at Government treasuries until the expiry of such further period, not being less than

Leg. Ref.

¹ The words "and eighth of a rupee" were omitted by S. 6 of the Indian Coinage (Amendment) Act (IV of 1918)

² This section was substituted for the original S. 13 by S. 7, *ibid*.

³ These words were substituted for the words "The two-anna" by S. 5 of the Indian Coinage (Amendment) Act (XXI of 1919).

⁴ These words were inserted by S. 5, *ibid*.

⁵ Repealed by the Indian Coinage Act, 1870

⁶ Repealed by Act XIII of 1862.

⁷ Repealed by this Act

⁸ These words were substituted by S. 2 of the Indian Coinage (Amendment) Act (X of 1924).

⁹ S. 15-A was inserted by S. 3, *ibid*

¹⁰ Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

twelve months, as the 1[Central Government] may fix by the notification.

*Diminished, Defaced and Counterfeit 2[*] Coins.*

16. Where any silver coin which has been coined and issued under the authority of the 1[Central Government] is tendered to any person 3authorised by the 1[Central Government] 4[* * *] to act under this section, and such person has reason to believe that the coin—

(a) has been diminished in weight so as to be more than such percentage below standard weight as may be prescribed as the limit of reasonable wear, or

(b) has been defaced, he shall, by himself or another, cut or break the coin.

Procedure in regard to coin cut under section 16 (a)

17. A person cutting or breaking coin under the provisions of clause (a) of section 16 shall observe the following procedure, namely:—

(a) if the coin has been diminished in weight so as to be more than such percentage below standard weight as may be prescribed as the limit of reasonable wear, but not more than such further percentage as may be prescribed in this behalf, he shall either return the pieces to the person tendering the coin, or, if such person so requests, shall receive and pay for the coin at such rates as may be prescribed in this behalf; and

(b) if the coin has been diminished in weight so as to be more than such further percentage below standard weight so prescribed as aforesaid, he shall return the pieces to the person tendering the coin, who shall bear the loss caused by such cutting or breaking.

Procedure in regard to coin cut under section 16 (b).

18. A person cutting or breaking coin under the provisions of clause (b) of section 16 shall observe the following procedure, namely:—

(a) if such person has reason to believe that the coin has been fraudulently defaced, he shall return the pieces to the person tendering the coin, who shall bear the loss caused by such cutting or breaking;

(b) if such person has not reason to believe that the coin has been fraudulently defaced, he shall receive and pay for the coin at its nominal value.

Explanation.—For the purposes of this section a coin which there is reason to believe has been defaced by sweating shall be deemed to have been fraudulently defaced.

Procedure in regard to coin which is liable to be cut under both clause (a) and clause (b) of section 16

19. If a coin is liable to be cut or broken under the provisions of both clause (a) and clause (b) of section 16, the person cutting or breaking the coin shall deal with it,—

(a) if he has reason to believe that the coin has been fraudulently defaced, under clause (a) of section 18 and

(b) in other cases, under section 17.

20. Where any silver 5[or nickel] coin purporting to be coined or issued under the authority of the 1[Central Government] is

Power to certain persons to cut counterfeit silver or nickel coin and procedure in regard to coin so cut.

tendered to any person 3authorised by the 1[Central Government] 4[* * *] to act under this section, and such person has reason to believe that the coin is counterfeit, he shall by himself

or another cut or break the coin, and may, at his discretion, either return the pieces to the tenderer, who shall bear the loss caused by such cutting or

Leg. Ref.

¹ Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937

² The word "Silver" was omitted by S. 6 (1) of the Indian Coinage (Amendment) Act (XXI of 1919).

³ For persons so authorised, see Gen. R.

and O

¹ The words "or by the Local Government" were omitted by Government of India (Adaptation of Indian Laws) Order, 1937

² These words were inserted by S. 6 (2) of the Indian Coinage (Amendment) Act, 1919 (XXI of 1919)

breaking, or 1[in the case of silver coin] receive and pay for the coin according to the value of the silver bullion contained in it

Supplemental Provisions.

Power to make rules

21. (1) The Central Government may make rules to carry out the purposes and objects of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) reduce the amount of remedy allowed by sections 5, 7 and 9 in the case of any coin;

(b) provide for the guidance of persons authorised to cut or break coin under sections 16 and 20;

(c) determine the percentage of diminution in weight below standard weight not being less in any case than two per cent. which shall be the limit of reasonable wear;

(d) prescribe the further percentage referred to in clause (a) of section 17, and the rates at which payments shall be made in the case of coins falling under the same clause;²⁺

²(e)

(3) Every such rule shall be published in the Official Gazette, and on such publication shall have effect as if enacted in this Act.

22. No suit or other proceeding shall lie against any person in respect of anything in good faith done, or intended to be done, under or in pursuance of the provisions of this Act.

Bar of suits

23. Nothing in this Act shall be deemed to prohibit or restrict the making at the Mint of coins intended for issue as money by the Government of any territories beyond the limits of British India.

Saving of making of other coins at Mints

24. * * *

Saving of copper coins.

Government may * * *³ *⁴ continue to be so coined until such time as the [Central Government] may by notification in the Official Gazette otherwise direct, and all copper coins so coined shall be a legal tender in payment or on account for the amounts for which bronze coins of corresponding nominal value are a legal tender under this Act.

[THE SCHEDULE.]

Repealed by Schedule II of Act X of 1914.

**THE COLONIAL COURTS OF ADMIRALTY (INDIA)
ACT (XVI OF 1891.)⁵**

| Year. | No. | Short Title. | How repealed or otherwise affected by legislation. |
|-------|-----|---|---|
| 1891 | XVI | The Colonial Courts of Admiralty (India) Act, 1891. | Repealed in part, X of 1914. Repealed in part and amended, VI of 1900, ss. 47 and 48 Amended, XI of 1923. |

Leg Ref.

¹ These words were inserted in S. 6 (2) of the Indian Coinage Amendment Act (XXI of 1919)

² The word "and" and clause (e) were omitted by S. 2 of the Currency Act (IV of 1927).

³ The words "The Acts mentioned in the schedule are hereby repealed to the extent specified in the last column thereof" and the

words "Provided that" were repealed by S. 3 and Schedule II of the Repealing and Amending Act (X of 1914)

⁴ The words "notwithstanding the repeal of the said Acts" were repealed by S. 3 and Schedule II, *ibid*

⁵ For statement of Objects and Reasons, see *Gazette of India*, 1891, Pt. V, p. 140; for Proceedings in Council, see *ibid.*, 1891, Pt. VI, p. 116

[14th May, 1891.]

An Act to declare certain Courts in British India to be Colonial Courts of Admiralty.

WHEREAS it is provided by the Colonial Courts of Admiralty Act, 1890,¹ that the Legislature of a British possession may by any colonial law declare any Court of unlimited civil jurisdiction in that possession to be a Colonial Court of Admiralty,

And whereas it is expedient, in pursuance of that provision, to declare certain Courts in British India to be Colonial Courts of Admiralty;

It is hereby enacted as follows:—

1. (1) This Act may be called THE COLONIAL COURTS OF ADMIRALTY (INDIA) ACT, 1891; and

(2) It shall come into effect—

(a) if Her Majesty's pleasure thereon has been signified by notification in the *Official Gazette*, on or before the first day of July, 1891, then on that day² or

(b) if Her Majesty's pleasure thereon has not been so signified on or before that day, then on the day on which Her Majesty's pleasure shall be signified by such a notification as aforesaid.

2. The following Courts of unlimited civil jurisdiction are hereby declared to be Colonial Courts of Admiralty; namely:—

(1) the High Court of Judicature at Fort-William in Bengal,

(2) the High Court of Judicature at Madras,

(3) the High Court of Judicature at Bombay, [and]³

(4) [* * * *]⁴

(4a) [* * * *]⁴

(5) [* * * *]⁴

3. The expressions "Court having Admiralty jurisdiction" and "Admiralty Court" and the expression "Admiralty or Vice-Admiralty cause," and other expressions referring to Admiralty or Vice-Admiralty Courts or causes, shall, wherever any such expression occurs in any ⁵[Indian Law] be deemed to include a Colonial Court of Admiralty and a Colonial Court of Admiralty cause, and to refer to a Colonial Court of Admiralty or a Colonial Court of Admiralty cause, respectively.

Construction of Indian Acts referring to Admiralty and Vice-Admiralty Courts

Leg. Ref.

¹ See *Gazette of India*, 1890, Pt I, p 654.

² For notification publishing Her Majesty's assent to this Act, see *Gazette of India*, 1891, Pt I, p 371

³ Word "and" inserted by Government of India (Adaptation of Indian Laws) Order, 1937

⁴ Sub-sections (4), (4-a) and (5) omitted by *ibid.*

⁵ Substituted for words "enactment of the Governor-General in Council, or of a Governor in Council or Lieutenant-Governor in Council by Government of India (Adaptation of Indian Laws) Order, 1937.

Notes.

Sec. 1.—In charges under Admiralty Jurisdiction the offence with which an accused is chargeable is the offence under English Law. Where therefore a person is charged under Ss. 4 and 304, Penal Code, he should be charged with manslaughter or a lesser offence of grievous hurt or simple hurt. The punishment which may be imposed will be the punishment which may be imposed for a like offence under the Penal Code as provided by S. 3, Colonial Courts Act (37 & 38 Vict. Chap. XXVII). The procedure which would govern the trial, question of jurisdiction apart, would be the Procedure in the Cr. P. Code. 29 S.L.R. 281=160 I.C. 375=1936 S. 3

4. Court-fees in suits instituted in the Colonial Court of Admiralty at Rangoon, Aden or Karachi, shall, unless the jurisdiction of the Court is to be exercised in any matter relating to the slave-trade, be leviable in accordance with the provisions of Chapter III of the Court-fees Act, 1870.

Court-fees in suits in the Colonial Courts of Admiralty at Rangoon, Aden and Karachi.

5. [Repealed by Act X of 1914, Sch. II.]

THE SCHEDULE.

[Rep. by Act X of 1914, Sch. II]

THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

[16 & 17 GEO. V. CH. 40].

[27th January, 1927.

An Act to confer on Courts in India and other parts of His Majesty's Dominions jurisdiction in certain cases with respect to the dissolution of marriages, the parties where to are domiciled in England or Scotland, and to validate certain decrees granted for the dissolution of the marriage of persons so domiciled. (15th December, 1926.)

Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons in this present Parliament assembled, and by the authority of the same as follows:—

1. Subject to the provisions of this Act¹ [a High Court in British India constituted by His Majesty by Letters Patent] shall have jurisdiction to make a decree for the dissolution of a marriage, and as incidental thereto to make an order as to damages, alimony or maintenance, custody of children, and costs, where the parties to the marriage are British subjects domiciled in England or Scotland, in any case where a Court in [British]² India would have such jurisdiction if the parties to the marriage were domiciled in India:

Provided that—

(a) the grounds on which a decree for the dissolution of such a marriage may be granted by any such Court shall be those on which such a decree might be granted by the High Court in England according to the law for the time being in force in England; and

(b) any such Court in exercising such jurisdiction shall act and give relief on principles and rules as nearly as may be conformable to those on which the High Court in England for the time being acts and gives relief; and

(c) no such Court shall grant any relief under this Act except in case where the petitioner resides in India at the time of presenting the petition and the place where the parties to the marriage last resided together was in India, or make any decree of dissolution of marriage except where either the marriage

Leg. Ref.

¹ Substituted for "a High Court in India to which Part IX of the Government of India Act applies" by Government of India (Adaptation of Acts of Parliament) Order, 1937

² Inserted by *ibid*

Notes.

Sec 1.—The effect of the Indian and Colonial Divorce Jurisdiction Act of 1926 upon the divorce cases is to divide His Majesty's subjects in India into two classes. Upon those who are residing within the

jurisdiction of a High Court established by Letters Patent some new facilities are conferred. Those who are resident elsewhere remain under the law as it was before the Indian and Colonial Divorce Jurisdiction Act was passed 1933 S 70. See also 130 I.C. 524=32 P L R 159=1931 L 245.

Proviso.—Object of the Act—Grounds for divorce—Applicability of English Law—Petitioner resident in India and marriage and adultery committed in India—Jurisdiction of Indian Court to grant divorce. 56 C 89=115 I C 572=32 C.W.N. 742=1928 C. 657.

was solemnized in India or the adultery or crime complained of was committed in India; and

(d) any such Court may refuse to entertain a petition in such a case if the petitioner is unable to show that by reason of official duty, poverty or any other sufficient cause he or she is prevented from taking proceedings in the Court of the country in which he or she is domiciled and the Court shall so refuse if it is not satisfied that in the interests of justice it is desirable that the suit should be determined in India.

(2) Any such order for alimony or maintenance or for custody of children shall have effect in India on the making thereof, but save as aforesaid no such decree or order shall have any force or effect either in India or elsewhere unless and until registered in manner hereinafter provided.

(3) On production of a certificate purporting to be signed by the proper officer of the High Court in India by which the decree or order is made, the decree or order shall—

(a) if the parties to the marriage are domiciled in England, be registered in the High Court in England;

(b) if the parties to the marriage are domiciled in Scotland, be registered in the books of council and session;

and upon such registration shall, as from the date of registration, have the same force and effect, and proceedings may be taken thereunder as if it had been a decree or order made on the date on which it was made by the High Court in India, by the High Court in England or the Court of Session in Scotland, as the case may be, and, in the case of an order, proceedings may be taken for the modification or discharge thereof as if it had been such an order as aforesaid:

Provided that—

(i) the High Court in England or the Court of Session in Scotland shall not, unless the Court for special reasons sees fit so to do, entertain any application for the modification or discharge of any such order if and so long as the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India; and

(ii) where an order for the payment of alimony has been so registered in the books of council and session, the Court of Session shall in addition to any other power have power in the event of any material change of circumstances to discharge or modify such order.

(4) Proceedings before a High Court in India in exercise of the jurisdiction conferred by this Act shall be conducted in accordance with rules made by the Secretary of State [* * * *]¹ with the concurrence of the Lord Chancellor, and those rules shall provide—

(a) for petitions being heard before a Judge or one of two or more judges of the Court nominated for the purpose by the Chief Justice of the Court with the approval of the Lord Chancellor;

(b) for the decree or order made by such a Judge being subject to appeal to two Judges of the Court similarly nominated without prejudice however to any right of ultimate appeal to His Majesty in Council;

(c) for prohibiting or restricting the exercise of the jurisdiction where proceedings for the dissolution of the marriage have also been instituted in England or Scotland;

Leg Ref.

¹The words "in Council of India" were omitted by Government of India (Adaptation of Laws of Parliament) Order, 1937.

Notes.

Sec 1 (2) & (3): DISSOLUTION OF MARRIAGE—DECREE NOT REGISTERED IN HIGH COURT IN ENGLAND—POSITION OF PARTIES—No decree for dissolution of marriage made by virtue of the jurisdiction conferred on a High

Court in India under the Indian and Colonial Divorce (Jurisdiction) Act of 1926 has any force or effect, either in India or elsewhere, unless and until it has been registered in the High Court in England. The absence of such registration means that the marriage between the parties is—at any rate to a limited extent—still in force, and a second marriage contracted by either of the parties in such circumstances, will be null and void. I.L.R. (1937) 1 Cal 417=41 C W N 268.

(d) for preventing, in the case of a decree dissolving a marriage between parties domiciled in Scotland, the making of an order for the securing of a gross or annual sum of money;

(e) for limiting cases in which applications for the modification or discharge of an order may be entertained by the Court to cases where at the time the application is made the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India;

(f) for prescribing the officer of the Court empowered to give certificates under this Act, and the form of any such certificate;

(g) for conferring on such official as may be appointed for the purpose within the jurisdiction of each High Court the like right of showing cause why a decree should not be made absolute as is exercisable in England by the King's Proctor.

(5) The decision of a High Court in India, or on an appeal therefrom, as to the domicile of the parties to a marriage shall, for the purposes of this Act, be binding on all Courts in England, Scotland [India and Burma].¹

²"1-A. [The provisions of section one of this Act shall apply in relation to Burma as they apply in relation to India, subject to the following modifications, that is to say—

(a) in sub-section (1) of the said section, for the words "a High Court in British India constituted by His Majesty by Letters Patent" there shall be substituted the words "the High Court at Rangoon", and for the words "where a Court in British India" there shall be substituted the words "where the Court";

(b) in the proviso to the said sub-section, for the words "any such Court", wherever those words occur, there shall be substituted the words "the Court"; and for the words "no such Court shall" there shall be substituted the words "the Court shall not";

(c) in sub-section (3) of the said section, for the words the High Court in India by which the decree or order is made" there shall be substituted the words "the High Court at Rangoon" and for the words "by the High Court in India" there shall be substituted the words "by the High Court at Rangoon";

(d) in sub-section (4) of the said section, for the words "a High Court in India" there shall be substituted the words "the High Court at Rangoon" and in paragraph (g) for the words "each High Court" there shall be substituted the words "the High Court";

(e) in sub-section (5) of the said section, for the words "a High Court in India" there shall be substituted the words "the High Court at Rangoon";

(f) save as aforesaid, for the word "India" wherever it occurs in the said section (except in the phrase "India and Burma") there shall be substituted the word "Burma".]

³21-B. (1) Any proceedings commenced under this Act before the separation of Burma from India may be continued, determined and appealed against in all respects as if Burma had continued to be part of India.

(2) The rules made under sub-section (4) of section one of this Act which immediately before the separation of Burma from India were applicable to the High Court at Rangoon shall, until superseded by fresh rules, continue to apply to that Court, and nominations made and approved under those rules shall continue to have effect."

2. (1) His Majesty may, by Order in Council, provide for applying [the

Leg. Ref.

¹Substituted for the words "and India" by Government of India (Adaptation of Laws

of Parliament) Order, 1937.

² Sections 1-A and 1-B were inserted by *ibid*

Power to extend Act to other British possessions. provisions of section one]¹ of this Act, subject to the necessary modifications, to any part of His Majesty's Dominions other than a self-governing dominion, in like manner as they apply to India, and, in particular, any such Order in Council may determine the Court by which the jurisdiction conferred by those provisions is to be exercised.

(2) For the purposes of this section "self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia (which for this purpose shall be deemed to include Papua and Norfolk Island), the Dominion of New Zealand, the Union of South Africa, the Irish Free State, Newfoundland, and the Colony of Southern Rhodesia.

3. Any decree granted under the Act of the Indian Legislature, known as the Indian Divorce Act, 1869, and confirmed or made absolute under the provisions of that Act for the dissolution of a marriage the parties to which were at the time of the commencement of the proceedings domiciled in England or in Scotland, and any order made by the Court in relation to any such decree shall, if the proceedings were commenced before the passing of this Act, be as valid and be deemed always to have been as valid in all respects as though the parties to the marriage had been domiciled in India [including Burma and Aden.]²

4. This Act may be cited as THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926.

Short title

RULES UNDER THE INDIAN AND COLONIAL DIVORCE JURISDICTION ACT (1926).

[Published in the Gazette of India, dated 26th August, 1927.]

HOME DEPARTMENT (16th August, 1927.)

RULES UNDER SECTION 1 (4), INDIAN AND COLONIAL DIVORCE JURISDICTION ACT, 1926

1. *Short title and commencement*—(1) These rules may be called the Indian (Non-domiciled Parties) Divorce Rules, 1927. (2) They shall come into force on the 27th day of July, 1927.

2. *Appointment of Judges*.—(1) As soon as may be after the coming into force of these rules the Chief Justice of each of the High Courts referred in sub-section (1) of section 1 of the Indian and Colonial Divorce Jurisdiction Act, 1926, hereinafter called "the Act," shall submit to the Lord Chancellor through the Secretary of State for India the names of such number of Judges of the Court (including, if he thinks fit, the name of the Chief Justice himself) not exceeding six, as he may consider necessary for the purpose of exercising jurisdiction under the Act and these rules.

(2) Upon the approval of the Lord Chancellor to any nomination so submitted being signified to the Chief Justice by the Secretary of State for India, the Chief Justice shall cause the names so approved to be notified in the local Official Gazette (or, in the case of the High Court of Judicature at Calcutta, in the *Gazette of India*) as Judges appointed to exercise jurisdiction under the Act, and the Judges whose names shall have been so notified shall thereupon have power to exercise jurisdiction accordingly.

(3) At any time after the first nominations under these rules have been approved, the Chief Justice may propose the name or names of a further Judge or Judges to take the place of, or to exercise jurisdiction in addition to, the Judge or Judges for the time being having powers under the Act and when such further nominations are approved they shall be notified as aforesaid.

3. Every petition under the Act shall be heard by a single Judge nominated and approved as hereinbefore provided, sitting without a jury and, subject to the provisions of the Indian Limitation Act, an appeal shall lie to a bench of two other Judges who have been similarly nominated and approved against any decree or order which would be appealable if it had been passed in proceedings under the Indian Divorce Act, 1869, and shall be disposed of accordingly. Each such Bench shall be constituted by the Chief Justice as occasion may arise.

4. Nothing in these rules shall be deemed to prevent the exercise of any ultimate right of appeal to His Majesty in Council.

Leg. Ref.

¹ Substituted for the words "the foregoing provisions" by Government of India (Adap-

tation of Laws of Parliament) Order, 1937.

² Inserted by *ibid*

5 *Petition*.—All proceedings under the Act shall be commenced by filing a petition to which shall be attached a certificate of the marriage.

6. (1) In the body of a petition praying for the dissolution of a marriage shall be stated—

(i) the place and date of the marriage and the name, status and domicile of the wife before the marriage;

(ii) the status of the husband and his domicile at the time of the marriage and at the time when the petition is presented, and his occupation and place or places of residence of the parties at the time of institution of the suit,

(iii) the principal permanent addresses where the parties have cohabited, including the address where they last resided together in India;

(iv) whether there is living issue of the marriage, and, if so, the names and dates of birth or ages of such issue,

(v) whether there have been in the Divorce Division of the High Court of Justice in England or in the Court of Session in Scotland or in any Court in India any, and, if so, what previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, and the result of such proceedings;

(vi) the matrimonial offences charged, set out in separate paragraphs, with the times and places of their alleged commission,

(vii) the claim for damages, if any,

(viii) the grounds on which the petitioner claims that in the interests of justice it is desirable that the suit should be determined in India.

(2) The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages and any order for custody of children if sought, and shall be signed by the petitioner.

7. *Verification of petition*.—The statements contained in every petition under these rules shall be verified by the petitioner or some other competent person in manner required by the Code of Civil Procedure for the time being in force for the verification of pleadings, and in cases where the petitioner is seeking a decree of dissolution of marriage the verification shall include a declaration authenticated in like manner that no collusion or connivance exists between the petitioner and the other party to the marriage, and that neither the petitioner nor within the knowledge of the petitioner the other party to the marriage has instituted proceedings which are still pending for the dissolution of the marriage in England or Scotland.

8. *Co-respondents are interveners*.—In every petition presented by a husband for the dissolution of his marriage, the petitioner shall make the alleged adulterers co-respondents in the suit, unless the Court shall otherwise direct.

9. Where a husband is charged with adultery with a named person, a certified copy of the pleading containing such charge shall, unless the Court for good cause shown otherwise directs, be served upon the person with whom adultery is alleged to have been committed, accompanied by a notice that such person is entitled, within the time therein specified, to apply for leave to intervene in the cause.

10. *Service of petitions and notices*.—Every petition or notice referred to in these rules shall be served on the party to be affected thereby, either within or without British India, in the manner prescribed by the Code of Civil Procedure for the time being in force for the service of summonses.

Provided that, unless the Court for good cause shown otherwise directs, service of all such petitions and notices shall be effected delivery of the same to the party to be affected thereby, and the Court shall record that it is satisfied that service has been so effected.

11. *Answers and subsequent pleadings*.—A respondent or co-respondent, or a woman to whom leave to intervene has been granted under rule 9, may file in the Court and answer to the petition.

12. (1) Any answer which contains matter other than a simple denial of the facts stated in the petition shall be verified in respect of such matter by the respondent or co-respondent, as the case may be, in the manner required by the rules for the verification of petitions, and when the respondent is husband or wife of the petitioner, the answer shall contain a declaration that there is not any collusion or connivance between the parties.

(2) Where the answer of a husband alleges adultery and prays relief, a certified copy thereof shall be served upon the alleged adulterer, together with a notice to appear in like manner as a petitioner. When in such case no relief is claimed, the alleged adulterer shall not be made a co-respondent, but a certified copy of the answer shall be served upon him together with a notice as under Rule 9 that he is entitled within the time therein specified to apply for leave to intervene in the suit, and upon such application he may be allowed to intervene, subject to such direction as shall then be given by the Court.

13. (1) If it appears to the Court that proceedings for the dissolution of the marriage have been instituted in England or Scotland before the date on which the petition was filed in India, the Court shall either dismiss the petition or stay further proceedings thereon until the proceedings in England or Scotland have terminated, or until the Court shall otherwise direct.

(2) If it appears that such proceedings were instituted after the filing of the petition in India, the Court may proceed, subject to the provisions of the Act, with the trial of the suit.

14. *Showing cause against a decree nisi.*—The Governor-General in Council in the case of the High Court of Judicature at Calcutta and the Local Government in other cases shall appoint a person to exercise within the jurisdiction of each of the High Courts referred to in section 1 of the Act the duties assigned to His Majesty's Proctor by sections 181 and 182 of the Supreme Court of Judicature (Consolidation) Act, 1925, and the name of the person so appointed shall be notified in the *Gazette of India* or in the local Official Gazette, as the case may be, by the designation of Proctor. Every Proctor so appointed shall, in the exercise of his functions act under the instructions of the Advocate-General or other Chief Law Officer of the province.

15. (1) If any person during the progress of the proceedings or before the decree *nihi* is made absolute gives information to the Proctor of any matter material to the due decision of the case, the Proctor may take such steps as he considers necessary or expedient.

(2) If in consequence of any such information otherwise the Proctor suspects that any parties to the petition are or have been in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may after obtaining the leave of the Court intervene and produce evidence to prove the alleged collusion.

16. (1) When the Proctor desires to show cause against making absolute a decree *nihi* he shall enter an appearance in the suit in which such decree *nihi* has been pronounced and shall within a time to be fixed by the Court file his plea setting forth the grounds upon which he desires to show cause as aforesaid, and a certified copy of his plea shall be served upon the petitioner or person in whose favour such decree has been pronounced or his advocate. On entering an appearance the Proctor shall be made a party to the proceedings, and shall be entitled to appear in person or by advocate.

(2) Where such plea alleges a petitioner's adultery with any named person a certified copy of the plea shall be served upon each such person omitting such part thereof as contains any allegation in which the person so served is not named.

(3) All subsequent pleadings and proceedings in respect of such plea shall be filed and carried on in the same manner as is hereinbefore directed in respect of an original petition, except as hereinafter provided.

(4) If the charges contained in the plea of the Proctor are not denied or if no answer to the plea of the Proctor is filed within the time limited or if an answer is filed and withdrawn or not proceeded with, the Proctor may apply forthwith for the rescission of the decree *nihi* and dismissal of the petition.

17. Where the Proctor intervenes or shows cause against a decree *nihi* in any proceedings for divorce, the Court may make such order as to the payment by other parties to the proceedings of the costs incurred by him in so doing, or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

18. Any person other than the Proctor wishing to show cause against making absolute a decree *nihi* shall, if the Court so permits, enter an appearance in the suit in which such decree *nihi* has been pronounced, and at the same time file affidavits setting forth the facts upon which he relies. Certified copies of the affidavits shall be served upon the party or the advocate of the party in whose favour the decree *nihi* has been pronounced.

19. The party in the suit in whose favour the decree *nihi* has been pronounced may within a time to be fixed by the Court file affidavits in answer, and the person showing cause against the decree *nihi* being made absolute may within a further time to be so fixed file affidavits in reply.

20. *Decree absolute.*—No decree *nihi* for the dissolution of a marriage under the Act shall be made absolute till after the expiration of six months from the pronouncing thereof, if no appeal has been filed within that period, or if any appeal (including an appeal to His Majesty in Council) has been filed, until after the decision thereof.

21. (1) Application to make absolute a decree *nihi* shall be made to the Court by filing a petition setting forth that application is made for such decree absolute, which will thereupon be pronounced in open Court at a time appointed for that purpose. In support of such application it must be shown by affidavit filed with the said petition that no proceedings for the dissolution of the marriage have been instituted and are pending in England or Scotland, and that search has been made in the proper books at the Court up to within six days of the time appointed, and that at such time no person had intervened or obtained leave to intervene in the suit, and that no appearance has been entered nor any affidavits filed on behalf of any person wishing to show cause against the decree *nihi* being made absolute; and in case leave to intervene had been obtained, or appearance entered or affidavits filed on behalf of such person, it must be shown by affidavits what proceedings, if any, have been taken hereon.

(2) If more than twelve calendar months have elapsed since the date of the decree *nihi*, an affidavit by the petitioner, giving reasons for the delay, shall be filed.

22. *Alimony, maintenance and custody of children.*—Proceedings relating to alimony, maintenance, custody of children, and to the payment, application or settlement of damages

assessed by the Court shall be conducted in accordance with the provisions of the Indian Divorce Act, 1869, and of the rules made thereunder.

Provided that when a decree is made for the dissolution of a marriage the parties to which are domiciled in Scotland, the Court shall not make an order for the securing of a gross or annual sum of money.

Provided further that no Court in India shall entertain an application for the modification or discharge of an order for alimony, maintenance or the custody of children, unless the person on whose petition the decree for the dissolution of the marriage was pronounced is at the time the application is made resident in India.

23. *Certifying Officer*.—A certificate referred to in sub-section (3) of section 1 of the Act shall be in the form set out in the schedule and shall be signed by a Registrar or Prothonotary of the High Courts to which the Act applies and sealed with the seal of the Court.

24. *Procedure generally*.—Subject to the provisions of these rules all proceedings under the Act between party and party shall be regulated by the Indian Divorce Act and the rules made thereunder.

25. The forms set forth in the schedule to the Indian Divorce Act, with such variation as the circumstances of each case and these rules may require, may be used for the respective purposes mentioned in the Schedule.

SCHEDULE.

(See Rule 23.)

I, [A B. Registrar
Prothonotary] of the High Court of Judicature at.....hereby certify that the foregoing is a true copy of a ^{order} decree made by the aforesaid High Court acting in exercise of the matrimonial jurisdiction conferred by the Indian and Colonial Divorce Jurisdiction Act, 1926, in App. No. of .. from judgment and decree in suit No. of .. in which the above-named C D. was petitioner and the above-named E. F. was respondent and the above-named G. H. was ^{intervener} co respondent.

(Signed)

Registrar

Prothonotary

THE INDIAN COMPANIES ACT (VII OF 1913).

| No. | Year | Short title. | Repealed or otherwise how affected by legislation. |
|------|------|-------------------------------|--|
| 1913 | VII | The Indian Companies Act 1913 | Repealed in part, XLVII of 1920 Amended, X and XI of 1914, XI of 1915; XLII of 1920, XXXIII of 1926; XIX of 1930; I of 1932, II of 1934, XXII of 1936, XX of 1937. |

INTRODUCTORY—"Company" is an association of a number of individuals for the purpose of carrying on a legitimate business, a number of persons united for the same purpose, or in a joint concern, as a company of merchants. The word is applicable to private partnerships, or incorporated bodies of men; hence it may signify a firm, house or partnership or a corporation. Association is included within the meaning of the term; in fact "Company" and "Association" are frequently considered as synonymous.

Suppose a number of persons intend to combine for the purpose of carrying on some business. If there are only a few of them they will probably form a partnership, but if their numbers are at all large, and particularly if they wish to limit their individual liability for losses, they will most probably decide to form or "promote" a company limited by shares under the Companies Act. This proceeding is in outline very simple. They must first decide upon certain essential particulars. The object which the company is to carry out must be agreed upon in the first instance. The name of the company, the place where the business is to be carried on, how far each member undertakes to be responsible for losses, and the amount of funds which they consider necessary to carry on the business properly,—these things also must first be decided upon. Their decision on these points is embodied in a short document called a Memorandum of Association, which must be signed by at least certain number of persons, fixed by the Act who must each agree to take one or more shares in the company. The memorandum so signed is taken to an official called "The Registrar of Joint Stock Companies" a fee is paid, the Registrar enters the new company on the register and prepares a certificate of incorporation, and the formation of the company is complete. The Companies Act is intended to regulate the incorporation and the running of the business of

companies *James, L.J.*, said with reference to the English Companies Act of 1862. "The Act was intended to prevent the mischief arising from large trading undertakings being carried on by large fluctuating bodies, so that persons dealing with them did not know with whom they were contracting, and were put to great difficulty and expense, which was a public mischief to be repressed." (*Smith v. Anderson*, 15 Ch. D. 273.) The same remarks will hold good in the case of the Indian Companies Act also. The law on the subject of Joint Stock Companies in India was contained in the Indian Companies Act, 1882, which was modelled closely on the English law in force in 1877. The object of the new Companies Act is to revise and consolidate the Indian law on the subject of Joint Stock Companies on the lines of English legislation. Since 1882 the Indian law had been added to by a large number of amending Acts, namely, the Indian Companies (Amendment) Act, 1887; the Indian Companies (Memorandum of Association) Act, 1895; the Indian Companies (Branch Registers) Act, 1900; and the Indian Companies (Amendment) Act, 1910. The substantial additions, however, which had been made to the English law by the long series of Acts passed between 1879 and 1908 had not with the exception of the matters dealt with in the four small amending Acts abovementioned, been adopted in the Indian law. The more important of those English Acts were the Companies Act, 1879, the Companies Act, 1880; the Companies (Winding up) Act, 1890; the Directors Liability Act, 1890, the Companies Act, 1907, and the Companies (Consolidation) Act, 1908. The English Companies Consolidation Act, 1908, consolidated the English law into a convenient Code and this Code had been taken as the model for the Indian Companies Act, 1913. The Indian Companies Act, 1913, follows the English Act not merely in its general principles but in its detailed arrangement and expression, wherever possible, as it is considered a matter of the first importance to have the Indian law as uniform as possible with the English law except where local circumstances demand a modification in substance. Among the new and important provisions introduced into the Indian Company Law by the Companies Act of 1913 are those relating to (a) the preparation of a statutory report by a company limited by shares before the first general meeting (cl. 81); (b) the appointment and advertisement of directors (cls 88 and 89), (c) the prospectus and statement in lieu of prospectus (cls. 96 to 104); (d) restrictions on proceeding to allotment (cls. 105 to 106); (e) restrictions on commencing business (cl. 107), (f) the appointment, remuneration and duties of auditors (cls 142 and 143), (g) the registering of information regarding certain kinds of mortgages and charges (cls 113 to 128), and (h) the registering of information regarding companies situated outside British India but operating therein (cl. 310).

It has been considered necessary to depart from English law on the subject of the winding up of companies by order of the Court, and in place of the provisions introduced into English law by the Companies (Winding up) Act, 1890, the procedure of existing Indian law has been in the main retained. The procedure leaves the discretion in the matter of winding up in the hands of the Court, whereas in the English law important functions are exercised by the Board of Trade, by Official Receivers, and by Committees of Inspection. On the subject of the annual balance-sheet the provisions of the existing Indian law have been retained where these appeared more complete than the provisions of the English law, and the prescribed form of balance-sheet has also been retained. In order to make inspection in the interest of shareholders without difficulty where a case for such inspection has been made out, the Registrar of Joint Stock Companies has been empowered to demand from any company an explanation of anything that is not clear in its balance-sheet or other return submitted to him, and the company will be liable, to a penalty, if it fails to provide a full and true statement to the Registrar, when called upon. A report from the Registrar will form a ground on which the Local Government may order an inspection of the affairs of a company. In regard to the qualifications of auditors, a matter on which the English law imposes no restriction, a provision has been inserted authorizing local Governments to issue certificates for the auditing of companies' account to approved persons in accordance with rules to be framed for the purpose and restricting the audit of companies' accounts to persons holding such certificates. It has not been thought necessary to include the provision of the English Act (S. 40) whereby a company is empowered to return accumulated profits in reduction of paid-up share capital. (See Statement of Objects and Reasons to the Companies Act, VII of 1913.)

AMENDING ACT XXII OF 1936—The following extracts from the Statement of Objects and Reasons would show the necessity for the amending enactment of 1936 and the broad lines on which the amendments have proceeded:—

"For some considerable time Government has had under consideration the overhaul of the law relating to companies.

Substantial material has accumulated in the form of communications and suggestions from Local Governments, public bodies and individuals, supplemented by publications in the press, indicating unanimity of opinion that the Indian Companies Act requires fairly extensive changes. The opinions received disclose a demand for power to deal with mushroom and fraudulent companies, for changes in the provisions relating to the issue and contents of prospectuses, for increased disclosure to shareholders of the financial position of companies and for increased rights to shareholders in connexion with the management of companies, for modification of the present law applicable to managing agents, for changes in

the provisions applicable to winding up, for special provisions to govern banking companies and for numerous other improvements

The Indian Companies Act, 1913, was based on the English Companies Consolidation Act of 1908, and followed generally the provisions of that Act. Its revision in order to overtake subsequent developments in the law is overdue.

The English Act of 1908 was examined by a committee presided over by Lord Wrenbury in 1918, and again by a committee presided over by Mr. Greene, K.C., in 1926. The latter committee made extensive recommendations many of which were subsequently incorporated with or without modification in the Companies Consolidation Act, 1929. The guidance afforded by that Act is now available in the task of revising the company law of British India.

In September, 1934, the Government of India placed a lawyer with experience in the administration of company law on special duty to examine the material collected and to make proposals for the amendment of the Indian law. Those proposals were further discussed by a small committee of business experts specially convened for the purpose. Out of these proposals and discussions there have crystallized the amendments now proposed.

The revision of the law in England took the form of a consolidating Act which completely replaced the Act of 1908. This course has not been followed here. The arrangement adopted in the new English Act has attracted unfavourable criticism to an extent which does not encourage its adoption, and there are manifest advantages in retaining the form of the existing Indian Act with the administration of which the Courts are now familiar, even though the additions to it by this Bill are extensive.

In the amendments proposed, the lines followed in the overhaul of the English law have in accordance with the policy followed in the past been adopted in the amendments now proposed where the problems dealt with are problems common to India and England, India has however problems peculiar to itself, for example, those connected with the managing agency system.

The special provisions relating to banking companies have been included, because there is no immediate prospect of legislation dealing solely with this subject undertaken. The recommendations of the Central Banking Enquiry Committee have been carefully considered in drafting these provisions."

The amending Act XXII of 1936 came into force on the 15th January, 1937
